

**RESTORATIVE JUSTICE, INTERSECTIONALITY THEORY  
AND DOMESTIC VIOLENCE: EPISTEMIC PROBLEMS IN  
INDIGENOUS SETTINGS**

by

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## Abstract

This thesis problematizes the use of feminist intersectionality theory within the context of the restorative justice social movement as applied in cases of violence against women in culturally heterogeneous settings. I argue that there is an imbalanced anti-essentialist tendency in some intersectional approaches to restorative justice (RJ) and domestic violence that slides toward gender underestimation, ultimately, leading to a phenomenon defined by feminist scholar Kimberlé Crenshaw: intersectional disempowerment. This position threatens the epistemological and critical stances of that feminist analytical tool for understanding racialized women's needs for security, offender accountability and empowerment at an individual level in situations of domestic violence. In addition, the existence of competing analytical categories in intersectional analysis and multicultural drives obscure pre-existing patriarchal relations in Indigenous communities applying RJ as remedial justice, i.e., intra-group gender inequality and allows co-optation of the intersectionality theory by ethnocultural non-emancipatory political interests.

This poses potential detrimental consequences to racialized women dealing with some RJ interventions like alienation, exclusion and the silencing of victims' individual histories, reinforcing the fact that the representation of the individual female victim within the RJ movement has not been adequately resolved and remains deeply problematic. To illustrate my arguments, I focus on sentencing circles that are used ostensibly as state-sanctioned alternative criminal justice responses designed to ameliorate the systemic racism and over-incarceration rates that Aboriginal peoples experience in postcolonial jurisdictions such as Canada and Australia. I argue that these restorative-like experience are especially vulnerable to intersectional disempowerment. In these RJ models, it becomes unclear whether intersectional approaches can sustain the particular needs and interests of victimized women.

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## Dedication

*To my family for the lost hours.*

# Introduction

## 1. Topic: Restorative justice, intersectionality theory co-optation and violence against women

This thesis explores the affinities and tensions that arise between the restorative justice social movement (hereafter RJ) and feminist intersectionality theory within the context of violence against women.<sup>1</sup> Basically, I contend that a theoretically ideal intersectional feminist analysis of the problem of the use of RJ as a remedy for cases of violence against women should bear in mind analytical criteria which meet all the intersectional inequality categories in a balanced way without losing the focus on the final purpose of any feminist analytical tool worthy of the name: to serve, above all, women's interests. A possible failure of some intersectional feminists in giving balance to claims of gender injustice with various other intersectional inequality markers like culture; social class; religion; and ethnicity may have been silencing critical objections to RJ as a tool for dealing with the problem of violence against women, especially within Indigenous communities. It might also create an impression encouraged by some RJ advocates that in general restorative experiences ---in their various models and forms

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<sup>1</sup> Although throughout this paper I may refer to the expression "violence against women" which is as a catch-all phrase to any kind of violence that is directed against a woman because she is a woman or that affects women disproportionately, my emphasis is on intimate partner violence also known as domestic violence, battering or family violence. These terms will be used in this paper generically and interchangeably as forms of gender-based violence; notwithstanding, distinctions among them can be found in the literature over violence against women. Definitions of intimate partner violence or domestic violence can vary according to jurisdiction, but in general they refer to a range of often repetitive and meaningful violent and abusive behaviours that reflect patterns of conduct characterised by the misuse of power and control by one person over another who are or have been in an intimate relationship. It can occur in heterosexual and same sex relationships and has profound negative impacts in the lives of children, individuals, families and communities. It may also involve physical, sexual, emotional and/or psychological abuse.

are egalitarian, gender-friendly and victim-oriented forms of justice that are suitable to any empirical and cultural context, no matter how disparate women's socioeconomic and ethnic realities are structured.<sup>2</sup> I challenge this assumption throughout this study by arguing that there are epistemic problems with the intersectional approach of RJ in Indigenous settings: mainly because of radical anti-essentialist stances in intersectionality analysis.

Furthermore, I hope to reveal that in some cases the underlying cause of this imbalanced intersectional approach is a possible co-optation of intersectionality theory by RJ's advocacy discourse and other ethnocultural political agendas. I argue that this appropriation of a feminist intersectional approach may function as a "stamp of approval" to still unreliable restorative experiences resulting finally, in an intersectional "backfire". According to Brian Martin a "backfire" is what happens when an action is counterproductive to its originators, and recoils against them. In a "backfire" dynamic, outcomes and processes can be worse than anticipated and in some cases worse than having done nothing.<sup>3</sup> I use the expression intersectional "backfire" in this same sense. These are intuitive insights for a very particular niche of feminist analysis on RJ that in general does not overlook the problems regarding RJ's doctrine and its scope. Nevertheless, I am aware of no study theoretical or empirical that

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<sup>2</sup> Feminists, however, have been made a critique of the RJ movement that revolve around three main themes: women's safety, offender accountability, and the politics of gender and race. See, e.g., Angela Cameron, "Restorative Justice: A Literature Review" (Paper presented to the British Columbia Institute Against Family Violence," 2005) [unpublished] at 18-22. (Noting and citing sources in a comprehensive literature review on RJ and domestic violence). Furthermore, here I make one more remark on terminology. Although I make casual use of the terms *Indigenous* and *Aboriginal* throughout this paper, in order to refer generically to autochthonous peoples from North America (United States and Canada) and Australasia (Australia and New Zealand). I do not have the intention to strip them of their particularities, ethnic diversity or to the right of designating and retaining their own names for communities, places and persons. For the sake of simplicity, I will use those terms interchangeably and as a neutral replacement instead of giving specific names. Nevertheless, when suitable for the purposes of this paper I may mention a specific group or ethnicity by their self-identified name.

<sup>3</sup> See Brian Martin, *Justice Ignited: The Dynamics of Backfire* (Lanhan, Maryland: Rowman & Littlefield Publishers, 2007). (Discussing through case studies theoretical implications of a "backfire" dynamic). See also Dana Greene, *Repeat Performances: Why Good Reforms Go Bad & Testing the Next Wave, RJ* (Ph.D. Thesis, The City University of New York, 2005) [unpublished]. (Describing a backfire dynamic concerning RJ as a benevolent penal reform initiative).



attempts directly to connect the (mis)use of an intersectional approach and the validation of RJ practices through the co-optation of the former.<sup>4</sup> In fact, the literature proceeds as if there are no potential epistemological problems, or as if intersectionality theory could be declared fault-proof as an analytical tool. However, my assessment of the subject matter considers an intersectional approach as open to criticism. In sum, my thesis problematizes the accommodation of intersectionality theory as a research tool within the context of RJ, domestic violence and Indigenous justice practices.

The conventional assumption is that an intersectional feminist approach brings about certain emancipatory effects for women. This usually means that the intersection of the inequality categories (or social identities) brings into light the structures of domination and oppression embedded in women's lives, and has the potential to expose existing detrimental power relations. However, in my opinion, some feminists and activists on RJ may reflect, at times, an unhelpful bias in their conceptualizations of the RJ processes and institutions producing an opposite effect when using an intersectional approach. These conceptualizations especially in Indigenous settings are developed with an explicit connection with collectivist RJ values and anti-racist political claims which do not coincide necessarily with Aboriginal women's primary interests. For this reason, it is possible that an imbalanced intersectional approach does not benefit its intended particular beneficiaries (in our main focus of study: Indigenous women), because it cannot assure them of a sense of security and empowerment in RJ conferences. Besides that, those intersectional conceptualizations of RJ can foster

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<sup>4</sup> I do not want to suggest that RJ and feminist scholars have ignored this topic completely. Intersectional themes have been openly considered in a great deal of feminist studies on restorative justice. In fact, almost the totality of them used somehow intersectional insights. However, none of them explored the problems and prospects of the methodology itself, or asked whether it might be co-opted by other political interests present in the RJ field. Most of the scholarly commentaries are laudatory front-page endorsements of an intersectional approach and do not engage in debate regarding possible procedural problems due to the presence of competing inequality categories. That is my original take on the issue.

ethnocentrism and cast doubts over the real achievements of outstanding members of the "benefited" group since they can create an unhealthy preoccupation with other political claims, causing an intersectional backfire on them.

This complicates the application of intersectionality theory to the study of RJ generating a kind of intellectual "myopia". It may serve to reproduce and reinforce those structures of domination and oppression, or may even contribute to their perpetuation by masking their principles of operation. In addition, an imbalanced version of an intersectional approach may not capture the internal and external flaws and vulnerabilities of the RJ rhetoric since it might be conflated with them. Instead of providing an explanation or critical evaluation of RJ insights from this imbalanced intersectionality approach might become more like a clique, where intersectional feminists and RJ practitioners function to validate RJ experiences rather than enlighten policy-makers about possible dangers. One could argue that almost any action can generate unforeseen adverse consequences. The relevant issue is to determine what is the cost of an intersectional "backfire" for Aboriginal women *versus* the cost of not using intersectional insights, and the benefits and/or costs to the RJ movement itself?

In order to advance understanding of the problem posed, besides an overview of the most relevant feminist theory scholarship about RJ and domestic violence, my thesis establishes as a working hypothesis positive links between the existence of competing inequality markers in an intersectional approach, and dissonant voices among feminist scholars about RJ effectiveness to cope with violence against women, especially regarding RJ models used in Aboriginal communities in Canada and Australia (mainly sentencing circles models). I seek to demonstrate that an excessive reliance on other intersectional inequality categories rather than a "gender-oriented" approach may result, paradoxically, in a feminist analytical tool that turns out to be divisive, uncritical and far from being in any way emancipatory to oppressed Aboriginal

women. As a matter of fact, I contend that an intersectional approach might function as a “double-edged sword” with the potential to address how other forms of inequality and oppression, such as racism, colonialism, ethnocentrism, and class privilege affect Aboriginal women victimized by violence, but at the same time it has the potential to be co-opted to serve as a validation tool for RJ advocacy purposes. In my opinion the rhetoric of RJ proponents resonates with a political agenda of diverse (and sometimes conflicting) interest groups where self-advocacy motives, multi-cultural drives and intersectional anti-essentialist epistemic stances tend to impact directly on some intersectional approaches of RJ interventions. The reason for that is a pattern of identification and divided loyalty by a number of intersectional feminists with RJ tenets and other movements’ historical struggles like those represented by the battered women’s movement, victims and offenders’ rights advocates, and ethnic or racial minorities’ anti-colonial political claims. In addition, the anti-essentialist rejection of gender as a standard category of analysis provides the epistemological frailty for intersectionality analysis. In this sense, the heart of my study is to test whether or not intersectionality theory is vulnerable to be “tamed” as a critical feminist analytical tool by the militant advocacy of restorative proponents. In sum, intersectional feminists’ epistemological (in)ability to deal with the messiness of these - most of the time - overlapping interests will be the central topic of my thesis.

## **2. Thesis structure**

The idea of engaging the problematic positioning of intersectionality theory within the context of RJ and violence against women will be presented in the body of this thesis in three chapters: In the first chapter, I sketch out the foundational assumptions and main features of RJ’s theoretical framework. In addition, a brief general critique of the RJ movement from various perspectives will be provided. The objective is to bring them into focus providing a solid foundation for the development of the following chapters.

A second chapter will focus on feminist scholarship and its interactions with restorative justice. In this chapter, the aim is to explore the relationship between feminism and RJ, by addressing the contributions of several schools of feminist thinking. This leads to positioning feminist intersectionality theory within the context of feminist criminology, RJ and violence against women. In addition, I present a more critical understanding of intersectionality analysis revealing epistemological vulnerabilities and connections with Indigenous postcolonial political claims. Whereas some intersectional feminists employ a feminist theory that focuses disproportionately on anti-essentialist stances to the detriment of gender as an important analytical category, I contend that intersectionality needs a more balanced approach --- strategically focused on individual gender equality concerns --- in which the forces shaping and obstructing intersectional analysis can be properly taken into consideration. Finally, this chapter will focus on the mainstream feminist contribution on the debate regarding the suitability of RJ to cope with domestic violence.

In the third chapter criticisms, conceptualizations and concerns introduced in the first two chapters regarding the interplay between intersectionality theory, domestic violence and RJ will be contextualized in Indigenous settings and further developed. This last chapter --- which also incorporates the conclusion --- seeks to develop insights into the use of intersectional thinking that reveal a lack of understanding from some intersectional feminists of particular cooptive structures (e.g., the impact of postcolonial multicultural theory on RJ and intersectional feminism) and other political (e.g., ethnocultural postcolonial claims) and epistemic processes (e.g., prospects of intersectional disempowerment) that point to the necessity of a more cautious approach of intersectionality analysis due to the risks of co-optation by non-woman centered interests.

### 3. Caveat, topic developments and literature review

Before proceeding, as a caveat to the reader I must acknowledge that my arguments concerning a possible co-optation of the intersectional theory by the RJ rhetoric cannot be applied to all intersectional feminist views on RJ and domestic violence. Actually, the prevailing perception of feminists (intersectional or not) over the use of models of RJ to cope with violence against women is highly critical and markedly hinders its use in several jurisdictions. By subjecting RJ concepts, practices and promises to critical analysis, feminist scholars have been playing an influential role in the adoption or otherwise of RJ models to cope with cases of violence against women to the extent that their objections or approval is, at times, decisive in the policy-making process.<sup>5</sup>

For this reason, my aim is to provide an assessment of the current feminist thought on this important public policy issue and to understand better the conflicting stances among feminist scholars, especially those that can be labelled as intersectional feminists or at least inspired by its methodology within the context of Indigenous women. I take this very particular niche of research concerning Aboriginal communities and the long term relationship between feminist theory and violence against women as a starting point for my study about how the feminist theory of intersectionality interacts with RJ in ways that can produce a backfire, especially in relation to Aboriginal women. As stated in the last section, I hope to emphasize the significance of a direct interplay between intersectionality theory and policy-making processes regarding RJ experiences for Aboriginal women.

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<sup>5</sup> Daly and Stubbs, for instance, observed that, "... with the exception of circle sentencing, RJ has largely been kept off the agenda for partner and sexual violence, in part due to feminist or victim advocacy." See Kathleen Daly & Julie Stubbs, "Feminist Engagement with RJ" (2006) 10:1 Theoretical Criminology 9-28 at 11. More recent literature, however, suggests that this tide may be turning with several ongoing RJ programmes particularly in Canada and the United States coping with domestic violence. See James Ptacek, ed., *Restorative Justice and Violence Against Women* (New York, NY: Oxford University Press, 2009).

I will focus my analysis mainly in two empirical contexts. Firstly, the access to and use of sentencing circles in Canada by Aboriginal communities.<sup>6</sup> I start with scholarly commentaries on the relationship between RJ and Indigenous justice particularly the adoption of RJ practices by Indigenous communities. That will permit us to get insights about the existence of competing inequality categories in an intersectional analysis of the relationship between specific models of RJ, and how Aboriginal women are affected by it empirically. Secondly, I ask whether we might not expand upon those insights by analyzing the effects of the use of similar models of RJ by Aboriginal people mainly in Australia. I use data collected by feminist scholars to explore whether or not there is a pattern of repetition concerning how Aboriginal women are impacted by RJ experiences.

Certain patterns of those imbalanced inequality categories seem to emerge to exist predominantly within particular political and socio-legal feminist mindsets. Thus, for instance, cultural and ethnic justice arguments found especially within the context of Indigenous Justice and RJ such as that domestic violence occurs because the community is still suffering from the effects of colonialization, gendered racism or lack of political self-determination may be

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<sup>6</sup> As Stubbs points out, “There are problems in conflating Indigenous justice with RJ, but no agreement on how to differentiate between the two. Circle sentencing is commonly designated as an example of RJ but Marchetti and Daly disagree and classify it as an Indigenous justice practice...”. See Julie Stubbs, “Restorative Justice, Gendered Violence, and Indigenous Justice” in James Ptacek, ed., *Restorative Justice and Violence Against Women* (New York, NY: Oxford University Press, 2009) at 1656-1659 in a kindle e-book version. Emma Cunliffe and Angela Cameron also resist to the idea of considering Aboriginal sentencing circles a form of RJ since, in their words, “This endorsement is risky because categorizing judicially convened sentencing circles as restorative justice acts as a frame by which the circle practice is interpreted as helping to secure restorative objectives, regardless of the fact that circles actually operate more ambivalently. The categorization also accords the practice legitimacy within the Canadian criminal justice system.” See *infra* note 8, Cameron & Cunliffe, *Writing the Circle* at 14. Angela Cameron also articulates several distinctions between Indigenous Justice and RJ, but at the same time she notes that: “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)”. See note 2 at 6. But see Ann Skelton, “Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa” (2007) *Acta Juridica* 228-246 at 230. (Observing that African writers are more open to making the linkages between modern restorative justice and Indigenous justice than are their counterparts from Australia, New Zealand and North America). For the purposes of my thesis I will treat Aboriginal sentencing circles as consistent with RJ experiences since the general perception is that both are conflated.

acclaimed by some intersectional feminists and RJ advocates, while women's safety and autonomy are neglected. Emphasizing some inequality categories may hamper the pursuit of others. In fact, advocacy of political goals through RJ and Indigenous justice may have a profound negative impact on the achievement of a safe environment for Indigenous women in restorative conferences, both ignoring and silencing the victim.<sup>7</sup> Recently, a number of scholarly works have given considerable attention to this focus of study. They highlight the potential perils of the way in which conflicting inequality markers and disparate political goals have been fostering the debate among and between Indigenous and non-Indigenous women on the appropriateness of restorative justice and Indigenous justice in response to partner, sexual and family violence.<sup>8</sup> Daly summarizes these concerns, as she writes:

Indigenous communities often show a willingness to engage with alternative forms of justice, born in part from a critique of the damage wrought by conventional criminal justice, and many are keen to adopt RJ. However, Indigenous aspirations for justice are commonly holistic and are associated with calls for self-determination; these elements are not often acknowledged in alternative modes of justice, nor are Indigenous women's perspectives typically addressed.<sup>9</sup>

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<sup>7</sup> Giving voice to victims is of paramount importance in any RJ conference since it is considered part of the healing process to allow victims to tell their stories to the community and to the ones who caused the harm in order to have them understand the impact of their actions.

<sup>8</sup> See, e.g., Angela Cameron & Emma Cunliffe, "Writing the Circle: Judicially Convened Sentencing circles and the Textual Organization of Criminal Justice" (2007) 19:1 Canadian Journal of Women and the Law 1-35; Elizabeth Adjin-Tettey, "Sentencing Aboriginal Offender: Balancing Offender's Needs, the Interests of victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19:1 Canadian Journal of Women and the Law 179; Carol LaPrairie & Jane Dickson-Gilmore, *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice and the Challenges of Conflict and Change* (Cullompton, UK: Willan Publishing 2005); Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2006) 18:2 Canadian Journal of Women and the Law 479-512 and Rashmi Goel, "No Women at the Center: The use of the Canadian Sentencing Circles in Domestic Violence Cases" (2000) 15 Wisconsin Women's Law Journal 293-3334. (Addressing specifically the issue of the use of sentencing circles in Indigenous settings and its consequences for Indigenous women). See generally the following books: James Ptacek, ed., *Restorative Justice and Violence Against Women* (New York, NY: Oxford University Press, 2009) and Heather Strang & John Braithwaite, eds., *Restorative Justice and Family Violence* (Cambridge, UK: Cambridge University Press, 2002). (In these collections of essays over the theme "RJ and violence against women several" several contributors have used a perspective of Aboriginal women).

<sup>9</sup> See Kathleen Daly & Julie Stubbs, "Feminist Theory, Feminist and anti-racist politics and Restorative Justice" in Gerry Johnstone & Daniel W. Van Ness, eds., *Handbook of Restorative Justice* (Portland, Oregon: Willan Publishing, 2007) at 161.

Although the intersectional approach addresses multiple discrimination categories (or inequality markers) --- gender; religion; ethnicity; culture; social class, etc.--- and helps us understand how different sets of social identities impact Indigenous women's interactions with RJ there is the tangible risk in considering a given inequality category or marker, for example, culture, as more important than others and by so doing neglecting essential features of the traditional feminist thought like security and empowerment.<sup>10</sup> Just to take one example of how a dynamic like that can function, I single out for demonstration an insight drawn from the work of the Canadian feminist scholar Angela Cameron. She points out the existence of asymmetric approaches by Indigenous women and feminist scholars concerning how they see RJ interventions in Canada. Some have a focus on community interests with self-determination as their primary goal --- clearly a cultural and political agenda. Others focus more on gender to address subordination of women in some Canadian Aboriginal communities.<sup>11</sup> She writes, "...the quest to incorporate an appropriate cultural *and* gender perspective in the debate about restorative justice is a difficult one. The scholars discussed in this segment, in many cases, prioritize a cultural agenda over an agenda that incorporates gender equality *and* culture in the context of intimate violence."<sup>12</sup>

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<sup>10</sup> As Barbara Hart, an historical militant in the battered woman's movement, argues: "In the context of domestic violence, there are six primary goals. The first and overarching goal is safety for battered women and children. Every intervention should be measured against the yardstick of safety." (According to her, safety is followed by stopping the violence (the second goal); holding perpetrators accountable (the third goal); divesting perpetrators of control (the fourth goal); restoring women who have been battered (the fifth goal), and enhancing agency in women who have been battered (the sixth goal) making them able to make decisions without interference by the batterer). See Barbara J. Hart, "Arrest, What's the Big Deal" (1997) 3 Wm. & Mary J. Women & L. at 207-209. Goodmark defines *empowerment*, "...as consistent with autonomy or agency—as self-direction, self-determination, enabling the woman who has been battered not only to make choices, but to define the options for herself, regardless of how others would evaluate those options." (I adopt her same view on women's empowerment). See Leigh Goodmark, "Autonomy Feminism: An Anti-essentialist Critique of Mandatory Interventions in Domestic Violence Cases", This article will be adapted as a chapter in *A Troubled Marriage: Domestic Violence and the Legal System* publication forthcoming (NY: New York University Press, 2011) at 48.

<sup>11</sup> See Angela Cameron, *Gender, Power and Justice: A Feminist Perspective on Restorative Justice and Intimate Violence* (LL.M. Thesis, University of British Columbia, 2003) [unpublished] at 136.

<sup>12</sup> Ibid.



Defenders of the primacy of community interests over gender issues often argue that women should put the community before themselves as a political assertion of their autonomy and self-governance. However, other Indigenous women and feminist scholars have criticized claims like those arguing that women's choices are, in that context, constrained by political forces. These forces are objectionable since they re-victimize Indigenous women undermining their freedom of choice --- even using state-based coercive sanctioning schemes -- and reinforcing gender subordination. They deprive individual Indigenous women of the self-determination and self-direction that are essential for their autonomy and empowerment. As Rashmi Goel, another Canadian scholar observes: "this dynamic is complicated when community members also see themselves as victims of the mainstream system ... interactions might simply shift to one in which the community and the offender stand as victims of the state".<sup>13</sup> She adds, "This could work to excuse the offender or to blame the victim for bringing punishment on a fellow member".<sup>14</sup>

This prioritization of the political assertion of autonomy and self-governance over safety and offenders' accountability is only one example consistent with a strand of feminist thought that I contend has permeated some imbalanced intersectional approaches. Those intersectional feminists do not focus on women's subordinated and victimized statuses believing they believe that other inequality loci are most significant, such as, cultural or ethnical political claims or even RJ advocacy interests. Doing so they might be giving validation to those RJ experiences as culturally sensitive while in truth women's security and empowerment are neglected. Cameron observes that although culture really matters, "(...) we need to move away

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<sup>13</sup> See Rashmi Goel, "Aboriginal Women and Political Pursuit in Canadian Sentencing Circles: At the Cross Roads or Cross Purposes?" in James Ptacek, ed., *Restorative Justice and Violence Against Women* (New York, NY: Oxford University Press, 2009) at 1048-1051 in a kindle e-book version.

<sup>14</sup> Ibid.

from romanticized, abstract notions of what can be achieved by western RJ or Aboriginal justice and turn our attention to the actual experiences of victims and offenders. Their experiences, whether positive or negative (or both) need to be grounded in a more adequate theorization of the intersection of culture and gender in post-colonial societies.”<sup>15</sup> From my point of view this “adequate theorization” means to combine and balance a commitment to women’s interests with a commitment to culturally appropriate forms of alternative justice in what Blagg named “constructive hybridization”. Daly, citing Blagg, defined the term constructive hybridization:

Blagg (2005, p. 3) terms this “constructive hybridization,” and it refers to the ways in which “Aboriginal values and principles can be incorporated into the non-Aboriginal justice system.” Constructive hybridization reveals intersectional thinking. However, it must include Indigenous women’s interests and avoid inappropriate uses of cultural arguments. Restorative justice practices typically work within a dominant white perspective, but they could benefit by using constructive hybridization. Indigenous justice practices can be improved by bringing the voice or perspective of the victim into the process. This is especially important so that an offender does not take up the position of offender and a victim of colonial society, which has the effect of obscuring the victim. It may also serve to break the common ground of male interests (that is, those comprising white justice and black community leaders).<sup>16</sup>

The question is how to balance values based on alternative forms of justice like RJ with values like gender empowerment. Part of the answer certainly includes studies that address fairness concerns regarding RJ conferences; that females’ and victims’ interests are not properly protected, and that feminist scholars are more likely to engage in dissent when they (mis)use an intersectional approach --- as I try to demonstrate in this thesis.

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<sup>15</sup> See Angela Cameron, “Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence” (2006) 10 *Theoretical Criminology* at 56-57.

<sup>16</sup> See Kathleen Daly, “Seeking Justice in the 21st Century: Towards an Intersectional Politics of Justice” in H. E. Ventura Miller, ed., *RJ: From Theory to Practice*. Sociology of Crime, Law, and Deviance Series, Vol. 11 (Amsterdam: Emerald Group Publishing Ltd., 2008) at 27. See also Harry Blagg, “A new way of doing justice business? Community justice mechanisms and sustainable governance in Western Australia” (2005) State Solicitor’s Office, Background Paper No. 8. Perth: Law Reform Commission of Western Australia at 3.

The uncertainty concerning who should play the major role in RJ thinking, or whether it is reasonable to expect restorative interventions<sup>17</sup> to be able to equally address victims, offenders and community interests, provides another opportunity to examine the complex relationships and contradictions inherent but latent in the RJ rhetoric. Many RJ proponents embrace (and defend) that restorative conferences have the capacity to benefit victims in a wide range of symbolic, material, therapeutic, and moral outcomes.<sup>18</sup> For example, as Stubbs observes: “Proponents typically point to the opportunity for victims to participate and have a voice and receive validation, and for offenders to take responsibility, for a communicative and flexible environment and relationship repair (if that is a goal; Daly and Stubbs 2006)”<sup>19</sup>. Moreover, victims have allegedly reported reduced levels of fear, anxiety, and anger and show less interest in seeking revenge. There are also claims of potential benefits concerning the reduction of the symptoms of posttraumatic stress after participating in RJ conferences.<sup>20</sup> However, the worry of many critics is that the capacity of RJ to advance victims’ interests is more contingent than actual. As Stubbs put it:

The aspirations of the RJ movement to deliver such a range of benefits to victims of crime are laudable. However, the capacity to advance victim’s interests remains limited by several factors. First, it does not have “its own concept of either victim or victimization” and thus lacks a foundation for challenging opposing claims ... Second, a theoretical basis for how and why RJ might benefit victims are rarely articulated... Third, despite emerging evidence that experiences of RJ might vary according to victim, offender, and offence characteristics and to the subjective experience of victimization, little theoretical empirical work guides practice in responding to these issues. Fourth, the tendency of much RJ literature to theorize crime as a discrete incident is at odds with research demonstrating that domestic violence is commonly recurrent and escalating and

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<sup>17</sup> The most common practices of restorative justice include family-group conferences, peace-making circles/sentencing circles, and a variety of victim-offender mediation processes depending on the legal jurisdiction. In chapter 1 these models of RJ will be presented in more details.

<sup>18</sup> *Stubbs*, supra note 6 at 1551-1554.

<sup>19</sup> *Ibid.* at 1560-1564.

<sup>20</sup> *Ibid.* See also Heather Strang, *Repair or Revenge: Victims and RJ* (Oxford: Oxford University Press, 2002) (Discussing the RJ promises to victims and offenders. There are allegedly benefits to the community like, for example, participation in their own problems reinforcing participatory democracy).

that the threat of violence may be ongoing and not reducible to discrete incidents (Cocker 2002; Stubbs 2002).<sup>21</sup>

In fact, the link between the mis(use) of the intersectional approach and the uncertain status of victims' interests in some RJ models is less obvious than the link between the RJ claim of RJ to bring together victims, offenders and community and the desire to reform the conventional criminal justice system. Nonetheless, my thesis seeks to explore an otherwise overlooked connection between the mis(use) of intersectionality theory and the equivocal role of victims, offenders and community in RJ theory and practice.

Another possible problem one comes up against in attempting to set priorities among the various RJ stakeholders is identifying which RJ model will adequately capture all the subtle shades of meaning within the RJ realm, while not excluding the richness and diversity of its experiences. Different versions of RJ thinking or models imply different appraisals by feminist scholars. By examining the literature I hope to identify problematic RJ models that victim-oriented feminist scholars would be willing to engage like sentencing circle experiences in Aboriginal communities in Canada and Australia. Key authors like Kathleen Daly; Julie Stubbs; Rashmi Goel; Elizabeth Adjin-Tettey, and Angela Cameron are particularly pertinent in this sense because they address the subject-matter in a way that privileges a victim-oriented analysis of the appropriateness of RJ to cope with violence against women without losing well-balanced intersectional feminists insights.

These scholars and others have summarized the current RJ theoretical framework under a feminist perspective, and at the same time either conducted or investigated several empirical studies on RJ, especially based on ongoing actual experiences in Canada and

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<sup>21</sup> *Stubbs*, supra note 6 at 1552-1556.

Australasia (Australia and New Zealand) with white and non-white subjects.<sup>22</sup> According to them, domestic violence offences and other manifestations of violence against women cannot be subsumed within existing generic restorative practices without significant risks to victims' interests. Furthermore, the extensive research data allowed them to identify a group of feminists who do not apply a balanced approach in using inequality categories which generates distortions in the critical evaluation of RJ experiences, especially in Indigenous communities. My thesis is largely inspired and influenced by their findings and intends to complement their work adding my own perspective on the issue, especially regarding the (mis)use of an intersectional approach and a possible co-optation of it by RJ advocacy arguments and other political claims that become amalgamated with them.

Furthermore, the importance of the applicability of RJ for gender-based violence is especially striking when one considers that the UN Basic Principles on RJ fundamentally aim to provide “an opportunity for victims to obtain reparation, feel safer and seek closure (...)” (Preamble).<sup>23</sup> This pledge for the protection of victims and victims' rights as absolute priority is a key feature that cannot be ignored when implementing any RJ program. If the restorative approach fails in delivering reparation, security or even empowering the victim, it also fails as a remedy and, therefore, as a viable practice to cope with cases of gender violence. Under that premise, any RJ legislation, program or policy must unquestionably assure the women victims of violence that their safety and autonomy will be preserved whether Indigenous or not; otherwise it cannot be deemed a viable approach. Likewise, I argue that if an intersectional approach to the problem of the use of RJ to cope with gender-based violence is co-opted by RJ advocacy discourses and other political agendas --- being diverted from its purpose as a methodology that

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<sup>22</sup> See, e.g., note 8.

<sup>23</sup> UN Economic and Social Council, *Declaration of Basic Principles on the use of Restorative Justice Programmes in Criminal Matters*, ECOSOC Res. 2002/12, UN Doc A/40/881 (1999).

further women's interests --- the whole idea of intersectionality may also become seriously compromised.

#### **4. A brief word on the co-optation of the feminist anti-violence movement by political interests**

As noted in the previous sections the main impetus for my thesis is my perception that an intersectional feminist approach to RJ may be co-opted by other interests rather than those committed to women's empowerment and autonomy. There are good reasons to hold such fears. The history of the feminist anti-violence movement suggests that its co-optation by other political interests in ways that could be misused to create policies to further alienate and disempower battered women, is by no means a novelty. Indeed, as James Ptacek put it, "...the history of how feminism has transformed state responses (*to domestic violence*) is the story of how the state has sought to co-opt feminist activism"<sup>24</sup> Ptacek of course is concerned about the appropriation of the feminist movement by the conservative right in order to legitimise and validate "get tough" policies such as mandatory pro-arrest policies for police and no-drop prosecution policies.<sup>25</sup> In truth, Ptacek's concerns are not very different from mine. While Ptacek

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<sup>24</sup> See James Ptacek, ed., *Restorative Justice and Violence Against Women* (New York, NY: Oxford University Press, 2009) at 155-158 in a kindle e-book version. Parentheses added by me.

<sup>25</sup> The impact of "tough on crime" or "zero tolerance" policies on domestic violence cases was subjected to harsh criticism by some feminist scholars who found that these policies operate in ways that may further state control of women, particularly women who are marginalized by race, class, and immigrant status. Mandatory arrest and prosecution policies, for instance, may result in increased numbers of arrests of non-citizen women who may then be deemed deportable under immigration law; my aggravate racist and abusive police behaviors; result on overincarceration of men of color; reinforce pathological notions that battered women do not want to assist prosecution and that they accept violence staying with the offender; unwarranted removal by the state of children from women who have been battered; prosecution of battered women involved, even peripherally, in criminal conduct, and limits women's ability to use the criminal justice system strategically to gain greater control over their lives, but did not necessarily complete legal processes. Nevertheless, many feminists aligned themselves with those policies. See Donna Coker, "Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence" in John Braithwaite & Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge, UK :Cambridge University Press, 2002) at 133. (summarizing the literature on this point). See also Donna Coker, "Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review"(2001) 4 Buffalo Criminal Law Review 801-860.

would ask: how is feminism affected by conservative political agendas? I would ask: How is feminism --- especially intersectionality theory --- affected by informal alternative justice practices like restorative justice? As we shall see, those alternative forms of justice practices are also capable of assimilating feminist theoretical approaches in their own terms, especially within the context of specific models used in Indigenous justice such as sentencing circles.

## **5. Theoretical framework: Intersectionality theory**

At this point it should come as no surprise that this study will draw on insights from intersectionality theory. But what does intersectionality mean? Intersectionality theory also known as feminist critical race theory, integrative feminism, anti-essentialist feminist theory, and multiracial (or multicultural) feminism may be defined as a feminist theory with the purpose of making plurality visible in academic debates and policy-making discussions.<sup>26</sup> Intersectionality theory is distinguished by its anti-essentialist claims. An intersectional approach demands to acknowledge that there is no unitary or monolithic experience for women. Feminists who take an intersectional approach to questions of power and subordination among women are highly critical of descriptions of inequality that tend to homogenize their experiences into experiences and political claims of white, middle-class women. For example, the experiences of Black women may be vastly different than those of white women, or those of poor women distinct from those more socially advantaged.<sup>27</sup> In fact, Kimberlé Crenshaw, who originally devised this

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<sup>26</sup> See Alison Bailey, "On Intersectionality and White Feminist Philosophy" *SSRN* (29 September 2008), online: Available at SSRN: <http://ssrn.com/abstract=1334786> at 4.

<sup>27</sup> See Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 *Stanford Law Review* 1241-1299. See also Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics" (1989) 14 *University of Chicago Legal Forum*, 538-54. But see Amanda Burgess-Proctor, "Intersections of Race, Class, Gender, and Crime: Future Directions for Feminist Criminology" (2006) 1 *Feminist Criminology* 7 at 44. (Arguing that, in her words: "intersectionality actually emerged during the 1970s. That is, at the beginning of the second wave of the feminist movement, women of color (as well as White antiracist women

approach in the 1980s, employed the term “intersectionality” to address specifically a black feminist perspective in contrast to the “sameness” of mainstream white feminism in the United States. Furthermore, intersectionality has been a fruitful analytical resource for feminist scholars working in a variety of fields. For example, history; feminist criminology; feminist theory; critical legal studies; and international human rights have been using intersectionality theory to emphasize the interactions between inequality markers and complex systems of domination or privilege.<sup>28</sup> The term “intersectionality” itself has its roots in the word “intersection” which lead us to the metaphor of crossroads and traffic used by Kimberlé Crenshaw to explain her insights on women of color’s oppression. In her words:

Intersectionality is what occurs when a woman from a minority group tries to navigate the main crossing in the city.... The main highway is ‘racism road.’ One cross street can be Colonialism, the [other] Patriarchy Street... She has to deal not only with one form of oppression, but with all forms, those names as road signs, which link together to make a double, a triple, multiple, a many layered blanket of oppression.<sup>29</sup>

Therefore, intersectionality can also be seen as a heuristic approach for studying, understanding and responding to the ways in which gender intersects with other inequality markers or social identities and how these intersections can raise concerns about women’s experiences of oppression, privilege and subordination. As Ange-Marie Hancock writes: “The

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and others who felt marginalized by mainstream feminism) began calling for scholarship that simultaneously attended to issues of race, class, gender, and sexuality. However, the concept of intersecting inequalities first appeared in criminology during the 1980s, corresponding to feminism’s third wave).”

<sup>28</sup> Supra note 26.

<sup>29</sup> This quotation was extracted from Bailey’s paper “On Intersectionality and White Feminist Philosophy” and according to her is originated from a paper Crenshaw gave at the World Conference Against Racism (WCAR) in South Africa. She adds that the paper is no longer available, but it is cited by Nira Yuval-Davis on her paper “Intersectionality and Feminist Politics”. Supra note 16 at 31. See also Nira Yuval-Davis, “Intersectionality and Feminist Politics” (2006) 13:3 *European Journal of Women’s Studies* at 196. (Yuval-Davis cites Crenshaw’s metaphor as a passage of a report of the WCAR meeting as presented by Indira Patel to a day seminar in London in November 2001). See also Kathy Davis, “Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful” (2008) 9:1 *Feminist Theory* 67-85 (Observing incidentally that Crenshaw expanded her conceptualization of intersectionality to address domestic violence in order to show how feminists have been primarily concerned with getting the issue of domestic violence on the political agenda as a ‘women’s issue’, and have tended to downplay differences among women).



term “intersectionality” refers to both a normative theoretical argument and an approach to conducting empirical research that emphasizes the interaction of categories of difference --- including but not limited to race, gender, class, and sexual orientation.”<sup>30</sup> Under an intersectional theory approach, therefore, women are usually divided along multiple inequality categories or social identities such as class, race, religion, ethnicity, sexual orientation, and nationality. As Ange-Marie Hancock has pointed out, “... intersectionality posits an interactive, mutually constitutive relationship among these categories and the way in which race (or ethnicity) and gender (or other relevant categories) play a role in the shaping of political institutions, political actors, the relationships between institutions and actors, and the relevant categories themselves.”<sup>31</sup> Similarly described by Bailey, an intersectional approach “offers a helpful strategy for bringing out the tensions and connections between feminism, anti-racism, anti-colonialism and other resistance movements.”<sup>32</sup>

For this reason, one of the often heralded attributes of intersectionality theory has been its capacity to reflect critically upon the objects of study *vis-à-vis* the existence of inequality categories that would help us to identify how different sets of identities impact on women’s oppression. In my thesis, however, I contemplate a paradoxical connection between an intersectional approach and RJ where intersectionality theory acts more like a validation tool than a critical instrument of analysis. Although I recognize the importance of other inequality markers as a theoretical framework in the intersectional approach to RJ and intimate violence, I also cannot ignore the potential negative effects of overemphasizing certain aspects to the detriment of others. For this reason, dividing the attention of feminists among so many and

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<sup>30</sup> See Ange-Marie Hancock, “When Multiplication Doesn’t Equal Quick Addition: Examining Intersectionality as a Research Paradigm” (2007) 5:1 Perspectives on Politics at 63-64.

<sup>31</sup> Ibid.

<sup>32</sup> See note 26 at 7

sometimes conflicting inequality categories may have come with a price, namely an imbalance among them.

Knudsen recognized this issue and argued that multiple inequality perspectives are turned into a problem, because any category may be considered as the most significant one. She depicted this problem using Crenshaw's metaphor of the crossroad, writing: "the ethnicity may be chosen in favour of gender as the one road chosen, while the other road is left behind."<sup>33</sup> Another insight pointed out by Knudsen that I also share is that inequality categories may be treated as "competing intersectionality", where categories are weighed in a hierarchy-basis as was the case in the 1970s where, for example, class and race gained more significance than gender. In the context of RJ, I contend that some intersectional feminists and RJ advocates ---in Indigenous settings --- adopted an imbalanced perspective putting gender as a secondary analytical category giving primacy to collectivist interests.

These problems were multiplied by substantive weaknesses of the RJ rhetoric and practice. More specifically, an overemphasis on the offender in some programs which have contributed to a great suspicion among some feminists about RJ is really committed to victims of gendered violence. According to my view, the phenomenon of gender underestimation derives directly from imbalanced intersectionality theory, and has led to a variety of stances in the feminist community regarding the appropriateness of the use of restorative justice models in cases of violence against women. Some enthusiastically support it, while others vehemently oppose it. By looking at the multifaceted, sometimes contradictory inequality markers and social movements that influence these points of view, I contend that we can better deal with the

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<sup>33</sup> Susanne Knudsen, "Intersectionality - A Theoretical Inspiration in the Analysis of Minority Cultures and Identities in Textbooks" on line: (2008) Caught in the Web or Lost in the Textbook, <[www.caen.iufm.fr/colloque\\_iartem/pdf/knudsen.pdf+intersectionality+theory&hl=en&ct=clnk&cd=3&client=firefox-a](http://www.caen.iufm.fr/colloque_iartem/pdf/knudsen.pdf+intersectionality+theory&hl=en&ct=clnk&cd=3&client=firefox-a)> at 63. Retrieved on 20 March 2008 (In the transversal intersectional perspective the categories intertwine, pervade and transform each other).

problem of the divergence between feminists revealing which inequality categories have more weight in an intersectional analytical perspective of RJ and how this might affect the feminist judgement and appraisal of restorative justice practices. For example, in Canada, Angela Cameron calls for a moratorium on new RJ and Indigenous justice practices for addressing violence against women under the argument that they do not provide necessary security and empowerment to victimized women, while in the USA Dona Cocker believes that it would be disastrous due to the implications in Indigenous political self-determination.<sup>34</sup> Cameron is a representative of the more “gender-based” school of feminism (although clearly inspired by postmodern feminism epistemic positions), and Cocker is more concerned with other inequality categories like culture, ethnicity and political assertion.

An impasse like that illustrated above places intersectionality simultaneously for and against restorative justice. For this reason my thesis also argues that there is a need for a more thoughtful and integrated intersectional approach within the context of RJ concerning its ability to cope with violence against women. After all, it is at least odd that the same analytical tool turns out to have such diametrically opposing appraisals of experiences inspired by the same RJ tenets. Of course, I acknowledge that the diversity of RJ models and practices also contributes to those conflicting results, but my point is that the existence of competing values in the intersectionality theory are left out of the picture. I suggest that great caution should be exercised in interpreting studies professing to employ intersectionality theory as an analytical tool, since contradictorily they can address adequately the use of RJ in relation to violence against women, and can also take the restorative claims on their own terms and without further investigations.

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<sup>34</sup> See Donna Coker, “Restorative justice, Navajo Peacemaking and domestic violence” (2006) 10:1 *Theoretical Criminology* 67-85. See especially Cameron, *supra* note 10. See also note 14.

## 6. Intersectionality and restorative Justice

As Daly points out, intersectionality theory, "...is used empirically to represent the multiple and shifting identities of people (e.g., Maher, 1997; see also McCall, 2005) and politically and analytically to critique categorical thinking in law, social theory, and social movement groups (Crenshaw, 1989, 1991; Marchetti, 2008).<sup>35</sup> Daly uses the latter sense more specifically, "to address the conflicting interests of victims and offenders, social movement groups, and individuals and collectivities in responding to crime."<sup>36</sup> I use her insights to analyse the interplay between intersectionality theory and RJ. To do so when using an intersectional perspective of RJ requires recognition of the existence of categories of difference other than those usually found in the intersectionality doctrine, such as gender; ethnicity; social-economic status; sexual orientation; immigration status; religion, and age. Daly, for example, identifies three not so self-evident loci of inequality that she names "sites of contestation" between and among feminists and anti-racist groups, because these relate to alternative justice practices like RJ. They are the inequalities caused by crime (victims and offenders), social divisions (race and gender politics), and individuals and collectivities (rights of offenders and victims).

The picture that emerges from Daly's new categories of inequality is of a division of loci, in which those "sites of contestation" (e.g. inequality caused by crime) and associated actors (e.g. victims and offenders) are marked by a pursuit of disparate goals which are in constant conflict with one another. For this reason, the political agendas of the actors belonging to each locus of inequality tend to focus on their own interests, even within a group that is already suffering from some kind of power imbalance or oppression. In other words, even within groups of disadvantaged (e.g., Indigenous people), the intersection of certain inequality

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<sup>35</sup> See note 16, Daly, *Seeking Justice*, at 5.

<sup>36</sup> *Ibid.*

categories are privileged (e.g., male Indigenous offenders) *vis-à-vis* the intersection of others (e.g., Indigenous women victimized).

As a result, that imbalance among the various sites of contestation produces a systemic dilemma for Indigenous women: in an intersectional context, for example, they may find themselves forcibly situated in one of two camps of sometimes conflicting political agendas. If Indigenous women question the validity of “alternative justice” approaches like RJ interventions, they may be categorized either as individualists or as people who do not embrace community interests, even though these may be more aligned to offenders’ interests. Crenshaw, cited by Bailey, referred to this systemic dilemma as a form of *intersectional disempowerment* since women are forced to split their political energies between two sometimes-opposing groups while men of color and white women seldom deal with this problem.<sup>37</sup> My fear is that a form of *intersectional disempowerment* may be occurring in some models of RJ used in Indigenous communities, especially concerning the emphasis given to male offenders as surrogates for collective political claims. As Daly has observed citing Emma LaRocque:

For example, critics of Indigenous women’s organizations say they are too closely aligned with feminist interests (or what is termed women’s or *individual rights*), not with the *collective interests* or rights of Aboriginal people. In response, Indigenous women say they are being asked (unfairly) to put community interests ahead of their interests as women. Relating this to criminal justice, Emma LaRocque (1997, p. 81), a Canadian Indigenous woman, says “it remains a puzzle how offenders, more often than victims, have come to represent ‘collective rights’.” She argues that in the interests of “social harmony, (...) the pendulum has swung way too far to the advantage of [offenders] within Native communities.”<sup>38</sup>

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<sup>37</sup> See note 27, Crenshaw, *Mapping the Margins*.

<sup>38</sup> See note 16 at 6.

Following this line of reasoning Daly contends that, “If we want to do justice differently, we must find ways to align race and gender justice politics, and not permit the antagonisms to stall a more constructive and progressive agenda.”<sup>39</sup>

My attempt to comprehend and engage critically the social-legal and political implications of using an intersectional approach within the context of RJ and violence against women draws on those insights from Daly. She uses what she terms “sites of contestations” in order to describe, “the different positions that feminist and anti-racist groups have taken toward justice practices”.<sup>40</sup> Daly thinks that those loci of inequality, as a I prefer to name them, “encapsulates the different emphases that Indigenous (or racialized political minority groups) and feminist groups take in seeking justice”.<sup>41</sup> According to Daly, that is the reason why racial and ethnic minority groups’ claims commonly centre on treatment of offenders, while feminist claims more likely convey the needs of victims. As she puts it:

Race and gender politics can be viewed as a group-based overlay on the positional interests of offenders and victims: Indigenous (or racialized minority) groups emphasize offenders’ interests; feminist groups, victims’ interests. In light of relations of Indigenous (or racialized minority) groups to the state, which are grounded in distrust spawned by a history of white racism, racial prejudice, and discrimination, taking the positional interest of an offender is logical and expected. Likewise, for feminist groups, who awakened consciousness to “the problem that has no name” (sexual and physical abuse by men toward women, particularly in the home), taking the positional interest of a victim is logical and expected.<sup>42</sup>

She concludes by arguing that this can create problems in finding common ground which is in consonance with my thesis regarding the existence of competing inequality categories in an intersectional approach on some RJ models used in Indigenous communities.

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<sup>39</sup> See note 16.

<sup>40</sup> Ibid. at 14.

<sup>41</sup> Ibid.

<sup>42</sup> See note 16 at 18.

As a consequence, the emerging feminist socio-legal analysis of the problem of using RJ in Indigenous settings has its roots in other developments besides solely gender. Issues like race, class, ethnicity, sexuality, age, religion, colonization, and other key markers or categories of inequality have emerged to compete at times against gender as a primary feminist category of analysis and, sometimes against each other. Razack was the first to capture this tension between inequality markers when she argued that “culture, community, and colonization can be used to compete with and ultimately prevail over gender-based harm”.<sup>43</sup> Daly argues that in order to address conflicts and competing interests that emerge in those sites of contestation mentioned before a balanced intersectional approach “requires resources (offender remorse; knowledge and capacities of victims, offenders, community people; and state support); movement of group-based interests to other positional interests; and positive rights for victims and offenders that are not compromised by collectivities.”<sup>44</sup> Unfortunately, I believe that this is not the case of some RJ models applied within the context of Aboriginal communities in Canada and Australia which will be our practical focus of study.

Before advancing to the next sections, I must pause and temporarily turn away from intersectionality theory. As stated in the previous paragraphs the main question to be raised in my thesis is the connection between the (mis)use of procedural values (inequality categories) in intersectionality theory, on the one hand, and the convenience of using RJ practices to cope with violence against women cases on the other hand. Although I had highlighted the importance of intersectionality theory in this connection, the relevance of RJ was not yet fully clarified. In this sense it is crucial to determine whether RJ interventions can do any better than the solutions found in the conventional criminal justice system (hereafter CJS) as feasible remedies to gender-

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<sup>43</sup> See Sherene Razack, “What Is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence,” (1994) 19 *Signs* 894-923 at 910.

<sup>44</sup> See note 29 at 24.

based violence. I point out two reasons which support the relevance of studying RJ within this context.

First, scholarly literature either defends or refutes the use of RJ to cope with violence against women which leaves an inconclusive answer among scholars concerning this problem of public policy.<sup>45</sup> I hope to draw my own conclusions about the topic from the debate among scholars. In order to do this, my research looks into RJ to explore what the current literature says or infers about the problem, either in terms of imposing constructive criticism (telling policy-makers what they should not do) or offering positive guidance (telling policy-makers what they should do). It is important to mention that the exploration of literature will be preceded by an outline of the conceptual and theoretical framework of RJ that should be helpful in addressing some of the complexities, promises and internal deficiencies of the RJ movement itself.

For example, at first sight it may seem difficult to go against the noble aspirations of RJ proponents. Their aspirations include a paradigmatic shift from a retributive/punishment model to a restorative/non-punitive model that involves, in general, empathetic dialogue and negotiation among the parties; victim/offender/community healing; offender accountability combined with character transformation, and a more meaningful role for victims in the criminal justice system. However, some critics of RJ question whether it is possible to achieve those

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<sup>45</sup> There is a considerable amount of scholarly work asserting the positive effects of RJ concerning violence against women while there is an equal, if not greater, amount of scholars criticizing those stances and presenting serious concerns, especially regarding autonomy and security of victimized women in RJ conferences. See, *e.g.*, *Stopping Violence*, note 15 at 56-59. (Angela Cameron classifying feminist stances on the use of RJ to deal with gender-based violence into groups for and against the idea). See also note 2, Cameron, *Restorative Justice: A literature Review*. (Here Angela Cameron identified an intermediary position where detractors of the use of RJ to deal with violence against women are willing to reconsider their position if restorative justice processes were better framed). See also, *Feminist Engagement*, supra note 5 at 18 (Daly and Stubbs listing the potential problems and benefits mentioned in the literature regarding the usability of RJ to cope with gender-based violence).



aspirations.<sup>46</sup> In the literature, for instance, there is constant criticism regarding lack of clarity and coherence of the RJ goals; doubts about whether or not there is an artificial dichotomy (between retribution/restoration) due to the RJ claim of a paradigmatic shift; value clashes between victims' advocates and offender-oriented programmes, and the paradox inherent in the restorative aspiration to offer a distinctive alternative to the conventional criminal justice system while simultaneously co-existing and adopting fundamental concepts within the very framework it seeks to challenge.<sup>47</sup> The study of RJ aspirations and its limitations will offer guidance not only to understand the fundamental interactions between these and violence against women, but may also help to explain how such models might set priorities among the various "sites of contestation" proposed by Daly. This is particularly the hope concerning individual interests where victims' and offenders' positive rights seem not be clearly articulated in contrast to collectivistic interests which may be acquiring primacy over others, mainly in Aboriginal models of RJ.

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<sup>46</sup> The extent to which RJ can achieve these aspirations is hotly debated. Compare, e.g., Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002); Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, Pennsylvania: Herald Press, 1990); Allison Morris, "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42:3 *British Journal of Criminology* 596; John Braithwaite, "Principles of Restorative Justice", in A. Von Hirsch, et.al., eds, *Restorative Justice: Competing or Reconcilable Paradigms?*, (Portland, OR: Hart Publishing, 2003) and John Braithwaite, *Crime, Shame and Reintegration* (New York, NY: Cambridge University Press, 1989). (Claiming that RJ has potential to achieve its aspirations), with Annalise E. Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver, BC: UBC Press, 2004); Kathleen Daly, "Mind the Gap: Restorative Justice in Theory and Practice" in A. Von Hirsch et. al, eds., *Restorative Justice and Criminal Justice* (Oxford: Hart Publishing, 2004); Kathleen Daly, "The Limits of Restorative Justice" in Dennis Sullivan & Larry Tifft, eds., *The Handbook of Restorative Justice: A Global Perspective* (New York, NY: Routledge, 2006); Joanna Shapland & et. al, "Situating Restorative Justice Within Criminal Justice" (2006) 10:4 *Theoretical Criminology* 505-532 (Critiquing work seeking to reveal flaws in the RJ theory and practice).

<sup>47</sup> See Margarita Zernova, "Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences" (2007) 47 :3 *British Journal of Criminology* 491-509 at 491. (Referring to fundamental problems in the RJ philosophy found in the literature).

## 7. Thesis preliminary critique and defense

An imbalanced intersectional approach which, for example, de-emphasizes the inequality caused by crime - i.e., one which occurs between victim and offender - may give credit to certain detrimental internal power relations relevant to Aboriginal women. According to my view, this happens simply because those power relations emerge from cultural and philosophical practices that somehow resonate with the aspirations of RJ proponents, e.g., a community pro-active role on conflict resolution, which can also mean --- in an Aboriginal view of justice --- an alternative justice intervention that conveys political autonomy and self-governance.<sup>48</sup> However, as stated before victimized women may feel that their interests are not exactly the same as those of their own community and that the majority of the community support is diverted to offenders, or there is a prevalence of a victim-blaming mentality in the restorative conferences. For example, a major untested assumption in the RJ discourse is that when a conference is successfully undertaken, there are positive effects to all participants. It is thought that if offenders learn from an RJ encounter they develop more empathetic feelings about the impact of crime on victims, and they may be deterred from future offending. It is also believed that RJ processes may assist in victims' emotional and trauma recovery.<sup>49</sup> However, there is no guarantee that victims, offenders and community supportive members will come to RJ conferences with equal power, equally able to assert their positions and to discuss and negotiate the terms of a restorative agreement among them in order to benefit according to

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<sup>48</sup> As observed by Cheon and Regehr, "Perhaps the most distinguishing characteristic of RJ is its reliance on "communities of care" to carry out the weighty tasks of changing offenders' behavior, supporting victims in healing, enforcing agreements, and doing their best to prevent further offending (Dodd, 2002; Presser & Gaarder, 2000)." To achieve these multiple goals simultaneously is not an easy task since they demand juggling several interests, at times, contradictory. See Aileen Cheon & Cheryl Regehr, " RJ Models in Cases of Intimate Partner Violence: Reviewing the Evidence" (2006) 1:4 Victims & Offenders 369-394 at 374.

<sup>49</sup> See generally Elmar G. M. Weitekamp & Hans-Jürgen Kerner, eds., *RJ: Theoretical Foundation* (Mill Street, Uffculme: Willan Publishing 2002); Eugene McLaughlin *et al.*, eds., *Restorative Justice: Critical Issues* (Thousand Oaks, CA: Sage Publications, 2003).

expectations. Some critics argue that all women are at a disadvantage in RJ conferences because of their unequal moral, economic and social power; most agree that women who have been battered are at a disadvantage in RJ as a result of the coercion and violence they have faced. As a consequence the admirable motives of intersectionality theory may backfire on Indigenous women when there is an imbalance amongst the various loci of inequality, creating more problems than solutions and jeopardizing the very notion of it as an emancipatory feminist research methodology. For this reason, I contend that it is better to insist on a more cautious methodological approach before advancing a policy position in support of certain RJ practices like those used in Aboriginal communities.

However, it is worth noting that I do not have the intention to discredit intersectionality as a well-proven tool for feminist critical analysis. On the contrary, I intend to strengthen it by reflecting how under certain circumstances that invaluable feminist analytical tool can be diverted by the restorative rhetoric and practice in ways that may even be considered detrimental to women, especially regarding undeserved favourable critical appraisals of RJ interventions as a remedy to deal with violence against women. Consequently, those feminist scholars who are using an intersectional approach without considering the balance needed among the various inequality categories embedded in this theory might be inclined to rush to approval of policies committed to RJ models. Lamentably, this may occur without further investigation concerning whether or not interventions based on RJ practices meet the needs of abused Aboriginal women.

In a situation like that an intersectional approach does not present concrete beneficial effects for women as a subject of inquiry. Indeed, it might be a disservice to them because it neutralizes the best of intersectionality theory (its critical approach) and provides

legitimization and validation to RJ experiences not fully committed to gender awareness.<sup>50</sup> The term “co-optation”, as used in this paper, refers exactly to a process of neutralization and appropriation of an idea by assimilation into an established dogma in order to re-use it as an element of self-advocacy. To remain valid as a critical emancipatory feminist tool, an intersectional approach must produce results functionally committed to women’s interests and essentially with them in sight. Representation of other interests like those present in RJ discourses, even when theoretically noble and legitimate --- like the assertions of autonomy and self-governance by Aboriginal people --- can be diversionary and overlook RJ faults concerning Aboriginal women’s interests.

For this reason, a secondary objective of this study is to use an intersectional approach as a strategy to foster a gender-centered perspective on the debate over the use of RJ to cope with violence against women in Indigenous settings. This may be seen as a paradoxical goal since the intersectionality methodology seeks departure from gender essentialism as I stressed before.<sup>51</sup> I am fully aware that recurring to gender as an inequality category that deserves special attention may be considered a superseded idea. In fact, nowadays the use of gender as a universal subject matter in inequality analysis is not held in esteem by new generations of feminists (especially anti-essentialists of which intersectional feminists are part); it is considered simplistic and a blatant failure to notice pluralistic feminist perspectives or it is labelled as monolithic and finally dismissed. At the center of these concerns is the danger of a gendered analysis that is unable to attend to differences among and between racialized women as intersectional feminists are constantly reminding us. Their critique has reinforced the scepticism

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<sup>51</sup> Angela Harris explains the notion of “gender essentialism” as the assumption “that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.” See Angela P. Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42 Stanford Law Review at 581. (Intersectional feminists argue that descriptions of inequality located in one category, for example, gender often falsely homogenizes the diverse experiences of racialized women).

about the unity apparent in the category “gender” by highlighting the intersectionality of identities like race, class, immigration status and sexual orientation, etc. Hence, the weak point in my line of reasoning would be not considering the fragmentation of the category “gender” and how this affects victimized women in the context of RJ.

In my defense, however, I argue that I do not ignore the diversity of women perspectives and the different needs and interests among them. I also do not see gender in isolation from other inequality categories. Rather, I seek to shift some territory to gender questions --- using the concept of *strategic essentialism* --- in the midst of other competing categorical markers and giving adequate emphasis to a self-evident element of situational commonality amongst victims of intimate violence. After all, it would be impossible within the context of violence against women to not give some privilege to gender as an analytical category simply because this particular inequality category --- among others --- arises as an important catalyst that precipitates violence and contributes significantly to the power imbalance in RJ encounters in Indigenous communities. In addition, the fact that women in different social loci may experience sexism differently does not mean that they have nothing in common since they still can suffer the consequences from sexism, patriarchal oppression and from other general effects of violence because they are women. Even when alternative justice practices like RJ are either applied or heralded as committed to intersectional thinking it does not take too much to misuse an intersectional approach regarding gender and race politics, especially when Indigenous women are kept marginalized and silenced instead of being the center of all attentions. For this reason, the effort of creating a balanced intersectional critical theory that advances women’s interests demands awareness of the ways that, paradoxically, intersectional thinking can interact with forces that keep individuals into traditional patterns of oppression --- what Crenshaw appropriately named intersectional disempowerment.

# Chapter I – Restorative justice

## Chapter outline

This chapter is a general introduction to RJ with an emphasis on its ideological foundations and theoretical framework. In the first part, I present an account of the birth and emergence of the RJ movement taking into consideration several areas of scholarship and social-political activism that have apparently informed it. In order to do that, I rely heavily on previous studies by Kathleen Daly; Russ Immarigeon; Julie Stubbs; Angela Cameron, and Theo Gavrielides who were able to accumulate a considerable amount of data on RJ literature and practice going back to its foundations and up to current developments. These scholars not only collected data, but also put some order in the scholarly production on RJ establishing an outline of what comprises the RJ movement in its standard criminal justice manifestation. They did it through an extensive literature review on RJ of which I hope to make good use in this thesis as a theoretical support for composing my own argumentation throughout this paper.

In the second part of this chapter, a working definition of RJ will be provided in light of the foundational accounts to be developed in the first segment. Furthermore, I identify some definitional problems concerning RJ; notably, because it is often regarded essentially as a contested concept in the literature, or explained in the vaguest generalities.<sup>52</sup> It is not rare to find

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<sup>52</sup> See Gerry Johnstone & Daniel W. Van Ness eds., *Handbook of Restorative Justice* (Mill Street, Uffculme: Willan Publishing, 2007) at 5. (Arguing that RJ is an appraisive, internally complex and open concept that continues to develop with new practices. For this reason, it cannot accommodate a single accepted conception otherwise the movement could be impoverished or be seen as misleading since might be presented as more unified and coherent than it actually is). See Katherine Doolin, "But What does it mean? Seeking Definitional Clarity in Restorative Justice" (2007) 71 J. Crim. L. 427-440. (For a discussion over the definitional problems of RJ; particularly, whether it should be defined in terms of the processes to be used, or rather, the outcomes to be achieved). See generally William B. Gallie, "Essentially Contested Concepts" (1956) 56 *Proceedings of the Aristotelian Society* 167. (Arguing that "essentially contested concepts" are in nature concepts that we would never reach agreement about the criteria for its application because they combine a general

people even in academic and practitioner circles who use the term “restorative justice” frequently in their everyday lives, but simply do not feel comfortable when confronted with requests to explain what the concept of RJ really means.<sup>53</sup> In this subsection, therefore, I hope to shed some light on the problems regarding the lack of clarity of a RJ definition. M. Kay Harris was amongst the first to suggest that we must have more definitional clarity in the field of RJ. She described the problem as follows:

One issue that immediately confronts anyone interested in restorative justice is a continuing lack of definitional clarity. Although the quantity of literature on this topic has grown dramatically in the last several years, definitions and descriptions of core elements of restorative justice vary rather widely. Some of the differences in how restorative justice is described reflect the difficulty of capturing a new mindset, orientation, or philosophy in a few sentences. However, there also is considerable diversity among proponents of restorative justice as to core principles and values and the implications that they see flowing from them.<sup>54</sup>

As Harris stresses above one, of the reasons for the lack of definitional clarity in RJ is the multiplicity and ambiguity of meanings that cluster around the term “restorative justice”. Actually, as pointed out by Zernova and Wright: “It may not be an exaggeration to

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agreement on the abstract notion that they represent with endless disagreements about what they might mean in practice).

<sup>53</sup> This claim, of course, is not entirely anecdotal. An empirical research conducted by Theo Gravielides among more than one hundred RJ theorists and practitioners around the world provides support for it. The study reports that the survey participants have highlighted that conceptual conflicts and different practical dimensions of RJ have affected negatively the understanding and implementation of it. Concerning, for instance: a) the level of collaboration and communication between them and other practitioners working either in the same or different RJ programmes/organisations; b) the outcomes of their funding applications to governmental or private bodies; c) the outcomes of the RJ processes; d) the procedure that was followed by RJ facilitators; e) the evaluation of restorative programmes and their outcomes; f) the parties’ willingness to participate; g) the parties’ motives to participate; h) the level of communication among the parties, and i) the genuineness of the restorative processes. According to Theo Gravielides, the study shows that “there is a division between sources of a theoretical nature and sources that originate from the field of practice. This separation seems to have affected the way the RJ conception was received.” See Theo Gavrielides, *RJ Theory and Practice: Addressing the Discrepancy* (Monsey, New York: Criminal Justice Press, 2007) at 133. (For a comprehensive study about the gaps between theory and practice in the field of RJ)

<sup>54</sup> See, e.g., M. Kay Harris, “Reflections of a Skeptical Dreamer: Some Dilemmas in Restorative Justice theory and practice”(1998) 1:1 Contemporary Justice Review at 59.

suggest that each proponent has his or her own vision of restorative justice”.<sup>55</sup> So as we can see, the fact is that RJ means many things to many people, and therefore is effectively without any universal meaning or established standardizing procedures. This poses a challenge for employing feminist analysis on RJ and intimate violence, since one perspective often has to be reframed in different ways depending on proponents’ opinions on RJ. As a matter of fact, this can become a serious epistemological problem since a conclusive description of what RJ really is may end up in the eye of the beholder, i.e., what one observer might recognize as a textbook example of RJ experience, another might recognize as something else that is not RJ in any way, and vice-versa. Moreover, as observed by Shapland *et al.*, “This situation itself promotes a proliferation of potential tasks and roles for restorative justice, such that different schemes or commentators can stress the importance of different aspects, and continue to disagree about what is its ‘essence’.”<sup>56</sup>

In order to circumvent this practical problem, I will narrow down my survey of RJ to specific models accepted as being more accurate and authoritative in the literature. Nonetheless, wherever there is considerable disagreement among scholars over whether or not a certain practice really is RJ, I will address it in particular as I will do with the Indigenous sentencing circles that will be engaged in a separate chapter. By referring throughout this chapter to well known examples of RJ --- sketched in the work of several RJ scholars --- I put some flesh on the theoretical bones that will be discussed in this chapter. My goal is to avoid equivocal points surrounding the use of definitions in RJ, although I acknowledge that this strategy is not fully satisfactory. In doing so I will be committing a fallacy of definition because examples cannot define a term due to the circularity of reasoning embedded in the act of exemplifying.

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<sup>55</sup> See Margarita Zernova and Martin Wright, “Alternative Visions of Restorative Justice” in Gerry Johnstone and Daniel W. Van Ness, eds. *Handbook of Restorative Justice* (Mill Street, Uffculme: Willan Publishing, 2007) 91 (Discussing how RJ should be conceived and practised, especially raising questions over the debate concerning the process- oriented concept of RJ and the outcome-focused RJ concept).

<sup>56</sup> See note 47, Shapland *et al.*, *Situating Restorative Justice*, at 506.



This approach is only an interim arrangement to justify the absence of a better definition of what constitutes restorative justice. Having acknowledged that, I will use exemplification more as a convenience tool than anything else; at least until a more consistent conceptualization of RJ is reached by the literature and RJ doctrine. Another important point to be stressed here is that the working definition to be provided in this chapter is only a limited theoretical concept of RJ that clearly does not retain all its features and hence does not support a claim to be definitive.

There is yet one other factor complicating the conceptualization of RJ. The term RJ is employed many times interchangeably to designate other forms of informal or alternative justice such as therapeutic justice; transformative justice; community justice; relational justice, and peacemaking justice to the extent necessary to make a fine-grained analysis in order to distinguish one from another. A good example of this difficulty are the continuities and similarities between RJ and Indigenous justice that make them almost indiscernible from each other to the point that one is often understood and explored in the literature through the other. In this paper then, any unqualified reference to RJ means the inclusion of other experiences that may fall under the rubric RJ unless specified otherwise. To complicate matters even further, RJ principles, values and practices are also employed in other fields besides adult criminal justice; youth justice being the most significant from which many general scholarly commentaries on RJ were originally conceived and targeted. Where necessary I will situate RJ ideas in the specific context of its usage and in conformity with the language and jargon articulated by the group or particular program to which I am referring. I took this valuable lesson from Angela Cameron who successfully used the same scheme in several of her studies on restorative justice.

As stated in a previous paragraph, the variations on RJ thinking stem in part from differing fundamental assumptions about what aspirations; roles; responsibilities, and promises exist for lay actors in RJ theory and practice. As a consequence, different versions of restorative

thinking may imply different focus on RJ's stakeholders, i.e., offenders, victims and community.<sup>57</sup> Thus, there is clearly some logic to use a stakeholder approach when addressing RJ. It can help in a quick assessment of the collective key issues for the lay actors of RJ's theory and practice while at the same time providing a stage where is possible to discern what is acceptable to each as individuals. After all, a specific RJ program can give more emphasis to a specific stakeholder, while deemphasizing others with whom it also interacts. This thesis addresses the doubtful claim of some RJ advocates that it is possible to create a model of alternative criminal justice which in ideal terms would equally empower all the stakeholders in crime: victims, offenders and their communities.

While one of the tenets of RJ theory is that all stakeholders matter and that restorative models should integrate their responsibilities to the various stakeholders uniformly, this balancing exercise has proven difficult to enact in practice. Bearing this in mind, this chapter also provides a brief overview on substantial divergences in emphasis that can be found in the RJ field regarding orientation in favour of victims, offenders and community and its reflects in practical experiences. Still in accordance with that approach, my thesis adopts a framework proposed by Angela Cameron in which she engages the problem of the ability of RJ models to

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<sup>57</sup> As Howard Zehr and Barb Toews point out the term "stakeholders" is widely used in the RJ jargon and normally refers to victims, offenders and communities which, in their words, "make the heart of restorative justice". In contrast, they also consider the term "stakeholders" offensive to colonized indigenous people since in its origins it refers to European settlers of North America driving a stake into the ground to claim land that originally belonged to Indigenous people. See Howard Zehr & Barb Toews, eds., *Critical Issues in Restorative Justice* (Monsey, New York: Criminal Justice Press, 2004) at 61-63. (Although I have found quite interesting this colourful account of that term etymology, mainly because I am an Old West movies fan, I believe that a more prosaic meaning applies for the term "stakeholders", i.e, a person or persons with an interest or concern in something. For this reason, I will use the term in this paper without any reservations). See also David Cornwell & Heather Strang, *The Penal Crisis and the Clapham Omnibus: Questions and Answers in Restorative Justice* (Hampshire, UK: Waterside Press, 2009) at 83 (Proposing a quadripartite stakeholder approach where besides victims, offenders and community the state government also plays a role in the RJ movement).

cope with intimate violence, primarily through the lens of the needs of female victims of violence rather than considering offenders or community needs first.<sup>58</sup>

In prioritizing victims, I am not underestimating offenders and community interests, but realizing that without placing victims' interests as a priority it is not possible to achieve justice for all stakeholders. As will be discussed in another chapter, since victims --- especially Indigenous women --- tend to have less influence on the dynamics of RJ interventions than offenders' and communities' claims, mainly due to power imbalances and deep colonizing effects, their claims and needs should be more carefully weighed than others stakeholders. As Cameron put it, "This is not intended to indicate that the interests of the offender are unimportant; ending violence against women can only be accomplished by ensuring that those who commit these crimes become whole, non violent beings."<sup>59</sup> Likewise, a community perspective will not be downplayed, although I argue in this paper that the cumulative effect of a certain degree of cultural tolerance for violence in intimate relationships in conjunction with the existence of diversionary political interests, especially in RJ models used in Indigenous settings, has been undermining the confidence in communities' ability or willingness to take domestic violence seriously enough. Finally, the acknowledgment of the primacy of victims interests is in consonance with RJ's general pledge for the protection of victims and victims' rights. For this reason, the perspective of victims will be a constant in this chapter as in the followings.

Finally, another part of this chapter considers a brief critique of the RJ movement in the hope of providing a better portrait of it. Notably, concerning several points of tension in the RJ movement identified mainly by Theo Gavrielides, Richard Delgado, R. London, and Raymond Koen. These scholars invite us to take a critical look at several fault-lines in RJ theory,

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<sup>58</sup> See note 11 at 15.

<sup>59</sup> Ibid.

advocacy rhetoric and practice under historical, philosophical, sociolegal, and psychological points of view. In addition, their line of critical analysis reveals a deep understanding of the main themes of disagreement in the RJ movement, and sets out other themes for analysis as they may evolve to other reflections like, for instance, the usability of RJ to deal with domestic violence and the potential harms and benefits associated with it. Their findings will be succinctly presented in this subsection and relevant implications highlighted.

## **1. The foundations of restorative justice**

Standing at the boundaries of disciplines like criminology, psychology, moral philosophy, and law, RJ --- as theory and practice --- also evolved from distinct and sometimes overlapping strands of grassroots activism, socio-legal scholarship and ethnic minorities' political claims. For this reason, keeping track of all of these influences can be a difficult and bewildering task. However, Daly and Immarigeon identified that the RJ movement mainly took advantage of the following strands of ideas and activism: community, offender, and victim disenchantment with the criminal justice system; concerns with the rising costs of punitive policies, especially the costs of imprisonment; enthusiasm on the part of citizens and governments to use informal processes whenever possible; and the popularity of metaphors of reconciliation, healing, and restoration.<sup>60</sup> They translated those strands of RJ ideology into a three-fold categorization of the theoretical and empirical roots that have informed the development of RJ thinking. According to these authors the core insights of RJ theory entail a commitment to a set of ideas and practices that more or less include the following ideological

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<sup>60</sup> See Kathleen Daly & Russ Immarigeon, "Restorative Justice: Origins, Practices, Contexts, and Challenges" (1997) August ICCA Journal on Community Corrections 1-17 at 2. (Other references to the multi-layered origins of RJ appear within general summaries of several other RJ scholars). See also Kathleen Daly & Russ Immarigeon, "The Past, Present, and Future of Restorative Justice: Some Critical Reflections" (1998) 1:1 The Contemporary Justice Review 21-45 at 14. (Refining the characterization of the origins of the RJ movement).

and political sources: social movements of the 1960s and 1970s; particular practices and programs; and academic research and theories.<sup>61</sup>

Nonetheless, the RJ foundational principles and ideological characterizations grouped above do not coexist harmoniously. RJ theory and practice may encompass --- depending on its empirical manifestation --- one or more of the aforementioned foundational principles, and even when some RJ experience is consistent with one set of ideas it may be inconsistent with others. The inevitable result is a fragmented theoretical and empirical movement that somehow puts together cohorts of stakeholders --- victims, offenders and community --- with distinct and sometimes conflicting interests. Thus, none of the following ideological sources of the RJ movement made by Daly and Immarigeon are a perfect portrait of its foundations. They rely on simplifying assumptions and only provide a first cut at demonstrating how RJ has drawn from one foundational input to another. As Angela Cameron has pointed out:

The proliferation of the use of this term [Restorative Justice] has led to some confusion and often to the conflation of disparate historical and political underpinnings that inform varied visions of restorative justice. When discussing “restorative justice” it is vital that the historical, political and cultural basis of the model or program in question be made clear. This facilitates evaluation of whether a restorative initiative meets the needs of victims of violence by framing the discussion of a particular model, with particular attributes or problems.<sup>62</sup> *Brackets added.*

In addition, their analysis was based on experiences carried out in North America (Canada and United States) or Australasia (Australia and New Zealand) and does not reflect the emergence of RJ in other geographical contexts. Nevertheless, their account is important because it clarifies the theoretical foundations of the RJ movement where it originally came to prominence and where it is currently applied as a first response to endemic social injustices

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<sup>61</sup> Ibid. Daly & Immarigeon, *Origins*, at 7.

<sup>62</sup> See note 11 at 46.

found within the conventional criminal justice system that have a particular impact on ethnic minorities and Aboriginal peoples. At the same time, they shed light on the underlying causes of the difficulty of providing a unifying concept of restorative justice. In the following segments, I refer directly or indirectly to many insights and schematizations initially devised by Daly and Immarigeon in conjunction with other scholars' contributions like Angela Cameron, and Theo Gavrielides.

### **a) The social movements of the 1960s and 1970s**

As Daly and Immarigeon suggest, an important sociologic input in RJ theory can be traced back to the civil rights and women's movements of the turbulent 1960s and 1970s in the United States and other countries.<sup>63</sup> According to them the civil rights movement was based, in part, on critiques of institutionalized racism in police practices, in courts, and in prisons. In parallel, feminists perceived that conventional criminal justice institutions had been excluding women victimized by domestic violence as protagonists. The over-incarceration of racialized women --- who also found their partners routinely marginalized by incarceration --- ensured feminist activists were, in the words of Daly and Immarigeon, "also involved in prisoners' rights campaigns."<sup>64</sup>

Somehow, as Daly and Immarigeon observed, victims and offenders - typically viewed as antagonists in the justice system - ended up sharing common ground in their

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<sup>63</sup> See note 61, Daly & Immarigeon, *The Past, Present* at 5. (Issues such as overcriminalization and imprisonment of racial and ethnic minority groups --- particularly, African Americans and Indigenous People --- and the mistreatment of victims in the criminal justice process were of crucial importance to catalyze the RJ movement in the United States. Likewise, anti-colonial movements in Canada, Australia and New Zealand embraced those perceptions and echoed them in their own settings. For example, the struggle of the Maori people against their overrepresentation in the criminal justice system in New Zealand and similar concerns of Aboriginal and First Nations people in Australia and Canada fuelled the discussions for alternatives to the conventional criminal justice system in the mid-1970s and following decades).

<sup>64</sup> Ibid. at 5-6.

experiences with conventional justice system practices usually seen as unfair and unresponsive to their particularities and needs. Those perceptions were crucial in triggering decarceration actions, including prisoners' rights campaigns and alternatives to confinement. As a result, a new line of feminist reasoning made a case for challenging existing remedies for violence against women around ideas such as alternatives to prisons, methods of alternative dispute resolution and informal justice. Some strands of RJ practice are a direct result of that criticism of the traditional justice system and turning to alternative processes for resolving disputes; to alternative sanctioning options, or as Daly and Immarigeon put it, "to a distinctively different, "new" mode of criminal justice organized around principles of restoration to victims, offenders, and the communities in which they live."<sup>65</sup> In contrast, during the 1970s the battered women's movement also pursued reforms in the criminal justice system that also superficially aligned many feminists with conservative retributive-based "get tough" policies. These reforms, with the goal of providing greater victim safety and increased offender accountability, were eventually put into effect in the mid-1980s and resulted in actions such as mandatory pro-arrest policies for police, no-drop prosecutorial policies (mandatory policies that do not allow victims to determine whether or not arrest and prosecution takes place), and restraining orders (also known as protective orders). This movement is also credit with a myriad of non-punitive victim-oriented services like battered women's shelters and safe-houses; emergency hotlines; counselling and support groups; financial assistance; transportation; job and housing locator services; civil relief legal assistance; and children's programs.<sup>66</sup> However, gradually feminist scholars started to express ambivalence about the more conservative and harsh conformation of the conventional

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<sup>65</sup> Ibid. at 2.

<sup>66</sup> See Kim Cook, "A Restorative Justice Critique of Shelters for Battered Women in the American Deep South" *Center Prison Fellowship International Centre for Justice and Reconciliation*, on line (26 August 2006): Restorative Justice On line: <<http://www.restorativejustice.org/10fulltext/cook/view/>> Retrieved on March 2010. (Contending that shelters cannot be deemed a community of care in the restorative justice sense of the expression).

criminal system that generated a desire for less-punitive and non-state-based interventions. There were concerns that some non-white, non-middle-class, and immigrant women simply did not want to see their partners arrested or prosecuted and were negatively impacted by these outcomes in various ways.<sup>67</sup>

Such feelings were part of a larger set of concerns and criticisms that have run through feminist theorizing since the 1970s when racialized-women started to question the very notion that the conventional criminal justice system itself could deliver justice to women victimized by intimate violence. The fact is that RJ theoretical language was profoundly influenced by elements of anti-racist politics and feminist dissatisfaction with treatment of victims in courts derived from social movements in the 1960s and 1970s. However, tracking the influence of all these elements in the RJ discourse is complicated by practical experiences that also emerged spontaneously almost at the same time in response to similar claims. In the following subsection I address these practical experiences according to Daly and Immarigeon's previous categorizations.

## **b) Programs and practices**

Feminist scholars like Daly and Immarigeon also share the view that RJ practical models had important inputs in the RJ movement. In fact, citing Tony Marshall they suggest that,

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<sup>67</sup> The impact of "tough on crime" or "zero tolerance" policies on domestic violence cases was subjected to criticism by some feminist scholars who found that these policies operate in ways that may further state control of women, particularly women who are marginalized by race, class, and immigrant status. Mandatory arrest and prosecution policies, for instance, may result in increased numbers of arrests of non-citizen women who may then be deemed deportable under immigration law; may aggravate racist and abusive police behaviors; result in overincarceration of men of color; reinforce pathological notions that battered women do not want to assist prosecution and that they accept violence staying with the offender; unwarranted removal by the state of children from women who have been battered; prosecution of battered women involved, even peripherally, in criminal conduct, and limits women's ability to use the criminal justice system strategically to gain greater control over their lives, but did not necessarily complete legal processes. See note 25, Coker, *Transformative Justice*, at 133. (summarizing the literature on this point). See also note 25, Coker, *Crime Control*.



“the practice of restorative justice came first, born of the exigencies of needing to do justice differently, and that the theory came later”.<sup>68</sup> As Daly and Immarigeon point out, since the 1970s many programs and practices have been implemented that could be labeled as restorative justice experiments. These pioneers’ experiments almost functioned on a trial and error basis with no prior guidelines apart from practitioners’ dissatisfaction with the fact-finding adversarial in-court process and in earnest desire for a more humane, informal conflict resolution.<sup>69</sup> According to Daly and Immarigeon, “early efforts focused on moderated meetings between victims and offenders, adapting or drawing from traditional mediation models.”<sup>70</sup> According to Daly and Immarigeon, “early efforts focused on moderated meetings between victims and offenders, adapting or drawing from traditional mediation models.”<sup>71</sup> Later, they concluded, “these

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<sup>68</sup> See note 61, Daly & Immarigeon, *The Past, Present*, at 11. See also Tony F. Marshall, “The Evolution of Restorative Justice in Britain” (1996) 4 *European Journal on Criminal Justice and Research* 21-43.

<sup>69</sup> A good example is the acknowledgement of pioneer work by practitioners initiatives like the Victim offender reconciliation programs (VORP) format that can be traced to Kitchener, Ontario where in 1974 Mark Yantzi and Dave Worth, both members of the Mennonite Church, working with the Kitchener Probation Department and with the help of a local judge successfully established a restitution and reconciliation program based in face-to-face mediation addressing emotional and informal needs of offenders and victims. A few years later in 1978 the first American program was established in Elkhart, Indiana also under the auspices of Mennonite Church representatives; the local judge; probation officers, and a community corrections organization called PACT (Prisoner and Community Together). These programs were quickly replicated in other parts of North America and gained the status of being considered the first RJ practical experiences in North America. See Dean E. Peachey, “The Kitchener Experiment” in Gerry Johnstone, ed., *A Restorative Justice Reader: Texts, Sources, Contexts* (Devon, UK: Willan Publishing, 2003) at 178.

<sup>70</sup> A good example is the acknowledgement of pioneer work by practitioners initiatives like the Victim offender reconciliation programs (VORP) format that can be traced to Kitchener, Ontario where in 1974 Mark Yantzi and Dave Worth, both members of the Mennonite Church, working with the Kitchener Probation Department and with the help of a local judge successfully established a restitution and reconciliation program based in face-to-face mediation addressing emotional and informal needs of offenders and victims. A few years later in 1978 the first American program was established in Elkhart, Indiana also under the auspices of Mennonite Church representatives; the local judge; probation officers, and a community corrections organization called PACT (Prisoner and Community Together). These programs were quickly replicated in other parts of North America and gained the status of being considered the first RJ practical experiences in North America. See Dean E. Peachey, “The Kitchener Experiment” in Gerry Johnstone, ed., *A Restorative Justice Reader: Texts, Sources, Contexts* (Devon, UK: Willan Publishing, 2003) at 178.

<sup>71</sup> See note 61, Daly & Immarigeon, *Origins*, at 2.

meetings expanded to include family members and friends of both parties, as well as professionals and others with access to community resources.”<sup>72</sup>

In addition to alternative conflict resolution schemes, the effort of retrieving practitioners’ influence on the foundations of RJ has a relationship with others strains of socio-political justice reform. For example, many RJ practices and its decarceration aims were clearly prisoners rights’ projects since its originators “felt offenders were victims of societal neglect, impoverished communities, and racial and gender discrimination. Accordingly, advocates hoped to change prison conditions, minimize the use of incarceration, and even abolish jails and prisons.”<sup>73</sup> Daly and Immagerion also suggested that practitioners were driven by victim advocacy influences since “Victim’s rights” groups focused efforts on restitution for crime, on victims having a formal voice in the court process, and on community safety.”<sup>74</sup>. Although RJ practices focus on differing interests, “Alliances between victim advocacy groups and criminal justice reform groups began to grow in the 1990s, as members recognized some common interests.”<sup>75</sup>

A summary of practices related to RJ in the context of criminal justice compiled by Kathleen Daly in several countries, but especially in North America and Australasia include the following experiences, in her words:

- ‘Conferencing’ of several varieties in Australia, New Zealand, England, the United States and Canada. Whereas the northern hemisphere version of conferencing is generally police-run, the southern hemisphere version is not.
- ‘Sentencing circles’, which arose in Canadian First Nations (or indigenous) groups, and which are now being taken up in justice practices for indigenous and non-indigenous groups in Canada

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<sup>72</sup> Ibid.

<sup>73</sup> See note 61, Daly & Immargerion, *The RJ Past*, at 6.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

and the United States.

- Victim-offender mediation schemes, which include a variety of practices in the United Kingdom, European and Scandinavian countries.
- Other practices such as ‘reparation boards’ in Vermont, services to crime victims, meetings between imprisoned offenders and victims (or their family members).<sup>76</sup>

As Daly accounts, RJ practices seem to rely on the following premises (at least in its incarnation in criminal justice matters):

- Offenders have admitted to the offense (or have chosen not to deny).
- Offenders and their supporters have a face-to-face meeting with a victim (or a victim representative) and a victim’s supporters, although having a face-to-face meeting is not essential. There may be other relevant people present, such as police officers or victim advocates.
- The process is informal, although the person organizing and running a meeting establishes the ground rules for participants (such as people must listen to each other and everyone has a chance to speak).
- Discussion and decisions taken rely on the knowledge and decision-making capacities of lay actors rather than legal actors (although diversionary conferences generally have a police officer present).
- The aims are to reduce victim fear and anger toward the offender, for the victim to “tell the story” of how the crime affected him or her, for the offender to acknowledge the harm and the negative consequences the crime caused a victim, for the offender to apologize, and for the offender to make up for what she or he did (“repair the harm”) by penalties agreed to.<sup>77</sup>

As Angela Cameron warns, the format, scope and agenda of RJ models are extremely diverse in their jurisdiction, display and subjects implicated. She writes: “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,

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<sup>76</sup> See Kathleen Daly, “Restorative Justice in Diverse and Unequal Societies”, (2000) 17:1 Law in Context at 4.

<sup>77</sup> See Kathleen Daly & Sarah Curtis-Fawley, "Gendered Violence and Restorative Justice: The Views of Victim Advocates" (2005) 11 Violence Against Women 603 at 606.

2001)".<sup>78</sup> Daly adds that all these practices may be presented, "as diversion from the formal court process, actions taken in parallel with court decisions, meetings between offenders and victims at any stage of the criminal process (from arrest, presentencing, and prison release), or meetings held for child protection cases."<sup>79</sup> It is important to remind the reader that the examples listed before are only a sample of experiences commonly associated with RJ values, processes and outcomes. The diversity of the RJ movement cannot be contained solely in such practical models. As Angela Cameron notes, "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".<sup>80</sup>

Insofar as RJ ideology was enriched by pragmatism and grassroots activism, academic research and theory occupied pivotal roles for the development of the RJ movement as well. After this brief overview of pragmatic influences on RJ the next paragraphs will survey precursory theoretical debates amongst scholars on the subject; it will concentrate on social-legal scholars, feminist views and justice theorists who from academia have given shape and substance to the RJ movement.

### **c) Informal justice and abolitionism**

Informal Justice and Abolitionism are ideas that are strongly associated with RJ ideological discourse. Daly and Stubbs note, for example, that informal justice along with victim-offender mediation and community conflict resolution in the 1970s and 1980s were

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<sup>78</sup> See note 2 at 8 [unpublished]. (Noting and citing sources in a comprehensive literature review on RJ and domestic violence. Though leaving aside other dimensions as youth justice; corrections; peacebuilding, and other constituents of RJ practice)

<sup>79</sup> See note 61, Daly & Immarigeon, *The Past, Present* at 2.

<sup>80</sup> Supra note 77 at 4.

precursors to RJ interventions.<sup>81</sup> However, they warn that many feminists, after an initial endorsement, have become disillusioned with the ability of informal negotiated processes --- like family mediation --- to tackle violence against women. The mediation or conciliation model was criticized for defining battering and other offences as trivial “disputes”. Another critique was the pressure put on women to obtain reconciliation. Furthermore, fear for women’s safety and dissatisfaction by the apparent futility of mediation in effecting meaningful change in recidivism and violence patterns made feminists condemn those experiences for erasing victimization. Later those same critiques were influential in curbing feminist enthusiasm for RJ practices. In discussing this issue, Stephen Hooper and Ruth Busch included this comment:

Because of the similarities in philosophical perspectives and process techniques between mediation and the processes used to implement restorative justice, the controversy about the appropriateness of adopting a restorative justice approach for domestic violence cases is embedded in the more general debate about utilizing mediation processes to deal with domestic violence situations.<sup>82</sup>

On the other hand, Daly and Stubbs observe that RJ and mediation practices are not the same.<sup>83</sup> They argue that in their ideal form RJ practices recognize victims and offenders and hold the latter accountable for wrongdoing. There is no push to reconcile, nor is victimization erased. In addition there is the presence of symbolic members of the community or family supporters of victims and offenders. The presence and interaction of these agents ensure that the nature of the offence is wrong (denunciation); that the victim was injured (empathy); and that the offender is considered responsible (accountability). Allegedly, the offender is also

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<sup>81</sup> See note 9 at 154. See also Lisa G. Lerman, “Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women” (1984) 7 *Harvard Women’s Law Journal* 57. (Criticizing the use of mediation for domestic violence cases). See also Lois Presser & Emily Gaarder, “Can Restorative Justice Reduce Battering? Some Preliminary Considerations” (2000) 27 *Social Justice* 175. See also note 61. See generally Richard L. Abel, ed., *The Politics of Informal Justice*. (New York: Academic Press, 1982) Vol. I & II.

<sup>82</sup> See Ruth Busch & Stephen Hooper, “Domestic Violence and Restorative Justice Initiatives: The Risks of a New Panacea”. *Waikato Law Review* (1996) 4 : 188.

<sup>83</sup> See note 81, Daly & Julie Stubbs, *Feminist Theory* at 154.

confronted with the full consequences of the crime. Finally, in the same dialogue-based process, family, neighborhood and society are benefited by the reintegration of the offender and victim to their previous *status quo* in the community.

There were also important implications in the findings that emerged from informal justice investigations like empirical and theoretical studies of informal and formal justice models in western industrialized societies and in tribal, agricultural-based societies. Several of those studies advocated that criminal justice could be administered in a consistent and efficient way without the restraints of court formalities so that the subjects involved in a crime matter could cope with it by themselves with very low or no state intervention and without professionals like lawyers, judges, etc. A good example is the work by Nils Christie who is considered a leading proponent of “Informal Justice” and also an important penal abolitionist. He was highly influential in the RJ field.

Christie argued that the State had “stolen the conflict” between citizens, and this had deprived society of entertaining non-state-based solutions for conflicts, including crimes.<sup>84</sup> Instead of enabling those in conflict to resolve troubles, he argued that the State had taken control of the matter translating it into the professionalized context of the criminal justice system in which neither victim nor offender is allowed any meaningful role. According to him we should seek to eliminate the concept of “crime” from our social vocabulary. We should talk and think not in terms of *crimes*, but of *conflicts* or *troubles*. Thus, conflicts and troubles are inevitable parts of everyday life, and therefore should not be delegated to professionals and specialists claiming to provide solutions. Christie believed that by restricting criminal procedure and law to the narrow legal definition of what is relevant and what is not, the victim and the

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<sup>84</sup> See Nils Christie, “Conflicts as Property” (1977) 17:1 British Journal of Criminology 1-15.

offender could not explore the degree of their culpability and the real effects of the event. The RJ advocacy argument of being an anti-State participatory and democratic form of justice that involves victims, offenders and community is clearly articulated in Christie's precursory study about criminal justice.

Another penal abolitionist of great importance to the RJ movement is Herman Bianchi. Bianchi claimed that there are better ways of dealing with society's criminals than putting them behind bars, arguing that the current criminal justice system is based on a view of justice as retribution. What he proposed instead was justice as reconciliation.<sup>85</sup> As Gavrielides points out, justice in Bianchi's view is not a set of scales to be balanced, or a form of moral accounting. It is a relational experience.<sup>86</sup> Here another core insight motivating the RJ theory can be found. As in RJ theory, crime is fundamentally seen as a violation of inter-personal relationships.

Martin Wright, another penal abolitionist, also led the construction of the RJ theoretical framework.<sup>87</sup> It is in Wright's work that some of the questions that later motivated many RJ thinkers on the conception of RJ are for the first time explicitly considered. Wright proposed that the offender or the community should help the victim, and that the offender should be required to *make amends* to both. Only this way, he argued, the offender would demonstrate respect for a victim's feelings and offer them practical help, while treating offenders in a non-punitive way would draw them back into society rather than increase their isolation. The concept

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<sup>85</sup> See Herman Bianchi, "Tsedeka Justice" (1973), Review for Philosophy and Theology 306-317. Herman Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control* (Bloomington: Indiana University Press, 1994).

<sup>86</sup> See note 54 at 21.

<sup>87</sup> See Martin Wright, "Nobody Came: Criminal Justice and the Needs of Victims" (1977) Howard Journal 16:1 22. See generally T. Mathiesen, *Prison on Trial*. (London: Sage, 1990) and L. Hulsman, "The Abolitionist Case: Alternative Crime Policies" (1991) 25 Israel Law Review 681-709.

of victim and offender participating in a non-retributive, non-adversarial process that pursues repair of harm rather than punishment of the offender is a common RJ approach.

#### **d) Reintegrative shaming and psychological theories**

Scholars and practitioners writing particularly from a psychological standpoint and using concepts like *shame* and *trauma recovery* seeking to reinforce the benefits of RJ approaches were also relevant to the construction of the RJ ideological language. The most prominent of them is John Braithwaite who formulated one of the most famous conceptualizations of RJ and also what is considered a general theory of crime.<sup>88</sup> Braithwaite introduced the idea of *reintegrative shaming* to argue for an integrative rather than stigmatizing response to crime and its effects. Braithwaite's theory of *reintegrative shaming* was extensively put into practice in RJ models in New South Wales, Australia. Most notably the police led community conferences conducted in Wagga Wagga and RISE (Reintegrative Shaming Experiments) in Canberra. Here is how Theo Gavrielides summarized Braithwaite's theory:

Braithwaite believes that shaming is the key to controlling all types of crime. In particular, he distinguishes two kinds of shame. The first is, what he calls, stigmatising shame, as it disintegrates the moral bonds between the offender and the community. The second is the reintegrative shame, which strengthens the moral bonds between the offender and the community. Stigmatisation (bad shaming) increases crime, but reintegrative shaming decreases it. Braithwaite embraces the idea of 'hating the sin but loving the sinner', claiming that offenders should be given the opportunity to re-join their community as law abiding citizens. However, in order to earn this 'right to a fresh start', offenders must express remorse for their past conduct, apologize to their victims and repair the harm caused by the crime.<sup>89</sup>

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<sup>88</sup> See especially note 47, Braithwaite, *Crime, Shame and Reintegration*. See also Nathan Harris, Lode Walgrave, John Braithwaite, "Emotional Dynamics in Restorative Conferences"(2004) 8:2 Theoretical Criminology 191-210. See generally John Braithwaite & Philip Petit, *Not Just Deserts: a Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990).

<sup>89</sup> See note 54 at 25.



As also noted above, the role of *trauma recovery* in RJ interventions has also emerged as an especially important feature in its theoretical framework. More recently RJ has been seen by many of its proponents as a kind of cognitive behavioral therapy able to relieve crime victims from post-traumatic stress disorder (PTSD) symptoms and other pathologies associated with victimization. For instance, Paul McCold points out that RJ conferences provide opportunities for victims to hold offenders accountable, tell their story to offenders and others, and receive new information that may have been missing; all of which are also components of successful trauma recovery programs.<sup>90</sup>

He argues that experiences of victimization, and even trauma, are involved in most situations of conflict and wrongdoing. RJ can acknowledge and address this sense of victimization and the resulting needs – often for everyone involved, including those who have offended. (Indeed, it can be argued that much offending – perhaps most or all violence – grows out of a sense of victimization and/or an experience of trauma). With or without the psychoanalytic frameworks employed by Braithwaite and others, such ideas have proven to be fruitful resources for restorative justice practitioners working in a variety of settings. To illustrate, scholars listed several dimensions of the use of RJ outside the criminal justice field. For example; youth justice; corrections; school discipline; workplace management; corporate regulation; post-conflict peace building (truth and reconciliation commissions); neighbour disputes, and employment/trade union disputes have been mentioned as practical dimensions of

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<sup>90</sup> See Interview of Paul MacCold by Abbey J. Porter, “Restorative Conferences reduce Trauma from Crime, Study shows” from the International Institute of Restorative Practices (15 August 2006) on *Restorative Practices EForum* online: [www.iirp.org](http://www.iirp.org) retrieved on January 10, 2009. See also David L. Gustason, “Exploring Treatment and Trauma Recovery Implications of Facilitating Victim Offender Encounters in Crimes of Severe Violence: Lessons from the Canadian Experience” in Elizabeth Elliott & Robert G. Cullomptom, eds., *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Portland, OR: Willan Publishing, 2005) at 193.

the RJ movement.<sup>91</sup> All of them benefited from the allegedly curative properties of RJ interventions.

### **e) Feminists theories on justice**

Another fundamental input in the RJ foundations emerges in the writings of contemporary feminist theorists on justice practices like Carol Gilligan, Frances Heidensohn and Kay Harris. According to Daly and Immarigeon, Gilligan has asked whether and, if so, to what extent our vision for understanding criminal justice is distorted in a way that privileges a masculine view of justice --- named “ethics of justice”--- to the detriment of moral reasoning and decision-making guided by a feminine “ethic of care.”<sup>92</sup> This works in the following way, as Daly and Stubbs put it: “the ethic of care centres on moral concepts of responsibility and relationship; it is a concrete and active morality. The ethic of justice centres on moral concepts of rights and rules; it is a formal, universalizing and abstract morality.”<sup>93</sup> In criminology, some have found the “ethic of care” useful, for example, Kay Harris and Frances Heidensohn who developed a care/justice dichotomy of the criminal justice system, drawing on Gilligan’s work. Heidensohn articulated two models of justice. The first is a *Portia model*, which values rationality and individualism in opposition to a more women-centered *Persephone model* that values caring and personal relations.<sup>94</sup> Harris also emphasised values associated with the

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<sup>91</sup> See Declan Roche, “Dimensions of Restorative Justice” (2006) 62:2 Journal of Social Issues 217-238 (Describing various other dimensions of restorative justice situated outside and alongside the criminal justice field)

<sup>92</sup> See note 61 Daly & Immarigeon, *The Past, Present*, at 13.

<sup>93</sup> See note 9, Daly & Stubbs, *Feminist Theory* at 153. See especially Carol Gilligan, *A Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982).

<sup>94</sup> See Frances Heidensohn, “Models of justice: Portia or Persephone? Some thoughts on equality, fairness and gender in the field of criminal justice” (1986) 14 International Journal of the Sociology of Law 287–308.

care/response approach rather than a justice/rights orientation, although she acknowledges that a complete substitution is unfeasible.<sup>95</sup>

Building on the legacy of these feminist thinkers some RJ advocates have continued to use Gilligan's *different voice* associating this variety of care-focused feminist approach to RJ discourse. As Daly and Stubbs observed, "...Guy Masters and David Smith (1998) invoke Gilligan's work in their attempt to compare retributive justice and RJ, and they argue that RJ offers a more caring response to crime (see the critique in Daly 2002a)."<sup>96</sup> However, Daly and Stubbs also pointed out that Gilligan's different voice construct was superseded by more complex analyses of ethics and moral reasoning, especially due to the influx of ideas from critical race and postmodern feminism in the 1990s that addressed the multiple influences of inequality markers like class, race, ethnicity and gender on social interactions. In time, as noted by Daly, these reading strategies came to be known as "intersectionality analysis" or simply "intersectionality theory". Nevertheless, Daly and Immarigeon observed that some current RJ practices remained inspired by the ethic of care approach. To illustrate this point they mention the work of Pennel and Burford on current family group conferencing in domestic violence cases in Canada.<sup>97</sup> The feminist project concerning RJ will be further explored in the second chapter of this paper; notably, from the point of view of intersectionality theory.

#### **f) Peacemaking criminology and philosophy theories**

Another important influx of ideas in the formulation of the ideological foundations of the RJ movement comes from "peacemaking criminology" and philosophical

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<sup>95</sup> M. Kay Harris, "Moving into the new millennium: Toward a feminist view of justice" in H. E. Pepinsky & R. Quinney, eds., *Criminology as peacemaking* (Bloomington, IN: Indiana University Press, 1998) 83-97.

<sup>96</sup> See note 9 at 154.

<sup>97</sup> See note 61 Daly & Immarigeon, *The Past, Present* at 13.. See also J. Pennell & G. Burford, "Widening the Circle: The Family Group Decision Making Project" (1994) 9 *Journal of Child & Youth Care* 1-12.

arguments for alternatives to the conventional justice system. According to Daly and Immarigeon “peacemaking criminology” corresponds to the idea that crime and criminal justice are violence and suffering. The idea finds substantial support in different traditions, including spiritualism and feminism. The most striking concept of “peacemaking criminology” is provided by Pepinsky and Quinney. Daly and Immarigeon delineated their new criminology by way of Quinney's definition of it as “a criminology that seeks to alleviate suffering and thereby reduce crime”.<sup>98</sup> Quinney argues that, “The ending of both suffering and crime, which is the establishing of justice, can only come out of peace, peace that is spiritually grounded in our very being.”<sup>99</sup>

Other scholars advanced the construction of a restorative ideology using philosophical justifications and calling for restricting the use of penal sanctions and for non-retributive modes of response to criminal offences. Theo Gavrielides chronicled the work of these early RJ ideologists. He starts with the work of Philip Pettit and John Braithwaite who advanced the RJ ideological framework based on republican ideals. They have sought to reframe what they regard as the key normative questions in the conventional criminal justice system in accordance with the maximization of freedom as non-domination. Their vision of RJ also compare a full retributivist position with a full republican position and conclude that a full just-deserts policy would increase injustice while a republican policy would reduce it. As Gavrielides noted, arguably their ‘Not Just Deserts’ theory “now constitutes the strongest proof of theoretical work on RJ.”<sup>100</sup>

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<sup>98</sup> See note 61 Daly & Immarigeon, *The Past, Present* at 13. See especially H. E. Pepinsky & R. Quinney, eds., *Criminology as Peacemaking* (Bloomington: Indiana University Press, 1991).

<sup>99</sup> Ibid.

<sup>100</sup> See note 54 at 25. See especially note 88, Braithwaite and Philip Pettit, *Not Just Deserts*.

Others drew on philosophical inquiries which try to revisit some basic problems that are associated with the role and use of punishment, criticizing the traditional punishment theories. For example, Wesley Cragg, as Gavrielides noted, "... argued in favour of formal justice, which according to his opinion is not antithetical to the restorative values of forgiveness, understanding, compassion, healing and restoration."<sup>101</sup> Robert Mackay, also using a philosophical standpoint, looks to ethics in restorative processes and "the issue of how to develop and maintain mediation practice that respects ethical principles, and is of good quality for victims and offenders".<sup>102</sup> Aleksandar Fatic was another scholar who tried to establish a philosophical justification for RJ. Gavrielides wrote that he "... based his theory on the moral principle of refraining from the deliberate infliction of pain, as well as on the functional principle of maximization of trust as a social commodity.... and in the creation of a pacifist society, where reconciliatory behaviour will be rewarded and punitive one will be sanctioned."<sup>103</sup>

Restorative's Justice foundational assumptions can also be conveyed in terms of traditional legitimists' accounts of justice. In fact, traditional legitimist accounts are prevalent in RJ literature, where they typically come in the form of associations made by practitioners and theorists between RJ and Indigenous or Christian Religious practices. RJ's roots are conceptualized on the basis of its spiritual or moral legitimacy, drawing on Indigenous forms of Justice and religious roots.

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<sup>101</sup> Supra note at 26. See also Robert Mackay, *Reparation and the Debate about Justice*, (Edinburgh: University of Edinburgh, 1992)

<sup>102</sup> Ibid.

<sup>103</sup> See note 54. See also Aleksandar Fatic, *Punishment and Restorative Crime-Handling: A Social Theory of Trust*, (Aldershot, UK: Avebury Ashgate Publishing, 1995).

## **g) Indigenous justice and religious roots**

Another recurrent ideological foundation of RJ is associated with Indigenous Justice. According to Daly, “Indigenous justice refers to a variety of justice practices, normally focused on sentencing, in which Indigenous people have a central role in responding to crime. They include urban sentencing courts, community justice groups’ advice to judges in sentencing, Elders’ participation in sentencing, and a variety of forms and contexts of sentencing circles.”<sup>104</sup> These approaches aim directly as Daly puts it, “to rebuild Indigenous communities and to redress the destruction of Indigenous peoples’ culture and social organization brought about by colonialism and state violence (Marchetti & Daly, 2004, 2007)”<sup>105</sup>. These attempts to increase indigenous participation in matters of criminal justice may be considered a corollary of political self-determination efforts (i.e., decolonization) and decarceration movements in conjunction with multiculturalists’ policies of liberal democracies. It is thought that supporting Indigenous self-determination means to use wherever possible alternatives to the non-Indigenous criminal justice system in order to open space to alternatives to incarceration that are normally used in the conventional criminal justice. This is particularly true because Aboriginal groups are known to be over-represented in the criminal justice systems of Canada and Australia (our main focus of interest) both as victims and offenders and resent by the lack of political autonomy and representation in an administration of Justice that impacts them so negatively.<sup>106</sup>

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<sup>104</sup> See note 16, Kathleen Daly, *Seeking Justice*, at 8.

<sup>105</sup> Ibid.

<sup>106</sup> A full discussion of the implications of this claim would require much more investigation. However, the empirical evidence speaks by itself. In the case of Canada, for example, according to data originally compiled by Statistics Canada, in 2007/2008, Aboriginal people are being imprisoned at a disproportionate rate when compared to non-Aboriginal people. Although Aboriginal people represent only three percent of the Canadian population, they made up 22 percent of individuals sentenced to custody in the provincial or federal correctional system. The figures are even more impressive in some provinces. For example, Aboriginal people accounted for 81 percent of admissions to sentenced custody in Saskatchewan and 69 percent in Manitoba, but represented only 11 percent and 12 percent of the provincial populations, respectively. In 2004 (the latest year for which data is

Many RJ proponents and practitioners like to characterize RJ experiences as suitably rooted within Indigenous Justice traditions, describing it --- as noted by Angela Cameron as "...modeled on these cultures which practiced restoration and healing following anti-social behaviour rather than punishment".<sup>107</sup> Although Cameron has acknowledged the confusion generated by this tendency of attributing restorative justice practices to something analogous to Indigenous or Aboriginal Justice, she also asserted that Indigenous Justice's true identity cannot be mixed up with RJ due to "the unique role of Aboriginal spirituality and culture in making Aboriginal justice distinct from other forms of restorative justice"<sup>108</sup>.

Furthermore, she points out that Indigenous Justice practices should not be identified with RJ, since in her words, the "contemporary restorative justice movement is not synonymous with Aboriginal justice, despite sharing similar theoretical or historical grounding".<sup>109</sup> Moreover, citing Kent Roach, a Canadian scholar, Cameron notes that Indigenous Justice developed a specific perspective focusing on renewing collective identity and creating community rather than individual reparation notions, which is precisely a point of

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available), Aboriginal people were also three times more likely than non-Aboriginal people to be the victim of sexual assault, robbery or physical assault (319 versus 101 incidents per 1,000 populations). See The Environics Institute, "The Urban Aboriginal Peoples Study" (2010) online: Urban Aboriginal People Study < <http://uaps.ca/> > retrieved on 11 April 2010. See also Statistics Canada, *Incarceration of Aboriginal people in adult correctional services* (Ottawa: Statistics Canada Catalogue no. 11-001-XIE, 2009). See also Jodi-Anne Brzozowski et al. "Victimization and offending among the Aboriginal population in Canada." (2006) 26:3 Juristat. Statistics Canada Catalogue no. 85-002-XIE. In Australia the figures are not much different. In Western Australia, for example, in 2004, Aboriginal people comprised 40 per cent of the prison population although they only represent 3 percent of that state population. Aboriginal people in Western Australia are also overrepresented as victims. In 2003 Aboriginal people were eight times more likely than non-Aboriginal people to be victims of violence. For Aboriginal women the figures are appalling; they are 45 times more likely than non-Aboriginal women to be victims of domestic violence by spouses or partners. See Austl., W.A., Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture* (Final Report No.94) by Commissioner AG Braddock (Perth: Quality Press, 2006) at 95-96. See generally Roy Walmsley, *World Prison Population List*, 8th ed. (London: International Centre for Prison Studies, 2009).

<sup>107</sup> See note 16, Kathleen Daly, *Seeking Justice*, at 6.

<sup>108</sup> See note 2 at 6

<sup>109</sup> Ibid.

departure from RJ conventional practices.<sup>110</sup> Kathleen Daly summarizes this point of sharp distinction between RJ and Indigenous Justice in the following passage:

For restorative justice, the focus of the interaction and relationship building is between offenders, victims, their supporters, community members, and “the community” (a non- racially specified community),<sup>9</sup> along with professionals such as a police officer and coordinator. For Indigenous sentencing courts, the focus is between offenders, their supporters, Elders, the Indigenous community (including service providers), and “white justice” (typically, embodied in the legal roles of the magistrate, prosecutor, and defense attorney).<sup>10</sup> Doing justice in a restorative process gives attention to victims and to rebuilding relationships between a victim, an offender, and their community; whereas doing justice in Indigenous sentencing courts gives attention to changing relationships between white justice and Indigenous people, including the offender. Relatively less attention is currently given to addressing the needs of victims in Indigenous sentencing courts, although this may change (Marchetti & Daly, 2007).<sup>111</sup>

Accordingly, only recently and perhaps because of the efforts of scholars like Angela Cameron and Kathleen Daly, has the literature on RJ started to make distinctions between white-based RJ and Indigenous Justice in a way that makes it possible to discern clearly between the two informal justice alternatives. Increasingly, however, Indigenous Justice and certain models of white-based restorative justice (mainly conference-based) have been more difficult to distinguish from one another since their inspiration and modes of operation are basically the same. Daly, for instance, describes the similarities between them. According to her they share the following general features:

- require an admission to offending (or in some jurisdictions, an offender choosing “not to deny” an offence);
- rely on lay actors (for restorative justice, victims and their supporters, an offender’s supporters, and other community members; for Indigenous justice, an offender’s supporters, Elders, and other members of the Indigenous community); and
- assume that incarceration is a penalty of last resort.

In addition, both emphasize the need for:

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid. at 13.



- improved communication between legal authorities, offenders, victims, and community members, using plain language and reducing some legal formalities;
- procedural justice, i.e., treating people with respect, listening to what people have to say, and being fair to everyone; and
- persuasion and support to encourage offenders to be law-abiding<sup>112</sup>

The difficulty of reconciling attention to victims' needs and to rebuilding relationships between victims, offenders, and their communities (a tenet of RJ), with the great deal of attention given in Indigenous Justice practices to changing relationships between white justice and Indigenous justice - where more emphasis is placed on the offender - is a sensitive point in my thesis. Clearly, the issue here is that Indigenous justice can be considered an assertion of power and self-determination of the Aboriginal anti-racist and anti-colonial movements that is more centered in potential short-term communal political benefits of making use of their own cultural norms, holistic values, and customary legal institutions in order to avoid the challenges they may face within the conventional justice system, whereas the white/western RJ movement is more centered, as Daly writes, with "changing justice practices to become more reintegrative and negotiated, to changing individual offenders, and to assisting individual victims."<sup>113</sup> This proposition raises some questions: Is it Indigenous political claims that shape the RJ movement? Or is the relationship the reverse? Does RJ shape those assertions of political self-empowerment in ways that motivate people to act and give broader support for their cause? More importantly: What is the role of victimized Indigenous women in this interplay?

Notwithstanding the implementation and use of Indigenous Justice, articulated through the language and methods of the so-called white RJ, may be seen by many as advancement of the political assertion of rights by Indigenous people. Notably, by the institution

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

of self-determining parallel structures of justice (e.g., sentencing circles) that are devised to play an active role in the administration of justice as well as empower community rules and sanctions to deal with law and order problems. Nevertheless, it may also create specific problems for Indigenous women who may find themselves cornered by the conflicting expectations of the aspirations on both justice systems. For this reason, despite the alleged advances prompted by the merger of RJ language with Indigenous justice, scholars like Chris Cunneen argue that gendered power imbalances still exist in both formats --- RJ and Indigenous Justice --- and operate in the context of a background system of colonial injustice where the process prioritizes men's knowledge over women's knowledge as particular and sectional.<sup>114</sup> As Cunneen puts it, "Gender interests impact on the ability of indigenous women to develop and use restorative justice programs. There is no inherent reason to believe that restorative justice practices will reinstate the voices of indigenous women."<sup>115</sup> Rather, this way of intersectional thinking or *constructive hybridization* may use the moral authority of Aboriginal justice practices to generate a model where sets of communitarian moral norms or political interests can silence Aboriginal women causing an intersectional backfire.<sup>116</sup>

Analyzing the origins of restorative justice Kathleen Daly pointed out the following:

In looking around the world, one finds many histories of restorative justice; most are ethnocentric. For example, the "history" of restorative justice as reported by Australians and New Zealanders begins where? In the Antipodes. The "history" as reported by North Americans begins, where else? In North America. The "history" as reported by some Christian-oriented North Americas begins in biblical texts.<sup>117</sup>

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<sup>114</sup> See Chris Cunneen, "What are the Implications of RJ's Use of Indigenous Traditions?" in Howard Zehr & Barb Toews, eds., *Critical Issues in Restorative Justice* (Monsey, New York: Criminal Justice Press, 2004) 345-353 at 352.

<sup>115</sup> Ibid.

<sup>116</sup> See note 16.

<sup>117</sup> See note 61, Immarigeon & Daly, *Origins*.

Indeed, these ethnocentric manifestations of restorative justice often refer themselves, especially at a symbolical level, to the moral authority of previous traditional cultural manifestations of justice that are used by restorative justice proponents as a spearhead to obtain legitimacy (in the sociological meaning) and a good public image. A blatant example of the co-optation of cultural elements to reinforce restorative justice rhetoric can be found, as stressed before, in the recurrent association made by practitioners and theoreticians, particularly in North America and Australasia, concerning the Indigenous roots of restorative justice. Likewise, to a certain extent the same association can be made concerning the RJ claims over the notion of Christian biblical justice which is directly related to the long pacifist and prison abolitionist tradition of Quakers and Mennonites, another foundational element of the RJ movement. In fact, this latter religious group influenced enormously the first steps of restorative justice, as we stressed in our account of the first RJ experiences in Canada and United States by Mark Yantzi and Dave Worth.

Despite substantial geographical and cultural differences several restorative justice proponents seem to identify a trait of “restorativeness” in the context of their own culture of study. For example, in Africa restorative justice advocates have established a connection between it and the local concept of *ubuntu* or *utu*.<sup>118</sup> In Asia, particularly in China, restorative justice scholars have claimed that the concept is deeply embedded and rooted in Asian heritage, albeit they have also recognized there are variations that deviate from the Western standard, like, for example, the coercive, arbitral nature of Chinese mediation and undesirable outcomes related to punishment in tribal justice such as public ignominy, labour service, re-education,

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<sup>118</sup> See, e.g., note 6, Skelton, *Tapping indigenous knowledge*. (For a full discussion on RJ experiences in south Africa and its similarities with traditional African models of community justice).

letters of repentance, banishment, imprisonment, the death penalty and in the past even burying the murderer alive with the victim.<sup>119</sup>

However, all these attempts to associate restorative justice with traditional justice practices in the context of diverse cultures and places must be seen critically as incarnated in particular modern realities that, albeit more culturally sensitive, sometimes do not have any proximity to the very traditions by which they claim to be inspired. In these cases, as Daly observes, they just represent a caricature of those cultural practices that both ignores improprieties, internal contradictions and --- in the case of RJ models applied in Indigenous settings --- a gender perspective. These “caricatures” as Daly properly named them, often represent a romanticized over-emphasis of cultural elements like sentencing circles or family group conferences that, I believe, are oversimplified for basically two reasons. Firstly: to allow a generic identification with familiar practices to provide a prompt understanding by the targeted audience. This perspective explains how RJ was so readily accepted in Aboriginal communities in Australasia and by Indigenous people in North America although the diversity among these people is enormous. Secondly: the restorative justice movement made itself more visible and persuasive due to an aura of contestation of the *status quo* (represented by the conventional criminal justice system) increasing the willingness of individuals to participate in restorative justice experiences. In this sense, I believe that much of the throwback arguments concerning RJ and traditional justice cultural manifestations have been operating in the hope of arousing public opinion in favor of the restorative justice cause. This RJ advocacy, I assert, has potential to conceal negative influences of other political interests in Indigenous settings (mainly community autonomy and self-determination) that often precede in influence the needs of vulnerable

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<sup>119</sup> See, e.g., Ping Wang et al., “Regional Review – Asia” in Gerry Johnstone & Daniel W. Van Ness, eds., *Handbook of Restorative Justice* (Portland, Oregon: Willan Publishing, 2007) 477-487.

stakeholders like Indigenous women, perpetuating harmful power relations of oppression and privilege within Aboriginal communities. Restorative justice proponents aimed, especially at the beginning of their movement, to propose an alternative to the so-called retributive conventional justice system by proposing a paradigmatic shift. In order to achieve this goal they sought to create a political space of contestation using a language that co-opted the discourse of other social movements, which also were critical concerning the conventional justice system. For example, Indigenous movements in North America and Australasia have always been critical of the conventional justice systems due to disproportionate incarceration rates of Indigenous people in those systems. Restorative justice proponents associated their own discourse of contestation about the retributive-punitive conventional system with the political struggle of indigenous activists, who were also trying to mobilize public opinion in recognition of their political rights by asserting their own justice systems based on their cultural values. This conferred legitimacy on the restorative justice claims boosting the potential appeal of its discourse. However, this kind of tactic came with a price. It imposed serious costs on the foundation of a conclusive and universal definition of restorative justice.

The appeal to ethnocentric manifestations of justice brought uncertainty at a definitional level because of concessions made to adjust the RJ discourse to specific cultural contexts of legitimization. Afterall, every model devised by practitioners had to be translated into a local image and values in order to be more readily accepted. Nonetheless, the vantage of being perceived as culturally appropriate in the eyes of the public and policy makers was crucial to the enormous success of the restorative justice proposals. The “cultural sensitivity” of RJ brought an irresistible appeal to policy makers eager to institute new government-funded informal justice initiatives and enact change, especially in Indigenous settings.

Indeed, that strategy proved to be very efficient. In less than thirty years RJ had become a new international trend in the field of criminal justice. However, the adoption of a body of universal practices and the framing of a conclusive conceptualization became unfeasible since the adaptation to local cultural conditions implied the sacrifice of organizational features that could be held as a constant in the idea of restorative justice. In addition, some RJ proponents (and intersectional feminists among them), driven either by a colonial sentiment of guilt or by a non-critical appreciation of those cultural practices seemed not to recognize the dangers that an unplanned adherence to traditional cultural justice practices might bring when no conclusive stance is taken towards political standpoints and cultural practices that ignore or silence Indigenous women's interests.

This fact notwithstanding, the potential adverse impact of ethnocentric manifestations of RJ has been raised by mainstream feminists who single out the case of indigenous women who are victims of domestic violence. On this theme Kathleen Daly, for instance, notes that there is a natural inclination by indigenous women to be sympathetic to RJ experiences, particularly in the North American model of sentencing circles which involves several cultural elements familiar to indigenous people such as mediation involving extended family members; the moral authority exercised by community Elders; storytelling; and other ritualistic ceremonies. Furthermore, Daly stresses that indigenous women see these experiences as a symbol of self-determination of their own culture, which means reshaping of the conventional justice system on their own terms.<sup>120</sup> A paradox is that feminist scholars have detected indigenous women who are also concerned with the prevalence of a communitarian interest discourse detrimental to their own security and empowerment. In addition, those scholars, particularly socio-legal feminists, have raised questions about the misuse of cultural

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<sup>120</sup> See note 9 at 161.

arguments in the context of restorative justice. As mentioned in the introduction to this thesis, Daly observed that: “Concerns have been raised that the subordination of women in some Canadian First Nations communities means that they do not enter the circle on an equal basis (Goel 2000; Stewar et al. 2001) and that women have sometimes been excluded, silenced or harmed because power relations were not recognized, or gendered violence not taken seriously.”<sup>121</sup>

In summary, the observance of an ethnocentric discourse of legitimization in the context of RJ does not ensure per se a desirable level of credibility, accountability and empowerment to all the stakeholders (especially to women victims of intimate violence). On the contrary, the tendency detected in the RJ discourse to assimilate cultural elements into its rhetoric, without determining if it is justified and critically addressed under a feminist perspective, may end up as a potential danger to the people who experience RJ interventions since it can perpetuate community acceptance of violence against women. For this reason, it is necessary to bear in mind that RJ interventions repackaged in more attractive ethnocentric discourses (as Indigenous justice for instance) are a double-edged sword that can serve as a powerful tool to draw attention and acceptance to an intersectional way of thinking about criminal justice, i.e., giving an opportunity to reconfigure the justice system with culturally sensitive values, but it may also impose heavy costs on vulnerable stakeholders and even on an epistemological level (as seen in the definitional problem of restorative justice). A better intersectional approach to RJ and violence against women must ensure these problems are addressed properly.

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<sup>121</sup> Ibid at 162.

## 2. Defining restorative justice

Up to this point I have tried to clarify some foundational issues with the goal of providing an abstract framework that could be used to schematize the diverse ideological roots that have informed RJ thought, without telling us exactly what RJ might be. In this subsection I hope to give a face to the multi-tonal world of restorative justice. Unfortunately, however, the phrase *restorative justice* has been defined in the most broadly based way; from the narrow perspective of a promising way to redress problems within the criminal justice system to grandiose plans to reform the world creating a more just society.<sup>122</sup> But neither of these two perspectives is able to provide alone a conclusive definition of restorative justice. In his book *The little book of Restorative Justice*, Howard Zehr, a seminal thinker in RJ, suggests that: “Even though there is general agreement on the basic outlines of restorative justice, those in the field have been unable to come to a consensus on its specific meaning.”<sup>123</sup> Depending on the worldview of a practitioner or theorist a conclusive description about what Restorative Justice is may be quite contestable. Johnstone and Van Ness, for example, have observed:

There is widespread agreement among proponents that the goal [of restorative justice] is to transform the way contemporary societies view and respond to crime and related forms of troublesome behaviour. However, there are a range of views as to the precise nature of the transformation sought. These are to some extent in tension with one another, suggesting that restorative justice is best understood as a deeply contested concept.  
*Brackets added.*<sup>124</sup>

As a matter of fact, there seems to exist a general feeling of resistance amongst RJ proponents to define the term conclusively. Susan Sharpe, for example, points out that many

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<sup>122</sup> See, e.g., Margarita Zernova, *Restorative justice: ideals and Realities* (Hampshire, UK: Ashgate Publishing Ltd., 2007) at 2-3. (For an account on the various perspectives about RJ. She observes that RJ is popular both with conservatives and liberals. The formers have an interest in promoting and maintaining RJ because it allegedly advances family values and the interests of victims and promises cost saving and reduction of re-offending, the latters view RJ as an individually empowering and less repressive response to crime).

<sup>123</sup> See Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002) at 36.

<sup>124</sup> See note 54, Johnstone & Van Ness eds., *Handbook of Restorative Justice*, at 1.



theorists are reluctant to establish firm definitions of RJ for fear of closing off innovations or responsiveness to local needs.<sup>125</sup> In other words, the effort to capture an adequate meaning for restorative justice encounters the problem of many proponents simply denying the necessity or opportunity to provide a definition for it. Gerry Johnstone, a renowned RJ advocate, observes that when RJ is defined only by its most visible manifestations, there is a danger that the idea can become over-identified with a particular practice or set of practices which reduces the scope of the movement.<sup>126</sup> He singles out the tendency to think about RJ as being mainly or even exclusively about processes such as victim-offender mediation or family group conferencing, or even experiences associated with reparation schemes. Likewise, Declan Roche argues that this tendency to see RJ as only a criminal justice initiative impoverishes the concept since restorative processes (which encourage citizens to negotiate among themselves, rather than rely on professionals to adjudicate), and restorative values (which emphasize the importance of repairing and preventing harm), can be found across a wide range of regulatory fields. In this sense, according to him, teachers dealing with bullying in schools; social workers; corporate regulators; civil mediators members of truth commissions; diplomats; and peacekeepers all to a certain extent practice a variety of restorative justice. As a consequence, the label *restorative justice* is more easily associated with a set of principles and values which makes the phrase itself an expression that serves as an umbrella term for a large spectrum of experiences and interventions.<sup>127</sup> This paper proceeds, as noted above, on the premise that there is no consensus

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<sup>125</sup> See Susan Sharpe, "How Large Should The Restorative Justice "Tent" be?" in Howard Zehr & Barb Toews eds., *Critical Issues in Restorative Justice* (Monsey, New York: Criminal Justice Press, 2004) at 18. Dana Greene stated in a good-humoured remark paraphrasing the United States Supreme Court that restorative justice, "is a bit like pornography, people know it when they see it". See note 3, Dana Greene, *Repeat Performances* at 245 unpublished.

<sup>126</sup> See Gerry Johnstone, ed., *A Restorative Justice Reader: Texts, Sources, Context* (Mill Street, Uffculme: Willan Publishing, 2003) at 21.

<sup>127</sup> In the restorative justice literature, for example, we can find studies associating it with problems as diverse as medical malpractice and school bullying.

on a RJ definition although it is possible to establish a working definition. In the next subsection we develop a workable concept of restorative justice.

### **a) Restorative justice working definition**

Howard Zehr's book *Changing Lenses* laid the foundations for the scholarly conceptualization of RJ studies in the early 1990s.<sup>128</sup> According to him, RJ is a participatory model of informal justice that encourages and expects active involvement by all stakeholders --- offenders, victims, affected community --- in the event of a crime, as an integral part of the full continuum of *healing the harm* caused by the wrongdoing. Crime in the RJ realm is seen fundamentally as a violation of people and inter-personal relationships. In addition, its basic idea promotes the potential value and goodness of human beings, emphasizing communitarian and participatory values. In general, RJ practices aim at reintegration of the offender and victim in the community, offender rehabilitation, and victim closure through informal and non-adversarial methods. It is commonly asserted among RJ proponents that there is a paradigmatic departure from a retributive criminal justice and its recurring themes (over reliance on punishment and just deserts "theory"; special and general deterrence; incapacitation; rehabilitation; retribution, and adjudication) to include community restoration, personal transformation, indigenous justice, victims' rights, and victim trauma treatment.

Most RJ interventions involve some sort of face-to-face meeting between victims and offenders with the assistance of facilitators. In addition, these encounters may involve members of the *community*. Depending on the RJ format the term *community* can mean either victims and offenders' family members/supporters, or representative members of the community. For example, Elders (in an indigenous setting), neighbours, supportive friends and anyone

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<sup>128</sup> See note 47, Zehr, *Changing Lenses*.

affected by the crime. In some RJ models even designated court agents or police officers are considered as members of this extended *community*.

For the sake of clarity this section will provide a working definition within the context of criminal justice. Therefore, it does not include any subsequent dimension that restorative justice advocates may propose in practice or theory in some other context. In any case, as Theo Gavrielides has observed, the lack of precise aims and limits is not exclusive to RJ, as he writes, "... theoretical disagreements and conflicting definitions are common phenomena in the field of criminology. Many argue that there is even disagreement as to what constitutes 'criminal law', 'criminology' or even 'crime'. RJ is no exception."<sup>129</sup>

However, whether it is true that this open concept can offer flexibility and adaptability in a myriad of factual situations that may arise and that closing the doors to new approaches may inhibit the movement evolution and scope is open to analysis. It is also true that misrepresentations of RJ regarding conflicting models, objectives, or statements may cause bewilderment, especially when one or more of the constituent human factors (offender, victim or facilitator) of RJ interventions may be imbalanced or misguided. Zernova sounded the alert when she stated, "Restorative reforms may go astray as a result of being co-opted and diverted from the original vision. There are historical precedents of criminal justice interventions which got sidetracked, resulting in undesirable consequences and serving functions rather different from those that had been intended".<sup>130</sup>

In fact, as mentioned in the introduction of this chapter, it would be no surprise to find practitioners operating a program, even for a long time, without knowing exactly whether or

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<sup>129</sup> See also Theo Gavrielides. "Restorative Justice: The Perplexing Concept: Conceptual Fault-Lines and Power Battles within the Restorative Justice Movement"(2008) 8 *Criminology and Criminal Justice* 165-183.

<sup>130</sup> See note 48 at 492.

not what they are doing is really *restorative justice* until somebody shows up and labels it as being so. On the other hand, someone may claim to operate a RJ programme without in reality employing restorative justice values and principles.<sup>131</sup> Commonsense dictates that we must establish reasonable limits to the still uncertain goals and objectives of restorative justice. A good starting point would be to provide a working definition of the term itself that encompasses the most desirable principles and values, at least in the field of criminal justice which seems to be the original vocation of restorative justice. In doing so, we expect to provide a working conceptual body to it.

Even aware of the risk that a definition of RJ may always be incomplete, in this section we use data collected by Theo Gavrielides who, whilst acknowledging this limitation, also observed that consistent attempts for a conclusive definition were already being made. In his meticulous research, Gavrielides listed a comprehensive set of working definitions and principles for restorative justice. For the purpose of this paper, however, we will only focus on those with a more favourable reception. The first in Gavrielides' list is that one provided by Tony Marshall where, "Restorative Justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offences and its implications for the future."<sup>132</sup>

Marshall described the basic principles of RJ as the following: 1) making room for the personal involvement of those mainly concerned (particularly the offender and the victim, but also their families and communities); 2) seeing crime problems in their social context; 3) a forward-looking (or preventative) problem-solving orientation; 4) flexibility of practice

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<sup>131</sup> Zehr and Mika also alerted to the danger that "As restorative justice programs continue to be widely adopted, the number of definitions of restorative justice has increased significantly. Oddly enough, some of the programs defined as restorative do not appear to contain some of the essential elements originally associated with restorative justice.". See Howard Zehr & Harry Mika, "Fundamental Concepts of Restorative Justice" (1998) 1 Contemporary Justice Review at 47-55.

<sup>132</sup> See note 24 at 44. See also Tony F. Marshall, "Restorative Justice: an Overview" in Gerry Johnstone ed., *A Restorative Justice Reader: Texts, Sources, Context* (Mill Street, Uffculme: Willan Publishing, 2003) at 28.

(creativity). In addition, he stated that desirable objectives of restorative justice would be (a) to attend fully to victims' needs (b) to prevent re-offending by reintegrating offenders into the community (c) to enable offenders to assume active responsibility for their actions (d) to recreate a working community that supports rehabilitations of offenders and victims, and is active in preventing crime and (e) to provide a means of avoiding escalation of legal justice and the associated costs and delays.<sup>133</sup>

Gavrielides concluded that this definition and principles, albeit still subjected to criticism because of its limitations regarding scope, was endorsed by the "Working Party on Restorative Justice"; a working group of notable restorative justice advocates and scholars that worked under the auspices of the 'Alliance of NGOs on Crime Prevention and Criminal Justice' in preparation for the 10th United Nations crime congress in 2000<sup>134</sup> Gavrielides also reported that this same group endorsed Ron Claassen's principles regarding restorative justice. According to Claassen's principles: (a) Crime is primarily an offence against human relationships; (b) Restorative justice is a process to make things as right as possible; (c) As soon as immediate victim, community and offender safety concerns are satisfied, Restorative justice views the situation as a 'teachable moment' for the offender; (d) Restorative justice prefers responding to the crime at the earliest point possible and with the maximum amount of voluntary cooperation and minimum coercion since healing in relationships and new learning are voluntary and cooperative; (e) Restorative justice recognises that not all offenders will choose to be cooperative, and that those who pose significant safety risks should be placed in settings where the emphasis is on safety, values, ethics, responsibility, accountability and civility; (f)

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<sup>133</sup> Ibid.

<sup>134</sup> This working group, according to Gavrielides, was comprised of the following notable restorative justice scholars, practitioners and theoreticians: Gordon Bazemore, John Braithwaite, Ron Claassen, James Consedine, Peter Cordella, Frank Dunbaugh, Burt Galaway, Julia Hall, Kay Harris, Virginia Mackey, Tony Marshall, Gabrielle Maxwell, John MacDonald, Paul McCold, Fred McElrea, Harry Mika, David Moore, Ruth Morris, Allison Morris, Wayne Northey, Dean Peachey, Joan Pennell, Kay Pranis, Barry Stuart, Daniel Van Ness and Howard Zehr.

Restorative justice recognises and encourages the role of community institutions, and requires follow-up and accountability structures. The definitional efforts of Marshall and Claassen when taken in conjunction are widely considered the most convincing definition in the restorative justice field.

Another effort listed by Gavrielides in order to establish a definition of restorative justice also includes one devised by the United Nations through the Economic and Social Council. On the 24th of July 2002, the Council adopted Resolution E/CN.15/2002/L.2/Rev.1 “Basic principles on the use of Restorative”.<sup>135</sup> However, this document in particular did not provide an accurate definition of the term itself. In fact, it only referred to the repetition of the previous rationalization developed by Marshall/Claassen in broad general terms limiting itself to describing what would be restorative processes/outcomes and other restorative jargon like “parties”, “facilitator” and “community”. In practical terms that effort has not added anything substantial to the debate about whether a conclusive definition of RJ is possible. Once more this timidity in establishing a definition was attributed by Gavrielides to the fear of restorative advocates to use “prescriptive or narrow definitions that might impede further development of the idea.”<sup>136</sup>

As seen in the previous paragraphs the divergent objectives of RJ make it difficult to establish a prevalent theoretical approach to the issue of a definition. However, it is essential to delimit the field, but where the line is drawn is ultimately an arbitrary choice that might be as good as any other. Bearing this in mind, our working definition of choice is one provided by Kathleen Daly which is marked by a descriptive approach to the essential elements of RJ. She wrote:

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<sup>135</sup> See note 23.

<sup>136</sup> Ibid.

First, a person has admitted responsibility for offending, either explicitly or implicitly. Although crucial, this is a commonly overlooked feature. RJ does not adjudicate or mediate facts, but is part of the post-adjudication (or penalty) phase of the criminal process. Secondly, an offender typically (but not always) has a face-to-face meeting with a victim (or a representative for a victim, say, a parent for a young child victim), along with other supporters or relevant community members. Thirdly, it is an informal process that relies on the knowledge and decision-making capacities of lay actors, but it is linked to and constrained by established criminal justice (CJ) practices. There are ground rules for participants' behaviour and what can be said, and there are upper limits on penalties, which depend on the legal context. Fourthly, the aims of RJ are to hold offenders accountable for their behaviour and to make up for what they did. It is hoped that the process and outcome will deter offenders from further lawbreaking and provide some form of reintegration into the community, although neither may be achieved.<sup>137</sup>

## **b) Overview of restorative justice models**

The relevant examples of RJ have been listed in a number of ways, however I cannot take the space in this paper to account the great deal of information necessary in a comprehensive survey of RJ models. Nevertheless, most of the scholarly literature certainly would include, as the most authoritative examples of RJ interventions, the following models: victim-offender reconciliation and mediation programmes, family group conferencing, and sentencing circles. In fact, according to Paul McCold, these three practices are the “purest forms” of RJ and the only practices that meet the requirements of a face-to-face meeting between victims and offenders along with their communities of care.<sup>138</sup> As he also observes, “These examples all follow similar processes. However they differ in who runs the programmes, how cases are referred, who conducts the mediation, how much pre-mediation counselling is involved, the length of the process, the types of offences addressed, and the primary goal of the

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<sup>137</sup> Kathleen Daly, “Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” (2006) 46:2 *The British Journal of Criminology* at 335.

<sup>138</sup> See Paul McCold, “Primary Restorative Justice Practices” in Allison Morris & Gabrielle Maxwell, eds., *Restorative Justice for Juveniles: Conferencing, mediation and circles* (Oxford, UK: Hart Publishing, 2001) at 41.

process.”<sup>139</sup> For this reason, I will narrow down my illustration of practical models of RJ to those three experiences that emerged independently, but that have greatly influenced one another. Although others models of RJ may be as important as those, I will refrain from mentioning them in this paper.<sup>140</sup>

This subsection, therefore, is dedicated to a brief account of the three most popular and well established formats of RJ. In order to do that I reviewed the research findings of RJ scholars like Margarita Zernova; Paul McCold; Loretta Frederick; Kristine C. Lizdas; Mark Umbreit; Howard Zehr; and Angela Cameron. In the following subsections, I will largely ignore empirical uses of those models since my main concern is with sentencing circles which will be empirically explored in the next chapter of this paper. Anyway, where it is indispensable I may mention only in passing a specific RJ program in North America and Australasia to illustrate better a particular model..

### **i. VORPs and VOMs**

Historically speaking, victim-offender reconciliation or mediation programmes are the oldest forms of restorative justice practice.<sup>141</sup> The practice of RJ in the form of dialogue-based encounters evolved basically from two distinct programs: faith-based victim-offender reconciliation (VORP) and community work-based victim offender-mediation (VOM) programmes. These programmes gained impetus in the 1970s and 1980s with victims’

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<sup>139</sup> Ibid.

<sup>140</sup> For example, victim impact panels; Navajo peacemaking; community justice sanction; community boards or panels; victim compensation, arbitration, etc. See, e.g., Paul MacCold, “The Recent History of Restorative Justice – Mediation, Circles and Conferencing” in Dennis Sullivan & Larry Tift , eds., *The Handbook of Restorative Justice: A Global Perspective* (New York, NY: Routledge, 2006)

<sup>141</sup> Zernova has observed that early programs were named “victim-offender reconciliation programmes”, or VORP, however, some objected to the term reconciliation, because it was value-laden. Victim's rights advocates believed that the term implied that victims need to reconcile with their offender. They preferred the term mediation. Today most programmes adopt the terminology victim-offender mediation. See note 122 at 8.



organizations, religious campaigners for non-custodial sentences and community activists involved in diverting young offenders from the conventional criminal justice system. To be more accurate, victim-offender reconciliation was the first configuration of a dialogue-based RJ format in the early 1970s in Canada and the United States, “having emerged even before the concept of restorative justice was fully realized.”<sup>142</sup> As Zernova points out, “Victim-offender reconciliation is based on the idea that following a criminal offence, the victim and the offender have a shared interest in righting the wrong. The emphasis is placed on reconciliation, assisting victims in the aftermath of an offence, helping offenders to change their lives and more, generally, humanizing the criminal justice system.”<sup>143</sup>

In a nutshell, restorative dialogues involve a face-to-face meeting between a victim and offender with the help of a neutral trained facilitator primarily for the purpose of giving the offender an opportunity to make reparations, express remorse and *if possible* reconcile with the victim.<sup>144</sup> Victims are supposed to have the opportunity to talk about what happened and ask questions to the offender in a respectful and controlled atmosphere in order to mitigate feelings of anger; fear; shame; frustration and vengeance. The idea is that these negative and punitive inner attitudes and emotions can be channelled in more constructive ways in the restorative encounter that ideally would function as a powerful cathartic release. According to Heather Strang, “It seems that this expression of feelings by victims is essential for the experience of empathy by offender towards their victims. It may be that empathy is the ‘engine’ that drives remorse on the offender’s part and discharge of retributive feelings on the victim’s

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<sup>142</sup> U.S. Department of Health and Human Services, *The Role of Restorative Justice in the Battered Women’s Movement*, by Loretta Frederick & Kristine C. Lizdas, (Washington: Battered Women’s Justice Project, 2003).

<sup>143</sup> See note 122 .

<sup>144</sup> If victims or offenders do not feel for any reason comfortable to meet face-to-face with their counterparts. They either may choose a surrogate to represent themselves or use the facilitator as an intermediary to carry information back and forth between the parties until a restorative agreement is achieved. Another common forms of indirect dialogue like those are to exchange letters, videos, emails or to meet with an unrelated offender or victim.

part.”<sup>145</sup> In sum, by appealing to the psychological and moral mechanisms of empathy, RJ practitioners intend to trigger inner processes in victims and offenders that give rise to a search for restoration; closure; healing; responsibility, and prevention.

Zernova concludes the description of the process mentioned above as follows: “Then the parties may decide together what needs to be done about what happened and reach a mutually satisfying agreement. An agreement may involve the offender making financial restitution, working for the victim (or the community), undertaking to behave in a particular way or attending some rehabilitation programme, such as anger management.”<sup>146</sup> The facilitator helps the mediation process, but does not impose any outcome upon the parties. The aim is to promote a dialogue and empower victims and offenders to solve the conflict the best way they can within certain procedural constraints. It is crucial to understand that restorative mediation processes are not necessarily apologetic, i.e., the restorative dialogue does not suppose that the offender will ask or receive forgiveness from the victim although this outcome may reasonably be expected in an optimal RJ encounter. In the case of inappropriate behaviour or breach of the pre-established protocols by the parties the facilitator normally would interrupt the encounter and refer the case again to court for the adoption of conventional criminal justice measures when it is suitable. Moreover, Frederick and Lizdas suggest --- citing Mark Umbreit --- that VORPs and VOMs can have positive effects on victims and on offenders as well. For example: a) increasing the satisfaction levels of victims with the justice system’s response to their case rather than going through the normal court procedures; b) after meeting the offender, victims are significantly less

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<sup>145</sup> See Heather Strang, “Is Restorative Justice Imposing its Agenda on Victims?” in Howard Zehr & Barb Toews eds., *Critical Issues in Restorative Justice* (Monsey, New York: Criminal Justice Press, 2004) at 101. (Arguing that RJ processes must recognize that victims are entitled to convey retributive and bitter emotions as a valuable element of restorative transformation of both offenders and victims). See also note 88, Harris et al., *Emotional Dynamics*. (Arguing that emotions like empathy, remorse and guilt will spill over into feelings of shame, that are consistent with the approach advocated by Braithwaite’s reintegrative shaming theory).

<sup>146</sup> See note 122.

fearful of being revictimized; c) more compliance with restitution obligations in regard to offenders; and d) offenders that agreed to meet their victims are rarely recidivist.<sup>147</sup> However, RJ critics argue these claims are in need of further empirical confirmation and theoretical clarification.<sup>148</sup>

Cameron observes that VORP experiences were primarily developed in Mennonite communities, and continue to be primarily run by Christian faith-based groups in North America, but now also in other parts of the world like Germany, Finland, Belgium, and the United Kingdom.<sup>149</sup> She also helps to clarify a number of distinctions which can be drawn between VORPs and VOMs. She summarizes these distinctions as follows:

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). 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)<sup>150</sup>

Furthermore, restorative victim-offender mediation can be, and has been, presented and used in a number of configurations depending on the structure of the criminal justice system in which it is used, as well as the level of acceptance coming from public opinion,

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<sup>147</sup> See note 140 at 8-9.

<sup>148</sup> See note 21. (In this note I quote Stubbs who provides examples of criticism regarding the promises of RJ to victims and community)

<sup>149</sup> See note 2 (For an account of examples of use of victim-offender mediations in Canada and other countries). See also note 70 for an account on pioneer experiences on VORP promoted by the Mennonite Community, especially the Kitchener experiment in Ontario. (The Mennonites are a Christian denomination or community who adherents have become known as deeply committed to pacifism, nonviolence and prison abolition. The Mennonite church is one of the so-called Peace churches like, the Quakers and the Brethren in Christ. Several RJ's prominent scholars and practitioners are members either of the Mennonite church or Quaker community, for instance, Daniel Van Ness, Howard Zehr and Joan Pennell. Basically they see RJ as a form of *Biblical Justice*. The Mennonite church, for example, is a leading sponsor of RJ initiatives in North America).

<sup>150</sup> See note 2 at 16.

policy-makers and the cultural and historical background of the country. According to Gavrielides, the first configuration is of *independent* programmes, when they are offered as real alternatives for criminal litigation, diverting the criminal case totally out of the formal process of the conventional criminal justice at a very early stage --- normally pre-charge.<sup>151</sup> The second configuration is of *relatively independent* programmes in which an offender's behaviour is reviewed and evaluated within a formal criminal proceeding.<sup>152</sup> At any stage of that proceeding, according to court or prosecutorial discretion, the case can be referred to a mediator or facilitator (I prefer the term facilitator to avoid allusive references to civil mediation) who takes charge of the responsibility of promoting an encounter between victim and offender. If this is accomplished successfully, it will have an impact on the outcome of the criminal proceedings. Normally, a positive outcome takes the form of a shortened sentence time, although there have been cases where charges were dropped altogether. The third configuration is of *dependent* programs which take place when the offender is already incarcerated or after sentencing. Finally, Gavrielides' schematization of victim-offender mediation configurations also attribute several distinctions concerning operational styles that are noteworthy to quote in length. In his words:

The first is between programmes that are primarily oriented towards the needs of the offender, and those that also take account of the needs of the victim. The second distinction is made between projects where victims meet their offenders and projects where groups of victims take part in discussions with unrelated offenders. Although this type of mediation does not preclude bringing the individuals together to consider how offenders can make amends, their main goal is to help both victims and offenders to challenge each other's prejudices. The third distinction concerns mediation programmes that may include face-to-face meeting of the victim with the offender, and those that have mediators act only as go-betweens. The fourth category depends on the cases that the mediation programmes accept. For instance, a project may take cases below or above a certain level of seriousness, or only juvenile cases. Lastly, there are victim-offender mediation programmes that are carried out by paid professional staff or by trained volunteers.<sup>153</sup>

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<sup>151</sup> See note 54 at 31.

<sup>152</sup> Ibid.

<sup>153</sup> See note 54 at 301.

In the next subsections I will describe family group conferencing and sentencing circles. Nevertheless, it is important to understand that many of the features ascribed to VORPs and VOMs are also shared by family group conferencing and sentencing circles because in its origins RJ was virtually synonymous with VORPs and VOMs. Paul McCold, for example, noted that: “In the beginning, mediation was restorative justice, and restorative justice was mediation.”<sup>154</sup> However, as A.W. Roberts observed: “Within a short time, VOM become more flexible, and often was multi-part, with several victims and/or offenders, family members and/or supporters. Next, this VOM model of practice became several models and then a family of models.”<sup>155</sup> Family group conferences and sentencing circles are, therefore, the result of the natural expansion of RJ dialogue-based encounters like VORPs and VOMS. For this reason, they essentially share the same strengths and weaknesses.<sup>156</sup>

## **ii. Family group conferences**

The central idea behind family group conferencing (hereafter FGC) is the recognition that victims and offenders by themselves may be unable to deal with the consequences of a crime since it also affects their families and communities as a whole. In other words, FGC depends not only on the agency of dialogue-based processes between victim and offender but also on the contributions of supportive family members of both of them; respected community members, and public officials like police and probation officers. As Frederick and Lizdas put it, “A wider circle of people is recognized as being victimized by the offense –

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<sup>154</sup> See note 138 at 24.

<sup>155</sup> See Ann Wamer Roberts, “Is Restorative Justice Tied to Specific Models of Practice?”, in Howard Zehr & Barb Toews eds., *Critical Issues in Restorative Justice* (Monsey, New York: Criminal Justice Press, 2004) at 242.

<sup>156</sup> The term *encounter* encapsulates in one word one of the most important tenets of the RJ movement: that victims, offenders and the affected community should be allowed to encounter one another outside highly formal, professional-dominated settings like a courtroom to deal with their own problems. See note 53 Johnstone & Van Ness, *Handbook of RJ*, at 9.

identified as “primary” and “secondary” victims in FGC. Victims are more likely to receive comprehensive support services because a wider net of people is involved.”<sup>157</sup>

This conception of a wider circle of people in conferencing models is linked to RJ’s principle of participatory democracy and holistic justice. As a matter of fact, the strongest connection between FGC and RJ is formed by one of the fundamental assumptions that underlies RJ theory, i.e., that the wrongdoer’s behaviour and its consequences are only part of something that is intimately interconnected with other stakeholders which can be only understood by reference to them as a whole.<sup>158</sup> In this sense, although the primary victims are those most directly affected by the offense, other lay actors, such as family members of victims and offenders, witnesses, and members of the affected community, are also considered victims. Bearing this interconnection in mind, it makes sense to seek an offender’s reinclusion into the circle of community belonging and support through the application of social pressure and collective expressions of disapproval like Braithwaite’s reintegrative shaming theory proposes. In sum, FGC involves the acknowledgment of a wider range of people as being victimized by the wrongdoing and at the same time requires collective responsibility in the task of reintegrating the offender and victim into the community, thus contributing to the empowering and healing of the overall community.

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<sup>157</sup> See note 142 at 9.

<sup>158</sup> Zehr and Mika stress that any restorative programme must be applied in the light of the following principles: 1) Recognition that crime is a violation of one person by another and not against the state; 2) Recognition that crime is harmful to interpersonal relationships and to communities; 3) The focus is on problem solving and restoration of social harmony; 4) Restitution, reconciliation and vindication are used as a means of restoration; 5) The community acts as a facilitator in the restorative process, and 6) The holistic context of an offence is taken into consideration including moral, social, economic, political and religious aspects. In addition, there are four procedural pillars for RJ practical models. Firstly, “the restorative encounter” which creates a window of opportunity for victims, offenders and community members who want to do so to meet to discuss the crime and its aftermath. Secondly, “the seek for reintegration” which means to restore victims and offenders as contributing members of society. Third, “the inclusiveness” that provide opportunities for parties with a stake in a specific crime to participate in its resolution. Finally, “making amends” that requires from offenders to take decisive steps to repair the harm they have done. See note 131.

According to Umbreit and Zher, FGC first developed in New Zealand in the late 1980s as a way to address the failures of conventional juvenile justice and as an attempt to incorporate traditional justice values of the Maori People --- the Indigenous group of New Zealand --- that emphasised the role of family and community in addressing wrongdoing.<sup>159</sup> In accordance with that intersectional thinking initiative, FGC was institutionalized in 1989 through, *The Children, Young Persons and their Families Act*, as an alternative to formal court proceedings for young offenders.<sup>160</sup> As Umbreit has observed, FGC is now the standard for processing juvenile cases in New Zealand and also in Australia that adopt the concept a short period later.<sup>161</sup> Since then, several countries such as Canada, United States, Israel and others in Europe, have followed the example of Australia and New Zealand by adopting restorative conferencing with minor changes in style accordingly to their own social and legal contexts.<sup>162</sup>

Kathleen Daly asserts that Australia and New Zealand are the leading “laboratories of experimentation” in restorative conferencing.<sup>163</sup> According to her, New Zealand

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<sup>159</sup> See Mark Umbreit & Howard Zehr, “Restorative Family Group Conferences: Differing Models and Guidelines for Practice” in Eugene McLaughlin *et al.*, eds., *RJ: Critical Issues* (Thousand Oaks, CA: Sage Publications, 2003) at 69-70

<sup>160</sup> See Cameron, note 2 at 15. See also *Children, Young Persons, and Their Families Act 1989* (N.Z.), 1989/24, 2009 RS. See generally F.W.M. McElrea, “Restorative Justice - A New Zealand Perspective” in David J. Cornwell, ed., *Criminal punishment and Restorative Justice: Past, present, and future perspectives* (Winchester, UK: Waterside Press, 2006) at 119. (Discussing the restorative justice principles applied in the 2002 Sentencing Act at New Zealand). See also *Sentencing Act 2002* (N.Z.), 2002/9, 2009 RS.

<sup>161</sup> See Mark Umbreit, “Family Group Conferencing: Implications for Crime Victims” (2000) U.S. Department of Justice - Office of Justice Programs. See also note 122 at 12 (For a detailed account of FGC outside New Zealand, specially the Wagga Wagga model in New South Wales, Australia, and the Thames Valley model in UK. These models differ from the New Zealand model because they use police officers, usually in uniform, or school officials to set up and facilitate meetings. No other agencies are involved in their functioning. They are clearly based on reintegrative shaming theories by John Braithwaite).

<sup>162</sup> See note 53, Johnstone & Van Ness, *Handbook of RJ*, at 446-557. (For a recent account of RJ experiences around the globe). See also Esther Shachaf-Friedman & Uri Timor, “Family-Group Conferencing in Israel: The Voices of Victims Following Restorative Justice Proceedings” in Natti Rone *et al.*, eds, *Trends and issues in Victimology* (Newcastle, UK: Cambridge Scholars Publishing, 2008) at 58. (Describing the *Kedem* family conferencing model in Israel).

<sup>163</sup> See Kathleen Daly, “Conferencing in Australia and New Zealand: Variation, Research Findings, and Prospects” in Allison Morris & Gabrielle Maxwell, eds., *Restorative Justice for Juveniles: Conferencing, mediation and circles* (Oxford, UK: Hart Publishing, 2001) at 59-61. (Discussing FGC evolution in New Zealand and Australia while pointing out misconception about the use of restorative conferencing in those countries).

and Australia have been spearheading a campaign to use restorative conferencing for addressing social problems, endemic racism in the justice system and to redress inequalities. As she observes:

— With the exception of two jurisdiction in Australia, all jurisdictions have statutory-based schemes, with conferences typically used as one component in a hierarchy of responses to youth crime.

— The overarching goal in legislative frameworks is to keep juveniles out of the formal system as much as possible.

— In addition to statutory-based schemes for juvenile offenders, conferencing is used in a variety of other contexts, including school and workplace disputes, family and child welfare (or care and protection matters), and as pre-sentencing advice to magistrates and judges.<sup>164</sup>

The impetus for those policies, she argues, is a commitment to an ideology that emphasizes social welfare and crime prevention. Moreover, their common law tradition allows a greater degree of experimentation with new justice forms which is not possible in civil law jurisdictions.

Typically, as in other RJ formats, a family group conference brings together the offender with the victim to discuss the causes and consequences of the crime and ways of preventing its repetition; but in this specific model, offender and victim are also supported by their families (in the case of young offenders usually their parents), friends or neighbours and the responsibility is shared among all the participants who must work together to stop the offending behaviour.<sup>165</sup> In addition, the restorative encounter is run by a neutral facilitator/mediator, and the offender and their family are usually supported by local social workers not employed by the criminal justice system. In several FGC programmes, however, as Umbreit notes, “a lawyer/advocate for the offender is invited, and a representative of the police department, who

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<sup>164</sup> Ibid. at 59-60.

<sup>165</sup> However, Cameron notes that unlike sentencing circles FGC participants are usually limited to immediate family members, as opposed to the larger community of supporters. See note 2 at 15.



serves as the prosecutor, is present.”<sup>166</sup> After all participants’ views have been presented, the entire group, which includes the extended “community of care” of offenders and victims, is expected to come to a consensus on the outcome for the case, not just on a restitution agreement. Goals of the conference would normally include accountability, prevention of future misconduct, and victim empowerment.<sup>167</sup> In some FGC configurations the offender’s family is invited to meet in private and draw up a plan which is submitted to the whole conference for acceptance. FGC encounters are based upon the assumption that people are more likely to honour plans to which they feel they have made an active contribution.

As one can infer, the same principles of empathetic dialogue and claims of substantive benefits to victims and offenders applies to FGCs as to VOMs and VORPs. However, Mark Umbreit points out the differences between VOMs and FGC, as follows: “Unlike VOM, FGC uses public officials (police officers, probation officers, school officials) rather than trained volunteers as facilitators. Although their roles include mediation, they are more broadly defined, combining mediation with other methods of interaction and allowing for more directed facilitation. The FGC process also casts a much wider circle of participants than VOM.”<sup>168</sup> In sum, FGC programmes provide the victim, the offender and all those who are affected by crime an opportunity to be directly involved in a discussion leading to a decision regarding sanctions and making amends. Finally, FGC may occur at any stage of a criminal legal proceeding. However, most of the times they are used by police as an alternative to arrest and as a diversion of the formal criminal justice system.<sup>169</sup>

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<sup>166</sup> Supra note 161.

<sup>167</sup> Ibid.

<sup>168</sup> Supra note 161.

<sup>169</sup> See note 54 at 34.

### iii. Restorative and sentencing circles

Restorative and sentencing circles are analyzed in depth in a following chapter. This section is designed merely to give the reader a general comprehension of the purpose and function of this RJ model which is the primary objective in this subsection.

Restorative circles and restorative family group conferencing, although arising from different Aboriginal traditions, are closely related and share common emphasis.<sup>170</sup> As Frederick and Lizdas note, restorative circles practices place: "... a strong emphasis upon local community member participation, making the circle community based; bringing victim and offender together in face-to-face interaction as does victim/offender mediation; and involving victim and offender family members and friends, such as in family group conferencing."<sup>171</sup> However, a clear distinction can be drawn between restorative circles and other restorative conferencing models. The former places aboriginal understandings of justice based in mediation and consensual decision-making as primary elements of motivation and direction in restorative encounters.<sup>172</sup> This allows Frederick and Lizdas to point out that, "These practices explicitly empower each individual in the circle as an equal and lift up the relationship between justice and the physical, emotional and spiritual dimensions of the individual in the context of community and culture."<sup>173</sup> In other words, those practices mean to Indigenous people at the same time the experimentation of a more humane and meaningful form of justice, and a politically stronger and

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<sup>170</sup> There is a general consensus in the literature that family group conferences were adapted from the justice traditions of the Maori People in New Zealand, while restorative circles are usually associated with the justice traditions of Indigenous people in Canada and United States. For example, the Navajo peacemaking in the United States. See note 138 at 48-49. But see note 6. (Arguing that sentencing circles are not a form of RJ, but a manifestation of Aboriginal Justice).

<sup>171</sup> See note 142 at 10.

<sup>172</sup> The Indigenous practice of *peacemaking circles* as a form of conflict-resolution is the basis of this approach.

<sup>173</sup> Ibid.

more empowering way of conceiving criminal justice in their own terms.<sup>174</sup> In this sense, restorative circles are perhaps the most culturally sensitive of RJ practices largely incorporating concepts emanating from Aboriginal perceptions of justice.<sup>175</sup> While in other RJ models which equally rely on conferences, Aboriginal insights function much more as an inspiration; in restorative circles they are the essence of the experience. Certainly, this has contributed to the vigour with which restorative circles were embraced by Indigenous communities in North America and more recently also in Australia.<sup>176</sup>

In fact, as we saw in a previous section of this chapter, there is even some doubt about whether the distinction between restorative justice circles and Aboriginal justice still exists in in practice.<sup>177</sup> Just to illustrate this claim, it is generally accepted that for Indigenous people in North America a criminal offence normally represents an interpersonal violation of the relationship between the offender and the victim as well as the offender and the community.<sup>178</sup> Moreover, it is also thought that the stability of the community is dependent on *healing* those

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<sup>174</sup> But see the following footnote commentary by Angela Cameron: "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 peoples (Ryan and Calliou, 2002; Linden and Clairmont, 1998; in the Australian context see: Behrendt, 2002)." See note 2 at 36. (Cameron's commentary is applicable only to sentencing circles though).

<sup>175</sup> This claim is supported by Paul McCold who argues, in his words, "The circle is central to traditional aboriginal cultures and social processes. As Yazzie (1998:129) notes, indigenous cultures around the world have developed a variety of similar process for responding to wrongdoing". See note 138 at 48. See also Robert Yazzie & James Zion, "Navajo Restorative Justice: The Law of Equality and Justice" in B. Galaway & J. Hudson, eds., *Restorative Justice: International Perspectives* (Mossey:Criminal Justice Press, 1996). *Contra* note 114 at 346 . (Cunneen argues that such gross generalizations about justice practices of Indigenous societies trivialize the diversity and complexity of Indigenous groups around the world. According to him, we cannot assume that the vision of justice is the same for RJ advocates and all Indigenous people).

<sup>176</sup> Restorative circles operate exclusively or primarily with Indigenous persons or within Indigenous communities. Although there are references in the literature to the use of restorative circles in non-indigenous settings they are not numerically relevant. For the expository purposes of this segment, I will ignore these experiences that, however, will be mentioned in passing in a following chapter. See, *e.g.* ,note 2 at 13.

<sup>177</sup> See text accompanying note 111.

<sup>178</sup> See Heino Lilles, "Circle Sentencing: Part of the Restorative Justice Continuum" (Paper presented to the Third International Conference on Conferencing, Circles and other Restorative Practices, Minneapolis, Minnesota, 8-10 August, 2002 [unpublished] on line: [http://www.iirp.org/article\\_detail.php?article\\_id=NDQ3](http://www.iirp.org/article_detail.php?article_id=NDQ3) (Retrieved on 25 March 2008).

strained relationships. Finally, according to a general Indigenous perception of justice the community is better positioned to address the causes of crime, because they are often rooted in the economic or social fabric of the community. All these standpoints are also echoed in the RJ discourse. Restorative circles have placed a heavy emphasis on a community-driven justice process that especially includes the assimilation and repackaging of the traditional imagery of Indigenous justice practices like, e.g., *peacemaking circles* through the use of language and methodology of restorative justice practices.<sup>179</sup> However, it is important to bear in mind that restorative circles are not “traditional practices” of aboriginal peoples now being resuscitated. Actually, they are a much more a palatable way of doing justice growing out the existing conventional system introduced within aboriginal communities, for the most part fostered by the judiciary serving these communities.<sup>180</sup> As Goel puts it:

Although the sentencing circle is drawn from Aboriginal customs, it is not a complete return to traditional Aboriginal dispute-resolution techniques (Lowe and Davidson 2004). Several authors have opined that sentencing circles are an example of *inventing* tradition, not *returning* to tradition (Cameron 2006a, 2006b; Dickson-Glmore 1992; Green 1998; McIvor 1996; Orchard 1998; Spiteri 2002).<sup>181</sup>

Soon, it also becomes evident that the adoption of restorative circles represent an attempt of the *status quo* powers to redress the errors of the colonial past and the endemic injustices found in the conventional criminal justice system towards Aboriginal people,

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<sup>179</sup> Paul McCold observes that Navajo peacemaking experiences in the desert Southwest of the United States are perhaps the first restorative circles experiences in the contemporary world. They have been in use for criminal and civil cases since 1982. See note 140 at 28. See also Robert Yazzie, “Navajo Peacemaking: Implications for Adjudication-based Systems of Justice” (1998) 1 Contemporary Justice Review 123-131. But see note 34, Coker, *Navajo Peacemaking*. (Noting the differences between Navajo peacemaking and restorative justice models like sentencing circles. According to her, while the peacemaking process is completely controlled by the sovereign Navajo Nation, in sentencing circles the processes is are often controlled by non-Indigenous authorities although sometimes in consultation with Indigenous leaders).

violence

<sup>180</sup> See Mary Crnkovich, “Report on the Circle Sentencing in Kangiqsujuaq” (Paper presented to for Pauktuutit and Department of Justice, Canada, 1993) Inuit Women and Justice: Progress Report Number one [unpublished] at 23.

<sup>181</sup> See note 13 at 969-978 in a kindle e-book version.

particularly, the over-incarceration of Aboriginal offenders in Canada and Australia.<sup>182</sup> The historic and systemic failures of these countries to ameliorate the impact of the criminal justice system on Indigenous people puts them in the difficult situation of having both to renew and reinvent their discourse and practice on justice processes just enough to make Indigenous people believe that a change had, in fact, taken place and that adjustments were made, while actually maintaining the basic structure of power on which their conventional criminal justice systems depend. Notably, this has been achieved by mainly putting into practice top-down governance strategies through which certain justice functions like sentencing powers are partially transferred or shared with traditional institutions, e.g., Indigenous circles. As Julia Emberley suggests, this is exactly the case in Canada where, “... the concept of ‘legal pluralism’ (the multiple, and sometimes combined, use of Aboriginal customary law and Canadian state law) is gaining ground in the judicial system...”<sup>183</sup> Goel Rashmi echoes this perception arguing that sentencing circles, for example, are a “ (...) a fusion of two judicial cultures.”<sup>184</sup>

There are, however, two fundamental problems with *constructive hybridization* strategies, as Blagg prefers to name legal pluralist initiatives. In theory, the approach is intended to empower aboriginal customary law and communitarian governance, but in practice, it keeps the existing professionalized justice institutions from delineating how the experience works and what outcomes can be achieved. In addition, there is the danger of overlooking the complex power dynamics among victimized Aboriginal women, their offenders and the community, especially within the context of domestic violence. Crnkovich, for example, argues that

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<sup>182</sup> See, e.g., note 106.

<sup>183</sup> See Julia Emberley, *Defamiliarizing the aboriginal: cultural practices and decolonization in Canada* (Toronto: University of Toronto Press, 2007) at 68. (Similar policies are also seen within the context of Australia).

<sup>184</sup> See note 13 at 971-975 in a kindle e-book version.

sentencing circles can introduce new and perverse forms of silencing Aboriginal women. As she has observed at first hand from an Inuit sentencing circle:

The circle was the first of its kind, being supported by the judge and Inuit leaders. If she [the victim] spoke out about further abuses or her dislike of this sentence, what would she be saying about this process everyone supported? Now, in addition to fearing her husband's retribution, she may fear that by speaking out she would be speaking out against the community. The sentence created in this circle is one endorsed not only by the Mayor and other participants, but also by the Judge and a highly respected Inuit politician. The pressure to not speak out against a sentencing alternative supported by so many is great. The victim may be afraid to admit she is being beaten because such an admission, she may fear, may be interpreted as failure of this process. She may hold herself to blame and once again continue to suffer the silence.<sup>185</sup> *Brackets added*

In conclusion, the nature of the confluence between RJ and the Aboriginal justice political project lies in the fact that both not only require a great involvement of the community, but also share several core notions, such as *healing*; victim/offender personal transformation; victim/offender reintegration to society and rehabilitation, albeit conveyed in slightly different terms. However, the common language and shared institutional mechanisms have the potential to obscure fundamental distinctions and divergent objectives between RJ and Aboriginal justice. The apparent commonality of interests conceals competing political objectives and substantive gaps between RJ theory and practice that can impact directly Aboriginal women within the context of domestic violence. Actually, there are several other focuses of criticism or opposition over the use of RJ language to articulate Aboriginal justice claims for recognition of customary law and self-determination, especially in cases of domestic violence.<sup>186</sup> However, they will be addressed in a later chapter.

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<sup>185</sup> See note 180 at 24.

<sup>186</sup> See, e.g., David Milward, "Making the Circle Stronger: an effort to buttress Aboriginal use of Restorative Justice in Canada against recent criticisms" (2008) 4:3 IJPS (For a discussion over the use of restorative justice in Aboriginal settings. The author includes the most common criticisms over the idea, but contends that there are still good reasons to maintain the use of restorative justice in Indigenous criminal justice)

The goals in that hybrid justice model are easily noticeable. Firstly, the aim is to prevent the imposition of incarceration penalties to recidivist aboriginal offenders.<sup>187</sup> Secondly, to allow Indigenous people to have a greater degree of input into and control over their own justice processes that would become more aligned with self-determination political claims and Aboriginal customary law. For example, according to traditional concepts of Aboriginal freedom and individuality one person cannot impose a decision upon another as usually occurs in formal courts.<sup>188</sup> Therefore, court judgments might be seen as a form of imposing formal justice on the Indigenous people who had been subjugated. Thirdly, to accommodate the particular needs of Aboriginal people in conflict with the law providing a more familiar atmosphere in order to reduce the lack of cultural sensitivity in the adjudication mechanism. Zernova, for example, points out that measures like sentencing circles help to prevent the culture shock, which First Nation people may experience when they have to appear in court.<sup>189</sup> Finally, to involve the community in creating and sharing knowledge, experiences, and solutions in order to pursue justice practices of their own choosing and predilection.

In contrast to essentially dialogue-based RJ interventions like VOMs and VORPs, restorative circles also imply that victims and offenders are not solely responsible for the resolution of criminal justice-based disputes. Community members, victims and offenders are supposed to participate in creating and expressing their own justice approach and, in so doing, empowering themselves to effect individual and collective transformation appropriate to

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<sup>187</sup> As Cameron has observed, "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)". See note 2 at 11. (The focus is on reconciliation and rehabilitations as goals for sentencing. By broadening sentence alternatives incarceration is seen as a last option).

<sup>188</sup> See note 140 at 28.

<sup>189</sup> She points out that when first nation people follow their traditional ethic during court appearances (such as avoiding making eye contact, showing anger and confronting or criticizing others), their behaviour may be interpreted as contemptuous acts to embarrass or engender disrespect for the court. See note 122 at 17.

themselves. Finally, restorative circles --- as in other models of RJ --- also require the usual protagonists of the criminal justice system, i.e., judges, prosecutors, lawyers and law enforcement agents, to act more as listeners and co-creators of solutions which result in a healthy partnership with the local community.

RJ practitioners and proponents have reiterated a relatively consistent set of arguments for the merits of restorative circles. According to Zernova --- drawing from commentaries originally developed by Barry Stuart --- a genuine and sincere participation in a restorative circle has the potential to reconnect offenders to their communities, rebuild broken relationships and address victims' needs.<sup>190</sup> In addition, it has the ability to educate the community about its problems, fostering a sense of belonging to it. Moreover, it also helps to reveal underlying causes of crime, which in other conditions may be overlooked. Finally, restorative circles also generate community initiatives aimed at redressing the needs of victims and offenders as well as addressing adverse social conditions.

Some conceptualizations of restorative circles manifest a more therapeutic perception of them, e.g., traditional Indigenous *talking circles* or *healing circles* that are primarily used to cope with substance abuse and other social conflicts outside the criminal justice field, while others like *sentencing circles* incorporate more recent influences from the RJ discourse and are chiefly designed to address serious criminal offences in conjunction with formal judicial institutions. For this reason, the collective meaning given by Indigenous people to *circles* is not reduced to a strictly criminal justice understanding. There is a spiritual and curative facet that cannot be ignored. Both kinds of circle models follow similar basic principles

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<sup>190</sup> Supra note. (Former Chief Judge of the Territorial Court of Yukon Barry Stuart pioneered sentencing circle experiences in Canada. More detailed examination of his decisions will be addressed in another chapter)



of operation that I will describe in the next paragraphs. Nevertheless, emphasis will be given to sentencing circles.

Typically sentencing circles involve a step-by-step procedure that is generally followed; it starts with applications from offenders who wish to participate in the process.<sup>191</sup> The prerequisites are full acceptance of the responsibility for the wrongdoing or at least a plea of guilt. In addition, a strong connection between the offender and the community must exist. Another requirement is a sincere desire for rehabilitation and reconnection. According to McCold, acceptance into the circle is decided by a community justice committee or circle support group.<sup>192</sup>

Lilles observes that sentencing circles demand a significant commitment from community members, so it is in a community's best interest to limit access to those offenders who demonstrate high levels of motivation and commitment to the process.<sup>193</sup> In addition, because the procedures are very time-consuming for everyone involved and also very costly, only serious cases are referred to sentencing circles.<sup>194</sup> Other considerations of public character may be present since it is the Judge who refers the offender to the sentencing circle and only after all the fact-finding issues have been already determined. Nevertheless, the general assumption is that the community is the one best equipped to identify who must enter the circle. So the final decision remains with the committee. As we can notice, therefore, sentencing circles are restorative interventions that occur in a post-conviction stage of a regular legal proceeding unlike other RJ models that usually occur apart from any formal proceeding.

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<sup>191</sup> The procedures and guidelines, however, may vary considerable from one community to the other. Cameron points out that in Canada this lack of consistency has been a source of criticism and concern both in the literature and in case law. See note 2 at 15.

<sup>192</sup> See note 138 at 51.

<sup>193</sup> See note 178.

<sup>194</sup> Ibid.

When a case is referred to the community committee and no concerns are presented regarding the offender's acceptance or his commitment to the circle's rules, the pre-hearing arrangements can begin. The circle support group provides an initial contact with all parties and their supporters as a way to promote their future link and commitment with the circle decisions. As McCold stresses, "Pre-hearing work includes exchanging information, developing plans and preparing all parties to participate."<sup>195</sup> Victims' voluntary participation in the circle is encouraged, however, a family member or friend can also represent them and put forward their interests. Moreover, there is one authoritative figure in the circle that deserves some attention: the circle keeper. The "keepers of the circle" are respected community members, usually Elders who lend their prestige and moral authority to the circle. According to Zernova, their function is to act as facilitators of the process. The keeper, as she puts it, "ensures respect for the teaching of the circle, mediates differences and guides the circle toward a consensus".<sup>196</sup>

All participants are encouraged to get closer to others and sit in a circle at the same level. All parties and the community are invited. Criminal justice professionals like the offender's lawyer; the prosecutor and the judge will be equally present in the proceedings. Most of the sentencing circles are held in courtrooms specially arranged to accommodate the circle. McCold describes the way in which the circle Keeper conducts the opening procedures. He writes: "Opening the circle with a prayer, the keepers of the circle welcome everyone to the circle and then introduce themselves by explaining who they are, what they do, where they are from and why they are in the circle today. The Keeper then asks others to similarly introduce

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<sup>195</sup> See note 138 at 51.

<sup>196</sup> See Zernova, note 122 at 16-17. See also McCold, note 138. (According to McCold, the function of "the Keeper of the circle" in the first experiences with sentencing circles was played by the Judge).

themselves, as an eagle feather or other sacred object used as a “talking token” is passed around the circle.”<sup>197</sup>

According to Zernova, those spiritual elements bring into consciousness the customary physical, emotional, spiritual and intellectual connections of the participants with their own community, and provide an opportunity for reintegration, empathy and catharsis.<sup>198</sup> Zernova also observes that most prayers stress the interconnectedness of all things and all people and induce in the participants a feeling of being part of community. By doing so, the participants amplify progressively a feeling that the suffering of one is the suffering of all, and that the disharmony caused by the offence affects the entire community. As a consequence, everybody in the circle shares responsibility for finding solutions to the problems.

The Keeper then stresses the moral and non-moral purposes to be achieved by the circle, and explains some guidelines. For example, to speak from the heart; to remain in the circle until it finishes; to allow others to speak by speaking briefly; to respect others by not interrupting, and, finally, to recognize the value of others’ contribution.<sup>199</sup> At this point, the charges are read and the prosecutor and defense lawyers make brief remarks about the offender’s conduct. Finally, every participant is invited to express his or her own opinion about the offence and propose constructive solutions. As Lilles observes, those who participate in the circle speak one at a time and may discuss issues not necessarily related to the criminal event.<sup>200</sup> The issues discussed may help to understand why the offence occurred and what needs to be done to meet the needs of the victim, hold the offender accountable and prevent recidivism. Then the judge, who is present during the whole process, passes a sentence and makes recommendations on the

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<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> See note 138 at 51.

<sup>200</sup> See note 178.

basis of what has been said in the circle. McCold points out that the closing procedures normally include summarizing what has or has not been agreed, outlining the next steps, thanking everyone for their participation, passing the feather for closing comments by all participants, and finishing with a closing prayer.

Now the basic question to be asked in this scenario is what happens after the circle is closed, what follows the sentence plan? As Lilles explains, after being sentenced in a circle, the offender's progress in following the sentencing plan is carefully monitored by his support group, the community Justice committee and a probation officer.<sup>201</sup> Actually, it is expected that the preliminary screening of the circle candidates ensures that the offenders will comply with the sentence plan without further problems. In addition, the sentence plan is not a responsibility passed down by the formal justice system, but by his own community that vouches for his credibility. Hence, the offender's commitment to the successful completion of the plan is generally very sound.

### **3. Points of tension: a brief critique of restorative justice**

This segment briefly reviews a few points of tension in the RJ theoretical frameworks and builds a general critique around them. There are more substantial criticisms to be made from a feminist perspective. However, this exploration will be developed in the next chapter, which will focus on the feminist engagement with RJ within the context of domestic violence and intersectionality theory. This section, therefore, provides only an overview of specific points of criticism on RJ, how they are interconnected, and a sample of its complexity. My purpose in this section is to provide an illustration of the most relevant critiques of restorative justice. There is empirical research that can confirm or question specific points in this

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<sup>201</sup> Ibid.

critique of RJ.<sup>202</sup> In this section, I extensively draw on the writings of Theo Gavrielides, R.D. London, and Raymond Koen among others.

### **a) Categorizing the critique of restorative justice**

According to Koen, the bulk of writings on RJ, “have been accompanied by a conspicuous dearth of critique.”<sup>203</sup> In fact, he contends that despite the near surfeit of literature on the subject most of it is merely expository or exhortatory with little or no criticism whatsoever. According to him, even among the critics there is a tendency to expose RJ shortcomings and excesses with the sole purpose of avoiding any negative impact on the much larger restorativist advocacy project. Indeed, for Koen most of the critics are themselves committed to the success of the RJ project rather than truly critical of it.

This perception of a lack of critical approach towards RJ is echoed in other authors like Milward.<sup>204</sup> In his words: “There has been a certain academic vogue since at least the 1990s in extolling the virtues of restorative justice as an alternative approach. Efforts to criticize restorative approaches have begun more recently by comparison, and are therefore less in quantity.”<sup>205</sup> Wheeldon is of the same opinion, as he puts it: “Numerous new publications in the fields of criminology and criminal justice address restorative justice, yet few are critical of the restorative justice paradigm.”<sup>206</sup> Gerry Johnstone, a renowned RJ scholar, seems to agree

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<sup>202</sup> For a review on empirical studies on RJ see note 54.

<sup>203</sup> See Raymond Koen, “The Antinomies of Restorative Justice” in Elrena Van der Spuy *et al.*, eds., *Restorative Justice: politics, policies and prospects* (Cape Town: Juta & Co Ltd., 2007) 247. (Critiquing RJ from a Marxist point of view).

<sup>204</sup> See note 186 at 139.

<sup>205</sup> *Ibid.*

<sup>206</sup> See Johannes Wheeldon, “Finding common ground: restorative justice and its theoretical construction(s)” (2009) 12:1 *Contemporary Justice Review* 91-100 at 92.

with those points.<sup>207</sup> He observes that the bulk of literature on RJ is written either by passionate proponents or more cautious sympathizers. As a result, there are not many pieces of scholarly writing on RJ that attempt to be overtly critical in tone and substance.<sup>208</sup>

However, this does not mean that RJ is immune from criticism. As a matter of fact, there is a growing volume of critical analysis on RJ emerging from fields of study as diverse as philosophy, law, psychology, and feminist socio-legal studies. Chris Cunneen points out that critical perspectives on RJ may be classified as neo-marxist, postmodernist, feminist, postcolonial and liberal.<sup>209</sup> According to him, these critiques cover various points of tension in the RJ movement like the role of the state within RJ practice; RJ promises to stakeholders (victims, offenders and community); the role of retribution and punishment in RJ theory; concepts of globalization and community; relations of power, ethnicity and gender; and, finally, questions about the rule of law, legal principles and due process of law.<sup>210</sup> However, for the purposes of this thesis, those lines of critical thought can be simplified and grouped into two large categories according to the relationship of RJ with the conventional justice system.

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<sup>207</sup> See Gerry Johnstone, "Critical perspectives on Restorative Justice" in Gerry Johnstone & Daniel W. Van Ness, eds., *Handbook of Restorative Justice* (Portland, Oregon: Willan Publishing, 2007) 598.

<sup>208</sup> An welcomed exception to this lack of critical approach on RJ is Annalise Acorn's work. Her book *Compulsory Compassion: A Critique of Restorative Justice* contains a full psychoanalytic, philosophical and social-legal critique upon the RJ movement. See Acorn, *Compulsory Compassion*, note 47.

<sup>209</sup> See Chris Cunneen, "Thinking Critically about Restorative Justice" in Eugene McLaughlin *et al.*, eds., *Restorative Justice: Critical Issues* (Thousand Oaks, CA: Sage Publications, 2003) at 182. See Koen, *Antinomies* note 203. (For a neo-marxist critique of RJ). See Bruce A. Arrigo & Robert C. Schehrb, "Restoring justice for juveniles: A critical analysis of victim offender mediation" (1998) 15:4 *Justice Quarterly* 629-666 (For a critique of RJ from a psychoanalytic semiotics and postmodern perspectives). See, *e.g.*, Chris Cunneen, "Restorative Justice and the Politics of Decolonization" in Elmar G.M. Weitekamp & Han-Jurgen Kerner, eds., *Restorative Justice: Theoretical Foundations* (Deon, UK: Willan Publishing, 2002) 32-49 (For a postcolonial critique of RJ). Naturally, this paper invites criticism and discussion on RJ based on a feminist perspective within the context of critical race politics and domestic violence. The feminist critique on RJ will be deeper explored in the next chapter.

<sup>210</sup> See Mary Ellen Reimund, "The Law and Restorative Justice: Friend or Foe? A Systemic look at the legal issues in Restorative Justice" (2004) 53 *Drake Law Review* 667. See also Mary Ellen Reimund, "Is Restorative Justice in collision course of Constitution" (2004) 3 *Appalachian Journal of Law* 3. Tina S. Ikpa, "Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System" (2007) 24 *Journal of Law & Policy* 301. See generally Lode Walgrave, ed., *Restorative Justice and the Law* (Cullompton, UK: Willan Publishing, 2002). (For an exploration of the critical liberal arguments on restorative justice).

The first category involves criticism that centers on advocates' claims that RJ is an authentic paradigmatic shift, i.e., a radical departure from the conventional justice system and its traditional, adversarial, and punitive/retributive characteristics. This claim emerged from the early years of the RJ movement. In this period, RJ proponents appealed to a strategy of revolutionary discourse heralding the radical replacement of the existing criminal justice system by an allegedly more humane, informal and inclusive justice system that could equally address victims, offenders and community needs and interests. In addition, several argued that RJ could provide not only a better way of doing justice, but a better way of living as well.<sup>211</sup> That kind of visionary and grandiose project for RJ was the focus of criticism by more cautious scholars and practitioners who raised doubts about its ability to deliver such promised benefits. Some of them, as we shall see, even expressed concerns about whether any are realizable at all.

The second category of criticism is focused on a more recent and practical facet of restorative justice. By assimilating the just criticism of their first wave of writings, many RJ proponents have retreated from allegations of life-changing virtues and adopted a more pragmatic posture where RJ functions more as an adjunct of the conventional criminal justice system rather than a replacement for it. This left the RJ movement less vulnerable to disapproval from skeptical legal scholars and at the same time left it more palatable to more conservative

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<sup>211</sup> See especially John Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" (1999) 25 *Crime and Justice* 1-127; John Braithwaite, "A future where punishment is marginalized: Realistic or Utopian?" (1999) 46 *UCLA Law Review* 1727-1746; Gordon Bazemore & Lode Walgrave, "Restorative juvenile justice: In search of fundamentals and an outline for systemic reform" in G. Bazemore & L. Walgrave, eds., *Restorative juvenile justice: Repairing the harm of Youth Crime* (Monsey, NY: Criminal Justice Press, 1999); Lode Walgrave, "Restorative justice for juveniles: Just a technique or a fully-fledged alternative?" (1995) 34:3 *Howard Journal of Criminal Justice* 228-249; Paul McCold, "Restorative justice and the role of the community" in B. Galaway & J. Hudson, eds., *Restorative Justice: International Perspectives* (Mossey: Criminal Justice Press, 1996) at 86, and Martin Wright, *Justice for victims and offenders* (Philadelphia: Open University Press, 1991). See also Howard Zehr note 47. (That was the first generation of writers on RJ who emphasized its radical virtues in order to canvass support among those discontent with rising case loads, growing prison populations, high recidivism and lack of regard to victims of crime and to the community generally. The strategy of a radical replacement of the conventional justice system proved to be successful. In less than forty years the RJ movement achieved international projection with hundreds of experiences all over the world claiming to be restoratists in body and soul).

audiences that found positive aspects in it like cost reductions, decrease of case loads, and victim empowerment. Restorative justice as an appendage of the conventional criminal justice system gathered momentum in the first decade of the 2000s when programs popped up in several jurisdictions around the globe under the auspices of the very criminal justice system that it once intended to replace. In this period of quick expansion even the United Nations was captured by the intense interest in RJ and ended up buying the idea by adopting the “Basic principles on the use of Restorative Justice” and sponsoring publications targeted to establish best practices in the area.<sup>212</sup> George Pavlich summarizes this issue well:

Here, proponents propose that restorative justice be seen as working within, and as a basic complement to the demands, of state criminal justice. Bazemore and McLeod (2002), Cooley (1999), and even Zher (2002) dilute the concept of 'alternative' by giving it much more of a local, parochial meaning where restorative justice is seen as providing limited alternatives to aspects of the existing criminal justice system. So, restorative justice may be seen as offering an alternative to 'courtroom procedures' or 'penalty regimes' within the criminal justice system, but not to the criminal justice itself.<sup>213</sup>

As a result, the questions regarding the notion of RJ as an appendage of the conventional justice system became more a matter of how to incorporate it into the mainstream and not whether it should be incorporated. In sum, hopes of a potentially independent justice paradigm that could stand either in parallel or instead of the current retributive paradigm were gradually left behind by most RJ theorists and practitioners.

The incorporation and institutionalization of RJ within the existing penal and criminal justice systems provides the empirical context for this study --- that is based on feminist critical perspectives --- but also for other avenues of criticism like the liberal one. Indeed, many

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<sup>212</sup> See Yvon Dandurand & Curt T. Griffiths, “Handbook on restorative justice programmes” Prepared for The United Nations Office on Drugs and Crime (Vienna: United Nations Publications, 2006). See also note 23. (UN Basic Principles on RJ)

<sup>213</sup> See George Clifford Pavlich, *Governing paradoxes of Restorative Justice* (London, UK: Glasshouse Press, 2005) at 18. (Arguing that RJ works as a *imitor paradox*, i.e, it is supposedly independent from conventional justice, but ensnares itself within criminal justice language, logic and agencies).



of the questions about the relationship with RJ and the rule of law, legal principles and due process of law have emerged from this merely complementary version of restorative justice.

## **b) The critiques revolving around RJ within the context of a paradigmatic shift**

This segment identifies the main criticisms of RJ within the context of its conceptualization as a paradigmatic shift, i.e., as an antithesis of the conventional criminal justice system and retributive justice.

### **i. Is RJ really a paradigmatic shift?**

According to Gravielides, many proponents claim that, “RJ is a complete, consistent and independent criminal justice paradigm that has the potential to stand alone, and which should replace the current one.”<sup>214</sup> The explanation Gravielides offers for this kind of claim is consistent with the advocacy motives that seemed to guide the early years of restorative justice. According to him, by introducing RJ as a paradigmatic shift, using liberal platitudes and overstatements, its advocates were hoping to make the then new and untested concept of RJ more appealing and interesting for theorists, practitioners and the general public.

However, as Gavrielides has also observed, soon the RJ movement acquired sufficient maturity to leave the phase of innovative impact to enter in the phase of practical implementation. At that point, those proponents seeking more unrealistic means of advancing RJ were confronted with the harsh reality that their celebrated proposition of a paradigm shift ---

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<sup>214</sup> See note 54 at 38. See also James Dignan, “Restorative Justice and the Law: The Case for an Integrated, Systemic Approach” in Lode Walgrave, ed., *Restorative Justice and the Law* (Cullompton, UK: Willan Publishing, 2002) 168–90. James Dignan, “Towards a Systemic Model of Restorative Justice” in A. Von Hirsch *et al.*, eds., *Restorative Justice: Competing or Reconcilable Paradigms?* (Portland, OR: Hart Publishing, 2003) 135-156.

that is still in circulation in some RJ circles --- was ill-conceived and vulnerable to criticisms. Ross London, for example, contends that “the characterization of restorative justice as a new paradigm, as in the case of many other academic disciplines, is better regarded as rhetorical excess than as a genuine application of Kuhn’s terminology.”<sup>215</sup> He summarizes the critique of RJ as a new paradigm in justice in the following terms:

- It emphasized dichotomies and divisions within the field, over-simplifying and delegitimizing opposing views as antiquated or reactionary.
- It adopted an ‘all or nothing’ approach in which the many advantageous features associated with the ‘old paradigm’ were uncritically rejected while many questionable features of the ‘new paradigm’ were uncritically accepted.
- It created ideological divisions that demanded dogmatic conformity from its adherents.
- It politicized academic discourse, giving rise to personal antagonism expressed in academic journals and questionable scholarship intended to advance a cause rather than impartially search for truth.
- It inhibited the development of knowledge by discouraging open inquiry into practices that best promote healing.
- It rejected attempts to integrate the best features of the ‘old’ and the ‘new’ approaches as threats to the purity of the ‘new paradigm.’ <sup>216</sup>

London’s schematization above echoed several previous criticisms of RJ regarding its conceptualization as a different paradigm of justice and eventual replacement for the existing criminal justice system. In the following subsections some of those criticisms are broken down into clearer points of tension in the RJ doctrine.

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<sup>215</sup> See Ross D. London, “Paradigms Lost: Repairing the Harm of Paradigm Discourse in Restorative Justice” (2006) 19:4 Criminal Justice Studies 397-422 at 400. (Noting systematic weaknesses in the RJ claim that it is a new and independent paradigm of justice).

<sup>216</sup> Supra note at 398. See generally Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 3rd ed. (Chicago: University of Chicago Press, 1996).

## ii. Restorative Justice *versus* Retributive Justice: The role of punishment

A classic focus of criticism when assigning a characteristic of paradigmatic shift to the RJ movement emerges from advocates' claims that it is the opposite of retributive justice.<sup>217</sup> Gavrielides points out that the views are divided into two groups.<sup>218</sup> The first group holds a "purist" version of RJ. They deny that RJ interventions can, in any way, be retributive/punitive. In contrast, the second group holds a "maximalist" version of RJ that argues that it cannot be prescinded from retributive justice elements like public censure and coercion. According to Gavrielides, RJ scholars like Paul McCold, Wright, and Sullivan/Tifft reject completely the idea of including any coercive judicial sanctions in the restorative process, as it might shift RJ back to being punitive.<sup>219</sup> However, other scholars such as Braithwaite, Walgrave and Bazemore, while arguing that the RJ response should be primarily non-punitive recognize that there is a role for limited punishment dispensed in a respectful way on public safety grounds.<sup>220</sup>

Daly especially, criticizes the dichotomy between restorative and retributive justice. According to her, there is an artificial and almost Manicheist opposition between restorative justice (depicted as good and virtuous), and retributive justice (depicted as inherently bad) in the RJ rhetoric.<sup>221</sup> Moreover, she observes that some RJ proponents also include rehabilitative justice as detrimental to a holistic view of justice because it focuses only on the offender and ignores the victim. Her insights suggest that the opposition between RJ and

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<sup>217</sup> See Michael T. Cahill, "Retributive Justice in the Real World" (2007) 85 Washington University Law Review 815. (For an overview of retributive Justice theory).

<sup>218</sup> See note 54 at 41.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> See Kathleen Daly, "Restorative justice: The Real Story" (2002) 4 Punishment & Society 55-79 at 59. See especially Kathleen Daly, "Revisiting the relationship between retributive and restorative justice" in Heather Strang & John Braithwaite, eds., *Restorative justice, from philosophy to practice* (Aldershot: Dartmouth, 2000) 33 .

retributive justice is artificial, simplistic and inadequate. As she puts it, “Advocates seem to assume that an ideal justice system should be of one type only, that it should be pure and not contaminated by or mixed with others.”<sup>222</sup> Rather, Daly suggests that RJ processes are not pure. As a matter of fact, she observes retributive elements (censure for past conduct) and rehabilitative justice (encouraging law-abiding behaviour) occurring alongside the development of RJ salutary properties (the offender making amends to the victim) in restorative encounters. For Daly, therefore, specific components of retributive justice, albeit with some modifications can also be important elements of RJ.

Furthermore, Daily voices concerns that RJ processes cannot ignore commonplace understandings about what to do in response to crime, including the need to incapacitate dangerous offenders; prevent them from being recidivist; separate them from the community; teach them a lesson; and aid them to help themselves.<sup>223</sup> In the same line of reasoning, London notes that strategies utilized to avoid the contradictions that arise from asserting a anti-retributive alternative to controlling crime like limiting the scope of RJ programmes only to cooperative offenders and to non-serious cases are destined to fail.<sup>224</sup> According to him, although retaining the “purity” of the non-punitive approach, they are still dependent on the conventional model that refers the cases to it. In addition, in his words “It strikes at the heart of the claim of restorative justice as a new paradigm because it provides no alternate solutions to the very problems that necessitate the creation of criminal law in the first place: serious offenses and uncooperative offenders.”<sup>225</sup>

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<sup>222</sup> Supra note Daly, *The real story*, at 59.

<sup>223</sup> See note 221, Daly, *Revisiting the relationship*, at 45. See also Antony R. Duff, “Alternatives to punishment – or alternative punishments?” in W. Cragg, ed., *Retributivism and its critics* (Stuttgart: Franz Steiner, 1992) 48-62.

<sup>224</sup> See note 215.

<sup>225</sup> Ibid. at 412.

In fact, more recently the debate over the role of punishment within RJ interventions, as London points out, became not so much a question of whether punishment ought to be superseded by the new RJ paradigm, but rather, a question as to the nature and extent of the punishment required in RJ interventions.<sup>226</sup> In reality, even Howard Zehr, who initially endorsed a purist view on RJ, in his subsequent writings, abandoned the view of restorative justice as the opposite of retributive justice. As Zehr has noted, “Restorative justice advocates have done a disservice by positioning restoration and retribution as mutually exclusive adversaries. As a restorative justice advocate who initially popularized this dichotomy, I have personally taken this argument to heart and changed my approach accordingly”.<sup>227</sup>

### **iii. Other criticisms revolving around claims of a paradigmatic shift**

Several of the issues concerning the restorative and retributive dichotomy overlap other avenues of criticism such as RJ practices being harmful, coercive or manipulative in various ways towards stakeholders. This kind of criticism is both unavoidable and indispensable in a field like restorative justice, full of rhetoric excesses, and it has done much to clarify and expose its vulnerabilities. In the following paragraphs, I briefly address some of them although I do not claim allegiance to any other particular line of criticism besides of course the feminist one. Having said that, I seek to give more emphasis to points on which feminists would also express some concern. Moreover, I try to introduce issues regarding the Aboriginal use of RJ practices.

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<sup>226</sup> Ibid.

<sup>227</sup> See Howard Zehr, Book review of *The spiritual Roots of Restorative Justice* by Michael Hadley, (2003) 43 British Journal of Criminology 653–654 at 654.

- **Privatizing crime: Lack of public denunciation**

A common line of criticism addresses the privatization of crime in RJ theory. As Koen notes, RJ re-conceptualizes the criminal event as a private conflict between individuals that has disturbed community relations.<sup>228</sup> Accordingly crimes are re-conceptualized as *harms* and victims' and offenders' rights re-conceptualized as needs. Thus, the primary goal of RJ is to amend those relations without the intervention of professional actors of the formal justice system (Lawyers, judges, prosecutors, etc.) and the punitive mechanisms of the state. This is, in Koen's view, the most radical tenet of RJ because it challenges the statist texture of criminal justice. In his critical analysis of RJ as a new paradigm, London notes that the theoretical basis for transferring state responsibilities to stakeholders is rooted in Nils Christie's influential work *Conflicts as Property*. As we have seen before, Christie argues that by replacing interpersonal conflict resolution with a state-imposed solution, the state *steals* the conflict by re-framing the problem as a crime against the state.<sup>229</sup> By using the state as the offended party, it is claimed that the needs of the actual victims are either neglected or addressed only incidentally, e.g., in victim support services or compensation programs. As London points out, citing Kurki: "The restorative justice solution reverses this unhappy historical development by requiring the state to 'surrender its monopoly' over responses to crime to those who are directly affected—the victim, the offender and the community (Kurki, 2000, p. 236)."<sup>230</sup>

Critics of RJ argue that those procedures make private what should be public, and therefore fail to reinforce and extend both public norms of conduct and commitments to justice embedded in formal judicial procedures. Feminist critics, for example, heavily criticize the

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<sup>228</sup> See note 203 at 249.

<sup>229</sup> See note 84.

<sup>230</sup> See note 215 at 413.

privatization of crime in RJ theory, chiefly on the grounds that the RJ conceptualization of crime as a private harm jeopardizes women's positions since it potentially denies public denunciation of violence against women cases. Domestic violence cases, for instance, can be seen again as private affairs and may be channeled into more informal processing which precludes public awareness, discussion, and potential change. Thus, some feminist critiques would see RJ as a retrograde step in their historical struggle for raising public awareness of violence against women. Indeed, some feminists believe that RJ maintains the continuing repression of women in guise of an alternative to the formal criminal justice system. This theme will be further explored in the next chapter.

- **Imbalance of power in RJ encounters**

Another source of criticism of RJ addresses concerns with imbalanced power relations in RJ encounters. RJ's proponents often claim that in restorative encounters everybody can speak on the same terms, and theoretically have his or her concerns addressed equally.<sup>231</sup> However, critics suggest that such claims are merely rhetorical and restorative conferences leave power differentials and social, racial and gender inequalities unexamined, unattended, and unchallenged.<sup>232</sup> <sup>233</sup> The concerns are threefold. Firstly, from a victim's perspective, there is the fear that they can be physically or psychologically harmed by RJ dialogue-based processes due to power imbalances between victims and offenders, especially in certain crimes marked by

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<sup>231</sup> See, e.g., Mara Schiff, "Satisfying the needs and interests of stakeholders" in Gerry Johnstone & Daniel W. Van Ness, eds., *Handbook of Restorative Justice* (Portland, Oregon: Willan Publishing, 2007) 228. (Discussing the needs, interests and responsibilities of various stakeholders in restorative processes).

<sup>232</sup> See, e.g., Loretta Capeheart & Dragan Milovanovic, *Social justice: theories, issues, and movements* (Piscataway, NJ: Rutgers University Press, 2007) at 63.

<sup>233</sup> See, e.g., Loretta Capeheart & Dragan Milovanovic, *Social justice: theories, issues, and movements* (Piscataway, NJ: Rutgers University Press, 2007) at 63.

processes of control and power like domestic violence.<sup>234</sup> Here the main related concern is the danger to the victim's security and empowerment due to the perils of revictimization.<sup>235</sup>

Secondly, in contrast, there is the fear that offenders can be left powerless by the lack of impartiality of facilitators/mediators.<sup>236</sup> Restorative justice encounters are not necessarily centered on the neutrality of the mediator/facilitator like in others alternative dispute resolution schemes. In fact, the ideology behind RJ is allegedly supportive of the victim.<sup>237</sup> For this reason, critics have also raised concerns about the imbalance between supposedly powerless offenders and supposedly powerful victims. Finally, critics of RJ often complain that both victims and offenders may be manipulated in RJ interventions.

#### ▪ **Accusations of manipulation**

For victims --- our main focus of attention --- the worry is that RJ programmes may treat them as “no more than props for efforts to rehabilitate offenders”, as Braithwaite has put it.<sup>238</sup> According to Delgado, RJ may be manipulating victims by pressuring them to forgive offenders before they are psychologically mature enough to do so.<sup>239</sup> In addition, he argues that facilitators/mediators, who typically want both parties to put aside their negative emotions such as anger, distrust, and desire for punishment, may suggest that victims are being obstructionist or emotionally immature if they refuse to do so. In other words, victims are not free to be

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<sup>234</sup> See, e.g., Goel, note 13.

<sup>235</sup> See Cameron, note 11 at 176.

<sup>236</sup> See, e.g., Richard Delgado, “Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice” (2000) 52: 4 Stanford Law Review 751-775. (Delgado critiques the informal setting of restorative justice processes and highlights issues of unequal treatment regarding victims and offenders).

<sup>237</sup> Supra note at 760. But see, e.g., Kelly Richards, “Taking Victims Seriously? The Role of Victims' Rights Movements in the Emergence of Restorative Justice” (2009) 21 Current Issues Criminal Justice 302. (Arguing that RJ is not as intimately tied to the victims' rights movement as some proponents suggest).

<sup>238</sup> See John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002) at 139.

<sup>239</sup> See note 235 at 763.



themselves in restorative encounters, and facilitators/mediators or even the community would have the capacity to induce an attitude in the victim in which he or she would feel inhibited to express perfectly understandable feelings of anger and resentment over the crime or the outcome of the RJ encounter.

Notably, Delgado observes that this problem is especially worrisome for victims of domestic violence. According to him, such victims who already blame themselves may magnify that self-blame. Delgado also explains that RJ casts the victim in the role of sentencer, holding the power of judgment over the offender. As he writes, “It may also place an unwelcome burden on the victim who will end up determining the fate of the offender. Not every victim will welcome this responsibility. In pressuring the victim to “forgive and move on” and handing him the power of sentencer, VOM may end up compounding the injury received from the crime itself.”<sup>240</sup>

#### ▪ Postmodern critique of RJ

According to Capeheart and Milovanovic, a more sophisticated line of criticism takes a postmodern/poststructuralist approach and applies Foucault’s notion of *disciplinary mechanisms* whereby subjects are pacified, normalized and, finally, silenced (e.g., trained to accept system directives, rules, and roles).<sup>241</sup> According to them, some critics borrow Foucauldian language to argue that restorative programmes are ultimately system-supporting schemes, i.e., mediators or community members help encourage agreements that are consistent with *status quo ante* interests, values, norms, and other ideologies. As they put it:

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<sup>240</sup> Supra.

<sup>241</sup> See note 232 at 63. See also Michel Foucault, *Discipline and Punish: the Birth of the Prison*, (New York: Random House, 1975).

Arrigo and Schehr (1998) have argued that victim offender mediations programs rely extensively on a master discourse within which system-sustaining frames of reference are rehearsed, thus assuring predictability and stability in the programs. In other words, victims are encouraged to verbalize their hurts in the language of mediation (reconciliation, healing, restitution, responsibility, etc.) This language is already ideological and points to certain outlooks (see also Acorn 2004; Pavlich 2005)<sup>242</sup>

In short, this postmodern perspective would assert that there is not much recognition on restorative processes of pre-existing power and status differentials regarding, for example, gender, ethnicity or social-class. As a consequence, the power imbalances in RJ interventions may reproduce and perpetuate the wider power imbalances embedded in the *status quo ante* or even function as a discipline of silence. For example, female victims of domestic violence may have little verbalization and influence in RJ encounters as Cameron and Cunliffe have noted.<sup>243</sup>

Drawing on Razack, Millward observes that power relations and gender imbalances rooted in Aboriginal communities can reverberate in the restorative process itself. He points out, citing a previous study by Sherene Razack, that the use of community-based sentencing in Aboriginal communities can mirror gender imbalances in those communities. As he puts it, “Aboriginal communities are suffused with patriarchal power structures that replicate Canadian forms of governance. It is male Aboriginal leaders who pursue community-based sentencing initiatives, to the benefit of male Aboriginal offenders who commit crimes against Aboriginal women.”<sup>244</sup> In sum, he observes that RJ experiences in Aboriginal communities can be tightly linked to the perpetuation of previous gender inequalities by the agency of *disciplinary mechanisms* in Foucaultian language.

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<sup>242</sup> Supra note.

<sup>243</sup> See note 8, Cameron & Cunliffe, *Writing the Circle* at 26-27.

<sup>244</sup> See note 186 at 144. See also Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 2001)

## ▪ General criticisms

Several other points of criticism on RJ could be cited and discussed at length here, but an exhaustive critique of the RJ movement is not the purpose of this segment. Thus, I shall limit myself from now on to just listing those critiques that some canonical authors consider worthy of further attention. Towards this end, I will make use of lists originally devised by Johnstone, Morris and Delgado. Some of the criticisms listed by them overlap at various points. In addition, some of them are interrelated with previous and upcoming notes. Nevertheless, their work, by way of compilation, offers a good snapshot of an RJ general critique. The first two scholars are RJ proponents, but they clearly distanced themselves from partisan attitudes. As Morris asserts, “I acknowledge that the restorative justice literature is plagued with imprecision and confusion and I do not seek to defend all practices that claim to be restorative justice.”<sup>245</sup>

According to Johnstone, criticisms on RJ can be summarized as follows: 1) Proponents’ description of RJ is vague and incoherent; 2) Proponents make exaggerated claims about what RJ can achieve and have multiple and unclear goals; 3) A significant move away from punishment towards RJ would undermine the policy of deterrence; 4) A significant move away from punishment towards RJ would result in a failure to do justice; 5) A significant move away from punishment towards RJ would result in systematic departures from axiomatic principles of justice; 6) While presented as a radical alternative to conventional approaches to

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<sup>245</sup> See Morris, *Critiquing the Critics*, note 47 at 597. See also Andrew Ashworth, “Some doubts about Restorative Justice” (1993) 4:2 Criminal Law Forum 277-299. (Raising the first concerns about the RJ theoretical framework). But see Daniel W. Van Ness, “A Reply to Andrew Ashworth” 4:2 Criminal Law Forum 301-306 (Responding to the criticisms made by Ashworth).

wrongdoing, RJ actually is predicated on the existing criminal justice system and its use will simply extend the reach of conventional systems of penal control (Net widening).<sup>246</sup>

Morris advances similar criticisms.<sup>247</sup> For example: 1) RJ erodes legal rights (basically encompassing the liberal critique); 2) RJ results in net widening; 3) RJ trivializes crime (particularly men's violence against women); 4) RJ fails to restore victims and offenders; 5) RJ fails to effect real change and to prevent recidivism; 6) RJ results in discriminatory outcomes; 7) RJ extends police powers (in specific programmes); 8) RJ leaves power imbalances untouched; 9) RJ leads to vigilantism; 10) RJ lacks legitimacy and RJ fails to provide justice; 11) RJ is too lenient an option to deal with crime, and RJ cannot deal with persistent offenders and serious crimes. Furthermore, Delgado identifies other criticisms on RJ such as its lack of consistency as a new criminal justice system; inequality of bargain power; waiver of constitutional rights; lack of punishment in general terms (deterrence, rehabilitation, public safety and retribution); lack of state control; poor evaluation criteria based on users' satisfaction; coercion to enter in the restorative schemes; disservice towards stakeholders; unlikelihood of sparking personal moral transformation and development, and treating conflict as a pathology.<sup>248</sup> Other critics, such as Blagg and Adam Crawford, also make comments that the RJ association with Indigenous forms of justice can be considered a form of orientalism and that the concept of community consensus is not well established by RJ theorists.<sup>249</sup>

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<sup>246</sup> See note 207.

<sup>247</sup> Supra note 244 at 600.

<sup>248</sup> See note 235.

<sup>249</sup> See Harry Blagg, "A Just Measure of Shame? Aboriginal Youth and Conferencing" (1997) 37:4 *Australian Journal of Criminology* 481-501. See also Adam Crawford & Todd Clear, "Community justice: Transforming communities through restorative justice?" in Gordon Bazemore & Mara Schiff, eds., in *Restorative Community Justice: Repairing Harm and Transforming Communities* (Ottawa: Anderson Publishing, 2001) 127-149.

### c) The critique revolving around RJ as an appendage of the justice system

This subsection addresses a more modest critique of restorative justice (compared to the volume of scholarly attention in the other category). It includes critiques of relatively narrow scope and ambition, focused mainly on liberal concerns about RJ and the due process of law (mainly due process protections and procedural safeguards for offenders). As I did in the previous subsection, I will succinctly cover salient examples by means of listing them. Cunneen, for example, lists those concerns related to the relationship between RJ and the investigatory stage of criminal prosecution. According to him, they proceed as follows: 1) the lack of independent legal advice; 2) pressures to admit an offence to obtain the benefit of a diversionary alternative to court and the avoidance of a criminal record; 4) the lack of testing of the legality of police searches, questioning and evidence-gathering and, finally, fears that the pressure to admit an offence means that issues relating to the criminal intent in committing the act (*mens rea*) and legal defenses are not considered by the court.<sup>250</sup> In the same line of reasoning, Reimund put forward concerns regarding, e.g., rights against self-incrimination and confidentiality; prosecutorial discretion in referring cases; the role of the lawyers in RJ conferences; and privation of the offender's liberty in the case of him failing with sentencing circles adjudication and probation conditions.<sup>251</sup> Tina Ikpa would include in the previous lists concerns about the offender's right to trial and concerns with double jeopardy (when there is a chance that the RJ interventions are not successful, and therefore the case proceeds to trial).<sup>252</sup>

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<sup>250</sup> See Cunneen, *Thinking Critically*, note 209 at 189.

<sup>251</sup> See Reimund, *Friend or Foe*, note 210.

<sup>252</sup> See Ikpa, *Balancing Restorative Justice*, note 210.

#### **d) Feminist critique of RJ: Deferring the discussion**

In recent years feminists have turned increasing attention to RJ, bringing new issues and fresh critical perspectives to the field. Some are only concerned with traditionally related fields such as domestic violence and the usability of RJ within that context. Other feminists expand the breadth of the discussion to incorporate in their research questions about the politics of race and gender in making justice claims, i.e., whether indigenous interests in promoting political self-determination and anti-racist organizations goals in reforming the criminal justice system are compatible with RJ aims.<sup>253</sup> However, these issues will not be addressed here. They will be developed in the following chapters, where I will address how feminist theorizing has been influencing and being influenced by RJ and I will engage my thesis main arguments.

Indeed, this subsection concludes my overview on the RJ theoretical and practical frameworks. The promises and shortcomings in some of the ideas put forward by the RJ movement have been addressed. Particularly, I have noticed that the RJ movement has shown a welcome aptitude to take account of criticisms and alter its position accordingly. Much of this is due to its conceptual flexibility. However, RJ does not seem to be any nearer to a flawless theory and practice. As we shall see, the feminist approach to RJ is strong evidence of this.

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<sup>253</sup> See Cunneen, *Thinking Critically*, note 209 at 192.

## **Chapter II – Feminism, restorative justice and domestic violence**

### **Chapter outline**

This chapter examines the feminist scholarship on RJ, briefly exploring its ongoing critique and contributions for the conceptualization and practice of RJ particularly within the context of violence against women. As mainstream feminist scholars and anti-violence activists turned their attention to the new phenomenon of the RJ movement, a growing distrust about its discourse and practice began to emerge. Utilizing insights from several varieties of feminist thinking; from the battered women's anti-violence movement and other sources, feminist scholars and activists presented their critique of the methods and practices used by restorativists and sought to elevated a more gender sensitive approach in the RJ theoretical and practical framework.

There is a great deal of variation in the approaches constituting feminist theorizing on restorative justice. Some emphasize the centrality of conventional gender issues while others emphasize the increasingly relevant role of non-gender-specific issues like race and post-colonial claims for remedial justice practices. As a result, that initial wariness based solely on gender concerns cannot be attributed to the whole feminist theoretical spectrum. The feminist analysis of RJ evolved to encompass distinct structural elements besides gender. In other words, the feminist critical articulation of the dialectic between RJ and gender violence has developed within the context of diverse theoretical feminist perspectives with focus on multiple loci within inequality or analytical categories. For this reason, the feminist distrust of RJ is not as prevalent as may be implied by a superficial survey of the feminist thinking on that subject matter. In this chapter, I will draw up an overview of the complex relationship between feminist scholarship

and RJ with special attention to the role of feminist intersectionality theory in the broader context of that movement.

The aim here is to introduce the reader to the ways in which gender; culture; race; self-determination politics; and other sites of inequality emerge and are used or misused in intersectional perspectives on RJ experiences. Firstly, I provide --- in a roughly chronological sequence --- an outline of the feminist engagement with RJ considering the several strands of feminist scholarship that have addressed it. Notably, this serves to introduce my perception of intersectionality theory and its prevailing epistemic stance, i.e., anti-essentialism. Secondly, I elaborate on how intersectionality theory has expanded the mainstream feminist critical analysis of RJ to include criticisms and contributions concerning the intersections between sexism and other forms of oppression and subordination such as racism, cultural domination and, above all, post-colonial claims for social justice. Following that, I identify potential vulnerabilities underlying intersectional analysis of restorative justice. I contend that it can be a potentially uncritical theoretical approach to the management of inconspicuous forces operating in RJ practices analogous to Indigenous justice. The main reason for this is the severe underestimation by some intersectional feminists of the effects of anti-essentialists' epistemic positions in relation to their appraisals of RJ practices. This in turn makes intersectionality analysis vulnerable to distortions and co-optation by non-feminist interests.

Following that reasoning, I argue that the anti-essentialist nature of the intersectional approach leads to deemphasizing gender as the primary inequality category to be addressed with unintended consequences concerning their appraisals of RJ's ability to promote safety, empowerment and justice. The issue of how to assess intersectional perspectives for reliability is critical, especially when unexpected detrimental effects to women may arise like silencing and exclusion. I also introduce my insights about how other forces like the self-



advocacy discourse of RJ and political claims for social justice/self-governance can complicate the process of a balanced interplay of loci of inequality used in intersectional analysis. Following this, I turn back again to mainstream feminism. I address the concerns regarding the suitability of RJ to deal with domestic violence cases regardless of race or culture. This provides a contrasting point between how anti-violence feminism interprets the relationship between RJ and domestic violence and how some intersectional feminists may view it from disparate positions.

Finally, in preparation for the next chapter, I contextualize and recapitulate my arguments as ultimately reinforcing the marginal status of Indigenous women especially when interacting with particular RJ practices. In sum, I contend that the critical examination of RJ experiences by feminists using intersectionality analysis may be prone to distortions and co-optation by other interests with detrimental consequences to victimized women and the emancipatory goals of that feminist analytical tool.

## **1. The feminist engagement with restorative justice**

### **a) General Issues**

Typically, feminist critical analysis on RJ seeks to add women and gender perspectives to RJ practices and it has been accompanied by efforts to ensure a safe, meaningful and empowering participation of women in restorative practices. Notably, it seeks to introduce gender-specific issues with which male victims (or offenders) interacting with RJ are not usually confronted.<sup>254</sup> In this process, feminists have identified RJ practices as a potential site of gender

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<sup>254</sup> In general, the scholarly attention given to women interacting with RJ ascribes to them the role of victims. Curiously, however, in *R v. Gladue* which is the leading case on the application of restorative justice principles for Aboriginal offenders in Canada the offender is a woman. Ms. Gladue, an Aboriginal woman, stabbed to death her abusive common law partner and was sentenced to a term of imprisonment. The Supreme Court of Canada interpreting the Section 718.2 of the Criminal Code of Canada attenuated the sentence and endorsed the notion of

inequality and women's oppression.<sup>255</sup> Their critiques essentially revolve around a common theme, regardless of race or culture: the harmful effects of lack of security and empowerment to women in restorative encounters. Some of them highlight that restorative dialogue-driven processes have the potential to exclude and silence women. Others assert that they are not designed to protect victims of gender violence from further victimization and they are not effective solutions to domestic violence and its peculiarities.<sup>256</sup> In essence, this means recurring claims that gender issues have been largely absent from forums that settle the planning and functioning of RJ models, which feminists deem to be skewed towards male offenders needs and interests. In other words, feminist critics of RJ (to whom I will refer generically as "mainstream feminists") find that women and gender (or, more accurately, issues of concern to women victims of gendered-violence) are routinely marginalized in RJ processes, or are treated in ways that may reproduce or perpetuate victimization and gender normative stereotypes as seems to be the particular case of some RJ practices used in Aboriginal settings in Canada.

Despite this generally negative view, however, this thesis identifies at least one specific strand of feminist thinking that displays ambivalent positions that range from profound distrust to open enthusiasm for the RJ project. I am referring --- of course --- to the feminist intersectional approach to restorative justice. Feminist intersectional perspectives are especially relevant for understanding the empirical focus in this work, which are restorative models used as

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restorative justice and a sentencing regime which is to pay fidelity to "healing" as a normative value for Aboriginal offenders even if the offender lives outside a reserve. See *R v. Gladue* [1999] S.C.J. No. 19, online: QL (SCJ). See also Mary Ellen Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R.v. Gladue*" (1999) 43 *Crim. L. Q.* 34. In addition, there is a growing literature on youth restorative justice and girls associated to gangs. This discussion, however, goes beyond the scope of our thesis and will not be addressed.

<sup>255</sup> See, e.g., Julie Stubbs, "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice", in John Braithwaite & Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge, UK: Cambridge University Press, 2002) at 42.

<sup>256</sup> See, e.g., C. Quince Hopkins & Mary P. Koss, "Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses" (2005) 11 *Violence Against Women* 693. (Addressing concerns raised by feminists about the use of restorative justice for gendered violence, albeit giving nuances in its use for cases of non-penetration sex violence).

*hybrid justice* constructs in postcolonial settings. To be more precise, RJ programmes and practices --- mainly sentencing circles --- that are used ostensibly as state-sanctioned alternative criminal justice responses designed to ameliorate the systemic racism and over-incarceration rates that Aboriginal peoples experience in postcolonial jurisdictions such as Canada and Australia. Intersectional perspectives on those experiences may vary substantially in content and in critical tone depending on the emphasis given to gender among other categories (or sites) of inequality; for example, ethnicity, race, culture and --- occurring in parallel --- postcolonial self-determination political claims as they relate to culturally sensitive criminal justice experiences of governance. As a consequence, some intersectional feminists have found themselves in the odd position of feeling compelled to endorse RJ practices, against critical views from other feminists (co-optation). This occurs mainly because some RJ models, such as sentencing circles, are framed and presented to conform to intersectional images of what a successful and culturally sensitive holistic criminal justice system ought to look like, despite serious objections to the lack of standards and safeguards that can make restorative interventions unsatisfactory for victims of gendered-violence. But before discussing such issues and their repercussions in this thesis --- the theme of the next chapter --- an overview of the feminist engagement with RJ is warranted.

## **b) Feminist criminology and RJ**

At first, it should be noted that the feminist movement is as diverse and complex as the RJ movement and perhaps even more plurivocal. Nevertheless, it is possible to define a distinct body of scholarship on RJ clearly marked by feminist concerns and insights. For example, in the article *The Feminist Engagement with Restorative Justice*, Daly and Stubbs

chronicled how feminist scholarship has critically engaged restorative justice.<sup>257</sup> According to them, through the years the feminist engagement with RJ has taken a number of forms. More specifically, there are five areas in which feminists have made direct contact with it, at times showing overlapping interests and common philosophical stances. Those areas are mapped as follows: 1) theories of justice; 2) the role of retribution in criminal justice; 3) studies of gender (and other social relations) in RJ processes; 4) the appropriateness of RJ for partner, sexual or family violence; and 5) the politics of race and gender in making justice claims.

In my survey of the foundational accounts of RJ (chapter I in this paper), I covered to a considerable extent the first three thematic areas of feminist engagement. Thus, in this chapter, only the last two areas of feminist involvement with RJ will be the focus of more detailed examination, i.e., the suitability of RJ to cope with domestic violence; and the politics of race and gender under feminist intersectional perspectives.<sup>258</sup>

Before focusing on these specific areas of feminist interaction with RJ, it is necessary to give a general outline of feminist theorizing in criminology and its implications for the study of restorative justice. Daly, citing Gelsthorpe, traces out the central features of feminists' perspectives in criminology as follows:

- a focus on sex/gender as a central organising principle in social life;
- recognition of the importance of power in shaping social relations;
- sensitivity to the influence of social context on behaviour;
- recognition that social reality is a process and that research methods need to reflect this;

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<sup>257</sup> See Daly & Stubbs, *Feminist Engagement*, note 5. (This article was later expanded and reviewed as a chapter of the book *Handbook of Restorative Justice* under the title *Feminist Theory, Feminist and anti-racist politics and Restorative Justice* ). See note 9.

<sup>258</sup> The remainder areas of feminist engagement with RJ were examined in the first chapter under similar headings. See pages 54 and 104.

- a political commitment to social change;
- personal and theoretical reflexivity on epistemological, methodological, and ethical choices and commitments; and
- openness and creativity in thinking about producing and evaluating knowledge.<sup>259</sup>

Daly also observes that there are undeniable similarities between feminist criminology and critical criminological avenues of research. She writes, “There is a good deal of affinity and crossover between feminist perspectives in criminology and those termed critical, anti-racist, multi-ethnic, or cultural criminology. Differences do exist in the focus of research, theories used, and preferred epistemologies and methodologies.”<sup>260</sup> Indeed, by comparing the characteristics attributed to critical criminology with feminist criminology, the close proximity between each other is readily noticeable. Below, for contrast, is the list compiled by Julie Stubbs with characteristics commonly seen as typical of critical criminology/ies, or related categories:

- transgressing mainstream criminology;
- challenging official definitions and statistics of crime and crime control;
- rejection of positivist methodologies;
- rejection of correctionalism;
- disavowal of the criminologist ‘as neutral scientific expert’;
- a critical posture towards agents, systems and institutions of social control;
- preference for sociological theories over individualistic theories;
- emphasizing the effects of social power and inequality as underlying offending, victimisation and criminalisation;
- drawing on a wider body of social theory;
- engaging with normative questions;

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<sup>259</sup> See Kathleen Daly, “Feminist Perspectives in Criminology: A Review with Gen Y in Mind” in Tim Newburn & Eugene McLaughlin, eds., *The SAGE handbook of Criminological Theory* (London: Sage Publications Ltd., 2010). See also Loraine Gelsthorpe, “Feminism and Criminology” in Mike Maguire *et al.*, eds., *The Oxford handbook of criminology*, 3rd ed., (Oxford: Oxford University Press, 2002) 112-143.

<sup>260</sup> Supra note Daly, *Gen Y in Mind*, at 9.

- recognizing that research and knowledge are political;
- a desire for social change, social justice or human rights;
- political engagement, allegiances with social movements and ‘turning cases into issues’;
- valuing the ‘view from below’; and,
- reflexivity concerning research and criminology (summarized from Carrington & Hogg 2002: 2-3; Carlen 2002; Bottoms 2000: 33; Hudson 2000: 189; Loader 1998).<sup>261</sup>

As one can easily notice by going through the features listed above by Daly and Stubbs, respectively; feminist criminology and critical criminological research have several points of overlap. In fact, it is fair to recognize that they are coalesced into a single body of scholarship in which critical criminological research can be described as the genus and feminist criminology as the species. However, feminist criminology represents much more than just a small subcategory of the critical criminology taxonomy. The significant body of work of feminist criminology has provided key theoretical resources for understanding how gender plays a role in RJ practices and how power relations among all the RJ’s stakeholders are significant within the context of domestic violence. In other terms, feminist criminologists focusing on gender and power relations have led to significant contributions in the developing of normative, empirical and epistemological accounts of restorative justice. These contributions will become gradually more intelligible to the reader when interpreted in the light of feminist theories, which will be addressed in the following subsections. At the moment, suffice to say that without the fore structure of feminist criminology, it would be very difficult to disentangle the complexities of the relationship between restorative justice and gender violence. But the close proximity between feminist criminology and critical criminology also raises some questions. Are there any

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<sup>261</sup> See Julie Stubbs, “Critical Criminological Research” (2008) 8:19 Legal Studies Research Paper University of Sidney at 3.

differences between critical criminology and feminist criminology? What are the implications of that proximity for the feminist theorizing of restorative justice?

As a recognizable branch of critical criminology, feminist criminology has often reflected its various critical and political characteristics sketched above. As Daly notes, both approaches have the shared enterprise of ‘transgressing’ and ‘transforming’ the field of crime and justice by promoting social justice and human rights.<sup>262</sup> Notwithstanding this transformative common nature and shared goals, there has been some reflection of differences between critical criminology and feminist criminology. Stubbs, for example, points out that the presence of differences between them is basically supported by a lack of attention to feminist concerns in general veins of critical criminology research. She notes: “Early critical criminology showed little interest in feminist concerns (Carrington 2002: 123, Naffine 1997).”<sup>263</sup> Feminist criminology, therefore, distinguishes itself from general critical criminology research in its goal of providing a normative analysis of gender and power in several areas of criminal justice.

Although both criminological approaches seek to maintain a critical posture towards the *status quo* and keep giving attention to power inequalities and its consequences to offending, victimization and criminalization, feminist criminology has its own agenda and peculiarities. Motivated by the historic feminist emancipatory political project of eliminating the oppression and subordination of women in patriarchal structures of power, feminist criminologists are also concerned with how criminal justice institutions and practices affect the lives of women and how they are implicated in those systems. It is, therefore, a discipline that conveys a distinctive epistemological and methodological critical attitude toward issues of crime and justice and their interactions with women. It urges the reform of gender inequities in

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<sup>262</sup> See note 257 at 9.

<sup>263</sup> See note 260 at 7.

criminal justice institutions and calls attention to neglected questions with the aim of improving women's conditions in all areas of their exposure to the criminal justice system, whether in conventional or alternative settings. In sum, much of feminist criminology can be described as a critical and purposeful theory --- critical either of the criminal justice system itself or of the structures of power embedded in it --- and purposeful for calling for change and women's emancipation on the basis of those criticisms. There are, however, various established and sometimes conflicting theoretical feminist discourses that differ in significant ways, regarding how to achieve the feminist goals mentioned above.

There are as many varieties of feminist criminology as there are of feminist thinking.<sup>264</sup> This means that feminist criminology theories evolved directly from related strands of feminist thinking, i.e., behind a particular feminist criminological perspective there is always a larger feminist theoretical framework that has been its formative principle and is closely associated with it. Roughly put, any feminist criminological perspective should somehow match a school of feminist critical analysis, which is not necessarily concerned with crime issues. Accordingly, the feminist scholarly treatment of RJ does not differ significantly from generic feminist approaches (not necessarily concerned with crime) and criminological feminist theories (concerned with crime). In fact, feminist scholars usually merge both lines of thought to form a single line of argumentation that can be used to analyze the pros and cons of restorative justice.

As a consequence, the theoretical context that provides the impetus for each type of feminist inquiry is crucial for the understanding of feminist appraisals on restorative justice. It is not by chance that most of the scholars addressing feminist criminology and RJ before advancing to specific issues about crime, spend some time and space in their works to

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<sup>264</sup> See, e.g., Burgess-Proctor, *Intersections of Race, Class, Gender*, note 27 at 29.



contextualize their arguments within one or more of the varieties of feminist thinking. In the next subsection, I will do the same by sketching out the most relevant feminist schools of thought, specifically, intersectionality theory and its significance to restorative justice. The primary aim is to provide a general context of feminist theoretical perspectives on law, gender and alternative justice practices. To this end, I will use previous schematizations originally devised by feminist scholars like Burgess-Proctor; Daly; Stubbs; and Hopkins/Koss.

### **i. Feminist schools of thought**

There are several angles of feminist theorizing that paved the way for future discussions within the context of restorative justice. This segment briefly lays out the various schools of thought and areas of concern and interest that have occupied feminist thinking for the past forty years. As Daly points out, they can “...provide a story of the emergence and development of differing trajectories of feminist work in criminology, as they were informed by the wider field of feminist and other social theories.”<sup>265</sup> But the usual caveat applies; the categories set below will be greatly simplified for the sake of brevity and important theoretical differences among and within each strand may well be downplayed, although the gist of each school’s intellectual contribution to feminist legal thinking will be preserved. Besides that, some schools are more or less relevant to the study of RJ depending on the emphasis given to crime and justice matters in the form of alternative forms of adjudication. Anyway, wherever possible, I seek to establish connections between each school of feminist thinking and restorative justice within the context of domestic violence.

It should also be noted that the following categorical feminist approaches are non-exclusive and inevitably overlap. This means that they can and do coexist in close proximity

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<sup>265</sup> See Daly, *Gen Y in Mind*, note 258 at 10.

with one another. However, there are times when the theoretical differences between feminist approaches may rise above common ground and shared interests to lead to diametrically opposite outcomes. As we shall see, this is especially salient when a specific feminist theory is the corollary of internal critiques of a preceding school of thought like, *e.g.*, intersectionality theory and previous strands of feminist theorizing. Finally, I will conclude this subsection by identifying in more detail the practical applications of feminist intersectionality analysis in the critical examination of the RJ movement. This will serve as a brief introduction to the next chapter, where I provide a deeper and more satisfying account of the usefulness of that line of feminist inquiry in understanding the realities of RJ and gendered-violence.

The various feminist schools of thought traditionally arise from a more or less stable number of academic classifications of distinct epistemological and methodological approaches with minor variations concerning taxonomy and terminology. To categorize the feminist thinking is important because it promotes a certain degree of consistency, chronology and predictability into a field that is well known for its diversity and at times overlapping stances. In addition, each feminist research tradition may have different implications for gender/power inequities and women's interaction with crime and justice. I will follow and adopt the categorizations laid down by the feminist scholars cited earlier and frequently quoted within the RJ field. Nevertheless, I will conflate their findings into a single catalogue of feminist perspectives of my own devising for the sake of simplicity.

According to Burgess-Proctor for example, feminist legal theory is divided into five major perspectives: liberal feminism; radical feminism; Marxist feminism; socialist feminism, and postmodern feminist. In addition, these perspectives are supplemented by other more recent trends in the feminist thinking such as Black feminism; critical race feminism;

lesbian feminism and multicultural feminism.<sup>266</sup> Hopkins and Koss employ a slightly different classification that is comprised of liberal, cultural, radical, Marxist and/or socialist, postmodern (or poststructuralist), and multiracial feminism.<sup>267</sup> Daly and Stubbs do not differentiate themselves from others in their classification of the feminist schools of thought.<sup>268</sup> According to them, feminist perspectives on law and justice are usually divided into categories such as liberal feminism, cultural feminism, radical feminism, critical race feminism, and postmodern or poststructuralist feminists. By bringing together these scholars' classifications of situated feminist perspectives about how gender and power shapes crime and justice, we can eventually generate our own selection of ways in which RJ can be influenced by feminist perspectives or, in contrast, can influence them. Finally, I will consider only the classifications that are relevant to the RJ field and gendered-violence.

I begin by describing the schools that have been labeled essentialist in order to later introduce the concept of anti-essentialist schools of feminism. The relevance of this distinction to our subject matter will be stressed in the following paragraphs.

## **ii. Essentialist schools of feminism**

In this subsection, I address essentialist schools of feminism that contributed in some way to explain restorative dynamics. However, one important limitation on this categorization of essentialist schools should be noted. There is a pejorative sense to the term *essentialist*, so some of the feminist thinkers listed here would probably reject this label. Anyway, the influences of essentialist stances on their feminist theoretical framework should not be ignored. The order of presentation reflects a more or less chronological order.

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<sup>266</sup> See, e.g., Burgess-Proctor, *Intersections of Race, Class, Gender*, note 27 at 28-30.

<sup>267</sup> See note 255 at 698-699.

<sup>268</sup> See Daly and Stubbs, *Feminist Theory*, note 9 at 150-151.

- **Liberal or “sameness” feminism**

The first category of feminist inquiry is concerned with equality, autonomy and agency of women. As Dally and Stubbs observe, liberal feminism “has been in place for over three centuries as women have sought to secure equality of legal and citizenship rights with men.”<sup>269</sup> Proponents of liberal feminism claim that women’s lack of autonomy and self-determination is due to the patriarchal nature of inherited traditions and institutions, and that the women's movement should work to identify and remedy them.<sup>270</sup> Classical liberal feminists are at odds with legal frameworks that explicitly treat women differently than men, but still rely on the state as the main agent of gender and social justice. In this sense, they recommend laws that seek to change social policies or practices that put women in positions of lesser or secondary importance. According to Hopkins *et al.*, liberal feminists are also referred to as “sameness” or “rule equality” feminists.<sup>271</sup> They hold that ““Sameness feminists” focus on the similarities between individual men and individual women leads them to advocate “gender-neutral” categories that do not rely on gender stereotypes to differentiate between men and women.””<sup>272</sup> In other words, liberal feminists put emphasis on multi-dimensional (political, economical, social, legal, moral) equality between women and men. Liberal feminists hold, therefore, that women are essentially similar to men and for this reason the sexes should be treated equally (i.e., the sameness approach)

Within the crime and justice field, liberal feminists pursue law reforms and practices that treat domestic violence cases in the same way that laws and practices treat stranger

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<sup>269</sup> Ibid.

<sup>270</sup> See, e.g, Susan Moller Okin, *Women in Western Political Thought* (Princeton, N.J.: Princeton University Press, 1979).

<sup>271</sup> See C. Quince Hopkins, Mary P. Koss and Karen J. Bachar, “Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities” (2004) 23 St. Louis University Public Law Review 289-312 at 297.

<sup>272</sup> Ibid.

violence against men. Historically, for instance, liberal feminists were responsible for deconceptualizing domestic violence and sexual assault cases as private or family matters through their relentless worldwide political campaigns to criminalize and publically condemn such practices as human rights violations. In addition, they developed actions at the theoretical and empirical levels to protect the autonomy and agency of victimized women.<sup>273</sup> As a consequence, liberal feminists usually object to mandatory arrest and prosecution policies that restrict women's autonomy particularly within the context of domestic violence.<sup>274</sup>

Liberal feminists may be potentially critical of the use of culturally alternative justice experiences due to their preconceived notions about autonomy and equality between women and men. As asserted earlier, the feminist liberal theoretical discourse seeks to advance the idea of equality between the genders and autonomy of women. In that sense, an issue that proponents may raise is whether advocating *hybrid justice constructs* like RJ experiences in Indigenous settings (sentencing circles) could also mean supporting the patriarchal schemes of traditional societies that give women subservient status in contrast to that of men. As Susan Moller Okin --- a leading exponent of the liberal feminism --- contends, feminists must object to multicultural experiences like that since they bestow legitimacy upon patriarchal and traditional cultures which results in women's repression, exploitation and discrimination.<sup>275</sup> She suggests

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<sup>273</sup> Sometimes this stance results in controversial propositions like, for example, the defence of using firearms for protection against rape or domestic violence. See *infra* note. See especially Richard W. Stevens, Hugo Teufel III, & Matthew Y. Biscan, "Disarming Women: Comparing 'Gun Control' to Self-Defense." in Wendy McElroy, ed., *Liberty for Women: Freedom and Feminism in the Twenty-First Century* (Chicago: Ivan R. D., 2002) 238-263.

<sup>274</sup> See, e.g., Amy R. Baehr, "Liberal Feminism" *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed)., online: (2010) <<http://plato.stanford.edu/archives/fall2008/entries/feminism-liberal/>> retrieved on April 2010. (For a comprehensive examination of the liberal feminism theoretical discourse including its several varieties: a) Classical Liberal feminism; b) Equity feminists; c) Cultural libertarian feminists, and d) Egalitarian liberal feminists).

<sup>275</sup> See Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999). See generally Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (Oxford: Oxford University Press, 2006). See also Roni Reingold & Lea Baratz, "Feminism and Multiculturalism: Two Common Foundations for a Vision and a Practice of Transformative Social Activities and Education in Israel" (2009) 10:4 *Journal of International Women's Studies* 53.

that in multicultural experiences with alternative justice practices the proponents and traditional leadership may exaggerate the level of communal consensus and the level of acceptance and knowledge among participants, in order to present a united front to larger society. As a result, multicultural polices such as sentencing circles could end up favoring some members of minority groups over others; and more specifically putting aside the rights of women. In sum, liberal feminists claim that there is the danger that women's autonomy or equality with men could be sacrificed in favour of what is deemed to be a more politically relevant cultural practice.

Indeed, in several areas liberal feminists represent the instances or issues that most intensely challenge RJ experiences in the context of domestic violence regardless of race or culture. Their general presuppositions and principles about autonomy and equality go against RJ in the sense that there is a fear --- in some cases justifiable --- that those offenders who inflict gendered harms would not receive sanctions from such alternative justice schemes, just as those who engage in gendered violent crime are sanctioned by the conventional justice system. In addition, they claim that the power asymmetries in dialogue-based processes like RJ experiences may result in detrimental consequences for women. These claims require more analysis, which will be provided in the subsection of this chapter devoted to domestic violence and restorative justice.

#### ▪ **Cultural or “difference” Feminism**

The second category of feminist inquiry is cultural feminism. According to Hopkins and Koss, cultural feminists are also referred to as “substantive equality” or “difference

feminists”.<sup>276</sup> As Burgess-Proctor explains, cultural feminists believe that women have distinctive characteristics (both biological and socially conceived) that require “difference” or “woman’s specificity” appreciation. Accordingly, the “difference approach” demands a legal theory that addresses the ways in which the legal system deals with differences between women and men. Just recognizing those differences it would be possible to overcome gender-based discrimination in patriarchal societies and institutions.<sup>277</sup> Furthermore, cultural feminists --- as Hopkins and Koss observe --- “disagree that alteration of formal rules will result in actual equality for women; equal treatment, they argue, disadvantages women because the baselines favor men.”<sup>278</sup> In fact, they do not believe in neutral-gender utterances of law and justice that affect women and men, indifferently. Following this line of reasoning, they also do not believe that the state is capable of advancing women’s interests since it is already contaminated by masculine and patriarchal traits like, for example, hierarchical structures and impersonal institutions.

Some of the cultural feminists’ discussions of justice consider how RJ was constructed as a distinct feminine moral development in the criminal justice field. According to Daly, for example, the main contribution of cultural feminists to RJ is related to its foundational theoretical framework. As she has points out, Carol Gilligan’s concept of the “different voice” of women was influential in the articulation of a theory of justice guided by a feminine “ethic of care” (i.e., relational; intimate; narrative; and collaborative) where gender differences upon

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<sup>276</sup> See note 255 at 699. (The term “substantive equality” has other meanings in Canadian constitutional equality law. However, the term as applied by Hopkins and Koss, has virtually nothing to do with it).

<sup>277</sup> Supra note 265.

<sup>278</sup> Supra note 275.

moral thinking resulted in direct links between RJ and feminine justice.<sup>279</sup> As Hopkins and Koss explain:

For cultural feminists informed and persuaded by Carol Gilligan's work on women's ethic of care, collaboration and interpersonal relationships are particularly valued by women, whereas hierarchy is particularly embraced by men (Gilligan, 1982; West, 1988). Many (but not all) cultural feminists today, however, claim not that women are, in fact, inherently different from men but that certain traits and values are perceived as feminine or female or as masculine or male. These masculine or male traits, the argument continues, are embraced by legal and other institutions, while feminine or female traits are devalued, marginalized, or even excluded by those institutions (West, 1988). In this sense, for cultural feminists these institutions are masculinist in practice to the extent that the rules under which they function exclude women's unique voices and lived experiences.<sup>280</sup>

As a consequence, cultural feminists are particularly prone to diversions of state-based conventional justice schemes, which are considered by them as representations of a "masculine justice". In contrast to the traditional justice system, restorative justice experiences -- much more personal, vocal and collaborative than conventional justice schemes --- are generally well received by cultural feminists for being considered more "feminine" in manifestation. Finally, RJ experiences are also supposedly victim-centered and holistic incorporating to a greater extent all the shades of meaning of a survivor's full experience. For all these reasons, cultural feminists, by and large, see relational and dialogue-driven alternative justice experiences like RJ with a certain amount of sympathy and validity.

#### ▪ Radical or "dominance" Feminism

Another important mode of feminist legal inquiry is the so-called "radical" or "dominance" feminism. Roughly speaking, radical feminism implies that the entire legal system is an all-embracing mechanism of dominance and subordination through the eroticization of

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<sup>279</sup> See note 93.

<sup>280</sup> Supra note 255 at 700.



forms of control (e.g., sex is a subject in which men are taught to see themselves as naturally dominant and women as naturally passive). As Hopkins and Koss explain, “Traditional radical feminists argue that religious, economic, political, and judicial institutions undergird as well as create men’s dominance over women, emphasizing the centrality of patriarchy and masculine control of women’s labor and sexuality (Curran & Renzetti, 2001; Flavin, 2004; MacKinnon, 1989; Sokoloff et al., 2004; cf. Ertman, 1998).”<sup>281</sup>

For this reason, gender difference is itself a characteristic of male domination and the natural implication is that masculinity is constructed to support the exertion of power and control over women. Accordingly, radical feminism rejects cultural feminism claims of a different *female voice*, emphasizing instead that a woman’s specificity is nothing more than a function of male domination. Unlike liberal feminists, who view the state as a reliable tool of social justice that only needs some formal adjustments to be adequate, radical feminists tend to understand the state and its justice institutions as mirroring societal inequalities and power asymmetries which also results in gender difference. As a result, dominance feminists usually view the state with distrust and consider it compromised by pernicious gender relations of dominance/subordination.

The most prominent exponent of the *radical* or *dominance* feminism is Catharine MacKinnon for whom female power is nothing more than “a contradiction in terms, socially speaking”<sup>282</sup>. As Daly and Stubbs explain, “In MacKinnon’s view, we cannot know what women’s values or voice are until there is a transformation of gender power relations.”<sup>283</sup> MacKinnon vehemently asserts, “Take your foot off our necks, then you will hear in what

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<sup>281</sup> Supra note 270 at 700.

<sup>282</sup> See Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987) at 53. See also Catharine A. MacKinnon, “Difference and dominance: On sex discrimination” in K. T. Bartlett & R. Kennedy, eds., *Feminist legal theory* (Boulder, CO: Westview, 1991) 81-94.

<sup>283</sup> See note 9 at 150.

tongue women speak”<sup>284</sup> According to Burgess-Proctor: “within criminology, radical feminists often focus on manifestations of patriarchy in crimes against women, such as domestic violence, rape, sexual harassment, and pornography, and recognize that women’s offending often is preceded by victimization, typically at the hands of men.”<sup>285</sup> In regard to RJ, dominance feminists are predisposed to believe that it “provides a less structurally hierarchical framework for resolution of gendered harms than traditional criminal justice, thus mapping onto the central concern of radical feminism”, as Hopkins and Koss have noted.<sup>286</sup>

Notwithstanding this recommendatory brief note found in the literature, I believe that the centrality of issues relating to power asymmetries in radical feminist models of inquiry and the reality of power differentials and control schemes in domestic violence cases can expose how dominance feminists may be suspicious of alternative justice schemes like restorative justice. Indeed, stances based on radical feminism make their proponents essentially inclined to be distrustful about RJ’s promises of equality, visibility and vociferousness to victims simply because these promises usually ignore previous patterns of male power and privilege what is *per se* a cause of disempowerment experienced by oppressed women in the condition of gendered-violence victims. In other terms, because social relations, especially in some traditional communities, are shaped by male power and privilege, radical feminists can inscribe RJ as one more example of gender-neutral justice models that mean negative consequences for women because of their potential to neglect issues of power and privilege between the genders.

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<sup>284</sup> Supra note 280 at 45.

<sup>285</sup> Supra note 265 at 31-34.

<sup>286</sup> Supra note 255 at 716.

### iii. Anti-essentialist schools of feminism

The feminist theoretical approaches that were featured in the established feminist modes of inquiry of the 1960s and 1970s (i.e, sameness, difference and dominance feminist theories) were seriously challenged from the mid-1970s onwards by critiques informed by new streams of feminist thinking drawing from a variety of Marxist, anti-racist, postmodern and post-structural social theories. In this period, changing political and ideological climates and internal contradictions of previous theoretical movements have prompted feminists to shift emphasis from “one axis of inequality and power”<sup>287</sup> based uniquely in sex and gender differences --- as Daly and Stubbs have put it --- to a more nuanced analysis. Consequently, others categories (or sites) of inequality such as race, ethnicity, religion and class coul play a more important role in exposing the plight of women living in gender-biased oppression, especially in homogeneous social conditions.

In that context, a new tension has emerged across the epistemological and ideological perspectives guiding the feminist movement as a whole. On one side we see mainstream feminists modes of inquiry, often focused on essentialist constructions of power, domination, inequality and subordination, i.e., based mainly in sex/gender related issues; while on the other side we see an increasingly influent anti-essentialist feminist movement, determined to reject the notion that gender/sex issues in feminist scholarship can or should be considered in isolation from other topics important to women such as race, culture or socioeconomic class.<sup>288</sup>

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<sup>287</sup> See note 9 at 150.

<sup>288</sup> In feminist theory, anti-essentialism is the view that there is no immanent and universal essence or identity of woman and, even if so, the category of woman could not be used to represent all women. Therefore universal claims about the category of woman are questionable by nature and effectively normalise and privilege specific forms of femininity, e.g., white-heterosexual-middle-class women. See Alison Stone, “Essentialism and Anti-Essentialism in Feminist Philosophy” (2004) 1 *Journal of Moral Philosophy* 135–153. (For a definition of

The latter perspective spawned a bewildering array of complementary, but not entirely equivalent feminist theories such as Marxist and Socialist feminism; critical race feminism; postmodern/post-structural feminism; multiracial feminism; Lesbian feminism (whose content is addressed in this paper only in passing), etc. These anti-essentialist perspectives are instrumental in developing the concept upon which the analytic model of intersectionality theory is built and how it is related to RJ, post-colonial justice claims and domestic violence.

▪ **Marxist feminism and socialist feminism**

Marxist feminists --- following the ideological doctrine of their non-feminists counterparts --- have understood women's marginal social condition as a result of economic disparities and class struggle. According to Burgess-Proctor, Marxist feminism holds that "the capitalist mode of production shapes class and gender relations that ultimately disadvantage women because women occupy the working class instead of the ruling class".<sup>289</sup> This feminist mode of inquiry also contends that revolutionary actions need to be established in order to overcome women's oppression, namely, the overthrow of the existing economic order and class structure, as Hopkins and Koss have noted.<sup>290</sup> In sum, Marxist feminism is committed to the idea that the root of women's oppression is their secondary class status within capitalist societies and that only through a revolutionary process can women be truly liberated.

It should be noted that the centrality of the relationship between sex/gender and inequality/power --- so present in previous avenues of feminist thinking --- is no longer as important to Marxist feminists. As they believe that women's oppression only exists because

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essentialism and anti-essentialism in feminist theory). See also note 52 (For a brief definition of essentialism in feminist theory).

<sup>289</sup> See note 27 at 29.

<sup>290</sup> Supra note 255 at 701.

economic and class oppression also exist, sex/gender and other attributes of mainstream feminist critical analysis are demoted as merely ancillary categories of inequality. In this sense, Marxist feminism, during the 1970s and early 1980s, inaugurated a whole new anti-essentialist tendency in feminist modes of inquiry where sex/gender and within power relations are not seen as the primary analytical categories.

Unlike the revolutionary stances of Marxist feminism that seek to reject the prevailing order altogether, --- and in the process reduce the importance of sex/gender in power relations --- socialist feminists advocate a more nuanced understanding that encompasses a wider range of inequality categories in which both class and sex/gender relations can co-exist as two sides of the same coin. According to Burgess-Proctor, socialist feminism "...combines radical and Marxist perspectives to conclude that women's oppression results from concomitant sex- and class-based inequalities."<sup>291</sup> While class struggle and economic disparity are the soul of Marxist feminism, socialist feminists are not tied only to such inequality markers, given as they are to placing some importance on the harm that may occur to women at the hands of sexism and patriarchy alongside theories of class. As Burgess-Proctor puts it, "In other words, class and gender work in tandem to structure society, and socialist feminists call for an examination of the ways in which gender relations are shaped by class and vice versa".<sup>292</sup>

Drawing from the epistemic stances and style analysis of dialectic materialism, Marxist feminism and socialist feminism offer a view that violence against women is mainly the result of unequal capitalist societies. Therefore, domestic violence is a product of the exploitative class relations inherent in capitalism alongside power imbalances caused by male domination (as

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<sup>291</sup> See note 27 at 29.

<sup>292</sup> Ibid. See, e.g., Batya Weinbaum, *The Curious Courtship of Women's liberations and Socialism* (Boston: South End Press, 1978) (For a more detailed account of Socialism Feminism).

argued specifically by Socialist-feminists).<sup>293</sup> Furthermore, political identification with RJ's communitarianism, informality and claims of social change seems to indicate that Marxist-socialist feminists are prone to a positive relationship with it.<sup>294</sup>

Notwithstanding this claim, whether RJ converges to or diverges from Marxist materialism is a matter yet to be clarified, since, more recently neo-Marxist theorists have argued that RJ, peace-making criminology and other alternative justice forms do not represent significant changes in conventional justice structures and contribute to netwidening. As Pavlich observes, Neo-marxists contend that "... informalism enabled the state to extend and intensify its control over individual lives. The welfare state could thereby deal with protracted legitimacy and fiscal crises of the 1970s by turning over 'minor' cases to volunteers in the community; however, in practice, it remained firmly in control of the finances, authorisation and even case loads for given programs."<sup>295</sup> In the words of Cunneen: "What the Neo-marxist critique demands is that restorative justice respond seriously to these broader social and economic issues and that it be able to deal constructively with the various 'hidden injuries' of class, including alienation from school and work, homelessness, drug abuse and marginalization."<sup>296</sup>

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<sup>293</sup> See Daniel J. Curran & Claire M. Renzetti, *Theories of crime* (Needham Heights, MA: Allyn & Bacon, 2001) at 223. Jane C. Ollenburger & Helen A. Moore, *A sociology of women: The intersection of patriarchy capitalism, and colonization* (Upper Saddle River, NJ: Prentice Hall, 1998). (Arguing that feminist theory incorporates three separate systems of oppression: patriarchy, capitalism and colonization and that mainstream feminism failed to address the diversity of the woman's condition). See especially Heidi Hartmann, "The Unhappy Marriage of Marxism and Feminism" in Lydia Sargent, ed., *Women and Revolution* (Boston: South End Press, 1981).

<sup>294</sup> But see note 203.

<sup>295</sup> See note 213 at 7-8.

<sup>296</sup> See note 209 at 183.

## ■ Postmodern and poststructuralist feminism

Another important approach in feminist theory relies on postmodern and post-structural social theories.<sup>297</sup> According to Hopkins and Koss, postmodern and poststructuralist feminists “... draw on the notion of social constructionism and argue that legal discourse itself creates the categories of women that law then proceeds to regulate.”<sup>298</sup> Daly and Stubbs characterized the postmodern/post-structural approach in similar terms as “The idea of power relations shifted from conceptualizing the dominance of one group (such men) over another (such women) to analyzing the legal and social discourses which construct sex/gender relations.”<sup>299</sup> In turn, Amanda Burgess-Proctor notes that postmodern feminism departs from other feminist theoretical perspectives by questioning any notions of pre-existing “truths” including women’s oppression.<sup>300</sup> In sum, the underlying aim of postmodern/post-structural research is to challenge fixed inequality categories and identities in favor of the existence of multiple truths. As a consequence, the postmodern approach rejects apparently self-evident dichotomies like sex/gender and power/subordination revealing, therefore, an authentic anti-essentialist epistemic position.<sup>301</sup>

That theoretical development in feminist theory is linked to linguistic deconstructionism and insights derived from studies of systems of thought. Postmodern feminists

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<sup>297</sup> See Ewa P. Ziarek, *An ethics of dissensus: postmodernity, feminism, and the politics of radical democracy* (Stanford, CA: Stanford University Press, 2001). See also Seyla Benhabib, *Situating the self: gender, community, and postmodernism in contemporary ethics* (New York: Routledge, 1992). (For a general perspective on postmodern feminism).

<sup>298</sup> See note 255 at 702.

<sup>299</sup> See note 9 at 151.

<sup>300</sup> See note 27 at 29.

<sup>301</sup> See Judith Butler, *Gender Trouble* (New York: Routledge, 1991). (In *Gender Trouble*, Butler pioneered the concept of feminist anti-essentialism drawing on social constructionism). See also Nancy Elizabeth Dowd & Michelle S. Jacobs, eds., *Feminist Legal Theory: An Anti-Essentialist Reader* (NY: New York University Press, 2003). (Collection of articles addressing anti-essentialist feminist perspectives).

constantly stress the need for social action to rectify the injustice and inequality in women's lives, but shift the emphasis of analysis from binary constructs like gender and power (i.e., anti-essentialism) to social discourses (i.e., the linguistic approach) in which they are devised and employed. As Hopkins and Koss explain, "In part, postmodern feminists seek to eradicate inequality by undermining the existing binary construct of male and female that has the effect of subordinating women to men ... Postmodern feminists thus advocate a complete restructuring of what society understands as available gender roles."<sup>302</sup> Consequently, there is a strong emphasis on critical insights and in exposing monolithically constructed systems of thought (as applied, e.g., by Michel Foucault in his account of *disciplinary mechanisms* in prisons)<sup>303</sup>. In the next paragraph, I briefly demonstrate how postmodern feminism can be used to address RJ and domestic violence both as a critique and endorsement.

Angela Cameron, for instance, has approached RJ from the perspective of Foucauldian disciplinary mechanisms and has concluded that some restorative interventions have the potential to function as a new "discipline of silence", as she calls it. According to her, RJ interventions may function as disciplinary mechanisms that induce self-effacing sacrifice and harmful personal survival tactics to racialised women victims of gendered-violence.<sup>304</sup> In a nutshell, she contends that the incorporation of collectivist rhetoric into the RJ movement means that victimized women ought to act as if conceding their individual needs for safety, vocalization and autonomy and yield to the most pressing political demands of the community. As a result, women docilely submit themselves to questionable dialogue-driven alternative justice

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<sup>302</sup> Supra note 296.

<sup>303</sup> See note 240. (Giving a brief account of the postmodern critique of RJ)

<sup>304</sup> See especially Angela Cameron, "Sentencing circles in cases of intimate violence: discipline, space and law" (Paper presented to the International Round Table for the Semiotics of Law, 16 April 2005) [Unpublished]. (Arguing that women victims of violence in judicially convened sentencing circles are being subjected to a type of infra-law or disciplinary mechanism while offenders themselves are subjected to a lenient form of juridical discipline). See also Angela Cameron & Emma Cunliffe, *Writing the circle*, note 8.



experiences mistakenly believing that they are serving the best interests of their communities while in truth they are making concessions to remedial, non-punitive justice actions that often benefit only offenders. In other words, some models of RJ can represent a new accommodationist strategy of women when dealing with patriarchal domination. Cameron illustrates this point, by using the example of Indigenous communities that adopted justice experiences analogous to RJ like sentencing circles. The rationale is simple. Since in such practices women are assigned the task of restoring the offender (and the whole community) and are also responsible for the prevention of further harm to themselves, they end up contributing to their own oppression by reproducing and perpetuating deeply enrooted gender hierarchies that keep them in an obsequious silence.<sup>305</sup>

Whereas Cameron draws on Foucault's account of disciplinary power mechanisms for a critique of RJ, Hopkins and Koss argue that feminist postmodernism provides a particularized response to crimes related to gendered-violence since RJ rhetoric insists that survivors and responsible parties should be viewed as something different from predetermined caricatures of victim and offender.<sup>306</sup> This means to begin to break down the idea of a fixed, single role attributed to victims and offenders, which often polarizes both into an adversarial position. So, the idea behind a postmodern approach is to deconstruct such formal categories, which is exactly what RJ has done with its stances on new identities of healing and transformation for victims and offenders. After all, RJ in theory and practice demands cooperation and empathetic dialogue between all the stakeholders in order to achieve its therapeutics outcomes. In that sense, RJ interventions would provide a considerable reduction of tensions between victims, offenders and community.

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<sup>305</sup> Supra.

<sup>306</sup> Supra note 297.

#### iv. Incorporating intersectionality theory

As discussed in substantial segments of the introduction to this thesis, concepts and epistemic positions found in intersectionality theory are invaluable as a tool for interpreting theoretical propositions and practical angles found in RJ rhetoric and practice.<sup>307</sup> Intersectional feminism uses aspects of different feminist theories to reflect many interactions among diverse analytical categories such as gender, race, class, and sexual orientation. However, no single dimension, especially gender inequality, is supposed to have primacy in explaining systems of oppression such as male violence against women. By revealing multiple, intersecting inequalities present in RJ practices intersectional feminists have been addressing and responding to exclusionary tendencies within the feminist movement itself. Notably, those tendencies that do not take into account the heterogeneous experiences of women of color or lesbian women. In the context of RJ and gendered-violence, Daly asserts that “With an intersectional framework, we can see the ways in which restorative and Indigenous justice improve upon established criminal justice, and where further improvements can be made”<sup>308</sup>. Notwithstanding, I contend that some intersectional approaches on the interplay between claims of gender and other loci of inequality such as race and post-colonial justice in RJ practices are beginning to take potentially harmful directions to Indigenous women victims of gendered-violence; For instance, partially excusing offenders’ behavior and disregarding victims’ interests for security, empowerment and expression, whilst not giving privileges to women-centered perspectives and concerns. As Daly has noted:

On the one hand, Indigenous women may, more than non-Indigenous women, see the value of alternative justice practices, especially when these can translate into more

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<sup>307</sup> See subsections five and six in the introduction for a recapitulation of the main points including definition and standards of operation of intersectionality analysis.

<sup>308</sup> See note 16, Daly, *Seeking Justice*, at 27.

meaningful ways of addressing crime and community disorder. At the same time, these alternatives may appear to protect “their” men from deserved penalties or from removal from the community. Their men (especially the more powerful leaders), in turn, may form alliances with non-Indigenous judicial officers and lawyers, who align themselves with the positional interests of offenders, although this is couched in terms of community interests and culture<sup>309</sup>

In the following subsections, I begin to elaborate on the contention that seems to suggest a co-optation of intersectional analysis by other forces and interests present in RJ practices. Initially, I put forward the opinion that the anti-essentialist epistemic nature of intersectionality theory is a decisive factor in creating what I call an *imbalanced* version of intersectional analysis of restorative justice. This means an epistemic attitude that makes intersectionality analysis almost unable to critically address political conflicts and competing pressures that emerge in sites of inequality found in some RJ models. In other words, I identify a weakened version of intersectionality theory that lacks critical assessment of RJ’s standpoint on gendered-violence. I then sketch a complementary line of reasoning that relates the existence of other political forces operating in some RJ experiences that ultimately lead to shape the contours of intersectional procedural values to fit their own needs, not women’s emancipatory aims. In basic terms these forces include: a) RJ’s self-advocacy stances and b) the rise of political discourses for self-determination in post-colonial settings.

#### ▪ **Multiracial feminism’s intersectionality theory**

Returning to the issue of how feminist disciplines engaged RJ, it is necessary to introduce the feminist schools of thinking that are pertinent to intersectionality theory. Indeed, there are several clear and explicit applications of feminist theory in the context of intersectionality analysis. For example, the emergence of intersectionality theory occurs in

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<sup>309</sup> Supra note at 20.

conjunction with the proliferation of pluralistic feminist points of view inspired by several feminist theoretical disciplines such as critical race feminism, women of color feminism, post-colonial feminism and Lesbian feminism.<sup>310</sup> In fact, the identification of intersectionality theory with such feminist modes of inquiry has gone so far that these schools of thought and their perspectives on issues of power and dominance have become irremediably conflated with intersectionality analysis methodology and epistemology. As a matter of fact, some scholars use those disciplines almost as synonyms of intersectionality theory, which causes some confusion in less attentive readers. But the relevant fact is that all those feminist venues of research basically share the same epistemic position of intersectional analysis, i.e., they have abandoned the primacy of sex/gender as an analytical standard that can claim overarching epistemic superiority over others loci of inequality like race, ethnicity, sexual orientation and social class. Such feminist models of investigation claim that there are important lessons to be learned from taking into consideration the experiences of marginalized groups, i.e., not only a cohort of white, middle class, English-speaking women, but also men and women in postcolonial societies, people of color, immigrant women, and so on.

All those feminist schools, therefore, cluster around more or less similar theoretical perspectives, which represent a natural outgrowth of anti-essentialist and intersectional sentiments that provided the impetus for feminist scholars and activists in questioning the very essence of the category *woman* in several areas of feminist exploration. As

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<sup>310</sup> Actually, each one of these strands of feminism can be connected to marginalized women's standpoints like, e.g., black, Latina, lesbian, postcolonial, etc. See generally Sandra G. Harding, *Is Science Multicultural?: Postcolonialisms, Feminisms, and Epistemologies* (Bloomington: Indiana University, 1998). See also Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001) (For a comprehensive account of critical race theory. The author also describes in two chapters of this volume the significance of intersectionality and anti-essentialism for the conceptualization of critical race theory). See especially Maxine Baca Zinn & Bonnie Thornton Dill, "Theorizing difference from multiracial feminism" *Feminist Studies* 22:2 321-331 (Describing the concept of *multiracial feminism*. (The authors argue that the term *multicultural feminism*, also used to describe *multiracial feminism*, does not place sufficient emphasis on race as a power system that interact and shape gender).

Alcoff and Potter have asserted, feminist epistemic positions should no longer be taken “as involving a commitment to gender as the primary axis of oppression, in any sense of ‘primary’ or positing that gender is a theoretical variable separable from other axes of oppression and susceptible to a unique analysis”.<sup>311</sup> Thus, those perspectives reflect a growing awareness of the impact of culture and race inequalities within the larger sociocultural context. For reasons of simplicity, however, I will condense all those feminist schools aforementioned into just one model of feminist theorizing: *multiracial (or multicultural) feminism*.

My use of the term *multiracial feminism* (also known as multicultural feminism) is not arbitrary. It is used to describe in one single phrase several lines of feminist research that have informed intersectionality theory. I have chosen the term *multiracial feminism* because it best represents all other venues of feminist research without excluding any type of particular racial, cultural or sexual orientation perspective. As Hopkins and Koss note, multiracial feminism “...is an overarching concept first described by Zinn and Dill (1996) as embracing several strands of feminist theory: womanism, women of color feminism, critical race feminism, and multicultural feminism (cf. Sokoloff et al., 2004, referring to this group of scholars as third-wave feminists).”<sup>312</sup> Also citing Baca Zinn and Thornton, Burgess-Proctor observed that, “[multiracial feminism] is known by a variety of names, including intersectionality theory and multicultural feminism, the term multiracial feminism is preferred because it emphasizes “race as a power system that interacts with other structured inequalities to shape genders” (Baca Zinn&Thornton Dill, 1996, p. 324)”.<sup>313</sup> In sum, the feminist mode of inquiry termed *multiracial feminism* (or multicultural feminism) refers to all the forms of oppression being selectively engaged (and, thus, prioritized) by several margined groups through intersectionality analysis.

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<sup>311</sup> See Linda Alcoff & Elizabeth Potter, *Feminist Epistemologies* (New York: Routledge, 1993) at 3-4.

<sup>312</sup> Supra note 255 at 702-703. See especially note 308, Zinn & Dill, *Theorizing difference*, 321-331.

<sup>313</sup> See note 27 at 35. *Brackets included*.

As Burgess-Proctor points out, “In many ways, the development of this intersectional approach to studying gender may be viewed as a natural progression of feminist thought.”<sup>314</sup>

Indeed, since *multiracial feminism* was originally described there have been a couple of developments in the same context. Perhaps the most significant is the integration of Lesbian feminism and Queer theory into intersectional feminist investigation. Such groups, like several other marginal groups in the past, sought both acknowledgement of their respective unique identity and visibility in feminist analysis to present their own claims of social justice. In criminology, for example, same-sex domestic violence was finally recognised as a relevant subject matter due to the work of those disciplines.<sup>315</sup>

The Queer movement has important theoretical implications because it puts into circulation different types of knowledge deconstruction. For example, as stressed by Sokoloff and Dupont, the fact that both abuser and victim are women calls into question the primacy of gender inequality in explaining the dynamics of lesbian intimate violence.<sup>316</sup> Certainly, as indicated above, Queer theorists and Lesbian feminists rely on anti-essentialist stances in order to articulate their worldview and convey the message that “... “the category woman” is a fiction and that feminist efforts must be directed toward dismantling this fiction”<sup>317</sup>, as Alcott has noted. Nonetheless, for the purposes of this work the perspectives of Lesbian feminists and Queer theorists to the understanding of RJ and domestic violence will not be addressed because there is a lack of scholarly treatment to the theme that prevent discuss of it at length here.

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<sup>314</sup> Supra note 27 at 37.

<sup>315</sup> See e.g., C. M. Renzetti, “Violence in lesbian relationships: A preliminary analysis of causal factors. *Journal of Interpersonal Violence*” 3 381-399.

<sup>316</sup> See Natalie J. Sokoloff & Ida Dupont, “Domestic Violence at the Intersections of Race, Class, and Gender: hallenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities” (2005) *Violence Against Women* 11:1 38-64 at 43.

<sup>317</sup> Linda Alcott, “Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory” (1988) *Signs* 13:3 at 416

## **v. Connecting multiracial feminism, restorative justice and indigenous justice claims**

This subsection seeks to address the connections that exist between multiracial feminism (i.e., intersectionality analysis), Indigenous studies, and restorative justice. According to Hopkins and Koss, along with reinterpreting the role of gender and race in feminist analysis, multiracial/intersectional feminists are also linking Indigenous justice and post-colonization studies to RJ experiences and in the process offering new ways to approach violence against women. As they have noted:

Finally, in addition to an insistence on the importance of race as a category of analysis, multiracial feminism situates feminist theory in the related dialogue about colonization and postcolonization studies, as well as within a global human rights framework (see Ollenburger & Moore, 1998). Notably, racism and colonization play an important role in the debate about restorative justice not just in the United States but also in Canada and elsewhere (see, e.g., Coker, 1999; Razack, 1994) (...) For example, multiracial feminist Sherene Razack (1998) warns that the failure of White male judges in northern Canadian communities to consider the impact of colonization and racism when sentencing male perpetrators of sexual assault to a restorative justice variety of community-based punishment results in further harm and no justice for the victim of those sexual assaults. Donna Coker (1999) raised similar concerns about Navajo Peacemaker Courts that address intimate violence against women (see also Deer, 2004a).<sup>318</sup>

As we can see from the passage above, the *multiracial* (i.e., intersectional) analysis of women in RJ settings is often conflated with coexistent political and theoretical trends such as post-colonialism; Indigenous justice; human rights and anti-racist struggles. As Daly puts it, “There is growing interest in what is called intersectional race and gender politics, which aim to negotiate differing Indigenous and feminist interests in seeking justice. (...) I use the term in the latter sense to address the conflicting interests of victims and offenders, social

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<sup>318</sup> See note 255 at 703. See also note 291, Ollenburger & Moore, *A Sociology of Women*. See, Razack, note 322, *infra*. See note 25, Coker, *Transformative Justice*.

movement groups, and individuals and collectivities in responding to crime.”<sup>319</sup> Intersectionality theory hence offered a new way to organize feminist theorizing on RJ, i.e., by integrating post-colonial and Indigenous justice political issues into the debate about alternative justice remedial practices developed to cope with violence against women. In so doing, intersectionality theory provides a tool for understanding how new inequality categories emerge and are applied to restorative practices around the world in heterogeneous ethnic settings.

That represents an important development of feminist thinking since in the past feminist theories were first and foremost about gender; and anti-racist theories were about colonialization, culture, and race-ethnicity.<sup>320</sup> In addition to offering a new feminist view of RJ that took cultural and ethnic imperatives into account, intersectionality theory also transformed the intellectual landscape by politicizing the discussions about the adherence of Indigenous communities to RJ practices. In fact, either deliberately or inadvertently, the intersectional feminist thinking contributed to misidentify that alternative justice model, in the minds of many, as a form of traditional customary law. As RJ resonates in many aspects with Indigenous postcolonial processes of contestation, assertion and self-determination and also convey political struggles that seek to redefine criminal justice relations with vulnerable groups, soon intersectional feminists merged the two movements into the same struggle. However, some versions of intersectional approaches are unable to recognize the dangers of such association since pockets of patriarchy in Indigenous settings have been giving collective power

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<sup>319</sup> Kathleen Daly makes use of the phrase “*Race and Gender Politics of Justice*” to convey her own view on multiracial feminism dealing with RJ and post-colonial Indigenous issues. According to her, with the emergence of intersectionality theory issues like colonialism, culture, and race-ethnicity entered in the feminist agenda, however, they remained at odds with one another in practice. For example, within the context of RJ, Indigenous (or racialised groups) emphasise offender’s interests while feminist groups, victims’ interests. See note 16, Kathleen Daly, *Seeking Justice*, at 8.

<sup>320</sup> Ibid.



considerations precedence over objectives of individual gender development. In the following paragraphs, I look more closely at the politicization of the use of RJ within Indigenous contexts.

In accordance with feminist intersectional views that coalesced RJ and gender and race politics into the same theoretical framework, Indigenous leaders and RJ proponents successfully aligned their political struggles and self-interest strategies. For example, RJ proponents --- as already seen in chapter one --- adopted the language, processes and appearance of Indigenous customary justice practices. In other words, in seeking to be accepted by Indigenous people and state actors interested in promoting customary law practices, RJ advocates structured restorative interventions so that they look like a version of Indigenous justice practices. In turn, Indigenous leaders gave support to this RJ self-advocacy tactic and corroborated the expectations or intuitions that many Indigenous people have had about RJ being a manifestation of traditional Indigenous justice. The rationale for that was quite simple. They used the RJ movement as a political platform to attempt to transform its emancipatory and abolitionist stances into political rights for self-determination and social justice. As Cunneen has pointed out, “Indigenous demands for recognition of customary law and rights brought attention to indigenous modes of social control, and indigenous leaders themselves would often articulate their claims for indigenous law within the language of restorative justice.”<sup>321</sup> Nonetheless, there are complicating factors in applying such alliances and connections that are being overlooked by some intersectional feminist scholars and activists.

The first factor is that patriarchal relations can be embedded in many (perhaps all) Indigenous settings and an awareness of this is a key to better understanding the limitations of the intersectional approach. Just to illustrate, patriarchal relations of power and subordination

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<sup>321</sup> See Chris Cunneen, “Reviving Restorative Justice traditions?” in Gerry Johnstone and Daniel W. Van Ness, eds. *Handbook of Restorative Justice* (Mill Street, Uffculme: Willan Publishing, 2007) 113-131 at 115.

can be disguised as cultural discourses about gender disciplinary roles that can leave many women resigned to being treated as subordinate as a matter of collectivist imperative, with no alternative but to accept their self-effacing role in RJ experiences.<sup>322</sup> For example, most of the leadership positions (e.g., Elders and circle keepers) may be held by a male elite and the effective control of the whole restorative processes may be exercised exclusively by them, while women exercise only secondary roles. Unfortunately, intersectionality theory does not warn us against such Foucauldian disciplinary mechanisms of subordination and is prone, due to its anti-essentialist positions, to underestimate an analysis of gender equality rights in order to prioritize cultural and political discourses for self-determination that are not always coincident with the promotion of women's interests. For this reason, intersectionality analysis must also comprehend and make some space for gender equality discussions although such an inequality category is not the analytical focus of this specific feminist mode of inquiry.

There are other noticeable problems with the intersectional integration of non-gender-specific issues into the discussion of RJ and domestic violence in Indigenous settings. For example, by suggesting that the individual concerns of racialised women cannot be met without first satisfying to some degree the collective concerns of postcolonial communities for self-determination and self-governance, intersectionality theory moved the analytical focus beyond solely considerations of gender to privilege, culture, and ethnicity.<sup>323</sup> As a result, Indigenous women who are victims of intimate and sexual violence are not anymore at the center of the worries and concerns of intersectional analysis. Such shift in focus results in the creation of conflicting stances between analytical categories (e.g., culture and post-colonial political

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<sup>322</sup> See note 303, Cameron, *Discipline*.

<sup>323</sup> Especially, because claims for self-determination and self-government convey ideas of social justice like the desincarceration of Aboriginal male offenders. See Loretta Kelly, "Using Restorative Justice in Aboriginal Communities", in John Braithwaite & Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge, UK :Cambridge University Press, 2002) at 219. (Arguing that RJ in order to be truly culturally appropriate must invoke Indigenous self-determination). But see notes 39 and 43 and accompanying texts for a critique of this stance.

claims *versus* individual gender issues), and when an imbalance between them exists, the most probable outcome is a less favorable condition to Indigenous women in RJ settings (e.g., passivity and marginalization). This results in a form of *intersectional disempowerment*,<sup>324</sup> i.e., this means women's interests being put behind collective interests just because the latter are seen as politically or culturally more relevant.

In fact, some Intersectional approaches may be inclined to favor one analytical category over the others, and in this process can end up provoking an undesirable underestimation of gender equality as a strategic analytical category. Since we know that gender is an element of commonality in domestic violence, there is at least an a priori assumption of its relevance to the analysis of RJ within that context. After all, intersectionality theory never established that gender equality concerns are unimportant or could be set aside in the discussion of domestic violence, only that they were as important as other sites of inequality present in the larger social context. Furthermore, as we shall see, a significant portion of mainstream feminist literature on the ability of RJ to cope with violence against women also advances concerns for redressing power asymmetries between victims and offenders. Those concerns are grounded mainly in gender inequality concerns. Thus, there is no reason for gender --- as an analytical standard --- to be underestimated in an intersectional approach to RJ in Indigenous settings. Ultimately, the realities of gender equality rights in Indigenous settings are also readily recognizable as important intersectional analytical categories, and must be properly considered in such approaches. Paradoxical though it may seem, an intersectional approach to RJ responses to gendered-violence in Indigenous communities must pass through conventional dominance feminism gender equality concerns at some stage of the analytical process in order to be balanced.

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<sup>324</sup> See note 38 and accompanying text.

In reality, wariness of the internal conflicting forces present in intersectional approaches to RJ in Indigenous communities has led some feminist scholars --- even those sympathetic to intersectionality theory --- to put forward some criticisms.<sup>325</sup> For example, Mary Crnkovich asserted that although restorative conferences have the potential to resonate with traditional Inuit justice values of harmony and social peace without making use of incarceration measures, there is the danger of lack of uniformity and the possibility for victims to be silenced.<sup>326</sup> Sherene Razack, another multiracial feminist, warns that culture, community and colonization can be used to compete with one another de-emphasizing gender-based harm completely.<sup>327</sup> Likewise, Rashmi Goel went on to conclude that RJ experiences --- especially sentencing circles --- may overlook the internal and external conflicting interests existent in Indigenous communities which can damage the reputation of the idea itself. As she writes:

There are competing interests, and political agendas, in addition to the stated goals of resolving the dispute and stopping the behavior. There is tremendous diversity within the community, which may render cultural values antagonistic to the needs and desires of some community members. In such cases, it may be impossible to accurately represent the needs of community members in a culturally specific process. Therefore, culturally specific adjudication based solely on the cultural identity of the offender and victim, without considering underlying interests, is unwise.<sup>328</sup>

Finally, as Daly and Stubbs observe, collective political aspirations in the form of claims for self-determination and social justice, "...are not often acknowledged in alternative modes of justice, nor are Indigenous women's perspectives typically addressed."<sup>329</sup> In sum, an Indigenous woman's intersectional experience with restorative-like formats of remedial justice depends on a complex interplay of her community political claims, her own various interests and a number of offenders' specific interests, and it stands to reason that there might be many places

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<sup>325</sup> Markedly, in the Canadian context.

<sup>326</sup> See note 180.

<sup>327</sup> See note 44, Razack, *What Is to be Gained*.

<sup>328</sup> See note 8, Goel, *No women at the center*, at 333.

<sup>329</sup> See note 5 at 162 and accompanying text.

where the process can go awry. In other words, this means that the interaction between intersectionality analysis, gender/race politics and the suitability of RJ to deal with violence against women has great significance in understanding how RJ operates and is likely to be perceived by Indigenous groups in post-colonial settings. This is especially true in the Canadian context where Indigenous women hold mixed views toward RJ and domestic violence. However, this discussion will receive further attention in the next chapter.

### **c) Problems with intersectionality analysis**

Particularly, in this subsection my intention is to clarify the detrimental effects that Indigenous political demands of self-determination may cause in conjunction with other existing co-optive forces in the context of RJ responses to domestic violence. In order to do that, I proceed with my investigation by addressing potential epistemological shortcomings of imbalanced intersectional approaches, i.e., those that put gender at the end of the list of analytical priorities present in RJ models resulting in *intersectional disempowerment*. Gender perspectives are important to intersectionality analysis within the context of RJ and domestic violence for several reasons.

Firstly, domestic violence affects women and their communities differently, and that difference is seldom taken into account in the design and implementation of RJ programs that usually view group interests and the individual needs of victimized women in a single project. Secondly, under some existing RJ programs, women and men have unequal access to voice their concerns and needs following wrongdoing. Particularly in light of the past social injustices and patriarchal inequalities that underpin several traditional and Indigenous societies, RJ may focus only on the interests of male offenders. Thirdly, in order to achieve optimum restorative effects, as mentioned in the first chapter, the inclusion and effective participation of

all stakeholders in the restorative process is necessary. Though RJ may be conceived as the means by which to deliver justice and voice to all, there are concerns that poorly managed RJ programs without a clear gender-centered perspective may in fact perpetuate cycles of revictimization, leading inexorably to the exclusion of women in those dialogue-driven processes.

In an ideal situation, intersectionality theory --- in the best traditions of critical feminist criminology --- could play a really constructive critical role by serving as an analytical tool to unveil patriarchy hidden in RJ practices used in heterogeneous settings. In addition, it could help rectify power imbalances between stakeholders and to resolve conflicts between the various categories of inequality present in such alternative justice systems. In practice, however, the approach of an imbalanced version of intersectionality analysis leads to an unwitting adherence of some intersectional feminists to non-emancipatory political agendas. This can be seen, I state again, in the uncritical appreciation of the political demands for self-determination and self-governance present in some RJ responses applied in Indigenous communities.

- **Intersectionality theory: making feminist analysis less open to gender equality concerns**

Intersectionality theory is supposed to be a type of critical and emancipatory theory. On the one hand, this means an emphasis on the idea of a critical posture towards agents, systems and institutions of social control (e.g., conventional criminal justice system and alternative formats like RJ).<sup>330</sup> On the other, it means acceptance of the notion of political engagement and allegiances with social movements in order to make the interests of the

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<sup>330</sup> Julie Stubbs' notes on the features of Critical feminist criminology. Supra note 260.

oppressed and marginal visible.<sup>331</sup> However, there are potentially conflicting interests between those two positions that can mean failure to recognize the problematic nature of women's individual interests within cultural contexts, i.e., positions where collective political claims do not necessarily match women's individual interests and needs. The oversight of the existence of conflicting inequality categories and other forces that deemphasize individual claims for gender-equality is an important vulnerability of some intersectional approaches on restorative justice. Notably, this happens because such intersectional approaches make concessions to analytical categories other than gender equality and selectively engage them as more relevant in the analysis. As a result, collectivists' political demands are put ahead of women's individual interests and needs, which are relegated to positions of subordination, passivity and silence. In sum, there is an intersectional failure to recognize that the perspective of gender equality provisions is a legitimate consideration, and women's individual interests cannot be assumed to coincide with political collectivity's interests.

Having said that, I move ahead with a brief critical exposition of the anti-essentialist epistemic position of the intersectional approach, which I believe is one of the reasons for that imbalance of intersectional approaches when dealing with the conflicting analytical categories of restorative justice. I argue that anti-essentialist stances can contribute to hinder our understanding of the increasingly self-effacing positions in which women are being placed themselves, when dealing with RJ experiences.

#### ▪ **Epistemic problems with Intersectionality theory: anti-essentialism**

Intersectionality analysis, by offering the heterogeneous perspective and interpretive insights of ethnically diverse communities, can be employed by feminists to

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<sup>331</sup> Ibid.

acknowledge both the individual lived experiences of diverse battered women and the collective political underpinnings of RJ under the guise of Indigenous justice. But intersectional feminists, because of existing epistemic problems, must be careful not to simply perpetuate patriarchal and oppressive views of reality rather than advance women's emancipatory goals. Both key features of feminist intersectionality theory, i.e., the rejection of "gender" as the standard category of analysis, and the importance given to heterogeneous and multiple perspectives are direct corollaries of anti-essentialist stances.<sup>332</sup> In fact, intersectionality theory holds that the fragmented and multiple perspectives of women's conditions do not allow the recognition of shared characteristics universal to all women, which in theory could have potential to unify them in a coalition of socio-political interests.

But questioning the commonality of gender issues in a manner intended to undermine or overthrow it left feminist scholars and activists with a twofold problem. Firstly, they lacked a common political identity and discourse on which to base their policy recommendations. Secondly, the political utility of the feminist movement began to be questioned since gender underestimation led to a crisis of identity in the feminist movement.<sup>333</sup> This famous quote from Teresa de Lauretis summarizes well the feminist unrest with anti-essentialist epistemic positions:

Its absolute rejection of gender and its negation of biological determinism in favor of cultural-discursive determinism results, as concerns women, in a form of nominalism. If 'woman' is a fiction, a locus of pure difference and resistance to logocentric power, and if there is no woman as such, then the very issue of women's oppression would appear to be obsolete and feminism would have no reason to exist.<sup>334</sup>

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<sup>332</sup> See note 287 for a definition of anti-essentialism in feminist theory.

<sup>333</sup> Ibid.

<sup>334</sup> See Teresa de Lauretis, "Upping the Anti (sic) in Feminist Theory" in Simon During, ed., *The Cultural Studies Reader* (London: Routledge, 1993) 307 at 314.



Other important feminist scholars like Naomi Schor, Gayatri C. Spivak and Diana Fuss put forward similar torrents of criticisms on anti-essentialist epistemic positions.<sup>335</sup> In my view, however, the main consequence of adopting a feminist analysis devoid of elements of gender commonality is the uncritical acceptance of anti-essentialist models of analysis (e.g., intersectionality theory) that may undermine individualist positions and women's subjectivities regarding equality concerns even though the ultimate goal of intersectionality, as a feminist critical theory, is exactly to promote them. The goal then is to improve the intersectionality theory by highlighting certain anti-essentialist weaknesses while retaining its critical identity as a specific way for understanding and describing gendered-violence in heterogeneous settings. The bottom line is not to promote empty criticism, but rendering intersectionality theory into a better approach usable by feminist scholars; an improvement mainly achieved by re-inserting individual gender-equality concerns into the analysis offered by intersectional feminists.

A less attentive feminist scholar or activist using an intersectional anti-essentialist approach to address RJ practices in Indigenous settings would first consider the socio-political imperatives that would accommodate collectivist interests, e.g., privileging culture and ethnicity political claims over gender individual concerns. Therefore, the impetus for an intersectional approach may stem from the principle of legitimacy (mainly collectivist), i.e., from a desire to maintain credibility and prestige in an overtly political environment like Indigenous justice. At the same time, the motivation could stem from a sense of public responsibility, particularly for outcomes related to the political goals of self-determination, self-governance and promises of social justice to Aboriginal offenders subject to endemic injustice in conventional criminal

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<sup>335</sup> See, e.g., Naomi Schor & Elizabeth Weed, eds., *The Essential difference* (Bloomington: Indiana University Press, 1994) (In this collections of essays, Lauretis; Schor; Spivak; Fuss and others discuss the demonization of essentialism within the feminist movement and address the relationship between essentialism and post-colonial studies. They also speculate about whether there can be a real anti-essentialist feminism, and whether or not the woman's question can be so easily discarded by feminist scholarship).

justice systems. Efforts to stem the legitimacy and political development of Indigenous justice (travestied as RJ) in ethnic communities, which often have taken the form of state-sponsored efforts to promote experiences like sentencing circles, may make gender-based inequality even worse for Indigenous women. In sum, anti-essentialist positions would eventually erase gender equality concerns more focused on the choices of individual stakeholders and their personal needs and concerns.

- **Strategic essentialism**

The danger of formulaically adopting intersectionality analysis within the context of RJ and Indigenous settings is that the tensions between the various analytical categories and political stances present in that remedial alternative justice may remain overlooked. In so doing, those intersectional feminists most committed to anti-essentialist stances leave unacknowledged the fact that RJ disguised as Indigenous justice --- together with the related concepts of social justice and self-governance --- may paradoxically accord with patriarchal and post-colonial dominance.<sup>336</sup> As a result collectivist interests may gain precedence over individual gender issues. But there is room for retaining gender as a crucial analytical category in an intersectional approach. The famous concept of *strategic essentialism*, devised as a counter-reaction to anti-essentialism, by feminist scholar Gayatri Spivak should be considered.<sup>337</sup>

According to Spivak, *strategic essentialism* assumes a temporary unified gender/sex position in order to achieve a particular political end. Such practice has been used among marginalized or vulnerable groups when they experience a need in situations of

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<sup>336</sup> Since alternative justice experiences like sentencing circles never concede actual powers to Indigenous people, as we shall see.

<sup>337</sup> See Gayatrcy C. Spivak, "Subaltern Studies: Deconstructing Historiograph" in Donna Landry & Gerald M. MacLean, eds., *The Spivak reader: selected works of Gayatri Chakravorty Spivak* (New York: Routledge, 1996) at 204.

asymmetrical power relationships. This is exactly the case of women in situations facing with RJ and domestic violence in Indigenous settings. Strategic essentialism can reemphasize the focus on gender issues in order to allow women to reclaim their autonomy and self-empowerment even when power asymmetric conditions are present and women live in heterogeneous conditions. Some intersectional feminists intuitively adopted such emphasis and avoided the pitfalls of anti-essentialist positions, but this will be addressed in the next chapter.

- **RJ self-advocacy: contributing to the imbalance of intersectional approaches through cultural frame alignment.**

This segment stresses the importance of RJ's self-advocacy discourse as an additional force contributing to produce imbalanced versions of intersectionality theory. The capacity of informal adjudicatory practices like RJ largely depends on whether its audiences recognize them as legitimate alternative justice practices.<sup>338</sup> In reality, Indigenous leaders, activists and postcolonial scholars often voice concerns about whether such arrangements have moral authority, and whether such informal practices are also culturally resonant in relation to customary justice practices.<sup>339</sup> Such perceived legitimacy is also important to sustain RJ's expectations for funding, political support and resources. RJ cannot survive --- being a participatory democracy experiment --- without political support of the target audience. In parallel, RJ language is adopted because it also offers novel political possibilities to Indigenous activists. They transform RJ's collective justice claims into new spaces of struggle for self-determination that are important to their own political agenda.

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<sup>338</sup> See, e.g., note 81, Abel, *The Politics* at 5.

<sup>339</sup> See, e.g., Harry Blagg, *Crime, Aboriginality and the Decolonization of Justice* (Sidney: Hawkins press, 2008).

RJ's advocacy discourse lies at the meeting of those Indigenous grievances and several other interest groups claims and depends on their support to gain political legitimacy and, therefore, progressive outcomes in restorative process. As Stubbs puts it, "It has been suggested that pro-feminist and anti-racist groups should be participants in restorative process in order to bolster victim narratives and to challenge those who do not take responsibility for their offending."<sup>340</sup> For this reason, the RJ movement usually conveys ideas of social justice that are less individualistic and more focused on communities and collectivist responsibilities and rights, aligning them to particular cultural narratives and contexts.<sup>341</sup> Sociologists and politic scientists studying social movements theory describe that process as "frame alignment".<sup>342</sup> According to Snow *et al.*, "frames" or "schemata of interpretation" are not by themselves coherent ideas, but ways of packaging and conveying ideas that generate prompt understanding by the target audience, motivate collective action and create strategies of self-advocacy for supporters.<sup>343</sup> As Anders Walker explains:

To be successful, social movement actors needed to construct their own frames, or schematic interpretations, that diagnosed social problems, identify a clear prognosis of those problems, and then mobilize target audiences to solve them. These "collective action frames," as they came to be called, worked best when aligned with the ideas, assumptions, and beliefs – in short cultural frames – already held by target audiences, a technique that David A. Snow, Robert Benford and others have termed "frame alignment."<sup>344</sup>

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<sup>340</sup> See note 254 at 59.

<sup>341</sup> As a principle RJ practices seek to involve those with a legitimate stake in the situation, including victims, offenders, community members and society. See, e.g., Kay Pranis, Barry Stuart & Mark Wedge, *Peacemaking Circles: From Crime to Community* (St. Paul, MN: Living Justice Press, 2003).

<sup>342</sup> See David E. Snow, et al., "Frame Alignment Processes, Micromobilization, and Movement Participation" (1986) *American Sociological Review* 51:4 464-481. See also Sidney Tarrow, *Power in Movements: Social Movements and Contentious Politics* (Cambridge: Cambridge University Press, 1998).

<sup>343</sup> *Ibid.*

<sup>344</sup> See Anders Walker, "Shotguns, Weddings, and Lunch Counters: Why Cultural Frames Matter to Constitutional Law" online: (19 August, 2010) *Florida State University Law Review*, Forthcoming. Available at SSRN: <<http://ssrn.com/abstract=1661981>>.

In other words, the RJ social movement frames itself to make culturally resonant connections with collective Aboriginal values and belief systems in order to consolidate its position as a viable alternative justice practice.<sup>345</sup> RJ's proponents seek to relate their legitimacy goals to the political goals or cultural assumptions of the targeted group. In so doing, the restorative frame alignment strategy also takes a particular story of wrongdoing (victims *vis-à-vis* offenders) and makes it a collective political concern (shared responsibilities between victims, offenders and communities). That particular story suddenly becomes politically relevant in the recognition of customary group political rights and is attached to a larger political context of collective empowerment. However, there is the chance those women's subjectivities and individual perceptions are silenced or alienated in the process. As Ferree warns, choosing cultural resonance as a *frame alignment* strategy requires the possibility of sacrificing ideals, limiting demands on authorities, and possibly excluding vulnerable groups as their demands conflict with collective interests.<sup>346</sup>

The self-advocacy strategy of the RJ movement linking its credibility and moral authority with the targeted audience in cultural terms becomes complicated when making political alliances and building community self-empowerment turns out to be more important than women's personal experiences when dealing with restorative justice. This is precisely the problem RJ proponents confront when they develop advocacy strategies based on cultural frame alignment discourses. If they frame RJ to be compatible with existing collective expectations, they may also be reinforcing pre-existing patriarchal notions about gender disciplinary roles. While an Indigenous woman's community struggles to reassert its self-determination, she may

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<sup>345</sup> See note 61, Daly & Immarigeon, *Origins*, at 10. (Arguing that RJ proponents adopted varied organizational and advocacy strategies. According to them, it is not at all clear whether it is best integrating restorative justice practices with Indigenous justice customary law or, alternatively, replacing traditional practices with restorative ones. Anyway, intersectional feminists coalesced both into the same analytical context).

<sup>346</sup> See Myra Marx Ferree, "Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany" (2003) 109:2 *American Journal of Sociology* 304-44 at 340.

find her new subject position within RJ awkward and relatively helpless due to power asymmetries and gender devaluation. As we shall see in the next and final chapter, the literature indicates that Indigenous women are basically being led to accept the existing patriarchal institutions of their communities in face the of multicultural collectivists' demands for political self-determination. In addition, some RJ advocacy discourses --- reinforcing those demands --- make them prone to a delegation of trust to those who advocate such alternative justice interventions because these are allegedly culturally competent and, therefore, bear legitimacy for coping with collective concerns for social justice. Indigenous women who fail or are resistant to culturally framing their particular narratives of RJ experiences can be alienated and silenced. In sum, Intersectional/multiracial feminists that are not aware of social movements theory, particularly *cultural frame alignment*, may be compelled to endorse such self-advocacy practices because they are structurally similar to their own conceptions about culture preeminence in RJ settings as outlined in the previous sections.

## **2. Daly & Stubbs on the appropriateness of RJ for domestic violence**

Feminists studies engendered three major contributions to the study of restorative justice. First and foremost, they brought women and gender issues to the fore and provided a diversified critical framework with which to scrutinize it. Those critical theoretical perspectives range from classic, but disparate lines of feminist thinking like liberal feminism or dominance feminism, to postmodern feminism and Marxist-socialist feminism that require borrowing anti-essentialist stances as an epistemological approach. Second, as noted previously, the natural evolution of those feminist disciplines allowed the integration of Indigenous political claims for self-determination and social justice into the discussion about RJ and domestic violence; notably, through the work of multiracial feminists (i.e., intersectional feminists) that coalesced RJ and Indigenous customary justice into a single analytical mass. Such positioning amplifies the

importance that some intersectional feminists attribute to Aboriginal collectivities, and shifts the focus from victims' subjectivities, such as women's needs and interests, to the formulation of a political agenda, with reverence to non-emancipatory aims, in order to accomplish, manage, and promote collective self-determination, self-empowerment, and self-governance. In other words, the intersectional research on RJ may be framed as devaluing sexuality and gender as primary inequality categories (i.e., anti-essentialism), but also as placing strong emphasis on Indigenous rights and post-colonial struggles (i.e., intersectional disempowerment).

Finally, feminists studies also developed more pragmatic approaches to RJ and domestic violence seeking to investigate its suitability to contend with the complexities of gendered-violence regardless of race or ethnicity. Typically, the focus of those studies has been on worries about women's security, autonomy (or agency) and offenders accountability.<sup>347</sup> All these particular concerns primarily reflect mainstream feminists and battered women's advocates' gender equality concerns vis-à-vis power imbalances between victims and offenders. In contrast to a focus on ethnic and cultural accounts of RJ - so common in intersectional scholarship - mainstream feminists and battered women's advocates draw from an essentially gender/sex positional perspective; a pragmatic standpoint that recognizes the inherent power differentials between female victims and male offenders.<sup>348</sup> In addition, the pragmatic approach is also in concert with fears of survivors' revictimization and allegations of re-privatization and trivialization of intimate violence by RJ practices. This is occurring after years of public denunciation of sexism and gendered-violence by feminist scholarship and activism. Other common concerns would include, for example, RJ programs giving more emphasis to offenders'

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<sup>347</sup> See note 2, Cameron, *RJ: Literature Review*, at 21-26. (Angela Cameron developed a comprehensive literature review on the topic and highlighted these specific worries). See also note 10 and accompanying text.

<sup>348</sup> See especially Loretta Frederick & Kristine C. Lizdas, "The Role of Restorative Justice in the Battered Women's Movement" in James Ptacek, ed., *Restorative Justice and Violence Against Women* (New York, NY: Oxford University Press, 2009) 612-919 in a kindle e-book version.

rehabilitation rather than women's actual needs; the lack of consultation with battered women's advocate; concerns that women victims should be given a better informed choice regarding whether or not to participate in RJ experiences; and, finally, the lack of resources and proper training.<sup>349</sup>

In fact, Cook *et al.* observed that by far the most prolific and significant niche of feminist scholarly work about RJ hinges exactly on the investigation of the potential benefits and dangers of restorative practices in cases of violence against women.<sup>350</sup> As a consequence, there is a great deal of sound research on the subject matter recommending the summary of results from existing commentaries by use of earlier reviewers' efforts. For reasons of space and simplicity, I draw from Kathleen Daly and Julie Stubbs' work that categorized that research to explain diametrically opposite feminist responses to the appropriateness of using RJ in domestic violence contexts.

Daly and Stubbs have produced arguably the most extensive compilation of scholarly discussion on the appropriateness of the use of RJ within the domestic violence context. The practical approach described in their compilation represents a synthesis of some of the best and most pragmatic commentaries and evaluations of domestic violence in the RJ literature. It should be noted that their work is often cited or reproduced at length in other scholarly works on the theme.<sup>351</sup> For this reason, I take the liberty of reproducing their

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<sup>349</sup> See Stephanie Coward, "Restorative Justice in Domestic and Sexual Violence: Healing Justice?" (December 2000) Directed Interdisciplinary Studies, Carleton University. See especially note 54, Stubbs, *Domestic Violence*. See also note 25, Coker, *Transformative Justice*. See note 49, Cheon & Regehr, *RJ Models*. See generally Lawrence W. Sherman, Domestic Violence and Restorative Justice: Answering Key questions" (2000-2001) 8:1 Virginia Journal of Soci"al Policy & Law 263.

<sup>350</sup> This area attracted such attention of feminist scholars that Cook, Daly and Stubbs pointed out that, "Virtually all feminist analyses of restorative justice have centred on its appropriateness for partner, family or sexual violence." See, e.g., Kimberly J. Cook, Kathleen Daly & Julie Stubbs, "Introduction – Special Issue" (2006) 10:1 Theoretical Criminology 5-7 at 5.

<sup>351</sup> See, e.g., Gitana Proietti-Scifoni, *Restorative Justice in Cases of Gendered Violence: Views from Aotearoa Opinion Leaders* (B.Crim. Thesis, Griffith University, 2008) [unpublished] at 11-12.



compilation of feminist insights on the suitability of using RJ in domestic violence cases. Their work summarizes the existing stances about the use of RJ to cope with gendered-violence by listing potential benefits and problems with RJ.

### **a) Potential problems of using restorative justice**

In general, the feminist objections about applying RJ to gendered-violence cases hinge on the impossibility to reconcile its ideology and practices with the harsh realities of domestic violence. Daly and Stubbs pointed out several ways that negative concerns about using RJ for domestic violence cases could be addressed. The following bullet points summarize and then synthesize commentaries from the literature:

- **Victim safety.** As an informal process, RJ may put victims at risk of continued violence; it may permit power imbalances to go unchecked and reinforce abusive behaviour.
- **Manipulation of the process by offenders.** Offenders may use an informal process to diminish guilt, trivialize the violence, or shift the blame to the victim.
- **Pressure on victims.** Some victims may not be able to effectively advocate on their own behalf. A process based on building group consensus may minimize or overshadow a victim's interests. Victims may be pressured to accept certain outcomes, such as an apology, even if they feel it is inappropriate or insincere. Some victims may want the state to intervene on their behalf and do not want the burdens of RJ.
- **Role of the 'community'.** Community norms may reinforce, not undermine male dominance and victim blaming. Communities may not be sufficiently resourced to take on these cases.
- **Mixed loyalties.** Friends and family may support victims, but may also have divided loyalties and collude with the violence, especially in intra-familial cases.
- **Impact on offenders.** The process may do little to change an offender's behaviour.
- **Symbolic implications.** Offenders (or potential offenders) may view RJ processes as too easy, reinforcing their belief that their behaviour is not wrong or can be justified. Penalties may be too lenient to respond to serious crimes like sexual assault.<sup>352</sup>

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<sup>352</sup> See note 9, Daly & Stubbs, *Feminist theory*, at 159. According to Daly and Stubbs, these potential problems have been identified by Stubbs (1997, 2002, 2004), Coker (1999, 2002), Goel (2000), Presser and Gaarder (2000), Shapland (2000), Lewis et al. (2001), Busch (2002), Acorn (2004), and Hopkins et al. (2004). For more details: See Julie Stubbs, "Shame, Defiance, and Violence against Women: A Critical Analysis of "Communitarian"

As we can see, mainstream feminists prioritize the goals of individual women and battered women's advocates --- safety and offender accountability --- over the goals of ethnic collectivities looking for ways to redress endemic social injustice in their relationships with the conventional criminal justice system and seeking to assert their political power in terms of self-governance and self-determination. I share the same concerns and, therefore, I take a position contrary to the use of RJ in domestic violence cases although I also incorporate procedural issues into the debate, as we shall see in the next chapter.

## **b) Potential advantages of using restorative justice**

- **Victim voice and participation.** Victims have the opportunity to voice their story and to be heard. They can be empowered by confronting the offender, and by participating in decision-making on the appropriate penalty.
- **Victim validation and offender responsibility.** A victim's account of what happened can be validated, acknowledging that she is not to blame. Offenders are required to take responsibility for their behaviour, and their offending is censured. In the process, the victim is vindicated.
- **Communicative and flexible environment.** The process can be tailored to child and adolescent victims' needs and capacities. Because it is flexible and less formal, it may be less threatening and more responsive to the individual needs of victims.

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Conferencing", in Sandy Cook & Judith Bessant, eds., *Women's Encounters with Violence: Australian Experiences* (London: Sage, 1997) 109-26. See note 5, Stubbs, *Domestic Violence*. See Julie Stubbs, "Restorative Justice, Domestic Violence and Family Violence" Issues Paper 9 (Sydney: Australian Domestic and Family Violence Clearinghouse, 2004). See Donna Coker, "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking" (1999) 47: 1 UCLA Law Review 111. See note 25, Coker, *Transformative Justice*. See note 34, Coker, *Navajo Peacemaking*. See note 8, Goel, *No Women at the Center*. See note 81, Presser & Gaarder, *Can RJ reduce Battering?*. See Joanna Shapland, "Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies" in Adam Crawford & Jo Goodey, eds., *Integrating a Victim Perspective within Criminal Justice: International Debates*, (Aldershot: Ashgate, 2000) 147-64. See Ruth Lewis, Rebecca Dobash, Russell Dobash and Kate Cavanagh, "Law's Progressive Potential: The Value of Engagement for the Law for Domestic Violence" (2001) 10 Social and Legal Studies 105-30. See Ruth Busch, "Domestic Violence and Restorative Justice Initiatives: Who Pays if we Get it Wrong?" in Heather Strang & John Braithwaite, eds., *Restorative Justice and Family Violence*, (Cambridge: Cambridge University Press, 2002) 223-48. See note 47, Acorn, *Compulsory Compassion*. See note 270, Hopkins *et. al*, *Applying Restorative Justice to Ongoing Intimate Violence*.

- **Relationship repair (if this is a goal).** The process can address violence between those who want to continue the relationship. It can create opportunities for relationships to be repaired, if that is what is desired.<sup>353</sup>

It should be noted that the demonstration of potential dangers or benefits might be highly dependent on which RJ model is being analyzed (e.g., Family Group conference, sentencing circles, etc.) and on which type of crime is committed by the offender (e.g., sexual violence or just battering).<sup>354</sup> A RJ model may look more favorable in comparison to one alternative or another. Moreover, the target audience is decisive in presenting different perceptions of the idea. For example, Indigenous women are inclined to be more receptive to RJ experiences due to prompt identification of Indigenous Justice with restorative justice. In contrast, white women and battered women's advocates are more distrustful of it due to the association of RJ with family mediation schemes and alternative dispute resolution. As Angela Cameron has observed:

In examining RJ practices, two elements must be considered. First is the model in question; some programmes have been endorsed by women, and others are critiqued (Goundry, 1998; Razack, 1999; Goel, 2000). Second is whether or not the practice arises or is derived from an Aboriginal tradition, law or legal order. Although the debates

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<sup>353</sup> Ibid. According to Daly and Stubbs, these potential benefits have been identified by Braithwaite and Daly (1994), Hudson (1998, 2002), Martin (1998), Morris and Gelsthorpe (2000), Presser and Gaarder (2000), Daly (2002b), Morris (2002), Pennell and Burford (2002), Koss et al. (2003), Hopkins et al. (2004), and Daly and Curtis-Fawley (2005). For more details: See John Braithwaite & Kathleen Daly, "Masculinities, Violence and Communitarian Control" in Tim Newburn and Elisabeth A. Stanko, eds., *Just Boys Doing Business? Men, Masculinities, and Crime* (London: Routledge, 1994) 189-213. See Barbara Hudson, "Restorative Justice: The Challenge of Sexual and Racial Violence" (1998) 25:2 *Journal of Law and Society* 237-56. See Barbara Hudson, "Restorative Justice and Gendered Violence: Diversion or Effective Justice?" (2002) 42 *British Journal of Criminology* 616-34. See Dianne L. Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 *Osgoode Hall Law Journal* 151-88. See Allison Morris & Loraine Gelsthorpe, "Re-Visioning Men's Violence Against Female Partners" (2000) 39 *Howard Journal of Criminal Justice* 412-28. Supra note, Presser and Gaarder, Can RJ reduce battering?. See note 221, Daly, *RJ: the Real Story*. See note 47, Morris, *Critiquing the critics*. See Joan Pennell & Gale Burford, "Feminist Praxis: Making Family Group Conferencing Work" in Heather Strang & John Braithwaite, eds., *Restorative Justice and Family Violence* (Cambridge, UK: Cambridge University Press, 2002) 108-127. See Mary Koss et. al, "Restorative Justice for Sexual Violence: Repairing Victims, Building Community and Holding Offenders Accountable" (2003) 989 *Annals of the New York Academy of Science* 384-96. Supra note Hopkins et. al. See Kathleen Daly & Sarah Curtis-Fawley, "Justice for Victims of Sexual Assault" in Karen Heimer & Candace Kruttschnitt, eds., *Gender and Crime: Patterns of Victimization* (New York: New York University Press, 2005).

<sup>354</sup> Supra note 353.

themselves are not always delineated by cultural or racial identification, there are often important differences in methods, philosophies and practice along these lines (Nightingale, 1991; LaRoque, 1997; McGillivray and Comaskey, 1999; Razack, 1999; MacDonald, 2001). Such cultural distinctions have been an integral part of discussions and debates in Canada.<sup>355</sup>

Furthermore, Angela Cameron, Kathleen Daly and Julie Stubbs; feminist legal scholars who performed systematic literature reviews on RJ, assert that there are few hard or agreed empirical data sets to back up any of the positions outlined above. As Daly and Stubbs point out, “Although there is considerable debate on the appropriateness of RJ for partner, sexual or family violence, empirical evidence is sparse.”<sup>356</sup> Cameron goes in the same direction. As she notes: “Arguments on either side are presented with emotion and a genuine desire for positive social change. However, the fact remains that there is little empirical evidence to support either position (R. Morris, 2000; Presser and Gaarder, 2000; Sherman, 2000; A. Morris, 2002)”<sup>357</sup> The current impasse between feminists portrayed above and the lack of empirical evidence practically ensures that no RJ model is a panacea to violence against women cases regardless of race or ethnicity. In fact, any RJ program should be taken with care and must be studied with developed planning that takes into consideration the potential problems and benefits described above.

As we can see from the arguments above for and against the use of RJ in cases of intimate violence, the negative or positive influence of existing feminist theories are not being taking into consideration in the scholarly contribution within the theme. Any potential problems, where they exist, usually stem from substantive issues not from procedural values or epistemological problems with a specific feminist approach. Nevertheless, I argue that RJ

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<sup>355</sup> See note 15, Cameron, *Stopping the Violence*, at 50.

<sup>356</sup> See note 5 at 160.

<sup>357</sup> Supra note 356 at 59.

practices in Canada and Australia are increasingly dominated by intersectionality theory insights and contributions. In fact, RJ interventions --- especially in ethnic and racial settings --- are infused with intersectional procedural values (such as anti-essentialism; anti-colonialism; collectivism; heterogeneity and ethnocultural political concerns) and have been shown to create significant implications for RJ and its adoption and evaluation. For instance, as stressed in the last chapter, Indigenous advocates and activists claim that RJ is a culturally appropriate response to the harm done to Aboriginal people by colonialism. This is a sign that intersectional thinking is pervasive in the RJ strategy of *cultural frame alignment* because it takes into consideration the interaction of ethnicity and gender politics at the forefront of debates. A good example of that are restorative-like experiments like sentencing circles. They are experiments clearly inspired by multiculturalism and devised as intersectional remedial justice practices in Canada, which were quickly transplanted to Australia. Notwithstanding, those infusions of intersectional thinking and multiculturalism into RJ and Aboriginal Justice bring new benefits and potential risks to bear on Aboriginal communities and greatly impact racialized women and their priorities.

The next and concluding chapter explores how intersectionality theory and multiculturalism are mobilized to inform decisions concerning the implementation and evaluation of RJ experiments in Aboriginal settings. In addition, I contextualize the potential epistemic and political problems in intersectionality theory, as developed in this chapter, to apply them to the use of sentencing circles within the specific geographical contexts of Canada and Australia. A conflict between ethnocultural collective politics and individual gender equality concerns in sentencing circles is articulated and developed. The prospects and perils of co-optation of intersectionality theory are stressed.

## **Chapter III – Further developments, implications and conclusions**

### **Chapter outline**

After having presented in chapters one and two an overview of the theoretical framework of the RJ movement and an outline of the feminist scholarship about it, plus some conceptual clarification as to what I consider to be the main epistemic problems in intersectional feminism as applied to RJ in Indigenous settings, chapter three points to a conclusion of how in pragmatic terms an imbalance in intersectional approaches can affect feminist modes of understanding RJ experiences. Since my thesis offers a critical perspective that focuses on instrumental and not substantive issues, i.e., seeks to identify and problematize an imbalanced version of intersectionality theory --- especially concerning its interaction with RJ models applied in Aboriginal settings --- all substantive (or empirical) considerations are relevant only to the extent that they corroborate or refute that goal. Thus, I will not focus in this concluding chapter on a specific RJ program, but only delineate and discuss the intersectional nature, direction, and meaning of practical restorative experiences that may confirm that such a feminist approach, paradoxically, can end up being harmful to Aboriginal women if managed without awareness of epistemological and political problems embedded in it.

In order to do that, this chapter builds on earlier studies and commentaries that have addressed the interplay between collective ethnocultural political claims and issues of individual gender inequality, particularly, as applied to RJ as a remedial justice practice in the form of sentencing circles. Furthermore, I move to end this paper by drawing implications and

conclusions from potential vulnerabilities of intersectional approaches within the study of RJ coping with domestic violence in Indigenous settings. The overall conclusion is that certain intersectional approaches to RJ experiences are susceptible to be appropriated and diverted from their initial emancipatory purposes to serve non-women-centered interests with unintended detrimental consequences to racialized women.

Before turning to the issues above, however, I pause to consider some of the influences of multiculturalism on intersectionality theory and restorative justice. In the first section of this chapter, therefore, I seek to develop connections between intersectionality theory, multiculturalism and sentencing circles. In other words, I contend that the interplay between imbalanced intersectional approaches and sentencing circle experiences must be read in conjunction with the influence exerted by multiculturalism in Canada and Australia. As a consequence, I argue that sentencing circles experiences in those countries are a direct result of a blend of multicultural rhetoric and intersectional feminists' concerns. In reality, there is a similar arrangement of values and goals associated with those two ideologies. For example, the two approaches deal with similar subject matters (i.e., respect for ethnocultural diversity and empowerment of minority groups) and they have other similarities like the accommodation of Indigenous self-determination political claims in the form of culturally sensitive remedial justice practices (e.g., sentencing circles). For these reasons, remedial justice practices like sentencing circles became a political project engendered by a relationship between multicultural theorists and intersectional feminists; a relationship that also runs in parallel with the rise of the RJ movement as a convenient alternative to the widely criticized conventional criminal justice system. However, as we shall see, that relationship is fraught with potential dangers to vulnerable group members like battered women.

Notably, I stress the problems that multiculturalism may present to vulnerable groups within ethnic minorities according to a feminist critique of the multicultural political project of cultural accommodations. I highlight that some of the critiques directed at multiculturalism can be equally applied to what I previously called imbalanced intersectional approaches to sentencing circles, i.e., intersectional feminist stances that prioritize the political assertion of culture, self-determination and justice self-governance in Indigenous groups over victims' individual safety and offenders' accountability resulting in intersectional underestimation of individual gender equality concerns. I conclude by suggesting that the existing nexus between imbalanced versions of intersectionality theory and multiculturalism vulnerabilities jeopardize to a greater extent women's positions in restorative circles. In other words, the ethnocultural focus of some intersectional feminists analyzing sentencing circles in Aboriginal communities resonates with the multicultural political project of countries like Canada and Australia. However, this brings possible problems to vulnerable subjects within ethnic minorities like battered women in Indigenous groups whose interests do not necessarily coincide with the collective political aims of ethnic communities' dominant groups. The comprehension of these problems in intersectional approaches on RJ programs is, therefore, a vital step to avoid detrimental consequences in gendered violence cases.

The second section is dedicated to sketching out research implications and significant conclusions we can make on the basis of RJ experiences like sentencing circles. Notably, I illustrate and discuss how intersectional approaches on sentencing circles can be distorted into a divisive and uncritical feminist analytical tool. In fact, the signs are that intersectional thinking is beginning to be co-opted by collective ethnocultural political demands. In other words, anti-racist, anti-colonial and ethnocultural politics seem to be commandeering intersectionality theory to leverage their own political platforms with unintended detrimental



consequences to racialized women like exclusion and effacement. This claim of co-optation and politicization should imply caution in using intersectional approaches to RJ and domestic violence in Indigenous settings since individual gender equality concerns might not be properly considered in such a scale of values. In order to illustrate this contention, I make use of selected literature on sentencing circles in Canada and Australia. The sample of literature moves from general perspectives about RJ and its relationship with imbalanced versions of intersectional thinking to more specific empirical problems within sentencing circles. Finally, I make some comments on the current process of international expansion and commodification of restorative justice.

The third section serves to wrap up key findings and to establish conclusions and recommendations for the feminist intersectional community interested in restorative justice. Most notably, I recommend re-assessing intersectionality theory as an analytical tool to address RJ and domestic violence in Aboriginal communities since it may be so conflated with non-women-centered interests that it can mean the total abandonment of its critical and emancipatory characteristics. Furthermore, to counteract this emptying of intersectional analysis by non-feminist interests this thesis also recommends developing essentialist strategic visions about the importance of gender equality issues in sentencing circles and other RJ experiments. I conclude by suggesting that intersectional feminists must be conscious of how their own political positions regarding RJ experiments may affect their critical and emancipatory objectives. When intersectional feminists place an excessive focus on ethnocultural political demands, they are likely to ignore victims' individual gender equality needs and concerns. In fact, I call for intersectional feminists to be more attentive to the dangers of co-optation of their own scholarship by non-feminist interests. Only this way, victims of gendered-violence can fully assert their own interests in restorative-like experiences conducted in Aboriginal settings.

## 1. Further developments: Intersectional feminism, multiculturalism and sentencing circles

This section deals with multiculturalism as a theoretical and political framework that runs in close proximity with the nature, objectives and dynamics of feminist intersectional approaches, particularly as applied to sentencing circles. Although multiculturalism and intersectionality are distinct concepts, there are shared interests, objectives and concerns that can be identified and further explored in order to reveal potential vulnerabilities of imbalanced intersectional approaches to sentencing circles. In fact, one key objective of this segment is to link intersectional feminism and its approaches to sentencing circles with the broader political structural context of multiculturalism in Canada and Australia.<sup>358</sup> By examining how multiculturalism can impact intersectional approaches to sentencing circles we can achieve a better understanding of the vulnerabilities of this feminist analytical framework within the context of restorative justice. Another goal in this section is to establish that the lessons drawn from the critique of multiculturalism can also be applied to the study of the relationship between imbalanced versions of intersectional feminism and sentencing circles.

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<sup>358</sup> See, e.g., Anne Philips, *Multiculturalism without Culture* (Princeton: Princeton University Press, 2007) at 3. See also: *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]. *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp). *Statement, Multicultural Australia: United in Diversity: Updating the 1999 New Agenda for Multicultural Australia: Strategic directions for 2003-2006*, Commonwealth of Australia 2003. (Both Canada and Australia have long declared themselves officially multicultural countries. In Canada, for example, since 1971, when prime-minister Pierre Elliot Trudeau has delivered his famous address to the House of Commons outlining the tenets of liberal multiculturalism in Canada. Multiculturalism, since then, has been reflected in the Canadian legal framework. For example, through the *Canadian Multiculturalism Act* and section 27 of the *Canadian Charter of Rights and Freedoms*. In Australia as far back as 1982 and, more recently, with the statement *Multicultural Australia: United in Diversity* in 2003).

## a) Multiculturalism and restorative justice: establishing connections

According to Sarah Song, “Multiculturalism is a body of thought in political philosophy about the proper way to respond to cultural and religious diversity.”<sup>359</sup> Song points out that multiculturalism seeks to supersede the mere toleration of group differences by treating members of minority groups, substantively and positively, as equal citizens.<sup>360</sup> This includes recognition of affirmative accommodations of group differences when required through “group-differentiated rights” without, of course, promoting the centrality of any culture or ethnic group. Song notes that “group-differentiated rights” can be operated individually or by a group. She provides the example of individuals who are granted exemptions from generally applicable laws in virtue of their religious beliefs or individuals who seek language accommodations in schools or in voting. Moreover, she observes that group-differentiated rights can be held by the group rather than its members individually; such rights are properly called *group rights*, as in the case of Indigenous groups and other ethnic minorities, who claim the right of self-determination.<sup>361</sup> She gives as examples of these policies the limited recognition of tribal sovereignty and the state acknowledgement of customary justice practices by the dominant legal system in countries like Canada and New Zealand.<sup>362</sup> Hence, we can argue without great concerns, that the reception and institutionalization of claims for self-determination by Indigenous people are typically associated with multicultural discourses, policies and strategies.

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<sup>359</sup> See Sarah Song, “Multiculturalism” The Stanford Encyclopedia of Philosophy (First published Fri Sep 24, 2010), Edward N. Zalta (ed)., online: (2010) <<http://plato.stanford.edu/entries/multiculturalism/#ProVulIntMin>> retrieved on Sep 2010. (For a comprehensive examination of multicultural theories including its several varieties and critique).

<sup>360</sup> Ibid.

<sup>361</sup> Ibid. See also Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 26-33. (Kymlicka identified three forms of “group-differentiated rights”: self-government rights, polyethnic rights and special representation rights). See especially J. T. Levy, “Classifying Cultural Rights,” in W. Kymlicka and I. Shapiro, eds., *Nomos XXXIX: Ethnicity and Group Rights* (New York: New York University Press, 1997) at 22-66. (Levy identified eight different manifestations of cultural rights: exemptions, assistance measures, self-governemnt, external rules, internal rules, recognition/enforcement, representation and symbolic claims).

<sup>362</sup> Ibid.

Furthermore, as Song also mentions, one of the proposed justifications for multiculturalism besides classical liberal values of equality and autonomy is exactly the critique of colonialism and the advance of Indigenous rights for self-determination and self-governance in formerly colonized states. Accordingly, multiculturalists look to the world from a postcolonial perspective, focusing on colonial oppression and persistent denials of basic human rights to cultural minority groups, as a point of critique. Multicultural theorists call this particular line of thinking *postcolonial multiculturalism*. As Song explains:

Lastly, some philosophers have looked beyond liberalism in arguing for multiculturalism. This is especially true of theorists writing from a postcolonial perspective. The case for tribal sovereignty rests not simply on premises about the value of tribal culture and membership, but also on what is owed to Native peoples for the historical injustices perpetrated against them. Reckoning with history is crucial. Proponents of indigenous sovereignty emphasize the importance of understanding indigenous claims against the historical background of the denial of equal sovereign status of indigenous groups, the dispossession of their lands, and the destruction of their cultural practices (Ivison 2006, Ivison et al. 2000, Moore 2005, Simpson 2000). This background calls into question the legitimacy of the state's authority over aboriginal peoples and provides a *prima facie* case for special rights and protections for indigenous groups, including the right of self-government.<sup>363</sup>

Not surprisingly, this frame of reference for postcolonial multicultural policies creates numerous opportunities for the adoption of culturally sensitive justice experiments such as restorative sentencing schemes and Indigenous-controlled courts.<sup>364</sup> Actually, one of the justifications for the massive growth of RJ experiments in the last two decades in countries like Canada and Australia, far beyond the broad limits envisioned by its proponents concerning a paradigmatic shift from punishment and retribution, can be attributed to the political agency of those liberal multicultural states in promoting what multicultural theorists define as “the politics

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<sup>363</sup> Ibid.

<sup>364</sup> The right of self-government involves jurisdictional authority over a delimited territory and institutional mechanisms to enforce it, e.g., tribal police or some sort of Indigenous Justice. See Margaret Moore, “Internal Minorities and Indigenous Self-Determination,” in Avigail I. Eisenberg and Jeff Spinner-Halev, eds., *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005) at 271-293.

of recognition”.<sup>365</sup> As Song explains, a “politics of recognition” challenges status inequality and the remedy it proposes is cultural and symbolic change. With respect to criminal justice and its formal institutions, this symbolic change means, for instance, the introduction of alternative justice practices like RJ that presupposes non-incarceration measures for Aboriginal offenders; dialogue-driven adjudication; diversion from formal courts and, finally, a more holistic and communitarian process of doing justice.<sup>366</sup> It is not by chance that state-sponsored alternative justice schemes like sentencing circles developed first through Indigenous groups in Canada and Australia. Multicultural policies of recognition fueled the RJ boom in liberal democracies like Canada and Australia in conjunction with the influence of several other social movements and theoretical and philosophical stances, as we have seen in chapter one.

#### **b) Intersectionality and multiculturalism: finding common ground**

With regard to the postcolonial aspect of the multicultural promotion of “group-differentiated rights”, i.e., the emphasis on certain rights for self-determination for Indigenous groups, there is an invitation by intersectional feminists to make claims concerning the commonality of presuppositions that inform multicultural policies and intersectional approaches to sentencing circles. Notably, I established in the last chapter that intersectionality is an approach that organized feminist theorizing on RJ practice around the integration of issues like post-colonialism, anti-racism and, especially, political claims for self-governance and self-

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<sup>365</sup> See Charles Taylor, “The Politics of Recognition” in A. Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (New Jersey: Princeton University Press, 1994). (Explaining the concept of recognition from several perspectives).

<sup>366</sup> See note 319, Cunneen, *Reviving RJ traditions*. (Describing the emergence of RJ practices within the context of Indigenous groups through multicultural policies).

determination by Indigenous groups.<sup>367</sup> This means that intersectionality analysis also focuses attention on responses to inequality that have long been the subject of debate and examination within multiculturalism and/or object of multicultural policies of recognition like Indigenous self-determination. As a consequence, one of the main points of friction between intersectionality analysis and sentencing circles, i.e., concerns about self-government rights by Indigenous people and decolonization mechanisms comes to look similar in direction and nature to multiculturalists' concerns and; thus, the turn to the critiques made against multiculturalism becomes a valuable resource for understanding the vulnerabilities of the intersectional approach as well. In short, multiculturalism and intersectionality theory can be considered intertwined systems of action and meaning that share, in some aspects, common ideological and political projects committed with Indigenous mechanisms of self-determination, decolonization and self-empowerment like restorative sentencing circles.

According to Reingod and Baratz, there is a very strong bond between feminist theories in general and multiculturalist theories since both share a general concern for promoting social justice and ethnic equality and there are transformational and emancipatory goals motivating both intellectual enterprises.<sup>368</sup> However, they also acknowledge that this connection between the feminist paradigm and multiculturalism is not free from dissension. They have identified three distinct stances among academic commentators. In the first stance, feminism is at odds with multiculturalism. As they have noted, "Advocated mainly by liberal feminist thinkers, the first approach claims that feminism and multiculturalism are contradictory, and there is a

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<sup>367</sup> See note 316 and accompanying text. (Actually, Chris Cunneen have established this connection between feminism and RJ, but in general terms). See note 209.

<sup>368</sup> See note 273, Reingod & Baratz, *Feminism and Multiculturalism*. (The vision is emancipatory in a broader political sense, whereby intersectionality and multiculturalism rhetoric can serve as tools for decolonization and anti-racist policies).

strained relationship between them.”<sup>369</sup> This position is, especially, defended by feminists inspired by liberal thinking like Susan Moller-Okin and Ayelet Shachar.<sup>370</sup> In the second position, feminism and multiculturalism are both contradictory and complementary at the same time. Notably, scholars within the context of education defend such positions.<sup>371</sup> Finally, there are scholars that consider multiculturalism and feminism as essentially compatible with each other like Shohat and Volpp.<sup>372</sup> These scholars advocate what some feminists call *multicultural feminism*, i.e., a strand of feminist theorizing also known by the term *multiracial feminism* or in some academic circles as *intersectional feminism*.<sup>373</sup> Nonetheless, the important point of this claim is not the terminological similarity between *multiculturalism* and *multicultural feminism* as seems to be the case at first sight. More importantly, it is the coincidence of objectives and values between multiculturalism, critical race theory (i.e., Afro-American feminism), or intersectional feminism. As Reingod and Baratz suggest:

The proponents of the third approach in the polemic assert that multiculturalism and feminism offer similar arguments to explain why women suffer from discrimination and injustice, presenting similar solutions for creating equality between the genders (...) and is essentially the thesis of the feminist school known as "Afro-American feminism."<sup>374</sup>

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<sup>369</sup> Supra note at 54.

<sup>370</sup> See note 274 and accompanying text. (The concept of multiculturalism has been critiqued by Susan Moller-Okin. According to her claims of minority cultures contradict norms of gender equality pursued by women in liberal states). See also Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001). (Addressing the relationship between multiculturalism and feminism as oppositional due to conflicts between aiming to support and protect many cultures and aiming to promote the equality and dignity for women).

<sup>371</sup> See note 273 at 54. (For an account of scholars that share this position).

<sup>372</sup> See, e.g., Ella Shohat, ed., *Talking Visions: Multicultural Feminism in a Transnational Age* (Cambridge: MIT Press, 1998). See also Leti Volpp, "Multiculturalism versus Feminism" in Natalie J. Sokoloff & Christina Pratt, eds., *Domestic violence at the margins: readings on race, class, gender, and culture* (Piscataway, NJ: Rutgers University Press, 2006) 39. (Arguing that positing feminism and multiculturalism as oppositional is flawed and illogical under the perspective of immigrant minorities. She contends that there is a common ground for a constructive dialogue between the two ideological stances.)

<sup>373</sup> See infra note 372.

<sup>374</sup> Ibid.

In reality, the terms Afro-American feminism (or Black feminism), critical race feminism and multicultural feminism come to identify several feminist perceptions that are aligned at the same time with certain features of *multiculturalism* and *multicultural feminism*. For example, as we have seen in chapter two, multicultural (or multiracial) feminism is greatly influenced by intersectionality theory in the sense of the attention given to the interplay of multiple categories of inequality and the appreciation of culturally heterogeneous perspectives and insights.<sup>375</sup> Thus, we can identify in multicultural (or intersectional) feminism one strand of feminist thinking that is in part committed to some of the ideological principles of multiculturalism, in particular, the respect for diversity and empowering culturally diverse groups (e.g., Indigenous people). In short, the postcolonial multicultural rhetoric in its proposition of rights to self-determination for cultural minority groups like Indigenous people posits several interrelated and reinforcing proximal political and philosophical drivers that substantively overlap with intersectionality theory.

### **c) Intersectionality and multiculturalism: establishing differences**

Despite the arguments above, finding common ground between postcolonial multiculturalism and intersectionality as applied to RJ does not mean that the two ideologies are totally equivalent. What may approximate multiculturalism to intersectional feminism may also confound scholars trying to make sense of their dissimilarities concerning epistemic approaches. It is precisely because their goals and subject matters look so close to one another in some aspects that it becomes necessary to establish clear distinctions between the two ideological

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<sup>375</sup> See notes 310 and 311 and accompanying texts. (Explaining the use of other terminologies to convey the idea of intersectionality theory like, for example, multiracial feminism).



positions. Actually, intersectionality theory is not equivalent to multiculturalism.<sup>376</sup> Although there are highly significant similarities between postcolonial multiculturalism and intersectional feminism, particularly, as applied to RJ, the two concepts cannot be confounded with each other. There are clearly disparate epistemic stances between the two theories. Multicultural theories are arguably defined mainly by essentialist positions; i.e. multicultural rhetoric treats individuals as if their particular ethnocultural group essentially defines them. For this reason, in multicultural theory culture plays the role of homogenization that sex/gender can play in women's studies. In contrast, intersectionality theory, in ideal terms, operates through well balanced anti-essentialist positions and explores the tension that arises along multiple inequality categories and axes of oppression, without giving primacy to a specific inequality category or site of oppression.<sup>377</sup> Both concepts have evolved from similar articulations within the RJ realm, but they have significant epistemological differences that focus on exploring ethnocultural considerations from different perspectives. In sum, intersectionality theory is not a feminist version of postcolonial multiculturalism, but seems to share certain substantial aspects of it.

Nevertheless, as we shall see in this chapter, there are imbalanced anti-essentialist intersectional positions --- especially, in cases of domestic violence adjudicated in restorative sentencing circles --- that work to deemphasize gender/sex equality concerns about individual victims (concerning, e.g., security, autonomy and offender accountability) almost to the point of displacing them as analytical categories. In particular, because imbalanced intersectional stances -- as occurs in postcolonial multicultural theory --- overemphasize the importance of culture, or ethnocultural political themes, they leave underestimated other inequality markers like gender power differentials. This suggests a close proximity with postcolonial multiculturalism, which

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<sup>376</sup> See Rita Dahamoon, "'Cultural' versus 'Culture': Locating Intersectional Identities and Power" (Paper presented at the Annual Meeting of the Canadian Political Science Association, June, 2004) [unpublished].

<sup>377</sup> Ibid.

also accords a strong emphasis on culture and collective identities, but without great concerns regarding subjectivities or individual needs. In this sense unbalanced intersectional approaches to sentencing circles can be, paradoxically, as essentialist as postcolonial multiculturalism because they prevent intersectional practices from considering other loci of inequality. Unfortunately, this insistence of unbalanced intersectional feminists on the primacy of ethnocultural political claims over survivors' individual needs sabotages the very conception of intersectional feminism as an emancipatory and critical feminist analytical tool. This is especially worrisome because unbalanced versions of the concept of intersectionality mirror other problems of multicultural theory, especially, concerning vulnerable internal minorities.

#### **d) Intersectionality and multiculturalism: shared vulnerabilities**

Sarah Song states that one of the most common criticisms of multicultural policies are the objections raised against protections to minority groups that may come at the price of reinforcing internal oppression of vulnerable members of those groups.<sup>378</sup> Indeed, this critique produced in what has been called by academic commentators the problem of “minorities within minorities” or “collective rights versus individual rights” in multicultural theory. In her summary of some of this criticism, Song notes that multicultural theorists have focused on inequalities *between* minority groups and the wider society, particularly, arguing for special protections for cultural minority groups, but such group-based special protections can, paradoxically, end up exacerbating inequalities *within* minority groups.<sup>379</sup> According to Margaret Moore, the drive for this concern is the fear that ethnic minority elites will use group-differentiated cultural rights to oppress or discriminate against their own vulnerable members such as religious dissenters,

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<sup>378</sup> See note 362.

<sup>379</sup> Ibid.

nonconformists, homosexuals, women, and children --- hence formulating policies that will work to “unfairly marginalize or discriminate against people who occupy positions that are at odds with dominant or accepted cultural understanding.”<sup>380</sup> Ayelet Shachar calls this fear *the paradox of multicultural vulnerability*, which draws attention to the less recognized costs of multicultural accommodation.<sup>381</sup> As she puts it:

Under such conditions, well-meaning accommodation by the state may leave members of minority groups vulnerable to severe injustice within the group, and may in effect, work to reinforce some of the most hierarchical elements of a culture. I call this phenomenon *the paradox of multicultural vulnerability*. By this term I mean to call attention to the ironic fact that individuals inside the group can be injured by the very reforms that are designed to promote their status as group members in the accommodating, multicultural state.<sup>382</sup>

Margaret Moore has established a typology of contexts in which ways of protecting minority groups from oppression by the majority may make them more likely to undermine the basic liberties and opportunities of internal vulnerable members. First, Moore highlights what she calls *positional* or *status diversity* contexts.<sup>383</sup> According to her, vulnerable members of minority cultures, as in any cultural context, will occupy different positions within that culture and the reality of the culture may mean discrimination against some people within that culture. This concern has been primarily raised by feminist writers who point to the patriarchal nature of many traditional cultures and the perils of cultural arrangements that can be used to justify the perpetuation or reproduction of forms of discrimination against women.<sup>384</sup> Second, Moore argues for *philosophical* or *ideological diversity* that is a source of concerns related to the external conduct or self-advocacy stances of minority groups. As Moore explains, this stance is concerned about questions of the “dynamics of majority-minority relations within

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<sup>380</sup> See note 367 at 273.

<sup>381</sup> See note 372, Shachar, *Multicultural Jurisdictions*, at 57.

<sup>382</sup> Supra note at 3.

<sup>383</sup> See note 367 at 273.

<sup>384</sup> See note 372.

the state, and the tendency for the minority group to seek to appear unified, especial vis-à-vis the majority group, in order to gain a better bargaining position.”<sup>385</sup>

Citing a previous work by Leslie Green, Moore remarks that “there is a tendency to minority groups in the state to exaggerate the extent of solidarity behind their particular political program, because any dissent from it is likely to be interpreted by the majority group as a sign of weakness, as a sign that compromise is unnecessary, that the elites are not representatives of everyone and so on.”<sup>386</sup> As a result, vulnerable internal groups dissatisfied with certain cultural accommodations may find difficulties in conveying their own needs and interests and might be silenced or marginalized as dissenters or fifth columnists. Moreover, I would also include in the typology women’s self-imposition of conformist roles due to patriarchal disciplinary mechanisms, as Angela Cameron has observed in sentencing circles applied to adjudicate domestic violence cases in Indigenous communities in Canada.<sup>387</sup> Song lists, among others, the following examples of problems with “minorities within minorities” in multicultural policies: “cultural defenses” in criminal law, accommodating religious law or customary law within the dominant legal system, and self-government rights for Indigenous communities that deny equality to women in certain respects.<sup>388</sup>

As noted earlier, the relationship between multiculturalism and intersectional feminism frequently arises in liberal postcolonial settings where dominant legal systems informed by multicultural theories are prepared to adopt new alternative justice remedies and customary Indigenous justice practices. With regard to self-government rights for Indigenous communities, we can assume not only a commonality of themes and interests, but also of

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<sup>385</sup> See note 367 at 273.

<sup>386</sup> Ibid. See also Leslie Green, *The Rights of Minority Cultures* (New York, NY: Oxford University Press, 1995).

<sup>387</sup> See note 302 and accompanying text.

<sup>388</sup> See note 362.

potential problems between the two approaches. If we can identify potential problems with vulnerable groups within minorities in multicultural policies, we can also speculate about similar problems in imbalanced intersectional approaches to RJ practices. Notably, because such a strand of feminist thinking brings into discussion within the RJ field exactly the same questions risen by multicultural theorists, i.e., issues related to Indigenous rights for self-determination and self-governance in justice matters.

Besides the previously mentioned thematically related allusions of commonality between multiculturalism and intersectionality theory, there are intersectional epistemic problems derived from extreme anti-essentialist positions and cultural frame alignment strategies of the RJ movement itself that also resonate with multiculturalism. For example, imbalanced versions of intersectional feminism assign great worth to collective ethnocultural claims while de-emphasizing individual gender inequality concerns, as multiculturalists also do when the paradox of vulnerability occurs. This highlights how crucial multiculturalism is for the correct understanding of unbalanced intersectional feminism. Indeed, unbalanced versions of intersectional feminism dwell on the same weaknesses of postcolonial multiculturalism concerning the perils around issues of diversity and internal minorities. Intersectional feminists should be aware of these functional similarities concerning potential problems in order to be able to avoid them within RJ settings, if necessary. In short, there is a coincidence of subject matters and epistemic drives that suggest similar negative outcomes when multicultural policies and imbalanced intersectional feminist approaches are present within RJ contexts. Indeed, this nexus between intersectionality and multiculturalism should spawn further investigatory efforts and questions in both research and practice. For the moment, it is sufficient to say that unbalanced intersectional approaches on RJ programs are tied to multicultural initiatives and that the critique

of these policies may actually serve to shed some light on what can go wrong with intersectional feminism as applied to the RJ field.

## **2. Discussion and implications: contextualizing imbalanced intersectional approaches**

As noted previously, intersectionality analysis has become a well-established feminist formula to align RJ experiments, postcolonial issues and multiculturalism theories within the same analytical frame, particularly bringing into discussion themes of great significance to Indigenous women such as domestic violence, rights to self-determination and remedial justice practices. Indeed, in commentary after commentary on restorative experiences within Aboriginal settings feminist scholars have made laudatory references to intersectionality analysis, while also emphasizing the need to incorporate this kind of feminist approach into their scholarship. Restorative justice scholar Ruth Busch, for instance, argues that if restorative experiences are to be used with domestic violence cases, it is imperative to have understanding of intersectionalities of race and gender in the lived realities of battered victims' lives.<sup>389</sup> In the same vein, Donna Coker argues for incorporating insights from critical race theory (i.e., intersectionality theory) in order to understand the intersecting oppressive systems that operate in the lives of men and women in Indigenous communities.<sup>390</sup> Moreover, Julie Stubbs points out that an intersectional framework which acknowledges the multiple and indivisible operations of race, class and gender may assist to examine how cultural practices work to sustain the power differences between politics and practices which represent Aboriginal people but ignore their gender or the reverse.<sup>391</sup> Finally, Angela Cameron clearly states her commitment to

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<sup>389</sup> See note 350, Busch, *Who pays if*, at 224. See, e.g., note 314, Sokoloff and Dupont, *Domestic Violence at Intersections*. (Noting that the incorporation of intersectional approaches to domestic violence studies is a classic line of feminist research.)

<sup>390</sup> See note 25, Cocker, *Transformative Justice*, at 129.

<sup>391</sup> See note 254 at 49.

intersectional thinking when she notes that either a cultural or sexist focus on judicially convened sentencing circles is an incomplete analysis without an intersectional framework.<sup>392</sup> Beyond this limited list there are, of course, other feminists and RJ scholars willing to give implicit or explicit support to intersectionality analysis in RJ studies --- but none of them, I would suggest, are prepared to push forward the epistemological and political challenges of the operationalization of intersectional approaches in such areas.

This segment critically reflects on the above feminist stances bringing into discussion not only positive, but also negative implications of intersectional thinking within the pragmatic context of RJ experiences, especially sentencing circles. Generally, intersectionality theory has no negative implications clearly recognized by scholarly work, leading many feminists to inappropriately disregard potential difficulties and complexities of this approach, as if they did not exist at all.<sup>393</sup> To the best of my best knowledge, for example, this paper is the first to problematize intersectionality theory within the context of RJ, domestic violence and postcolonial Aboriginal justice. Because little or no research has been conducted directly problematizing the concept of intersectionality within RJ and domestic violence settings, there is a paucity of information to allow intersectional feminists to question their own political and ideological commitments and how this affects their subjective perceptions of RJ initiatives. For this reason, it is important to identify potential undesirable effects of intersectional thinking. In addition, intersectional feminism operates on the assumption that all interests, including individual's membership within a particular group, can be adequately protected through the

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<sup>392</sup> See note 2, Cameron, *RJ: Literature Review*, at 29.

<sup>393</sup> But see Rita Dahamoon, "Considerations in Mainstreaming Intersectionality as an Analytic Approach" (Paper presented at the Annual Meeting of the Western Political Science Association, 20-22 March, San Diego.) [unpublished]. (Expressing fears that mainstream intersectionality may end up reducing an understanding of difference and power because of the wrongly perceived but widespread idea that categories can be fractured into never-ending sub-categories. Dahamoon also argues that the prevalence of racism, sexism, homophobia, disableism, and class privilege within intersectionality-type methods will mean that theoretical, conceptual, and normative linkages that challenge the status quo may be diluted or rejected entirely.)

recognition of their needs as members of the collectivity. However, as we have seen, imbalanced intersectional approaches can favor communal political interests of the majority, tainting the evaluation and perception of RJ processes in relation to the individual needs of victimized women.

Furthermore, there is a growing concern among intersectional feminist scholars regarding the emptying out of the concept of intersectionality analysis due to its ubiquitous influence in feminist research.<sup>394</sup> According to Michelle Berger, for example, “(...) we are witnessing a period of flattening the intersections and decoupling lives from political conditions; and that intersectional analyses are being used to splinter social movements rather than create the ground for varied groups to come together.”<sup>395</sup> This position is also shared by Rachel Luft who argues that, “(there) ... can be unintended consequences to the blanket application of intersectionality. Uniform deployment may inadvertently contribute to flattening the very differences intersectional approaches intend to recognize.”<sup>396</sup> In other words, intersectionality analysis can offer an important critique of battered women’s experiences in RJ settings by warning of the presence of multiple intersecting oppressions in such alternative justice projects. However, there are also potential problems in some intersectional approaches that, ironically, can serve to reinforce the very identity roles and patriarchal structures that intersectionality theory aims to unsettle. Imbalanced intersectional readings of RJ experiences can prevent

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<sup>394</sup> See especially note 29, Davis, *Intersectionality as Buzzword*. See also Leslie McCall, “The Complexity of Intersectionality” (2005) 30:3 *Signs: Journal of Women in Culture and Society*. (These authors provide an excellent account of the ubiquitous influence of intersectionality analysis in feminist studies).

<sup>395</sup> See Kathleen Guidroz & Michele Tracy Berger, “A Conversation with the Founding Scholars of Intersectionality” in Kathleen Guidroz & Michelle T. Berger, eds., *The intersectional approach: transforming the academy through race, class and gender* (The Univ. of North Carolina Press, 2009) 61. (The authors in this chapter organized a conference call between the founding scholars of intersectional theory such as Kimberlé Crenshaw, Nira Yuval-Davis and Michele Fine to discuss the challenges that intersectionality has been facing in the academia and activist circles).

<sup>396</sup> See also Rachel E. Luft, “Intersectionality and the Risk of Flattening Difference” in Kathleen Guidroz & Michelle T. Berger, eds., *The intersectional approach: transforming the academy through race, class and gender* (The Univ. of North Carolina Press, 2009) 100.



recognition of those roles and structures, since both of them can be obscured by the supposedly antisexist image of an intersectional approach and end up creating a situation of uncritical validation and conformity. This subsection, therefore, identifies potential problems in intersectional approaches, particularly, in sentencing circles.

As noted above, no feminist scholar has previously distinguished between positive and negative aspects of intersectionality as applied to RJ, an important omission since this same feminist approach plays an important role in RJ models with a specific ethnocultural component. In fact, as indicated earlier, there is a scarcity of related research that has examined intersectionality as an analytical tool that pits *gender inequality* against *culture* as a worrisome trade-off, e.g., with non-Indigenous feminists pushing for more equality and offender accountability and usually Indigenous participants and postcolonial/anti-racist activists pushing for political self-determination and self-governance. An exception, however, is feminist scholar Kathleen Daly who seems to be concerned with that delicate balance when she notes that Indigenous groups (or the collectivity) emphasize offenders' interests; while feminist groups privilege individual victims' interests in RJ experiences.<sup>397</sup> As stressed in the introduction, Daly proposes what she calls *an intersectional politics of justice* that can be equally critical of the conflicts and competing interests that emerge in the different sites of contestation between feminist and anti-racist groups as these relate to alternative justice practices.<sup>398</sup>

As noted previously, Daly claims that the sites of contestation are the inequality caused by crime (between victims and offenders), social divisions (race and gender politics), and individuals and collectivities (rights of offenders and victims).<sup>399</sup> She believes that it is possible to respond to these inequalities in a way that is not necessarily a matter of a zero sum game, i.e.,

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<sup>397</sup> See note 16, Daly, *Seeking Justice*, at 1.

<sup>398</sup> See note 16, Daly, *Seeking Justice*, at 8.

<sup>399</sup> *Ibid.*

an intersectional analysis is capable of avoiding leveraging one site of inequality over the other. While I would agree with Dally's contention that intersectionality analysis has the capacity to address all the intersecting sites of inequality equally, I also believe that there are overlooked imbalanced versions of intersectional thinking that can reinforce zero sum expectations or even worse, to perpetuate or reproduce inequalities caused by crime and by gender inequality positions. Unlike Cameron, Daly and other intersectional feminists, I believe that intersectional thinking within the RJ field can be misrepresented and appropriated to serve political commitments not fully aligned with women's interests. More recently, even Kimberlé Crenshaw --- a seminal thinker in intersectionality theory --- recognized that, "There's an imbalance in how intersectionality gets used, mostly as a point of entry for gender but not as a point of entry for race."<sup>400</sup> She also observes that the differences between postmodernism, anti-essentialism, and intersectional critiques are at the core of this imbalance generating, paradoxically, gender underestimation.

Likewise, I have established that there is an imbalanced anti-essentialist tendency in some intersectional approaches to RJ and domestic violence that slides towards gender inequality underestimation; ultimately, leading to intersectional disempowerment and intersectionality theory co-optation by non-women-centered interests. This imbalance jeopardizes racialized women's positions by downplaying their need for security, offender accountability and empowerment at an individual level, particularly, in situations of domestic violence. In fact, I have noted in other parts of this paper that imbalanced versions of intersectional thinking could be also *divisive*, *uncritical* and susceptible to *co-optation* by interests not centered in the subjectivities and needs of racialized female victims of violence. Such claims, needless to say, are the direct result of my previous articulation of the ubiquitous

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<sup>400</sup> See note 392 at 76.

presence of intersectional analysis within RJ and postcolonial Indigenous justice and have great significance on how racialized women are perceived and treated in RJ settings, including sentencing circles.

As we have seen, I have attributed the existence of the above-mentioned negative features to certain epistemic vulnerabilities of intersectionality theory (i.e., tendency to radical anti-essentialism) in conjunction with other relatively complex interactions with RJ self-advocacy (i.e., cultural frame alignment) and multiculturalism theory vulnerabilities (i.e., the paradox of vulnerability). All these practical forces plus political issues mean that what is originally intended in intersectionality theory, i.e., emancipation and liberation of racialized women affected by multiple systems of oppression and privilege, simply does not play out in the real world. Internalized ethnocultural political ideologies and distorted intersectional approaches can then lead to collective unjust decisions and underestimated perceptions of battered women in RJ settings, especially, when these women express some discomfort with ethnocultural restorative practices. In fact, the pervasive influence of intersectionality analysis makes it even more susceptible to distortions because its good reputation among feminists can hide or skew other values and objectives.

Until this point all these claims were developed in this work in a merely speculative and correlational way. But, it is also important to contextualize the reality of those claims of intersectional co-optation and disempowerment by stressing negative outcomes around real restorative experiences that have the potential to jeopardize the lived experiences of women victims of domestic violence. Ultimately, I try to demonstrate that possible distortions in intersectional approaches are capable of the emptying out of the concept itself. I start with some clarifications on sentencing circles in Canada and Australia, just to address some issues left open in the previous chapters. Having made such clarifications, I move on to identify in a synthesized

selected literature on sentencing circles in Canada and Australia some indications that imbalanced intersectional approaches may be appropriated to serve non-woman-centered interests.

#### **a) Sentencing circles: further clarifications**

Three basic restorative models were initially described in chapter one: victim-offender mediation/reconciliation, family group conferencing, and restorative sentencing circles. However, I will give attention only to the last-mentioned restorative model. Sentencing circles are employed as a sentencing method that incorporates culturally sensitive guidelines with the purpose to determinate preferably non-custodial sentences for offences committed by Indigenous offenders. To be more precise, I am referring to what Cameron and Cunliffe call *judicially convened sentencing circles judgments*, i.e., a form of sentencing practice that takes into consideration insights from respected members of an Indigenous community (e.g., Elders) and other stakeholders (e.g., victims, offenders and their families and supporters) that are literally organized in a “circle” at a courtroom or communal hall for sentencing an offender who is somehow connected to that community.<sup>401</sup> The general functioning of a sentencing circle has already been described in a previous chapter.

It is largely accepted that the first sentencing circle was held in the Canadian justice system. According to several sources, in 1992, the then Yukon territorial judge Barry Stuart devised in *R. v. Moses* a sentencing mechanism under which restrictions on incarceration

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<sup>401</sup> See note 8, Cameron & Cunliffe, *Writing the circle*, at 12. (Hereafter, I will refer to judicially convened sentencing circles judgments simply as *sentencing circles*. Although sentencing circles has been used either principally or exclusively to Aboriginal offenders, there are accounts of non-aboriginal people with a connection to Aboriginal communities being judged in sentencing circles schemes). For example, in *R. v. Sellon*, 172 Newfoundland Supreme Court Trial Division (unreported) (April 4, 1996). See note 13, Goel, *Canadian Sentencing circles*, at 934-943 in a kindle e-book version. See also note 176.

measures were fully justified and community participation incorporated into the sentencing process, on policy grounds compatible with customary Indigenous traditions and RJ practices.<sup>402</sup>

Stuart articulated the principles of sentencing circles in the following passage of his decision:

Currently the search for improving sentencing champions a greater role for victims of crime, reconciliation, restraint in the use of incarceration, and a broadening of sentencing alternatives that calls upon less government expenditure and more community participation. As many studies expose the imprudence of excessive reliance upon punishment as the central objective in sentencing, rehabilitation and reconciliation are properly accorded greater emphasis. All these changes call upon communities to become more actively involved and to assume more responsibility for resolving conflict. To engage meaningful community participation, the sentence decision-making process must be altered to share power with the community, and where appropriate, communities must be empowered to resolve many conflicts now processed through criminal courts.<sup>403</sup>

Sentencing circles and analogous experiences with Indigenous-controlled courts are seen in Indigenous and academic circles as legitimate attempts of redressing the colonial exclusion of Indigenous people from legal and judicial decision-making.<sup>404</sup> However, it should be noted that the whole sentencing process occurs under the supervision and direction of an official Judge, usually non-indigenous, who retains *de facto* power over the ultimate sentencing outcome. This characteristic of sentencing circles has been a source of criticism from the Indigenous community and some RJ academics. Dickson-Gilmore and Laprairie, for example, argue that while the sentencing circle may contribute to an appearance of power-sharing, this contribution is more illusory than real since the court retains both authority and jurisdiction to impose whatever sentences the judge rather than the circle, decides or recommends for a particular offender.<sup>405</sup> Actually, sentencing circle experiences are entirely handled under the auspices of the conventional legal system that also set clear limits on the sentencing outcomes. In

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<sup>402</sup> See, e.g., note 13.

<sup>403</sup> See *R. v. Moses*, [1992] 3 C.N.L.R. at 118.

<sup>404</sup> See note 319, Cunneen, *Reviving RJ traditions*, at 121.

<sup>405</sup> See, e.g., note 8, Dickson-Gilmore & Laprairie, *Will the Circle be unbroken*, at 142. (Anyway, the collective adjudication is largely respected by trial judges.

Canada, for example, this type of restorative circle follows the provisions of the Criminal Code, section 718.2(e), which calls on courts to consider all available alternatives to incarceration for Aboriginal offenders that are reasonable in the circumstances.<sup>406</sup>

The exact numbers of sentencing circles held in Canada are sketchy due to the lack of formal written records in some cases, but anecdotal evidence suggests hundreds in several Canadian provinces.<sup>407</sup> Cameron remarks that there are a considerable number of ongoing sentencing circle programs in several Canadian jurisdictions.<sup>408</sup> The numbers may well be dozens, perhaps almost a hundred sentencing circles and this suggests large acceptance of this specific RJ model in Canada. Within the Australian context sentencing circles are also largely accepted. The version of sentencing circles practiced there is a blend of indigenous and imported elements that consolidated itself in the period following the international expansion of RJ practices in the early 1990s. To be more accurate, Kathleen Daly observes that sentencing circle schemes were adapted from the Canadian experience and then imported into Australia in 1992.<sup>409</sup> Marchetti provides more details on the implementation and operation of sentencing circles in Australia. She notes that there are “... over 50 Indigenous sentencing courts operating in all Australian states and territories, except Tasmania. These courts were first established in urban centres in South Australia (the first was opened in Port Adelaide, a suburb of Adelaide,

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<sup>406</sup> Ibid. (According to Cameron and Cunliffe, before the provisions of the Criminal Code the judge made use of common law sentencing powers to justify sentencing circle schemes). See also *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2(e).

<sup>407</sup> See, e.g., note 8, Dickson-Gilmore & Laprairie, *Will the Circle be unbroken*.

<sup>408</sup> See note 2, Cameron, *Literature Review*.

<sup>409</sup> See note 16, Daly, *Seeking Justice*, at 10. (Unlike Canadian sentencing circles, Daly observes that Australian sentencing circles are organized as a regular part of the court's sentencing schedule. Nevertheless, Australian sentencing circles like they Canadian counterpart do not enforce customary law, but ordinary criminal law.)

Australia on June 1, 1999) and today they operate under varied legislative frameworks and with differing eligibility criteria (Marchetti & Daly, 2004, 2007)”.<sup>410</sup>

There are objective criteria recognized by case law in Canada to hold sentencing circles. In *R. v. Joseyounen* Judge Fafard of Saskatchewan Provincial Court established seven clear criteria that are often quoted by subsequent case law and scholarly commentary:

(1) The accused must agree to be referred to the sentencing circle; (2) The accused must have deep roots in the community in which the sentencing is held and from which the participants are drawn; (3) There are Elders or respected non-political community leaders willing to participate; (4) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing; (5) The court should try to determine beforehand, as best it can, if the victim is subject to battered women's syndrome. If she is, then she should have counseling and be accompanied by a support team in the circle; (6) Disputed facts have been resolved in advance; (7) The case is one which a court would be willing to take a calculated risk and depart from the usual range of sentencing.<sup>411</sup>

In Australia, Potas *et al.* note that sentencing circles seek to incorporate the following objectives:

(a) include members of Aboriginal communities in the sentencing process; (b) increase the confidence of Aboriginal communities in the sentencing process; (c) reduce barriers between Aboriginal communities and the courts ;(d) provide more appropriate sentencing options for Aboriginal offenders;(e) provide effective support to victims of offences by Aboriginal offenders; (f) provide for the greater participation of Aboriginal offenders and their victims in the sentencing process; (g) increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong; (h) reduce recidivism in Aboriginal communities.<sup>412</sup>

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<sup>410</sup> See Elena Marchetti, “Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances During the Sentencing Hearing” (2010) 43: 2 *The Australian and New Zealand Journal of Criminology* 263–281. See also Elena Marchetti & Kathleen Daly, “Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model” (2007) 29 *Sydney Law Review* 415-443. (Identifying differences between Indigenous sentencing circles and RJ experiences while recognizing that there are elements in common. The authors also provide an informative table describing all Indigenous sentencing courts established in Australia from June 2000 to January 2007. In addition, this table includes legislation and other directives that governs establishment and procedures of those courts in all local contexts where such experiences are applied).

<sup>411</sup> See *R. v. Joseyounen*, [1996] 1 C.N.L.R. 182. See also note 13.

<sup>412</sup> See Ivan Potas; Jane Smart; Georgia Brignell; Brendan Thomas; Rowena Lawrie; Rhonda Clarke, “Circle Sentencing in New South Wales: A Review and Evaluation” (2004) 8:4 *Australian Indigenous Law Reporter* 73.

Judicially convened sentencing circles judgments provide the best empirical framework for the identification of epistemic and political problems with intersectionality analysis that may indicate possible damaging consequences to Indigenous women.<sup>413</sup> This is most notably because such models have been largely used to engage cases of intimate violence in Indigenous settings.<sup>414</sup> In fact, Goel notes that Canadian sentencing circles have been used in domestic violence cases with Indigenous defendants for almost 15 years.<sup>415</sup> In addition, they have produced substantial analyses of feminist scholars committed to the two lines of intersectional thinking: one more centered in collective ethnocultural political interests and the other concerned with individual interests of battered women. The geographical context to be considered is again mainly Canada and Australia.<sup>416</sup> The rationale for this choice was already clarified in previous chapters. But it is sufficient to say here that those countries are liberal democratic systems that apply extensively *hybrid justice constructs* like sentencing circles, at the same time seeking to assert Aboriginal rights for social justice and self-determination while aligning these goals to RJ and its holistic and anti-retributive stances.

Although sentencing circles' primary aim is to reach a sentencing outcome that naturally balances offender rehabilitation with accountability, community empowerment and victim healing (i.e., through safety and empowerment) they also bring new preoccupations to the

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<sup>413</sup> As earlier noted, the harmful consequences flowing from imbalanced intersectional approaches include a number of negative positional outcomes to victimized women, such as physical and psychological re-victimization, feelings of exclusion and alienation, and silencing before the primacy of communal interests.

<sup>414</sup> Evidence in the case law supports this claim. In Canada, for example, Cameron and Cunliffe compiled the following cases: *R. v. Morris* (2004), B.C.C.A 305, 186 C.C.C (3d) 549 [Morris, cited to C.C.C.]; *R. v. Naappaluk*, [1994] 2 C.N.L.R 143 (Q.C. (Crim. Div.)) [Naappaluk]; *R. v. Bennett*, [1992] Y.J. No. 192 (y. terr. Ct.) (QL) [Bennett]; *R. v. Charleyboy*, [1993] B.C.J. No 2854 (B.C. Prov. Ct. (Crim. Div.)) (QL) [Charleyboy]; *R. v. Green*, [1992] Y.J. No. 217 (Y. Terr. Ct.) (QL) [Green]; *R. v. H.K.C.* [1997] S.J. No. 577 (Sask. C.A.) (QL) [H.K.C.]; *R. v. J.J.* (2004) N.L.C.A 81, 192 C.C.C (3D) 30 [J.J., cited to C.C.C.] and *R. v. W.B.T.*, [1995] 132 Sask. R. 221 (sub nom. *R. v. Taylor*), 3 C.N.L.R. No. 167 (Sask. Q.B. ) (QL). See note 8, Cameron & Cunliffe, *Writing the circle*.

<sup>415</sup> See note 13.

<sup>416</sup> In fact, Australasia since New Zealand will be addressed as well, however, in a lesser degree of attention. The reason for that is simple. Sentencing circles are more common in the Canadian and Australian contexts while in New Zealand family group conferences plays a more dominant role.



field of restorative justice. According to Goel, for example, there are unstated political goals and implications in those particular RJ models.<sup>417</sup> She argues that sentencing circles are backed politically and ideologically by the particular ambitions of Indigenous people, aimed at autonomy/self-governance, expression/education and reassertion of traditional methods of dispute resolution.<sup>418</sup> Thus, sentencing circles adopt an ethnocultural approach in searching for appropriate sentences for Indigenous offenders. The underlying premise when using sentencing circles as part of such Aboriginal political projects is that they capture unique minority features that can considerably affect sentencing outcomes. To fully understand these inherently political variables and their effects on racialized women, we need to study them in a way that takes into consideration such postcolonial discourses and the positioning of intersectionality theory within that same context.

In fact, linking sentencing circles experiences to postcolonial processes has been identified in the literature as an important problematic topic in the field of applied restorative justice. According to Adjin-Tettey, postcolonial theory is a process of disengaging from Western imperialism and fracturing and destabilizing hegemonic epistemology, colonial structures, and domination.<sup>419</sup> She also argues that sentencing circles are consistent with postcolonial remedial justice approaches. Such restorative experiences --- as multicultural policies --- call for recognition and respect for diverse ways of life, institutions, values and cultures, while also aiming to remedy the consequences of colonial marginalization like overincarceration and overrepresentation of Aboriginal people. However, Adjin-Tettey argues that there is an overlooked emerging threat in those postcolonial additional goals of Indigenous people when using sentencing circles. She questions whether or not communal ethnocultural political ambitions in

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<sup>417</sup> See note 13, Goel, *Canadian Sentencing Circles*, at 931-938 in a kindle e-book version.

<sup>418</sup> Ibid.

<sup>419</sup> See note 8, Adjin-Tettey, *Sentencing Aboriginal offender*, at 187.

sentencing circles have the potential to undermine individual victims' rights and safety. As she puts it:

The process and outcome [of sentencing circles] can be influenced by community politics in ways that undermine their transformative potential. Concerns that women's interests and their need for protection might be compromised in some restorative justice initiatives threaten to undermine their alleged goals since women's interests may be subordinated to the interests of offenders and perceived community harmony.<sup>420</sup> *Brackets added*

I shall return to this issue later, but it is pertinent to acknowledge since now that the presence of intersectional approaches have an important role in the answers given to such questions. Imbalanced intersectional approaches are inadvertently encouraging some postcolonial feminists and Indigenous women to believe that sentencing circles and other RJ experiences are always congruent with women's emancipatory values and needs, but the statements central to that approach may be obscuring detrimental consequences to women by privileging ethnocultural politics over individual gender inequality.

### **b) Imbalanced intersectional approaches in context: incorporating insights**

Given the widespread appeal of intersectionality theory in feminist readings of RJ interventions within Indigenous settings it might seem that this analytical frame would lead to a unified perspective of the value and efficacy of such experiences.<sup>421</sup> However, conflicting conceptualizations of intersectional approaches left distinct traces in the observed performance and subjective evaluation of sentencing circles and other RJ models. Notably, it fostered *divisiveness* among intersectional feminists and between non-indigenous and indigenous women. Intersectional feminists, program participants and RJ activists with a variety of interests and

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<sup>420</sup> Supra note at 193.

<sup>421</sup> See note 30, Hancock, *Intersectionality as a Research paradigm*. (Describing the notion of intersectionality as a widespread feminist method of research.) See also subsection V in the previous chapter.

focuses produced different and sometimes clashing visions of restorative justice.<sup>422</sup> In Canada, for example, intersectional feminists and grassroots activists assessing sentencing circles were polarized into two roughly contrasting groups. On the one hand, we can find a group comprised of feminist legal scholars, indigenous and non-indigenous women and anti-violence activists who place strong emphasis on the roles that gendered inequalities and power differentials play in the implementation and operation of sentencing circles in domestic violence cases and that, usually, project distrust and criticism on such experiences.<sup>423</sup> On the other, a distinct group comprised of feminists and mainly Indigenous women who tend to suggest favorable outcomes of restorative sentencing circles due to their potential benefits for anti-colonial and antiracist objectives of Indigenous people (i.e., self-governance and autonomy).<sup>424</sup> As Cameron has observed, these feminists and Indigenous women view race and culture, and the effects of

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<sup>422</sup> But see note 349. (There is space for intermediary positions as Proietti-Scifoni, for example, has suggested. She identified a three-way typology that challenges the dichotomous “for and against” debate in the literature. According to her, at least among Aboriginal opinion leaders in New Zealand, there are supporters, sceptics, and contingent thinkers regarding the appropriateness of using RJ in cases of intimate violence.) I concede that reducing the complexity of the feminist debate over RJ in only two diametrically opposing sides is, admittedly, somewhat of an oversimplification. There are, of course, many areas of both actual and potential agreement between the sides, and it is possible to identify more nuanced approaches that blend aspects of each position among feminist scholars and participants. However, the initial claim’s validity remains. Research is replete with studies demonstrating the segregation of Aboriginal and non-Aboriginal woman in two conflicting sides concerning RJ experiences. Likewise, feminists share different opinions according to their ideological views on the issue. See note 349 at 14. (Listing examples of empirical literature where.) See also *infra* note.

<sup>423</sup> For a detailed list of these authors: See note 15, Cameron, *Stopping the Violence*, at 53. (Cameron cites several authors and groups that explicitly assume such position, e.g., Mary Crnkovich; Carol LaPrairie; Emma LaRoque, Aboriginal Women’s Action Network and Kelly MacDonald. I would include Cameron herself. [citations omitted]. As Angela Cameron explains, “This group of writers and activists employ feminist theory and methodology alongside various Aboriginal worldviews on gender roles and equality. Their work centres on the particular oppressions faced by Aboriginal women, and their analysis of western RJ and Aboriginal justice is informed by feminist and anti-racist perspectives. They speak both to colonial and patriarchal oppression of the Canadian state and the oppression of a powerful male elite within their own communities”).

<sup>424</sup> *Ibid* at 55. (Cameron lists several Aboriginal authors and non-indigenous scholars and groups as well, e.g., Patricia Monture-Okanee; Therese Lajeunesse; Ross Gordon Green; Sharon Perrault and Jocelyn Proulx and the Provincial Association of Transition Houses. [citations omitted]. She points out that, “For these women, Aboriginal culture (and sovereignty) is the primary tool to be used against colonialism.”) See also Sara Mills, “Post-colonial Feminist Theory” in Jackie Jones, ed., *Contemporary feminist theories* (Edinburgh: Edinburgh University Press, 1998) 98. (Their stances are directly connected with postcolonial feminism, i.e., a strand of feminist theorizing derived from mainstream postcolonial theory which centers around the conception that racism, colonialism, and the long lasting effects detrimental (economic, political, and cultural) of colonialism in the postcolonial setting, are inextricably bound up with the unique gendered realities of non-white, non-Western women.)

colonialism and oppression on racialized groups as the primary lens through which to evaluate RJ programs in Indigenous communities.<sup>425</sup> As she has put it:

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.<sup>426</sup>

In other words, some feminists and indigenous and non-indigenous women may attempt to employ intersecting inequality categories (i.e., gender, ethnicity, race, culture) as a signal that intersectional thinking embraces, above all, individual gender inequality concerns in RJ experiments; a signal most often relevant to victims of domestic violence who are prioritized in order to stress their needs for security, empowerment and offenders accountability (e.g., through public denunciation). In contrast, other feminist scholars and mainly Indigenous women --- who give primacy to political in nature ethnocultural claims --- may also attempt to employ those same intersectionalities as a signal that they have prioritized collectivist interests (e.g., spearheading self-determination) in the development and operation of sentencing circles, a signal most often relevant to the political agenda of dominant groups within Indigenous communities that seek to demonstrate their own fitness for culturally competent self-governance, particularly, in face of the public, and the state.

Similarly, within Australia, some feminist scholars and Aboriginal women seem to give more attention to collectivist ethnocultural considerations rather than individual gender inequality imperatives within RJ initiatives. Australian RJ scholar Henry Blagg, albeit not writing from an intersectional feminist perspective, argues that the principle of self-

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<sup>425</sup> See note 2, Cameron, *Literature Review*, at 30.

<sup>426</sup> Ibid.

determination needs to be placed at the centre of restorative initiatives since it is a *sine qua non* for the cultural and physical survival of Aboriginal people.<sup>427</sup> His claim is echoed in the writings of several Australian feminists, Aboriginal and non-Aboriginal, whose work suggest an intersectional explanation of the difficulties of Aboriginal men and women in RJ settings. For example, Larissa Behrendet, Loretta Kelly (Aboriginal), Rowena Lawrie (Aboriginal) and Winsome Matthews (Aboriginal) assign great worth to Aboriginal self-determination and, although recognizing the plight of Aboriginal victims of violence in the colonization process, they identify their own core commitments to political autonomy and self-governance of Aboriginal people, and then select from the existing intersectionalities those which are best suited to give those commitments more expression.<sup>428</sup> Just to illustrate, Behrendet contends that the legacy of colonization will end only when Indigenous sovereignty is fully recognized by former colonized states allowing, e.g., Indigenous people jurisdiction and decision-making powers through the inherent right of self-government.<sup>429</sup> She concludes pointing out that, “(...) the principles of self-determination and empowerment need to guide any restorative justice strategy that seeks to navigate and negate the dynamics and forces that encourage family violence to flourish”.<sup>430</sup>

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<sup>427</sup> See Henry Blagg, “Restorative Justice and Aboriginal Family Violence: Opening a Space for Healing” in John Braithwaite & Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge, UK: Cambridge University Press, 2002) at 199.

<sup>428</sup> See note 321, Kelly, *Using Restorative Justice*. See Larissa Behrendet, “Lessons from the Mediation Obsession Ensuring that Sentencing ‘Alternatives’ Focus on Indigenous Self-Determination in John Braithwaite & Heather Strang, eds., *Restorative Justice and Family Violence* (Cambridge, UK: Cambridge University Press, 2002) 178-190. See Rowena Lawrie & Winsome Matthews “Holistic Community Justice: A Proposed Response to Family Violence in Aboriginal Communities” (2002) 25 *The University of New South Wales Law Journal* 228-232. But see Pam Greer, “Aboriginal Women and Domestic Violence in New South Wales” in Julie Stubbs, ed., *Women, Male Violence and the Law* (Sydney, Sydney: Institute of Criminology, 1994) at 65. (Arguing the safety and offender accountability should be the primary objectives in alternative justice experiences developed in Australia to cope with domestic violence. She has noted that, “While too many Aboriginal men have died in custody, too many Aboriginal women have died in their communities. In two States more Aboriginal women have died in their communities than all of the total national Aboriginal deaths in custody”).

<sup>429</sup> *Supra* note, Behrendet, *Lessons*, at 190.

<sup>430</sup> *Ibid.*

Even in empirical research on sentencing circles this commitment to the ethnocultural political assertion of Aboriginal self-determination seems to gain more emphasis than the immediate needs of women victims of violence. In fact, how intersectionalities (e.g., race, culture, gender) are addressed in empirical research can communicate powerful messages about what is valued and devalued in certain intersectional approaches. For example, recently RJ scholar Elena Marchetti conducted an empirical study in the Australian states of Queensland and New South Wales, exploring the extent to which gendered power imbalances are present in Indigenous sentencing court hearings concerning intimate partner violence offending.<sup>431</sup> She has noted that, “A decolonising and critical race approach was adopted when conducting the interviews”<sup>432</sup> In other terms, she admitted to employing an intersectional approach as applied to RJ within postcolonial settings.<sup>433</sup> Therefore, she clearly identified herself as an intersectional feminist and, consequently, opted to distinguish herself from mainstream feminism.

In practical terms, this meant that she shifted the focus from a mainstream feminist binary-based explanatory model of domestic violence (i.e., female victim/ male offender) to one in which intersecting systems of oppression and privileges were considered with more emphasis. And inevitably, this also meant ethnocultural preoccupations with issues like racism and colonialism and its past and present effects on the program participants surveyed. Hence, Marchetti strategically focused her research process on analyzing how ethnocultural insights from Elders and court practitioners could address power imbalances that can be present during a sentence hearing for an intimate partner violence offence. Marchetti’s intersectional approach, therefore, distanced her critical perspective from conventional issues of mainstream

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<sup>431</sup> The study was conducted in 2010. Supra note 408.

<sup>432</sup> Supra note 408.

<sup>433</sup> Ibid. (Marchetti points out that Aboriginal sentencing experiences cannot be considered restorative justice. However, she also remarks in her research that they are comparable in several aspects like functioning and values.)

feminist exploration in domestic violence (e.g., gender inequality between victim and offender), albeit these were not totally absent. Accordingly, she restricted the scope of her research by interviewing only Elders and court practitioners instead of victimized women and offenders.<sup>434</sup>

She here explains this omission:

Although Indigenous sentencing courts do not give Elders or community representatives complete control over the process and final sentence, they do allow for the incorporation of Indigenous knowledge in the sentencing process and in this way, transform the sentence hearing into one that reflects Indigenous community values. However, little is known about how such cultural participation affects an offender and whether such courts can address power imbalances that may be present during a sentence hearing for an intimate partner violence offence. The findings presented below explore this issue from the perspectives of Elders, magistrates, court workers, and domestic and family violence support workers.<sup>435</sup>

In doing so, Marchetti reflected an imbalanced intersectional approach by making the Elders and court practitioners the only representative cross-section of the Aboriginal community. Relying solely on influential representatives, such as court practitioners or Elders, led to a biased representation of gender disciplinary norms, not only failing to capture the existing heterogeneous perspectives, but worse failing to understand the versions that could jeopardize marginalized community members like battered women. Consequently, the RJ and intersectionality theory crucial task of giving voice to marginalized and oppressed women who are battered was obscured by other collective intersectionalities like race, class, and colonialism. Marchetti's study overlooked the singular narrative accounts of victimized women to privilege collective cultural components of RJ experiences and, therefore, failed to achieve a balanced intersectional perspective. As a result, her findings reflected only a political ethnocultural perspective of dominant elites in Aboriginal groups that naturally tended to favor collectivist interests. Just to illustrate this point, in her research findings all Elders and court practitioners

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<sup>434</sup> Ibid. (It should be noted that Marchetti recognized the need to interview offenders and victims in future research.)

<sup>435</sup> Ibid at 271.

interviewed were clearly favorable to the use of the Indigenous courts in sentencing offenders of intimate partner violence. Although Elders and Indigenous and non-Indigenous court practitioners recognized the existence of power asymmetries, they poorly addressed mechanisms of power imbalance between victims and offenders and, therefore, potential detrimental effects to victimized women in the circles were overlooked.<sup>436</sup> The omission of victims' perspectives in intersectional approaches like that is a strong indicator of intersectional disempowerment and is another sign of imbalance attributable to the overemphasis given by some intersectional feminists to political and ideological influences that result from ethnocultural collectivist views.

In a previous Australian study on sentencing circles the same sign of intersectional disempowerment is noticeable, i.e., collectivist ethnocultural positions effectively can efface women's positions in sentencing circles. Potas et al., analyzed 13 sentencing circles cases in New South Wales Aboriginal communities. Similarly to Marchetti's findings their preliminary report suggested that Elders, offenders and Aboriginal communities see sentencing circles as an unqualified success. As they have noted, "In reviewing the effectiveness of circle sentencing it has been difficult to find any real deficits."<sup>437</sup> In addition, they observed that ethnocultural claims for self-empowerment of Aboriginal communities should be at the center of that experience. As they have put it:

One of the aims of circle sentencing is to empower Aboriginal communities in the sentencing process. Clearly the current trial has achieved this – a considerable number of Aboriginal people from the Nowra community have been directly involved in circle sentencing both as victims and offenders, but also as Aboriginal community representatives, support people for victims and offenders, and service providers assisting in the implementation of sentences.<sup>438</sup>

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<sup>436</sup> Ibid at 278.

<sup>437</sup> See note 410, Potas et al, *Circle Sentencing in NSW*, at part 4.

<sup>438</sup> Ibid.



Commenting on the above research, Julie Stubbs has observed that, although two sentencing circles analyzed by Potas et al. were related to domestic violence cases, no mention of any safety planning or follow-up with victims was suggested in the sentencing outcome.<sup>439</sup> Actually, Stubbs noted that victims' expectations were superficially addressed in the program design. As she has noted, "Most victims reported that they had been unclear about what to expect and were unprepared for the emotional intensity of the process."<sup>440</sup> In addition, she has observed that the report gave strong emphasis to the role played by Elders in legitimizing the sentencing process. As she put it, "The Aboriginal Elders were seen as the greatest strength of the program, instilling moral and values and lending authority and legitimacy to the process"<sup>441</sup> However, to acknowledge the influence of Elders in the functioning of sentencing circles does not necessarily mean that such participation is always positive to victimized women, especially because they are the most important articulators of ethnocultural political claims within Indigenous settings. That said, while Elders accord with the collective importance of sentencing circles in reaffirming self-governance and autonomy in Justice matters they may not give adequate importance to the need to protect victimized women from further harm. Women's voices remain silenced in the circles due to communal tolerance to domestic violence, for instance. Actually, the accommodation of ethnocultural political goals conveyed by Elders and respected persons, historically seen as community mediators in Indigenous settings, may end up threatening even more the positions of racialized women. In reality, within Canada, where sentencing circles have been studied for twenty years, some feminist scholars like Goel; Adjin-Tettey; Cunliffe and Cameron have identified several negative effects of the political influence of collective ethnocultural claims in the functioning of sentencing circles.

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<sup>439</sup> See note 6, Stubbs, *RJ and Gendered Violence*, at 1696-1703 in a Kindle e-book version.

<sup>440</sup> Ibid.

<sup>441</sup> Ibid.

Returning to insights devised by feminist scholars Rashmi Goel and Adjin-Tettey, for instance, it is possible to develop a number of compelling arguments about the narrow-minded biases and blind spots that an intersectional approach may have due to its interactions with collectivists' ethnocultural political commitments to Indigenous groups.<sup>442</sup> Moving from the RJ theoretical framework to that of postcolonial political considerations, Goel and Adjin-Tettey have identified points of self-deception in intersectional approaches and distortions in the functioning of RJ experiences within the Canadian context. As noted in the previous subsection, Goel has argued that Aboriginal people in Canada through a history of colonial subjugation and oppression come to apply restorative-like experiences with three specific political goals: 1) Expression and education; 2) Autonomy and self-governance and, finally; 3) Integration.

With respect to *expression and education* Goel states that Indigenous communities view restorative experiences, and sentencing circles in particular, as an opportunity to convey their philosophical and spiritual ideas and insights to internal and external audiences. This means that historically constructed causes of societal problems in Aboriginal communities can be denounced in sentencing circles by addressing issues like colonialism, alcohol/drug abuse and endemic racism --- within and outside of the justice system. As she puts it, "In other words, the circle serves as an opportunity to highlight the victimization of Aboriginal people at the hands of the majority community."<sup>443</sup> Therefore, intersectionality theory depicts Aboriginal people within RJ settings through a rhetorical mode of victimization, bringing into discussion the colonial historic context, victim story-telling, and the semantics of oppression to challenge stereotypical perceptions of Aboriginal people.

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<sup>442</sup> See note 13, Goel, *Canadian Sentencing Circles*, at 1010-1016 in a kindle e-book version.

<sup>443</sup> Ibid.

Another political goal is *autonomy* and *self-governance*. According to Goel, the circle can also represent an opportunity to involve Aboriginal people with the control of their own destiny. This means greater cultural and judicial autonomy for Aboriginal people. In addition, the circle can also mean *political integration*, i.e., it may help to establish healthy interactions between Aboriginal perspectives and Western justice. As Adjin-Tettey points out, sentencing circles, “(...) are seen to have better chances of rehabilitation, the reduction of recidivism, and the promotion of a just, peaceful, and safe society.”<sup>444</sup> But circles’ political and legal benefits have to be balanced against the risk of undermining women’s positions. In the next subsection I address some of these risks.

### **c) Detrimental effects of collective ethnocultural political claims**

Rashmi Goel has observed that collective political goals can undermine the effective function of circles in some sentencing goals. With respect to rehabilitation, for example, she has observed that some circles spend considerable time discounting offenders’ behavior by recounting their personal histories as victims of social injustice and acknowledging colonial factors that contributed to it.<sup>445</sup> As noted in a previous chapter, Goel points out that sentencing circles can easily leave the impression that Elders --- who probably once experienced racism and colonial injustice in their own lives --- can treat eligible offenders as less culpable for their acts than non-Aboriginal offenders.<sup>446</sup> Moreover, they can convey the notion that conventional punishment is always inappropriate even when the offender can be considered a repetitive or violent aggressor. In other words, the ethnocultural political approach of unbalanced sentencing circles can compromise victims’ safety by having an excessive focus on offenders’

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<sup>444</sup> See note 8, Adjin-Tettey, *Sentencing Aboriginal offender*, at 180-181.

<sup>445</sup> Supra note 440.

<sup>446</sup> Ibid.

vindication and rehabilitation. Adjin-Tettey points out that a failure to account for and be cognizant of these specific gendered-effects of political ethnocultural claims can have a significant effect of further alienating women in particular and, more generally, hindering the success of sentencing circles. As she writes:

Focusing on decolonization or reversing the legacies of colonization could thus render women's victimization (both from colonization itself and the resulting social disintegration) invisible. Although it is important during sentencing to recognize the disadvantaged background of Aboriginal offenders that may have contributed to their commission of the offence in question, the harmful effects of the victimization of Aboriginal women (who are obviously disadvantaged as victims of colonization) must not be trivialized. A tension may thus appear between the collective interest in decolonization and the immediate interests of victims and the public to see and feel that "justice" has been done in the situation.<sup>447</sup>

With respect to self-governance, Goes argues that the desire for autonomy and empowerment can make Indigenous communities overestimate their ability to control offenders and underestimate the resources required to operationalize RJ stated goals in relation to them. As a result, offenders can see sentencing circles as an easy way out of harsher penalties --- and make them more likely to enter in the circles with mental reservations. As she notes, "This brings into question not only the ability of the community to provide the necessary rehabilitative support (Green 1998; Orchard 1998), but also the offenders' genuine desire to change."<sup>448</sup> Furthermore, in line with the political ethnocultural narrative style of restorative circles, Indigenous communities can see sentencing circles as a culmination of their anti-racist and anti-colonial struggles. Here, however, sentencing circles function not as a symbol of an alternative justice practice aiming to promote victims interests (i.e., security, empowerment and offenders' accountability), but rather as an affirmation of Aboriginal perceptions of self-empowerment and the overcoming of colonial hegemonic forces. As Goel puts it, "Community input may however

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<sup>447</sup> Ibid at 1043-1050.

<sup>448</sup> Ibid.

be compromised by political goals. In particular the desire for self-government may force a unified front, especially vis-à-vis the state. Some participants may concede with the positions enunciated by Elders, even when at heart they disagree, so that the views expressed in the sentencing circles may not always be the real view of community members.”<sup>449</sup>

Finally, Goel argues that the community’s political goals can play a part in the silencing of the women’s individual histories, reinforcing the fact that the representation of domestic violence survivors within sentencing circles has not been adequately resolved and remains deeply problematic.<sup>450</sup> She observes, for example, that women may be reluctant to charge abusers because of the treatment Indigenous men receive within the conventional justice system. In addition, self-government impairs a victim’s ability to advocate for herself. According to Goel, in the Aboriginal way, women have a tendency to put the community before themselves. This means that they go along with the community view of the correct sentence, even at the cost of their own disparate opinions. As Goes has noted, “Finally, the importance of supporting a uniquely Aboriginal response to the problem is also voiced by community leaders, only increasing the pressure on victims to toe the line.”<sup>451</sup> In other words, Indigenous women who are victims of domestic violence can find themselves between two appealing choices: They are wedged between a perceived need to advance their communal ethnocultural political claims in the face of the state and the desire to express an individual identity and their perception of

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<sup>449</sup> Ibid. (As we have seen, this is very similar to articulation of the paradox of multicultural vulnerability)

<sup>450</sup> Ibid. See also note 8, Cameron & Cunliffe, *Writing the Circle* at 18-20. (Cameron and Cunliffe have observed that institutional accounts produced by trial judges in sentencing circles decisions also attempt to rationalize offender’s behaviour and, usually, assume an apologetic tone. In addition, they have identified through a review of case law that issues, aspects, and concerns related to survivors of domestic violence within sentencing circles were disregarded, poorly addressed, or avoided in trial records. They observed that survivors can be absent in trial judgements records in three ways. As they put it, “First and most simply, in two of the trial decisions, the judge makes no reference whatsoever to the presence of the survivor in the sentencing circles. Second, in several decisions, the trial judge records that the survivor was present when the sentencing circle occurred but fails to describe the nature and extent of the participation or to record her words. Finally, the trial decisions overwhelmingly disregard the need to ensure that the sentencing circles is conducted in a way that reassures the survivor of the community’s concern for her safety and emotional well-being.”)

<sup>451</sup> Ibid at 1084-1092.

themselves as a vulnerable group within a minority with which they share a history of oppression. In short, Indigenous women are caught between a proverbial rock and a hard place.

#### **d) Intersectionality and uncritical validation of ethnocultural political claims**

As noted earlier, intersectionality theory is just one theoretical underpinning through which feminist researchers have examined RJ initiatives. However, its importance became more pronounced within Indigenous settings because of its resonance with postcolonial and anti-racist claims embedded in RJ's ethnocultural political discourses for self-governance and autonomy. As also noted in previous subsections, some intersectional feminists interpreting RJ experiences within Indigenous settings tend to be, above all, in the service of their own anti-racist and anti-colonial critical views of the conventional criminal justice system and this can take the form of uncritical validation of alternative RJ practices seen as more legitimate and culturally competent. Although racialized women's positions are not fully secure against further harm or exclusion within RJ experiences analogous to Indigenous justice practices, claims of empowerment of the community and anti-colonial benefits are often present in such ethnocultural intersectional approaches. In fact, the very intersectional understanding of culture in such cases proves to be much more essentialist than anti-essentialist in nature and direction. Ultimately, imbalanced versions of intersectionality present culture as an essentialist concept that is spatially and temporally predetermined. It is used to represent some sort of homogenized-culture without any qualification or interrogation of its usage and without reference to overlapping and multiple aspects of cultural identity. As a matter of fact, intersectional feminists with strong anti-colonial inclinations insist on treating culture as if it were synonymous with political claims for self-determination and self-governance: In pursuing one the other is also achieved, they seem to believe. In this simplistic view, the community life and collective

ethnocultural politics gain more space than the needs of survivors of domestic violence. Culture gains primacy over individual rights and liberties. Hence, some intersectional feminists tend to exalt culture and collective political gains in detriment of victims interests and needs that should matter most, especially in an allegedly feminist approach.

Those political and ethnocultural conceptualizations of intersectional thinking have been limited by a myopic reading of sentencing circle experiences. Although professing to serve or represent a feminist cause or professing to be critical or transformative, they are actually incapable of detecting and denouncing the preexisting patriarchal structures and power asymmetries between offenders and victims that effectively silence and further alienate battered women. The reason for that is rather simple. The political commitments that drive unbalanced intersectional approaches shift from individual issues or grievances from victimized women to collectivist political interests. This indicates that intersectional efforts may be channeled into a feminist analytical tool with the paradoxical effect of making women's interests recede in priority. Even if those collectivist ethnocultural interests can be considered legitimate --- and essentially they are --- there is also a need to understand that battered women's individual needs may remain unaccounted for, as we have seen above. This means that they remain subordinated by gender disciplinary identity roles and patriarchal discourses that minimize or ignore the value of placing the needs and views of battered women at the center of the RJ encounter, even though such placement is an absolutely critical factor for ending domestic violence. In fact, there appears to be an emerging tendency of intersectional thinking to be appropriated by political interests not fully coincident with women's emancipatory aims. Below, I will further discuss these indications of co-optation that appear to relate to certain ethnocultural conceptualizations of intersectionality, with the caveat that this assertion is valid only where intersectional disempowerment occurs.

## **e) Tendencies to co-optation**

As already seen in the introduction, intersectionality theory is a feminist approach with a value base aimed at social justice outcomes. As a consequence, intersectional approaches are inherently political in implication and emancipatory in purpose. This means that intersectional approaches emphasize purposeful policies whose goal is the application of scholarly methodologies to achieve sustainable pragmatic outcomes for the benefit of oppressed women. Besides that, much of intersectionality theory potential for social justice stems from its anti-essentialist ability to effectively address the claims of pre-existing heterogeneous narratives, i.e., the uniqueness of a specific individual or group claim, even while this individual or group may share inequality markers with other individuals or groups (e.g., domestic violence affects differently middle-class white women, and poor, marginalized women of color). However, as noted earlier, in some imbalanced intersectional approaches, the promotion of gender equality as a form of intersectional justice has been sacrificed to a simplistic --- albeit rather pragmatic --- ideology of collective ethnocultural self-empowerment. This shift of direction in intersectional approaches is a clear sign that co-optation and misrepresentation are increasingly --- and insidiously --- emptying out the transformative and critical attributes of intersectional thinking.

In particular, the appropriation of intersectionality theory by parallel ethnocultural politics is evidenced through a shift in declared goals. The original intersectional goals of revealing socially and culturally constructed gendered categories of discrimination and privilege appear to have been set aside in the name of postcolonial theory platforms and values. In this context, as noted in the previous chapter, a new tension has emerged across intersectional perspectives guiding RJ experiences. On one side we see feminists, often focused on the resolute defense of women's individual concerns; on the other side feminists focused on ethnocultural



political agendas. By ethnocultural political agendas, I mean collectivist political interests (e.g., self-government and autonomy) that can potentially downplay antisexist priorities normally set by intersectional feminist approaches in cases of domestic violence. As a consequence, conventional feminist critical concerns for security, agency and offender accountability are appeased through the appearance that such issues are being adequately addressed and, as a result, no longer need to be engaged. By employing the language of collective self-empowerment, autonomy, and self-governance, ethnocultural-inflections of intersectional thinking assume a pseudo-feminist stance. Such rhetoric suggests --- galvanizing political support from some feminist perspectives --- that domestic violence is above all a sub-product of colonization processes that can be neutralized through community empowerment and self-determination.<sup>452</sup>

Although domestic violence within Aboriginal settings cannot be understood apart from the broader cultural and political history of which they are a part, domestic violence is also a complex phenomenon involving much more than a colonial hangover. The above mentioned misrepresentation about community empowerment as a kind of magic-bullet, albeit a well intentioned one, may contribute even more to women's effacement within RJ settings through the false perception that ethnocultural claims can ensure a meaningful place to women in RJ encounters. Unfortunately, despite valuable insights, community empowerment is certainly not a panacea for domestic violence in Indigenous communities. Through silence and alienation, as we have seen earlier, the intersectional feminist promise of political and personal transformation proves to be an unfulfilled ambition since individual experiences of gender inequality and power

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<sup>452</sup> See note 8, Goel, *No women at the center*, at 299-312. (According to Goel, for example, colonialism fostered violence against women in Indigenous communities in three ways: By reducing the power and status of Aboriginal women by stifling the values and traditions which protected and honoured them; stripping Aboriginal people of their culture and proffering European values in return; decimating any opportunities women had to hold power and by validating violence against women as a way to resolve domestic disputes.)

differentials within RJ settings are rendered invisible as they are folded into and subsumed under parallel ethnocultural political agendas.

With this display of pseudo-feminist ideas, intersectionality is open to assimilation with political agendas being prescribed by non-woman-centered interests and intersectional insights being used to validate RJ experiences without careful consideration of the implications of bringing into discussion such issues. As Luft and Ward have warned, “The fact that intersectionality has developed intellectual, political, and moral capital, however, has created unintended consequences. The extent to which it has become a trend with leverage means it is also being appropriated to less than intersectional ends.”<sup>453</sup> They also have observed that, “When not joined to intersectional practice, intersectional intonations function as a kind of credentialing, an appropriation used to mask an anti-intersectional orientation.”<sup>454</sup> I am of the same mind with regard to the RJ social movement and ethnocultural cooptive processes, i.e., the language of intersectionality can serve to convey political claims that are divorced from the lived reality of battered women and, ironically, can be appropriated to veil hierarchical power relations of domination and subordination, inclusion and exclusion. Such a trend does a disservice to the transformative and social justice aims of intersectionality theory as applied to restorative justice. Rachel Luft, who understood both the irony and the paradox of intersectional co-optation long before other intersectional theorists, wrote, “As more movement actors adopt intersectional frameworks without substantive pursuit of intersectional aims --- whether out of naiveté or a more insidious adherence to hegemonic investments --- the disconnect contributes to mystification and cooptation.”<sup>455</sup> It is therefore important that feminist scholars, RJ advocates

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<sup>453</sup> See Rachel E. Luft and Jane Ward, "Toward an Intersectionality just out of reach: Confronting challenges to intersectional practice" in Vasilikie P. Demos & Marcia Texler Segal, eds., *Perceiving gender locally, globally, and intersectionally* (Howard House, Emerald Publishing Ltda., 2009) at 16.

<sup>454</sup> Ibid at 17.

<sup>455</sup> See note 394 at 103.

and practitioners are conscious of the cultural, social, political and other forces that contribute to such tendencies of co-optation. Only this way can they also reveal key intersections between RJ initiatives and the influence of other contextual factors like *RJ cultural frame alignment*, *the paradox of multicultural vulnerability*, and *the political ethnocultural appropriation of intersectional thinking* that, as we have seen, predominantly situate Aboriginal women in the awkward position of perpetuating their own oppression and subordination through the justification of restorative practices in their communities.

**f) Other implications: RJ international expansion and the perils of intersectional imbalance**

In this subsection, I point out potential research implications drawn from the current process of international expansion and commodification of restorative justice. This subsection briefly examines the ways that RJ programs like sentencing circles are transplanted from one geographical context to another. I highlight the example of sentencing circles in Canada and Australia. In addition, I establish that intersectional disempowerment may also be a potential problem when other countries marked by processes of conquest and colonization seek to embrace the idea of RJ's cultural competence without caution. I conclude arguing that intersectional feminists analyzing such program exports should be aware of ethnocultural conceptualizations of intersectionality theory when dealing with RJ within the context of domestic violence and, therefore, about the risks of co-optation of intersectional approaches by non-women-centered political interests.

While RJ practitioners and activists have been active in Canada and the United States since the 1970s, RJ scholars and advocates began to adopt transnational networking as an advocacy strategy only in the early 1990s. Moving into the 1990s there was a rapid progress and

spread of RJ initiatives at an international level, especially with the promotion of restorative models as less retributive, individualistic and more focused on collective responsibility. It was estimated, for example, that by mid-2000s well over 100 countries used some form of restorative practice in addressing criminal justice cases.<sup>456</sup> However, as we have seen previously, the rapid international growth of RJ initiatives resulted much more from advocacy strategies and grass-roots efforts than strong empirical evidence supporting restorative promises. Actually, RJ advocates lobbying efforts in the eighth (1990), ninth (1995) and tenth (2000) United Nations congresses for the Prevention of Crime and Treatment of Offenders were those responsible for the incorporation of the RJ social movement into the international arena with such visibility and prevalence. In these congresses much of their work focused on educating international criminal justice policymakers about RJ while lobbying UN members into lending their support to the idea itself. As a consequence, they succeeded in convincing UN members to approve an international document that gathered in one place all basic policies for the use of RJ, i.e., the *UN Declaration of Basic Principles on the use of Restorative Justice Programmes in Criminal Matters*.<sup>457</sup> And most importantly, the declaration also called for countries to specifically create laws and programs to begin dealing with restorative justice. In short, that document allowed RJ advocates to put their message on the agendas of several international policymakers and lawmakers. In addition, RJ advocates formed transnational networks that multiplied their lobbying power throughout the world. Nowadays, there are a number of associations of RJ's practitioners and NGOs like the Centre for Justice and Reconciliation at Prison Fellowship

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<sup>456</sup> See Daniel Van Ness, "An Overview of Restorative Justice Around the World" (Paper presented to the 11<sup>th</sup> United Nation Congress on Crime Prevention and Criminal Justice, 22 April 2005) [unpublished]

<sup>457</sup> See David J. Cornwell, ed., *Criminal punishment and Restorative Justice: Past, present, and future perspectives* (Winchester, UK: Waterside Press, 2006) at 114. See also note 23. (The UN Declaration of Basic Principles on the use of RJ programmes, also calls for countries to specifically create laws and programs to begin dealing with restorative justice).

([www.restorativejustice.org](http://www.restorativejustice.org)) entirely dedicated to expanding RJ methodologies to every corner of the world.

For this reason, RJ experiments have over the last two decades or more become an increasing trend for international organizations and activists working on legal development cooperation. Legal professionals, grassroots activists and criminologists rushed to attend RJ international workshops on how to employ restorative methodologies in their own local realities.<sup>458</sup> Other professionals rushed to lead these workshops, given the growing demand for specialists. Just to illustrate this trend, in Europe six international conferences on restorative justice have been held since 1999. As Van Ness noted, “In only twenty-five years, restorative justice has become a worldwide criminal justice reform dynamic.”<sup>459</sup> There is no doubt RJ is a hot subject, and it is a global phenomenon.

Besides advocacy activism and transnational networking the RJ exponential international expansion is partially due to a process of taking programs and experiences developed by proponents and state partners in one setting and replicating them in another setting with minor adaptations. As Cornwell has observed, citing insights from Robert Cormier, one of the messages conveyed by RJ proponents is that “restorative justice is an exportable and importable commodity on an international scale, capable of being translated into practice in different cultures while still adhering to its own specific principles and vision.”<sup>460</sup> In fact, RJ processes are relatively easy to transport and apply in different settings precisely because the

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<sup>458</sup> In fact, my first personal contact with restorative justice was in a workshop organized in Brazil, my home country, in 2004 by a visiting mission from New Zealand composed of scholars and legal professionals involved with restorative experiments in juvenile justice. On that occasion, I was attracted to the Indigenous roots of restorative practices in New Zealand and the culturally competent features of restorative justice. Being myself of Indigenous descent and with an interest in informal justice only made the RJ concept more attractive, at least, as a first impression.

<sup>459</sup> See note 451.

<sup>460</sup> Supra note 454.

processes of colonization, and its effects, are pretty homeogenous allowing similar manifestations of non-conventional justice practices. A good example of how this works in practice are sentencing circles, which were imported from Canada to Australia by RJ activists and advocates and ultimately accommodated by the Australian state in its legal system with minor changes. In particular, RJ experiences like sentencing circles have been heralded as something that has “successfully” addressed the needs and interests of Indigenous communities in Canada and Australia. As Cornwell has observed, the Canadian perspective bears remarkable similarities to that from Australia and New Zealand in relation to the extent to which particular ambitions and culture of Indigenous peoples have been afforded recognition within considerations of criminal justice.<sup>461</sup> As he puts it, “This has, to some extent, opened the door to wider application of restorative principles within the mainstream debate and the determination of criminal justice policies and legislation.”<sup>462</sup> However, as we have seen, this process of transplanting culturally competent RJ programs from one country to another makes it necessary at times to align the feminist intersectional approach with the ethnocultural political rhetoric of Indigenous dominant elites in order to attract support and gain legitimacy before the group, the majority and the state. As a result, there is a blend of ethnocultural rhetoric and intersectional feminists’ concerns within RJ experiences. But they can be blended so fully, that they also merge into preexisting patriarchal and sexist relationships, where intersectional approaches may completely lose their critical and transformative potential. As an unintended consequence, Indigenous women’s individual positions can be neglected or downplayed in that process.

Furthermore, several other regions marked by processes of conquest and colonization and with large populations of marginalized Indigenous people may be attracted to

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<sup>461</sup> Ibid at xvii.

<sup>462</sup> Ibid.

embrace the idea of restorative culturally competent initiatives to deal with domestic violence. As noted earlier, RJ activists and advocates have developed an efficient transnational network preoccupied with the international promotion of RJ models. Indeed, RJ has over the last two decades or more become a valuable commodity ready to be exported or imported whenever required. South America, my native region, is a prime example of a prospective market for RJ experiences. In particular, because RJ methodologies are not yet fully incorporated or developed into the legal frameworks of most of the countries of the region due to a variety of reasons such as the historic reliance on retribution and punishment lately exacerbated by penal populism; lack of social capital to organize communities around informal justice initiatives; resistance of legal professionals; poorly institutionalized programs carried out by untrained volunteers or NGOs; lack of funding and a Romano-Germanic legal tradition that does not allow the exercise of great discretion about whether or not to prosecute.

As a consequence, in the region there are only pilot projects mainly designed to address juvenile justice or post-conflict reconciliation processes due to “top-down” importation of RJ programs. Now RJ pilot projects are underway in Argentina, Colombia, Brazil and Peru, where the idea is not employed for cases of domestic violence, despite some exceptions, and not everybody thinks it is a great idea, especially feminists.<sup>463</sup> Nevertheless, there is a growing demand from Indigenous groups in countries like Bolivia, Brazil, Paraguay, Ecuador, Colombia and Venezuela for informal and culturally competent adjudication methodologies in expectation of Indigenous self-determination advancements.<sup>464</sup> Although there are not Indigenous justice

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<sup>463</sup> See Pedro Scuro, “Regional Review – Latin America” in Gerry Johnstone & Daniel W. Van Ness, eds., *Handbook of Restorative Justice* (Portland, Oregon: Willan Publishing, 2007) 500-510 (This Brazilian author provides an account of the development of RJ initiatives in Latin America under a sociological perspective).

<sup>464</sup> See Willem Assies, Gema Van der Haar, & A. Hoekema, eds. *The Challenge of Diversity, Indigenous Peoples and Reform of the State in Latin America* (Amsterdam: Thela Thesis, 2000). (More recently, Article 5 of the United Nations Declaration on the Rights of Indigenous Peoples provides for the right of indigenous peoples “(...) to maintain and strengthen their distinct political, legal, economic, social and cultural institutions (...)” which includes

experiences based directly in RJ methodologies currently functioning in the region, it is only a matter of time until one of the countries of the region imports an RJ-like model to deal with the specific needs of that ethnic group. However, as noted above, the formulaic incorporation and use of imbalanced RJ models, especially when rhetorical strategies related to ethnocultural political claims are present, may hide risks for victimized women within Indigenous settings. For example, by perpetuating harmful and oppressive sexist practices within their own cultural groups like communal tolerance to battering. For this reason, the notions of intersectional disempowerment and potential detrimental effects of the appropriation of feminist views by political ethnocultural discourses within RJ settings are problems that policymakers and law-makers in prospective RJ markets may want to address since the assessment of restorative outcomes may vary according to the persuasion of those ethnocultural political claims.

### **3. Summary of conclusions and recommendations**

The central thesis of this paper focused primarily on the problem of conventional views of the use of intersectionality theory within the context of the RJ movement. The introductory claim was that some intersectional stances could fail to address gender inequality --- mainly within Indigenous settings --- and this resulted in misleading assessments of RJ experiences as applied in cases of violence against women. In particular, the underlying question was whether or not feminist intersectional critical analysis could be neutralized either by its own epistemological vulnerabilities (i.e., radical anti-essentialism), or by other cooptive forces present in the RJ field (e.g., RJ cultural frame alignment and ethnocultural political demands). My research findings suggest that it can in both cases. The following paragraphs summarize key

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justice systems compatible to Indigenous perception of justice). See UN General Assembly, Declaration on the Rights of Indigenous Peoples, General Assembly, Res. 61/295, UN Doc A/RES/61/295 (2007).



findings, at the same time suggesting some conclusions drawn from the study. I conclude making some recommendations to prevent the problem of the neutralization of the critical attributes of intersectional thinking by non-women-centered discourses.

Initially, this study established that the RJ movement evolved from a complex array of distinct and sometimes overlapping strands of grassroots activism, socio-legal scholarship and political claims such as the social movements of the 1960s and 1970s; the victims' advocates' movement; penal abolitionism; the feminist movement and insights from Indigenous and spiritual conceptualizations of justice. The result was a fragmented theoretical and empirical movement with no general agreement concerning a unifying conceptual structure. Indeed, as noted earlier, whether a process, outcome, or model is deemed RJ will likely vary according to the ideological affiliations; theoretical background; ethnic identity, and even the spiritual beliefs of the evaluator. In this sense, different RJ theorists and practitioners have different "conceptions" of restorative justice. Thus, I have reached the conclusion that the RJ definition is what William Gallie in 1956 called an essentially contested concept, i.e., we cannot reach agreement about the criteria for its application because they combine a general agreement on the abstract notion that the idea represent with continual disagreements about what they might mean in practice.<sup>465</sup> I have also argued that this lack of definitional clarity is not an impediment to sketching out the main characteristics of the RJ movement.

Indeed, I have advanced the notion that RJ is an umbrella term encompassing various types of processes and outcomes, held together only by the following descriptive elements --- though not necessarily present in all RJ models: 1) Crime is considered a *harm* against individual and communal relationships; 2) no fact-finding judicial adjudication, i.e., the

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<sup>465</sup> See note 53.

wrongdoer has admitted partial or total responsibility for offending; 3) problem-solving orientation not concerned with punishment; 4) informal dialogue-driven encounters or conferences making room for the personal involvement of those mainly concerned with the wrongdoing, i.e., the offender and the victim (or a surrogate), but also their families and communities; 5) requires follow-up and accountability mechanisms for offenders and victims; 6) the need for an holistic approach and; 7) It is hoped that the processes and/or outcomes will deter offenders from further lawbreaking and provide some form of reintegration into the community, although neither may really be achieved. In addition, a great diversity of models exists among RJ initiatives, but in general they are summarized in the following: 1) faith-based victim-offender reconciliation programs (VORPs) and community work-based victim offender-mediation (VOMs) programs; 2) family group conferences (FGCs) and restorative circles. Although there are several eloquent accounts and anecdotal assessments of the positive impact of RJ models in terms of victims' satisfaction and offender reintegration into the community, little reliable research has been done to assess the real impact of restorative practices on recidivism, criminal justice, or offenders' accountability. In fact, it is still unclear whether or not RJ practices are able to deliver their promises to all stakeholders.

Furthermore, I have demonstrated that at the outset the RJ intellectual movement was originally conceived as part of a paradigmatic shift and, as such, represented a challenge to the hegemonic discourse of the conventional criminal justice system in which was based on retributive justice theories. Therefore, RJ --- at least in its early years --- could be described as a radical social movement. This contention that RJ was a radical social movement is justified by its initial orientation towards a fundamental change in the criminal justice system that emphasized new protagonists in the criminal justice systems (victims, offenders and community rather than professional judges or attorneys); replacement of structures (informal procedures

rather than a formal adversarial *due process of law*); and new principles and values (repairing the harm rather than punishment); all of which were outside those already in existence in the conventional justice system.

However, I also established that this claim was indeed a rhetorical device that ignored powerful countervailing considerations such as the operational proximity between RJ and the conventional criminal justice system, and specific components of retributive justice that with some modifications could also be important elements of restorative justice. In reality, the rupture with the conventional justice system and retributive (and deterrence) theory never come to reality. As a matter of fact, contrary to what some RJ proponents prescribe, the most striking feature of the contemporary RJ scenario is the intensification of its ancillary relationship with the conventional criminal justice system, especially, through the use of restorative experiences as diversionary schemes. Actually, as I have argued, claims of a paradigmatic shift were an advocacy strategy required to convert RJ proposals into something that could be more promptly accepted by legal actors, scholars and the public who in general were disenchanted with the conventional justice system. Most importantly, this stance of the RJ social movement led to a mimetic self-advocacy discourse that exaggerated the resemblance of RJ experiences to traditional forms of Indigenous justice.

Consequently, the RJ movement made itself more acceptable to Indigenous people because of the idea that it contested the *status quo* --- the status quo represented by the oppressing colonial criminal justice system --- increasing the willingness of individuals and groups to participate in restorative justice experiences. Some Indigenous leaderships and participants sensed a resonance in the making and understood RJ experiences fitting alongside their own customary justice practices, albeit in essence this perception was only the result of the cultural frame alignment of RJ as a social movement seeking space as a new alternative justice

system. Increasingly --- though scholars have differentiated between western RJ and those justice experiences driven by Indigenous customary practices --- the so-called Indigenous Justice and certain models of white-based restorative justice (mainly conference-based) have been more difficult to distinguish from one another. In this context, the idea of RJ as a close relative to Aboriginal perceptions of justice emerged as an opportunity for political rhetoric which presented Indigenous people at the heart of decision-making in justice initiatives. However, this politicization of RJ as applied in Indigenous settings stressed the collective experience of the history of Aboriginal people in Canada and Australasia, but de-emphasized the role of the individual, specially the victim, in its relationship to restorative justice.

This paper also analyzed the general critique of restorative justice. In my summary of RJ critique, I have developed the notion of two great lines of reasoning that challenged the RJ movement. The first category grouped criticisms around themes related to the notion of RJ as a paradigmatic shift. They are directly tied to a set of arguments challenging the questionable and manicheist opposition between *restorative justice* (depicted as good and virtuous), and *retributive justice* (depicted as inherently bad) in the RJ proactive advocacy strategy. In addition, I have established that RJ practices can be harmful, coercive or manipulative in various ways towards stakeholders and especially victims. Notably, through the privatization of crime in RJ theory (lack of public denunciation), the manipulation of offenders and victims and, as critics have pointed out, by leaving power differentials and social, racial and gender inequalities unexamined, unattended, and unchallenged.

In this sense the *R. v. Naappaluk* case provides a clear example of how ethno-cultural political references can shape a restorative encounter in detrimental ways to victimized

women.<sup>466</sup> This RJ encounter was the first judicially convened sentencing circle held in an Inuit community in 1994 and was witnessed at first hand by feminist researcher Mary Crnkovich. She had no doubt that she had witnessed a political contrived acting that was essentially negative to women. According to her, there was no concrete connection to the victim 's life since all the discussion was conveyed by the personal narrative strands of the Elders, the Judge and the offender and its supporters, who seemed to be more interested in the advantages of Indigenous justice than real life consequences to the female victim. Indeed, she observed that the female victim felt isolated by an intimidating focus on the offender and community political interests. She noted, for example, that the victim had had very few supporters and spoke only three times - --when requested by the judge and Elders to do so--- during the entire restorative encounter. Moreover, all the moral support lent by the circle was channeled to the offender benefit rather than the victim empowerment. At least one political leader present in the circle expressed only the concerns and wishes of the community. For these reasons, she concluded that the circle outcomes were too pat and the focus highly suspect and those who cared for the victim had been introduced to a meaningless and empty experience. As Crnkovich has put it:

The Sentencing Circle may have imposed an even greater silence. The circle was the first of its kind, being supported by the Judge and Inuit leaders. If she spoke out about further abuses or her dislike of this sentence, what would she be saying about this process every one supported? Now, in addition to fearing her husband's retribution, she may fear by speaking out against the community. The sentence created in this circle is one endorsed not only by the mayor and other participants but by the judge and a highly respected Inuit politician. The pressure to not speak out against a sentencing alternative supported by so many is great. The victim may be afraid to admit she is being beaten [in later counselling sessions] because such an admission, she may fear, may be interpreted as a failure of this process. She may hold herself to blame and once again continue to suffer in silence.<sup>467</sup>

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<sup>466</sup> See *R. v. Naappaluk* note 414. (Jusip Naappaluk had plead guilty of assaulting his wife Kullutu Naappaluk. It was Mr. Naappaluck's fourth formal charge, but he admitted informally to the circle several other assaults to his wife. No imprisonment was suggested and Mr. Naappaluk was put on probation under the supervision of the community). See also note 13, Goel, *Canadian Sentencing circles*, at 72-74.

<sup>467</sup> See Mary Crnkovich, "A Sentencing Circle" (1996) *Journal of Legal Pluralism* 36 159-181 at 172-173.

The second category of criticisms was concerned with RJ as an appendage of the conventional criminal justice system. According to this viewpoint, there is a fundamental contradiction at the core of the RJ movement, i.e., its practical functioning as an adjunct of the conventional criminal justice system rather than a replacement for it. Many critics, for example, raised objections related to the rule of law, legal principles and due process of law such as lack of punishment in general terms (deterrence, rehabilitation, public safety and retribution); the lack of independent legal advice; pressures to admit an offence to obtain the benefit of a diversionary alternative to court and the avoidance of a criminal record; the lack of testing of the legality of police procedures, questioning and evidence-gathering and, finally, the privation of the offender's liberty in the case of him failing with sentencing circles adjudication and probation conditions (double jeopardy claims). Finally, I have identified an important body of literature concerned with a postmodern and feminist critique of restorative justice. In particular, the postmodern critique advanced many negative impacts of current experiences with restorative justice like battered women's effacement and the danger of overlooking preexisting power and status differentials in cases of domestic violence. These critical stances have drawn from the Foucauldian notion of *disciplinary mechanisms* to argue that restorative programs are ultimately system-supporting schemes, i.e., mediators or community members facilitate agreements that are consistent with *status quo ante* interests, values, norms, and other ideological and political interests.

Furthermore, given that the RJ movement since its inception is deeply rooted in feminist thought and activism --- with a particular focus on violence against women ---, the feminist critique is a *sine qua non* part of any account of debates on restorative justice. As a consequence, this paper also considered the role of feminist theory and criminology and their connections with the RJ movement, arguing that the feminist critical analysis on RJ sought to

add women and gender perspectives to RJ practices and was marked by efforts to ensure a safe, meaningful and empowering involvement of women in restorative practices. Accordingly, feminist commentators and researchers have advanced concerns related to the harmful effects of ineffective security and empowerment to women in restorative encounters and conferences that lead to revictimization issues. Most notably, the mainstream feminist critique established that restorative dialogue-driven processes and outcomes have the potential to disregard and silence women by keeping them absent from forums that settle the planning and functioning of RJ models, which feminists deem to be excessively skewed towards male offenders' needs and interests. Indeed, it is generally agreed that RJ programs on intimate violence should only be undertaken with certain conditions present, such as strong offender accountability mechanisms; meaningful levels of security and empowerment; ownership of RJ by all relevant stakeholders; and basic guarantees of free communication and transparency. However, given the informal and fragmented nature, form, and implementation of RJ experiences this rarely occurs. For this reason, mainstream feminists claimed that the informal arrangements of RJ practices and strong collectivist views of what constitutes a restorative encounter or conference could mean that women are treated in ways that may reproduce or perpetuate victimization and collective gender normative stereotypes as seems to be the particular case of some RJ practices used in Aboriginal settings.

Notwithstanding, this study has identified different trajectories of feminist thinking with respect to RJ and emphasized the importance of examining the various schools of feminist thought from essentialist to anti-essentialist feminist schools. After describing the most salient examples of essentialist and anti-essentialist feminist schools, I have reached the conclusion that the intersectional feminist school, in particular, entails an anti-essentialist approach to RJ with important repercussions in the study of restorative experiences in

Indigenous settings. First of all, I have identified intersectionality theory as a new way to organize feminist theorizing on RJ, particularly, by integrating post-colonial and ethnocultural political issues into the debate about alternative justice remedial practices developed to cope with violence against women. In addition, I have argued that intersectional approaches also transformed the intellectual landscape by generating polarized and politicized views of the discussions about the adherence of Indigenous communities to RJ practices. However, I also have argued that the politicized rhetoric was not prevalent among intersectional feminists and several intersectional feminists remained skeptical about the efficacy of RJ to cope with domestic violence in Indigenous settings. Nevertheless, some ethnocultural conceptualizations of intersectionality theory tended, as described in this chapter, to generate a sympathetic rather than structurally critical response to gender inequality issues of restorative justice. That sympathetic nature towards RJ overlooked women's alienation and exclusion within RJ experiences, which is generally manifested in obsequious silence in RJ encounters and conferences, and in a propensity to follow collective directives favorable to RJ interventions even at the cost of their expression and security. This raised a dilemma for battered women in Indigenous communities since they were cornered into taking stances that would either make them betray their own community --- eager to assert self-determination in justice matters through RJ interventions --- or betray their own interests and needs for security, offender accountability and empowerment.

In parallel, I have demonstrated that the analytical model of intersectionality theory --- among other characteristics --- is built on the interplay among diverse and sometimes competing inequality markers such as gender; race; class; culture; and ethnicity. For this reason a well-balanced intersectional approach to RJ should address those inequality categories on an equal basis without giving primacy to a specific inequality marker in explaining systems of oppression like male violence against women. However, I also concluded that an imbalance in



anti-essentialist positions in some intersectional approaches tended to take insufficient account of the potential adverse impact of gender inequality in RJ models, particularly, in Indigenous settings. In this sense, I have identified an epistemological vulnerability caused by radical anti-essentialist stances that can render some intersectional approaches to RJ virtually incapable of addressing gender inequality properly. This vulnerability --- that consists of an under-appreciation of gender inequality issues ---- and, consequently, the difficulties that confront individual victims of domestic violence is magnified by collectivist ethnocultural and patriarchal political interests (e.g., Indigenous self-determination) that obscure or motivate some intersectional scholars to ignore the impact of power differentials in RJ experiences generating a form of *intersectional disempowerment* where women's concerns are put aside in order to privilege non-women-centered claims. Moreover, I have identified a series of interrelated cooptative forces --- namely, a) RJ cultural frame alignment; b) the rise of ethnocultural political discourses for self-determination in post-colonial settings; and c) multicultural rhetoric in Canada and Australasia --- that helps to explain why some intersectional approaches are unlikely to address gender inequality within RJ practices.

As briefly indicated in the previous chapter, in order to counteract the disempowering aspects of unbalanced intersectional stances the wisest course of action is to tackle the epistemic problem at its source, i.e., by adopting strategically essentialist positions that recommit intersectional feminists to gender issues when analyzing restorative schemes in ethnocultural and sexist settings. As I hope I have shown, some intersectional approaches to RJ have developed epistemic problems and an ethnocultural political inflection that downplays gender issues. This is weakening an analytical structure that is already under attack from other cooptative forces. In fact, I have a feeling that intersectionality analysis as applied to RJ in Indigenous settings is too linked to postcolonial discourses, contingent multicultural rhetoric and

short-term anti-racist objectives that shifted the focus from women's issues. Thus, the sensible thing to do would be to steer intersectional feminists back to gender justice issues. If intersectionality theory is to forge ahead in providing a safe and meaningful space to Indigenous battered women within the RJ movement, it is essential that researchers work closely with RJ practitioners to develop, implement, and analyze methods and programs that can be shown to benefit, above all, victimized women not other political interests. In the next paragraph I advance some recommendations for improving the use of intersectionality theory within RJ contexts.

For example, concerning gender underestimation, by using recommendations posited originally by Angela Cameron who strategically repositioned "gender" as an important analytical intersectional standard in RJ interventions.<sup>468</sup> She identified --- like in this study --- that there has been little consultation between victimized women and antiviolence groups, which are not sufficiently heard or taken into consideration. For this reason she recommended comprehensive consultations with those actors before, during and after RJ encounters and conferences. I would include, in particular, consultation and educational procedures for developing an understanding of the specific individual experiences of battered Indigenous women in RJ models. Using this perspective, social-legal scholars, policymakers and intersectional feminist-activists would recommend RJ models that foster women's strengths, encourage a sense of control, and foster an equal exchange of information among all the stakeholders in restorative encounters and conferences. In addition, Cameron recommended that RJ initiatives which accept cases of domestic violence must be evaluated as soon as possible adopting rigorous control of methodologies in consultation with antiviolence groups.<sup>469</sup> I share the same opinion, especially to avoid inadequate outcome measures (e.g., to measure

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<sup>468</sup> See note 11 at 199.

<sup>469</sup> Ibid at 200.

stakeholders' satisfaction) and short follow-up periods, which limit the value of empirical evidence collected in such investigations. I would also include putting women in leadership positions in all phases of RJ encounters and conferences, especially, in sentencing circles in order to avoid offender-centered stances and the unwillingness to value the needs and visions of battered women.

With respect to intersectionality co-optation, I believe that it is not possible simply to convert the sympathy for the RJ movement that multiculturalism and ethnocultural political claims elicit from the intersectional evaluator into a critical orientation towards specific inequality issues like gender injustice since those concerns are embedded in the intersectional thought on restorative justice. Notably, because they stem from legitimate concerns over decision-making policies, or from the unfair treatment of Indigenous people. But it is perfectly possible to steer the debate to more women-centered positions by reintroducing the social fact that gender inequality matters most in domestic violence cases. Although intersectionality at its core is precisely the recognition of the deconstruction of gender as an analytical category, I believe we cannot rescind from the strategic use of gender-issues, politically and pragmatically, within RJ experiences. As Rachel E. Luft wrote: "Movement actors with intersectional analysis and commitments have to manage the effects of their own dominant and subordinate identities, and the competing directives that a solidarity politics bases on each suggests, as the navigate a field of shifting allies, opponents, and power dynamics in a context of a larger, macro structural constraints and opportunities."<sup>470</sup>

As the preceding conclusions suggest, some intersectional approaches to RJ within Indigenous settings are vulnerable to at least two objections: First, epistemological issues

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<sup>470</sup> See note 451 at 32.

that deemphasize gender inequality. Second, cooptive mechanisms that also tend to shift the focus away from women's issues, most notably, when intersectional feminists contend with domestic violence in RJ contexts. However, intersectional frames are supposed to come with strong critical and social change goals. At its essence intersectionality may function as the most critical step in ending or limiting domestic violence by revealing systems of oppression and privilege in heterogeneous settings. It can act instrumentally and substantially to reveal sexist positions over RJ experiences. Unfortunately, however, if applied without caution intersectionality can also create unexpected vulnerabilities in assessments of RJ experiences in culturally heterogeneous communities that can perpetuate or reproduce sexist gender roles. Responding to this dilemma, this study sought to serve as a cautionary note. By this I mean that close attention must be paid to the intersectional thinking that emerges in RJ settings since it can backfire on the very individuals and groups it was designed to protect and emancipate.

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