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Feminism, Rape and the Search for Justice[†]

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Abstract - Justice for rape victims has become synonymous with punitive state punishment. Taking rape seriously is equated with increasing convictions and prison sentences and consequently most feminist activism has been focused on reforming the conventional criminal justice system to secure these aims. While important reforms have been made, justice continues to elude many victims. Many feel re-victimized by a system which marginalizes their interests and denies them a voice. Restorative justice offers the potential to secure justice for rape victims, but feminist resistance has resulted in few programmes tackling such crimes. In *After the Crime*, Susan Miller evidences the positive outcomes of a restorative justice programme tackling serious offences including rape and recommends their development. However, her vision is ultimately limited by her recommendation of only post-conviction restorative processes and the implicit endorsement of the conventional criminal justice system. I argue that feminist strategy and activism must rethink its approach to what constitutes justice for rape victims, going beyond punitive state outcomes to encompass broader notions of justice, including an expansive approach to restorative justice.

Keywords: feminism, justice, rape, sexual violence, restorative justice, punitive punishment

1. *Introduction*

What constitutes justice for rape victims? Is it seeing the perpetrator convicted and imprisoned for a significant period of time? Is it being believed and treated with respect by prosecuting authorities? Is it receiving compensation, from the offender or the state? Is it having the opportunity to tell one's story in a meaningful way, perhaps directly to the offender? The answer, of course, is that justice for rape victims can take any or all of these forms, as well as many more possibilities. The problem is that it has come to be so closely associated with punitive, carceral punishment that other means of securing justice have been almost completely obscured. As conviction rates for rape and other sexual offences are so low, the end result of such a fundamentally limited approach is that justice eludes most victims of rape and other sexual offences.

In *After the Crime*, Susan Miller offers another possibility, that of restorative justice. After providing rich, in-depth narratives which tell the positive stories of victims and offenders engaging in dialogue, Miller suggests that the potential for the use of restorative justice in cases of 'gendered violence' is 'vast'.¹ Nonetheless, she continues that it is only post-conviction restorative justice programmes which can guard against the 'host of legitimate concerns' over the use of restorative justice in such cases.²

[†] A review of Susan Miller, *After the Crime: the power of restorative justice dialogues between victims and violent offenders* (New York University Press, New York 2011).

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¹ Susan Miller, *After the Crime: the power of restorative justice dialogues between victims and violent offenders* (New York University Press, New York 2011) 198.

² Miller (n 1) 213.

Thus, while Miller provides a necessary anti-dote to the long-held feminist resistance to the use of restorative justice for gendered violence, in view of the low conviction rates for such offences, a focus on post-conviction restorative justice offers a constrained vision of justice benefiting only a small number of victims. Furthermore, in her endorsement of post-conviction restorative justice only, Miller enhances the status of the conventional criminal justice system. This is problematic in light of its current punitive and retributive orientation and its systemic marginalisation of the interests of victims of gendered violence. In this article, after examining and welcoming Miller's defence of some forms of restorative justice, and focussing on rape and other forms of sexual violence³, I will suggest that feminist strategy and activism must rethink its approach to what constitutes justice for rape victims. It must move beyond a predominant focus on punitive state outcomes, with its emphasis on convictions and high prison sentences, to encompass broader notions of justice, including an expansive approach to restorative justice.

2. *Victims' Voices Heard: the Power of Restorative Justice*

After the Crime is a powerful defence of post-conviction restorative justice programmes dealing with serious crimes, including rape and child sexual abuse. The case is made by means of nine vivid narratives which detail the lives and experiences of victims and offenders who engaged in dialogue through the programme 'Victims Voices Heard' (VVH). VVH is a 'victim-centred' programme in the US which brings victims into face-to-face contact, post-conviction, with their respective offenders to 'receive information, to tell offenders about the consequences of their violence, and to help them regain control over their lives that was taken from them first by the offender and then by the criminal justice system'.⁴ It is an intensive programme which has no impact on criminal justice outcomes such as prison release and dialogues are preceded by months of preparation. As most restorative projects specifically exclude sexual offences, that VVH includes offences of rape and sexual abuse within its remit marks it out as distinctive.⁵ Of the nine cases examined in *After the Crime*, four deal with sexual violence (two stranger rapes and two cases of child sexual abuse by older family members), one involves domestic violence (including marital rape and attempted murder), with the remaining being homicides.

Each of Miller's accounts is based variously on interviews with the offenders, victims, family members and facilitators, together with official and personal documents relating to each case. The stories presented are a skilful blend of easily accessible narratives, with the complex social and political reality of victimhood and offending carefully interwoven. These extremely powerful accounts detail the lives, background, hopes and fears of offenders and victims, offering a multifaceted picture of crime and its effects. In doing so, Miller reaches beyond simplistic accounts of victim 'satisfaction' with restorative programmes, towards a deep understanding of the workings (or failings) of the criminal justice system and the complex, often contradictory, needs and desires of victims.

Having a voice and being heard were key motivations behind victims' decisions to engage with the programme, even for those who had been given the opportunity to participate

³ For reasons set out further below, while the literature on restorative justice discusses 'gendered violence' generally, I argue that it is more appropriate to focus on its efficacy for specific forms of such violence. My focus is on rape and other forms of sexual violence.

⁴ Miller (n 1) 6.

⁵ Many such exclusions are the result of feminist resistance to restorative justice. For a discussion of feminism and restorative justice see: James Ptacek (ed), *Restorative Justice and Violence Against Women* (OUP, Oxford 2010) and John Braithwaite and Heather Strang (eds), *Restorative Justice and Family Violence* (CUP, Cambridge 2002).

in their criminal cases.⁶ Miller states that participation in VVH gave victims ‘the very thing that had eluded them in the criminal justice system: a voice’.⁷ Further, victims wanted offenders, ‘visibly and publicly’, to ‘acknowledge the consequences of their actions’, as well as wishing to ‘give the offenders the emotional baggage they had been carrying all these years’.⁸

Miller reports that the ‘restorative success for victims is crystal clear’ and the benefits were long-lasting.⁹ The whole process, including the many meetings with the facilitator, letter exchanges and the face to face dialogue, was ‘transformative, empowering and cathartic and brought [the victims] a sense of peace’.¹⁰ It did not necessarily bring ‘closure’, but ‘facilitated forward movement’.¹¹ Victims felt ‘empowerment’ and a restored ‘sense of self-control and autonomy’.¹² Further, Miller suggests that the dialogues gave victims back their power: the ‘asymmetry of power that was present during the crime and the case processing was reconfigured’.¹³ This was particularly important in the cases of gendered violence where victims ‘sought empowerment over people and situations over which they had previously had no power’.¹⁴ Nonetheless, where the victims and offenders were strangers prior to the offence, the outcomes ‘were more positive’.¹⁵ In these cases, the victims were also most likely to receive unconditional support from families and friends. Offenders who knew their victims did accept responsibility, but ‘their contrition rang a little hollow’.¹⁶ The victims still emerged from the programme ‘empowered’, Miller notes, but these sexual offenders continued minimize and rationalize their offending.¹⁷

The overall impact on offenders is more difficult to assess, especially as most remained in prison. Miller reports that offenders felt satisfied that they were able to make some amends for their crimes and express their remorse. Many planned to reform when released from prison and some proposed community action to help others move away from a life of crime. As Miller states, it is only after prison release that we will know whether offenders’ resolve to reform will manifest itself, although even a few years after the dialogues, the desire for change remained strong.¹⁸

To give just one example of the power of the dialogues: Donna survived being raped in her home by an intruder, Jamal. The impact of this offence on Donna was long-lasting, including deep feelings of distrust, self-blame and loathing and a fear of others which effectively made her a prisoner in her own home. Around ten years after Jamal was imprisoned, Donna started the VVH programme and found it transformative. After the process, she concluded that: ‘He no longer controls my life.’¹⁹ Further, she felt able to move

⁶ Miller (n 1) 163, 175.

⁷ Miller (n 1) 175.

⁸ Miller (n 1) 178-179.

⁹ Miller (n 1) 187-188.

¹⁰ Miller (n 1) 164.

¹¹ Ibid.

¹² Miller (n 1) 166.

¹³ Miller (n 1) 178.

¹⁴ Miller (n 1) 179.

¹⁵ Miller (n 1) 167.

¹⁶ Miller (n 1) 171.

¹⁷ Ibid. While restorative justice is often criticized for minimising the harm of an offence, it must be remembered that the traditional criminal justice system is expert at this, via an adversarial process encouraging an offender to refuse to admit guilt and to diminish any harm. As Kathleen Daly and Sarah Curtis-Fawley point out, in the restorative process such behaviours are at least aired and challenged in a way that does not happen in the court room: ‘Restorative Justice for Victims of Sexual Assault’, in Karin Heimer and Candace Kruttschnitt (eds) (New York University Press, New York 2005) 255.

¹⁸ Miller (n 1) 188.

¹⁹ Miller (n 1) 46.

on, commenting that: ‘I will not let the rape steal my happiness’.²⁰ Indeed, from having been terrified of her attacker, following the dialogue process Donna reported that she ‘wouldn’t stop him from getting released’.²¹ Jamal expressed his remorse over his offence, apologized, answered Donna’s questions and articulated a clear desire to reform and move away from his previous life and behaviours when released.²²

Overall, therefore, *After the Crime* provides four compelling stories detailing the positive impact of restorative justice dialogues on victims of sexual violence and one relating to domestic abuse. Miller’s multifaceted methodology and long-term investment in the research pays dividends and her writing style creates narratives which are moving and inspiring. Furthermore, not only does she convey the experiences and expectations of the victims, but she also manages to open a window into the feelings and perspectives of the offenders, respecting their humanity, but without ever condoning their actions.

3. *Restorative Justice and Sexual Violence: constraints and opportunities*

Miller rightly suggests that *After the Crime* will ‘shed important light’ on debates over the appropriateness of using restorative justice in cases of gendered violence.²³ This highly ‘controversial’²⁴ debate has largely been the domain of feminist communities where discussion of the possibilities of restorative justice has been met with ‘deep skepticism’.²⁵ Critics have characterized it as a ‘soft option’²⁶, warning of the dangers of re-victimisation, of risks to women’s safety and the concern that a turn to restorative justice will effectively re-privatize sexual violence, thereby reversing the progressive law and policy reforms of recent decades. These are valid concerns though they are sometimes based on myths and generalisations about restorative justice and ‘gendered violence’. To be more specific, some feminist resistance appears to be rooted in assumptions about the comparability of restorative justice with forms of civil mediation which feminists have rightly critiqued for their presumption of equality between participants and lack of understanding of the dynamics of domestic abuse.²⁷ However, restorative justice significantly differs from mediation principally due to the fundamental prerequisite of restorative practices that an offender acknowledges responsibility for the offence.²⁸ Such an admission clearly establishes the roles of offender and victim: there is no fact-finding. Further, many critiques tend to equate restorative justice with straightforward diversion from the criminal justice system. Over recent years, however, practice has demonstrated that there is a vast range and variety of restorative justice programmes which can operate at any stage of the criminal justice system, having various impacts on outcomes and punishment, or none at all; or a process can operate outside of the criminal justice system entirely.²⁹ It is perhaps revealing that Sarah Curtis-

²⁰ Miller (n 1) 55.

²¹ Miller (n 1) 44.

²² Miller (n 1) 54-55.

²³ Miller (n 1) 179.

²⁴ Julie Stubbs, ‘Restorative Justice, Gendered Violence and Indigenous Women’, in Ptacek (n 5) 105.

²⁵ James Ptacek, ‘Resisting Co-optation – three feminist challenges to antiviolenence work’, in Ptacek (n 5) 19.

²⁶ As suggested by some victim advocates in Sarah Curtis-Fawley and Kathleen Daly, ‘Gendered violence and restorative justice – the views of victim advocates’ (2005) 11 *Violence Against Women* 603-638, 624.

²⁷ *Ibid* 607.

²⁸ A commonly cited definition of restorative justice is that given by Tony Marshall: ‘a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’: *Restorative Justice: an overview* (Home Office, London 1999) 5

²⁹ For a discussion, see Mark Umbreit and Marilyn Armour, *Restorative Justice Dialogue – an essential guide for research and practice* (Springer, New York 2010).

Fawley and Kathleen Daly found in their interviews with victim advocates that the greatest opposition to restorative justice was expressed by those who were most unsure of what it was.³⁰

Nonetheless, notwithstanding myths and misunderstandings, contention remains due to the lack of empirical evidence clearly establishing the dangers or value of restorative justice for sexual offending.³¹ There are only a handful of programmes internationally which use restorative techniques in cases of sexual violence and even fewer evaluations of such projects. *After the Crime*, therefore, provides important evidence of the power of restorative justice. It shows how victims of sexual violence value restorative justice and would recommend it to others in similar situations.³² It also responds to concerns regarding the risks of re-victimisation and endangering safety, demonstrating that restorative justice for sexual violence is viable and can have significant positive effects. However, while Miller does advocate the use of restorative justice in cases of serious violence including rape, she only recommends such schemes post-conviction. This is a considerable limitation on the scope of any future developments and we need, therefore, to understand in more detail why she might be making this argument.

Miller distinguishes between what she labels ‘therapeutic’ restorative justice and ‘diversionary’ programmes.³³ Specifically, VVH is ‘therapeutic’ and ‘designed to help victims with their recovery; it is *not* designed to affect the outcome of criminal cases’.³⁴ Further, therapeutic programmes ‘operate after offenders have been convicted; their primary goal is to empower and heal victims’.³⁵ Miller suggests that it is these specific features which mean that such schemes can be ‘effective in handling crimes of gendered violence’.³⁶ In contrast, diversionary programmes are those in which the restorative element may determine the outcome of the case, are ‘offender oriented’ and offer an ‘alternative’ outcome in lieu of the conventional criminal justice process.³⁷ According to Miller, there are a ‘host of legitimate concerns’ with their use for gendered violence including that they ‘do little to disrupt’ the unequal power relations between offenders and victims and ‘risk revictimising women and children’.³⁸ In general, they ‘fail many victims’.³⁹ Diversionary programs, she concludes, are only appropriate for ‘nonviolent property and juvenile cases’.⁴⁰

It can be seen, therefore, that in seeking to defend VVH from the ‘great controversy’,⁴¹ which courts the use of restorative justice for crimes of gendered violence, Miller emphasizes both the purpose of VVH – recovery and healing – as well as its stage in the criminal justice system, that is post-conviction. Specifically, Miller states that the ‘checks and balances’ of VVH, plus the fact of incarceration, ensure that victims feel safe, empowered, in control and

³⁰ Curtis-Fawley and Daly (n 26) 618. This finding has been confirmed in relation to opinion leaders in New Zealand: Gitana Proietti-Scifoni and Kathleen Daly, ‘Gendered Violence and Restorative Justice: the views of New Zealand Opinion Leaders’ (2011) 14 *Contemporary Justice Review* 269-290.

³¹ For an overview of the field, see Mary Koss and Mary Achilles, ‘Restorative Justice Responses to Sexual Assault’, (2008) VAWnet available at: http://new.vawnet.org/Assoc_Files_VAWnet/AR_RestorativeJustice.pdf

³² See also Clare McGlynn et al, “‘I just wanted him to hear me’”: sexual violence and the possibilities of restorative justice’, forthcoming.

³³ Miller (n 1) 12.

³⁴ Miller (n 1) 6, original emphasis.

³⁵ Miller (n 1) 12.

³⁶ Miller (n 1) 13.

³⁷ Miller (n 1) 198.

³⁸ Miller (n 1) 213, 13.

³⁹ Miller (n 1) 198.

⁴⁰ Miller (n 1) 161. However, many youth justice programmes do not deal with such serious offences which can lead to their under-examination. For an analysis of this phenomenon in the UK context, see McGlynn et al (n 32).

⁴¹ Miller (n 1) 207.

not vulnerable to re-victimisation.⁴² It is certainly clear that there is effective screening and risk assessment in the programme and that preparation is taken extremely seriously. However, it is not clear why only post-conviction programmes can deal effectively with these risks. For example, a poorly managed post-conviction programme, without the ‘checks and balances’ of VVH, could run the real risk of re-victimisation and endangering safety. And, on the contrary, a well-managed restorative project operating at different stages of the criminal justice system could effectively manage and monitor risks. This would suggest, therefore, that it is not timing - post-conviction - which per se protects victims, but the exceptional care to risk-assess, prepare and to ensure that any dangers are minimized.

Indeed, it is just such care that is taken in two projects which use restorative conferences to tackle sexual crimes at different stages of the criminal justice system.⁴³ The Restore programme in the US, for example, is a diversionary scheme dealing with acquaintance rape and sexual assault.⁴⁴ In particular, the programme aims to ‘facilitate a victim-centred, community-driven resolution of selected individual sex crimes that creates and carries out a plan for accountability, healing and public safety’.⁴⁵ Being specifically designed for sexual offences, the programme understands the power dynamics between victims and offenders and goes to great lengths in its protocols and risk assessments to protect victim safety and to ensure positive outcomes for all parties. Mary Koss, who leads the programme, suggests that its operation demonstrates that ‘carefully reasoned, safe, and respectful alternatives can be offered for sexual assault if we collaborate, consult and listen to the needs of our constituencies’.⁴⁶ Miller does acknowledge that Restore is ‘victim-centred’ but states simply that it cannot be compared to the post-conviction approach in VVH, without further explanation.⁴⁷

Another similar programme is Project Restore in New Zealand which focuses on crimes of sexual violence and takes referrals from the court system, as well as community and self-referrals where there has often been no prior contact with the investigatory authorities.⁴⁸ The Project is a ‘survivor driven organisation’ and aims to provide a ‘sense of justice, support offenders to understand the impacts of their behaviour and facilitate the development of an action plan which might include reparation to the victim and therapeutic programmes for the offender’.⁴⁹ A recent evaluation found that the project ‘can provide a sense of justice in cases of sexual violence’⁵⁰ and Shirley Jülich, one of the project’s founders, comments that it offers victims a ‘glimmer of hope’.⁵¹

These projects both show the potential for restorative justice programmes to meet the needs of many victims: such as control over, and participation in, their complaint; an early

⁴² Miller (n 1) 198.

⁴³ There are a wide range of restorative practices, usually involving face to face meetings together with a facilitator, including victim-offender dialogues, circles of support, sentencing circles and conferencing. Restorative conferences bring together the victim, offender, their supporters/family members and potentially other community members or criminal justice personnel. For a discussion of the variety of restorative practices, see Umbreit and Armour (n 29).

⁴⁴ See C Quince Hopkins and Mary Koss, ‘Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offenses’ (2005) 11 *Violence Against Women* 693-723.

⁴⁵ Mary Koss, ‘Restorative Justice for Acquaintance Rape and Misdemeanor sex crimes’, in Ptacek (n 5) 218-219.

⁴⁶ Ibid 219.

⁴⁷ Miller (n 1) 209.

⁴⁸ Shirley Jülich *et al*, *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (2010), available at http://aut.academia.edu/documents/0121/2233/The_Project_Restore_Report.pdf.

⁴⁹ Jülich (n 48) 1. See also Shirley Jülich, ‘Restorative Justice and Gendered Violence in New Zealand – a glimmer of hope’, in Ptacek (n 5) 246.

⁵⁰ Jülich (n 48) vi.

⁵¹ Jülich in Ptacek (n 5) 251.

acknowledgment of responsibility; an opportunity to tell their story and explain the impact of an offence; and the possibility of vindication. Both are examples of community-driven, victim-led restorative innovations which offer victims alternatives to the conventional justice system and, specifically, they tackle only sexual offences. It is this latter feature which is overlooked by Miller in her advocacy of programmes such as VVH for crimes of ‘gendered violence’ more generally. In common with much of the sceptical feminist literature on restorative justice, Miller’s analysis largely centres on circumstances of domestic violence.⁵² She rightly highlights many of the reservations regarding the use of restorative justice for domestic violence, principally due to its integration of psychological and physical abuse, the often lengthy pattern of coercive conduct and the common need for continued contact. However, too often such fears are assumed to be equally applicable to other forms of gendered violence.

While women’s experiences of victimisation cannot be easily categorized, there are important variations between domestic violence and many forms of sexual violence meaning that they can be treated with some degree of separation.⁵³ For this reason, the literature is becoming more ‘nuanced’, with discussion differentiating between different types of gendered violence⁵⁴; an approach which I endorse. My emphasis, therefore, is on considering the applicability of restorative justice for specific types of harm, here sexual violence, whereas Miller stresses the timing of the programme, ie post-conviction. It is perhaps true that if restorative justice only took place post-conviction then some of the worries regarding its use in cases of sexual violence would fall away. However, it is also the case that following such a path means excluding the vast majority of victims from the potential benefits of restorative justice. It is well established that very few victims of sexual violence ever see their attacker convicted of an offence.⁵⁵ Therefore, while the development of post-conviction schemes is to be recommended, we must look to a more expansive approach to restorative justice if we are to offer justice to many more victims than is currently the case.

In this light, it is important to examine further Miller’s criticisms of diversionary restorative justice. As a general comment, Miller appears to underplay the extensive variety of restorative programmes which is not just limited to Miller’s dyad of diversionary and therapeutic schemes. There are many post-conviction restorative schemes which do affect outcomes, such as sentencing or prison release; and there are programmes which operate entirely outside of the conventional criminal justice system. Partly due to this sheer diversity of restorative practices, it is difficult to make definitive claims about efficacy and victim satisfaction. However, the position does not appear to be as clear as Miller perhaps suggests. Although Miller cites Umbreit et al’s extensive research as revealing ‘positive outcomes of [restorative justice] practices across the board’⁵⁶, she concludes that diversionary practices

⁵² For a discussion of concerns see Julie Stubbs, ‘Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice’ (2007) 7 *Criminology and Criminal Justice* 169-187 and Ruth Busch, ‘Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong?’ in Braithwaite and Strang (n 5). On the possibilities of restorative justice for domestic violence, see Carolyn Hoyle, ‘Feminism, Victimology and domestic violence’ in Sandra Walklate (ed) *Handbook of Victims and Victimology* (Willan, Collumpton 2007).

⁵³ This is not to suggest that there is no possibility of restorative justice being used in cases of domestic violence. Indeed, there are a range of projects nationally and internationally which deploy restorative techniques and some to apparently good effect: see, for example, Marian Liebmann and Lindy Wootton, *Restorative Justice and Domestic Violence/Abuse* (Home Office Crime Reduction Unit for Wales, Cardiff 2010) and Joan Pennell and Stephanie Francis, ‘Safety Conferencing – Toward a Coordinated and Inclusive Response to Safeguarding Women and Children’ (2005) 11 *Violence Against Women* 666-692. What I am suggesting is that there are strong reasons to consider the use of restorative justice separately for domestic violence and sexual violence.

⁵⁴ As discussed in Stubbs (n 24) 105.

⁵⁵ Kathleen Daly and Brigitte Bouhours, ‘Rape and Attrition in the Legal Process: A Comparative Analysis Across Five Countries’ (2010) 39 *Crime and Justice* 565-650.

⁵⁶ Miller (n 1) 207.

'fail many victims'.⁵⁷ While it is evident that many victims are not satisfied with their experiences, Kathleen Daly's research, to which Miller refers, as well as finding that victims were indeed those least satisfied with the outcome of family conferences, went on to report that victims as well as offenders reported high levels of procedural justice.⁵⁸ Daly continued that 'for victims, meeting offenders in the conference setting can have beneficial results' and concluded that the 'evidence is mixed' but that restorative justice is a practice 'worth maintaining and perhaps enlarging'.⁵⁹ More recent studies have suggested more widespread victim satisfaction. An evaluation of restorative youth conferencing in Northern Ireland found high levels of victim satisfaction⁶⁰, as has other UK research on a range of restorative interventions, including diversion.⁶¹

The picture that emerges, therefore, is complex and variable and one which has led Lawrence Sherman and Heather Strang to conclude that the 'evidence on restorative justice is far more extensive, and positive' than is the case for 'many other policies which have been rolled out nationally'.⁶² At this juncture, it may be worth recalling that while we need to learn more about restorative processes and their impact, we do in fact already know that the conventional justice system routinely fails victims. The aphorisms 'second-rape' and 'judicial rape' were coined exactly to describe the victim trauma and blame-culture endemic in conventional criminal justice prosecutions of sexual violence.⁶³

Indeed, it is such a comparison between the conventional system and restorative processes in relation to sexual offences which Daly examined in later research from South Australia. The study compared the nature and outcomes of youth sexual assault cases processed via formal caution, restorative conference and youth court.⁶⁴ It found that although courts can impose more serious penalties, the findings 'challenge those who believe that the court is the place that sends 'strong messages' that serious offending is treated seriously, or that it holds greater potential to vindicate victims than [restorative justice] conferences'.⁶⁵ In particular, while offenders readily deny charges and attrition rates are extremely high in the conventional system, the restorative approach ensured a 'greater degree of disclosure of sex offending and victimisation which can then be addressed in a constructive manner'.⁶⁶ Further, the study showed that the court cases took considerably longer to finalize, possibly adding to the victim's ordeal.⁶⁷ In essence, Daly suggests that the results 'underscore the limits of the formal court process in responding to sexual violence' and she suggests that restorative justice critics should take a 'wider view' of the potentially adverse impact of formal court processes on victims.⁶⁸ Thus, programmes operating at many stages of the criminal justice

⁵⁷ Miller (n 1) 198.

⁵⁸ Kathleen Daly, 'Restorative Justice – the real story' (2002) 4 *Punishment and Society* 55-79, 69-71, 69.

⁵⁹ Ibid 71-72.

⁶⁰ Catriona Campbell et al, *Evaluation of the Northern Ireland Youth Conference Service* (Northern Ireland Office, Belfast 2005).

⁶¹ Joanna Shapland et al, *Restorative justice: the views of victims and offenders* (Ministry of Justice Research Series 3/07, London 2007).

⁶² Lawrence Sherman and Heather Strang, *Restorative Justice: The Evidence* (Smith Institute, London 2007) 4.

⁶³ Lee Madigan and Nancy Gamble, *The Second Rape: Society's Continued Betrayal of the Victim* (Macmillan, London 1991); Sue Lees, 'Judicial Rape' (1993) 16 *Women's Studies International Forum* 11-36.

⁶⁴ Kathleen Daly, 'Restorative Justice and Sexual Assault – An Archival Study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334-356, 339.

⁶⁵ Ibid 351.

⁶⁶ Daly (n 64) 352.

⁶⁷ Ibid.

⁶⁸ Daly (n 64) 353.

system, including diversion, offer some hope and possibility of meeting victim needs and to a far wider range of victims.⁶⁹

This leads to a final point about Miller's dichotomising of diversionary and post-conviction restorative justice, namely the emphasis on the latter being 'therapeutic'. The concern here is twofold. First, the assumption appears to be that it is only the post-conviction programmes similar to VVH that contribute to healing. Yet in all forms of restorative practice, victims express some of the benefits by using terms such as 'closure', or 'moving forward', indicating potential health benefits.⁷⁰ Secondly, the emphasis on outcomes being considered only therapeutic, rather than also as a form of justice, limits both the conceptualisation and ambition of restorative practices.⁷¹ Therapeutic outcomes and justice are intertwined, with each facilitating the other. Restorative programmes can contribute to healing and thereby offer a sense of justice to some victims of sexual violence, regardless of whether the particular programme operates post-conviction, during the criminal justice system or outside the system entirely. In those post-conviction cases where there is no impact on any conventional outcome, such as prison release, it may be understandable to emphasize victim healing. However, the concern may go deeper. It may be that what is seen to constitute 'justice' is so intimately bound up with the conventional justice system, and its emphasis on convictions and punitive punishment, that the assumption is that 'justice' is done when the offender is incarcerated and then only 'healing' is left. It is such a conceptualisation of justice, as being rooted in the conventional criminal justice system, which is considered further below.

4. *Rape Victims and the Search for Justice*

The victims who participated in the VVH programme were 'united in favouring an initial punitive response, conveying their unqualified support for punishment'.⁷² Miller emphasizes that the victims would '*not* have favored a diversionary program'.⁷³ Yet, ultimately, these quests for 'vengeance did not fulfil them'.⁷⁴ Although 'punishment for the sake of punishment conveyed that the individual had committed a terrible wrong', it did not 'allay victims' fears'.⁷⁵ Miller notes that with the passage of time, the victims' punitive attitudes were tempered; the victims felt 'hollow', as though the 'satisfaction that they were supposed to feel by participating in the formal criminal justice system or knowing their defendants were behind bars was not enough'.⁷⁶ Healing, she states, eluded the victims whose desires for

⁶⁹ There are legitimate concerns regarding the rights of offenders in restorative processes, particularly questions of compulsion and the validity of outcomes varying depending on victim preferences. For a debate on these themes, see Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice* (Hart, Oxford 2010). However, from a victim-perspective restorative justice is generally viewed as 'offender-friendly' and it is indeed such concerns which have fuelled feminist resistance. In moving forward, we must take appropriate account of offenders' due process rights, as well as ensuring that our notion of justice also meets the interests of victims.

⁷⁰ Sherman and Strang (n 62) 8. See also Lawrence Sherman et al, 'Effects of face-to-face restorative justice on victims of crime in four randomized controlled trials' (2005) 1 *Journal of Experimental Criminology* 367-395 which found positive health benefits in face to face restorative justice processes, which took place at various stages of the criminal justice system including diversion, for victims.

⁷¹ See further the idea of 'therapeutic jurisprudence' as discussed in David Wexler, 'Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development' (2010) 7 *Irish Probation Journal* 94-107.

⁷² Miller (n 1) 160.

⁷³ *Ibid*, emphasis in original.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

'retribution were eclipsed, but not completely replaced, by the need to find answers and be heard'.⁷⁷ In this light, Miller supports schemes such as VVH on the basis that they 'combine elements of both retributive and restorative justice'.⁷⁸ The retributive element conforms to the idea that 'most people' would believe that 'punishment for offenders of severe violence should communicate ... the abstract societal message that what they did was wrong'.⁷⁹ Healing is achieved by the VVH programme itself which works 'in addition to the criminal justice system rather than in lieu of it'.⁸⁰

Miller, and the victims in her study, are not alone in focusing on state-sanctioned retributive justice as the means by which to gain recognition of the serious harm of sexual violence. Feminist activism over the past thirty years has understandably concentrated on securing public acknowledgement that rape is a serious crime, demanding significant punishment, via the criminal justice system. This is because, as Barbara Hudson notes, the formal criminal justice system remains the 'recognized way of demonstrating that society takes something seriously'.⁸¹ The hope has been that in harnessing the power of the state to condemn sexual violence, we could work towards its eradication. This optimism has not, however, borne much fruit. Feminists find ourselves in a situation in which there has been extensive, often feminist-inspired, law reform, yet little evidence of any reduction in the prevalence of sexual violence, few convictions of perpetrators and a system which affords victims little justice.

Dianne Martin places the blame for this situation on the dominance of neoliberal punitive attitudes towards crime control over the past two decades. She suggests that it has been those feminist proposals which strengthen the criminal justice process that have been adopted by governments desperate to be seen to be controlling crime and addressing insecurity. In this way, feminist arguments, and credibility, have been used to bolster state power, not in order to empower victims, but as a means of exercising control, particularly over marginalized and vulnerable communities.⁸² Kristin Bumiller has vividly described this development as: 'how neoliberalism appropriated the feminist movement against sexual violence'.⁸³ Bumiller argues that by focussing on the criminal justice system as the key site for recognising the harm of sexual violence, feminists have played into the neoliberal agenda, in particular its emphasis on individual responsibility and risk-avoidance which reproduces many myths about rape, such as the prevalence of stranger rape.⁸⁴ Sexual offenders have been stigmatized and characterized as beyond the law-abiding majority, thereby justifying their punitive punishment but, more significantly, generating the idea that they are different from ordinary men.

Thus, paradoxically, feminism has helped to shape this 'politics of penalisation', yet there has been little increase in the conviction and incarceration of sex offenders.⁸⁵ In this way, although there have been widespread demands for improvements in victim's rights,

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Miller (n 1) 191.

⁸⁰ Miller (n 1) 169.

⁸¹ Barbara Hudson, 'Restorative Justice and Gendered Violence – Diversion or Effective Justice' (2002) 42 *British Journal of Criminology* 616-634, 629.

⁸² Dianne Martin, 'Retribution Revisited: a reconsideration of feminist criminal law reform strategies' (1998) 36 *Osgoode Hall Law Journal* 151-188, 153.

⁸³ Kristin Bumiller, *In an Abusive State: how neoliberalism appropriated the feminist movement against sexual violence* (Duke University Press, Durham NC 2008).

⁸⁴ Bumiller argues, for example, that provisions such as sex offender notification, reinforce myths about stranger rape, rather than contribute to safer communities (n 83) 8. See also Emma Bell, *Criminal Justice and Neoliberalism* (Palgrave, Basingstoke, 2011).

⁸⁵ Bumiller (n 83) 7.

reforms remain minimal and piecemeal, with victims' experiences being 'displaced by an outcry focused on controlling the threat of dangerous men'.⁸⁶ It has been presumed that punishing offenders is necessarily beneficial for victims. But this is not necessarily so, particularly in the case of sexual offences where a much wider challenge to the culture and attitudes which condone sexual violence is required if victims' rights and sense of justice are to be genuinely improved. The end result is a culture where the 'recognition of harm' is equated with the 'length of a prison term' and 'criminal justice responses which are not punitive are seen to be unresponsive to victims'/women's harms'.⁸⁷

It is this culture which produces victims' expressed wishes for punishment, as it is assumed this is the only way to achieve public condemnation of harm, yet leaves them feeling 'hollow'. An irony, therefore, may be that the therapeutic nature of VVH is required *because of the failings of the conventional criminal justice system*. Victims' needs and desires, their varying ideas of justice, have been eclipsed by the seemingly ever increasing demands for punitive action. It is when we dig further and ask victims about their conceptions of justice that we find a more varied and complex picture which demands a more diverse approach to justice.

In her interviews with victims of domestic and sexual violence, Judith Herman found that punitive punishment, as traditionally conceived and practiced by the criminal justice system, was not a key priority for victims.⁸⁸ The goal most commonly sought was exposure of the offender as an offender.⁸⁹ It was more important to 'deprive the perpetrator of undeserved honor and status than to deprive them of either liberty or fortune'.⁹⁰ Further, victims sought validation from the community, by 'denunciation of the crime', which 'transferred the burden of disgrace' to the offender.⁹¹ In this way, while acknowledgement from the offender was important, validation from 'bystanders' was of 'equal or greater importance'.⁹² For these reasons, Herman found that victims' needs and wishes are often diametrically opposed to the requirements of formal legal proceedings.⁹³

In a similar vein, Jülich found that a common theme arising from survivors of historic child sexual abuse was the desire to tell their story in a way that was meaningful for them and in a safe environment.⁹⁴ They were critical of the criminal justice system for 'denying them a voice' and were pessimistic that restorative programmes which might be staffed by the same people responsible for conventional criminal justice provision would engender any significant change.⁹⁵

These findings are echoed in two recent reviews of the experiences of rape victims in England and Wales. Sara Payne concluded that we need a 'redefinition' of what constitutes justice which is 'not just punishing a perpetrator and preventing further crimes'.⁹⁶ The subsequent Stern Review concluded that 'support and care for victims should be a higher

⁸⁶ Bumiller (n 83) 157-158.

⁸⁷ Martin (n 82) 170.

⁸⁸ Judith Herman, 'Justice from the Victim's Perspective' (2005) 11 *Violence Against Women* 571-602, 589. This finding is replicated in other studies, for example: Ruth Lewis *et al*, 'Protection, Prevention, Rehabilitation or Justice? Women's use of the Law to Challenge Domestic Violence' (2000) 7 *International Review of Victimology* 179; Heather Strang, *Repair or Revenge? Victims and Restorative Justice* (OUP, Oxford 2002).

⁸⁹ Herman (n 88) 593.

⁹⁰ *Ibid*.

⁹¹ Herman (n 88) 585.

⁹² *Ibid*.

⁹³ Herman (n 88) 574.

⁹⁴ Shirley Jülich, 'Views of justice among survivors of historical child sexual abuse – implications for restorative justice in New Zealand' (2006) 10 *Theoretical Criminology* 125-138, 131.

⁹⁵ *Ibid* 131, 134-135.

⁹⁶ Sara Payne, *Redefining Justice: addressing the individual needs of victims and witnesses* (Ministry of Justice, London 2009) 11.

priority' and that a broader approach to measuring 'success' and outcomes than just a focus on convictions needs to be developed.⁹⁷ Further, that while a conviction is a 'very worthwhile outcome', victims wanted more, such as to be 'treated well' and they 'wanted to know that their experience had been understood and its effects acknowledged'.⁹⁸ In essence, Stern concluded, what victims want are processes which 'honour the experience'.⁹⁹

Importantly, honouring the experience does not mean giving up on justice, or punishment, or vindication.¹⁰⁰ For example, this approach echoes the findings of Liz Kelly et al who have stressed the importance for victims of 'procedural justice', even where substantive justice is not forthcoming.¹⁰¹ Miller also found that victims value procedural justice with many feeling that the preparation process of VVH had been beneficial, with one stating that the dialogue itself was just the 'icing on the cake'.¹⁰² Therefore, even without a conviction and conventional punishment, procedural justice can embed a sense of fairness, of justice. But, in addition, we can find other ways of securing substantive justice, an outcome, which is not necessarily tied to the conventional justice system's demand for a conviction and punitive punishment.

Restorative justice is one means by which this can be achieved. It requires the offender to have admitted responsibility, thereby giving some measure of vindication to the victim. It also offers a form of offender accountability by demanding they explain their actions and listen to the harm they have caused. It may be valuable to bear in mind here that restorative justice is an 'alternative punishment' not an 'alternative to punishment'.¹⁰³ For these and many other reasons, Barbara Hudson notes that while feminists both for and against restorative justice all agree that offences of sexual violence warrant a significant response, her argument is that restorative justice could carry out the 'traditional functions of criminal justice – retribution, rehabilitation/reintegration, individual and public protection – better than formal justice does'.¹⁰⁴ In other words, it may offer more *effective* justice.¹⁰⁵ Restorative justice, therefore, offers important possibilities and feminists must help to shape its further development.¹⁰⁶

⁹⁷ Baroness Stern, *The Stern Review – An Independent Review into how Rape Complaints are Handled by Public Authorities in England and Wales* (Home Office, London 2010) 11.

⁹⁸ Stern (n 97) 46. Further, as Wendy Larcombe contends, a focus on conviction rates can work against feminist aims of rape law which include more 'qualitative and victim-centred' outcomes: Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27-45, 29.

⁹⁹ Stern (n 97) 9, 101-102.

¹⁰⁰ Dorothy Vaandering makes the argument that '[j]ustice is honouring the worth of the other': (2011) 14 *Contemporary Justice Review* 307-328, 324.

¹⁰¹ L. Kelly et al, *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office, London 2005) 87-89.

¹⁰² Miller (n 1) 172.

¹⁰³ Anthony Duff, 'Alternatives to punishment and alternative punishments', in W Cragg (ed) *Retributivism and its Critics* (Steiner, Canada 1992) 44. See also Bronwyn Naylor who proposes an 'alternative restorative pathway' for cases of adult sexual assault, aspiring to 'symbolic and practical justice' as well as ensuring censure and punishment: 'Effective Justice for Victims of Sexual Assault: taking up the debate on alternative pathways' (2010) 33 *UNSW Law Journal* 662-684

¹⁰⁴ Barbara Hudson 'Restorative Justice and Gendered Violence – Diversion or Effective Justice' (2002) 42 *British Journal of Criminology* 616-634, 626.

¹⁰⁵ *Ibid*, emphasis in original.

¹⁰⁶ Also, greater consideration must be given to the potentially gendered nature of restorative processes more generally, an area which is largely overlooked. For thoughtful interventions on this theme, see Kimberly Cook, 'Doing difference and accountability in restorative justice conferences' (2006) 10 *Theoretical Criminology* 107-124, Fidelma Ashe, 'From Paramilitaries to Peacemakers: the gender dynamics of community-based restorative justice in Northern Ireland' (2009) 11 *British Journal of Politics and International Relations* 298-213 and Gilly Sharpe and Loraine Gelsthorpe, 'Engendering the Agenda: Girls, Young Women and Youth Justice' (2009) 9 *Youth Justice: an international journal* 195-208.

There are also a myriad of projects which seek to challenge and reduce violence against women by means of various community based activities; determined to resist co-option by the state.¹⁰⁷ These are very clearly ‘alternatives’ to the criminal justice system, many resolutely refusing any involvement by state bodies or finances.¹⁰⁸ Others similarly recommend a shift of focus from criminal justice, this time towards civil justice with Ilene Seidman and Susan Vickers advocating greater use of the civil law, especially in meeting the most immediate post-offence needs of victims.¹⁰⁹ Kathleen Daly and Brigitte Bouhours imagine a ‘changed societal context’ in which “‘sex offenders’ are less stigmatized and demonized’ and rather than ‘negative and punitive legal mechanisms’, more ‘socially inclusive and integrative approaches’ would be deployed.¹¹⁰ Part of this landscape would be ‘mechanisms that encourage admissions by offenders (only those who are factually guilty, of course) at a very early stage’, revealing greater levels of sexual offending and according some vindication to victims.¹¹¹ The furore surrounding a recent policy proposal in England and Wales, which followed Daly and Bouhours’ recommendation to encourage early admissions, demonstrates just how difficult it is going to be to secure such changes.

An increased sentencing discount was to be offered for an early guilty plea.¹¹² To justify the proposal, the Government offered the example of rape victims as those who may benefit by being saved the trauma of giving evidence at trial. This suggestion was greeted by one front page headline declaring that the Government was ‘Soft on Rapists’.¹¹³ Almost the entire debate proceeded on the basis that lower prison sentences constituted a travesty of justice.¹¹⁴ But this was only one approach. The expressed views of many victims, for acknowledgement of the offending, for vindication, for a voice, were drowned out. Indeed, while one victim’s objections to the policy were extensively reported in the media, when she later changed her mind on learning more of the actual detail of the policy, her views were conspicuously absent in subsequent reports.¹¹⁵ In the light of the barrage of public criticism, including from the opposition Labour party and many feminist organisations, the policy was dropped.¹¹⁶ This is just one further example of feminist rhetoric about the harm of rape being deployed to shore up a punitive approach to punishment and incarceration. Rape was used as a political football and the expressed needs of some victims were lost in a storm of punitive-correctness. What this example also demonstrates is the depth of the challenge to re-orientate and re-imagine our justice system as one which secures justice for rape victims.

¹⁰⁷ For a discussion, see Mimi Kim, ‘Alternative Interventions to Intimate Violence: defining political and pragmatic challenges’, in Ptacek (n 5) 193-217.

¹⁰⁸ As considered in Andrea Smith, ‘Beyond Restorative Justice: radical organizing against violence’, in Ptacek (n 5) 255-278.

¹⁰⁹ Ilene Seidman and Susan Vickers, ‘The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform’ (2005) 18 *Suffolk University Law Review* 467-491. Similarly, Nikki Godden suggests that greater use could be made of tort law claims based on rape: Nikki Godden, ‘Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?’ (2011) 22 *Kings Law Journal* 157-182.

¹¹⁰ Daly and Bouhours (n 55) 623. On sexual offenders and the value of restorative justice, see Anne-Marie McAlinden, *The Shaming of Sexual Offenders – Risk, Retribution and Reintegration* (Hart, Oxford 2007).

¹¹¹ Daly and Bouhours (n 55) 623.

¹¹² As reported in: Robert Winnett and Christopher Hope, ‘50pc “discount” in jail term for rapists who enter early guilty plea’, *The Telegraph*, 18 May 2011.

¹¹³ *Daily Mail*, 19 May 2011.

¹¹⁴ With exceptions: see Editorial, ‘Ken Clark’s prison plans are broadly right’, *The Observer*, 22 May 2011; Clare McGlynn, ‘Ken Clarke was right to start a debate on sentencing in rape cases’ *The Guardian*, 19 May 2011 <http://www.guardian.co.uk/law/2011/may/19/ken-clarke-debate-sentencing-rape>.

¹¹⁵ Ben Chu, ‘How the right-wing press lost interest in Gabrielle Brown’, *The Independent*, 8 June 2011 <http://blogs.independent.co.uk/2011/06/08/how-the-right-wing-press-lost-interest-in-gabrielle-browne/>

¹¹⁶ Patrick Wintour, ‘Kenneth Clarke drops shorter jail terms for rapists after tussle with Cameron’ *The Guardian*, 8 June 2011.

5. Conclusions

Considerable strategic energy has been directed at the conventional criminal justice system in the hope that it will denounce sexual violence and assist in fulfilling feminist ambitions to eradicate violence against women. We have arrived at a situation, however, in which the investment by feminists has not been repaid. Victims see little justice in the current system which, in its neoliberal manifestation, may in fact have contributed to the culture in which sexual violence is endemic. The idea that increased punitiveness and punishment would secure feminist aims has indeed been the ‘ultimate false promise’.¹¹⁷ In *After the Crime*, Miller is critical of the criminal justice system and recommends many improvements. However, while reform is essential and urgent, by advocating only those restorative justice programmes which operate as an addition to the conventional justice system, she suggests a rather static conceptualisation of the criminal justice system. Restorative justice is to be practiced only when the formal system has run its course; rather than envisaging restorative justice as being part of a movement to transform the system itself.

It may well be that Miller has taken a strategic decision to advocate post-conviction restorative justice as a first step towards securing greater justice for victims, even if a defence of the conventional system is a by-product of that strategic judgement. She may also be cautious of any challenge to the due process rights of defendants. However, in focussing her recommendations on only certain restorative practices, and by her implicit endorsement of the current justice system, Miller’s vision of justice is constrained. There is also a danger that it largely reinforces, rather than challenges, assumptions about what constitutes justice and what we expect from our criminal justice system. In doing so, it offers little to the vast majority of victims of sexual violence.

We must move forward by listening to the diverse voices of rape victims and recognising their specific and individual needs. This means ensuring that victim-led justice is no longer synonymous with increasingly punitive attitudes or a predominant focus on convictions and imprisonment. Feminist activism and strategy, therefore, must rethink its approach to what constitutes justice for rape victims, going beyond punitive state outcomes to encompass broader notions of justice, including an expansive approach to restorative justice.

¹¹⁷ Martin (n 82) 184.