RESTORATIVE JUSTICE: A SPECIAL ISSUE OF THE *ALBERTA LAW REVIEW* INTRODUCTION

VAL NAPOLEON*
SPECIAL ISSUE COORDINATOR

In this special issue of the *Alberta Law Review*, we present a range of articles that explore some of the many critical questions in the contested and dynamic field of restorative justice. We set out to provide a space for a deep and critical engagement with the complex questions and issues in the field and, with this issue, we have succeeded in creating just such a space where these challenging conversations can take place. This issue brings together an interesting and diverse group of nine authors who bring different perspectives, experiences, and wide-ranging approaches to both the practice and theory of restorative justice.

Briefly, this special issue is organized as follows. The first article of the issue, by Barbara Tomporowski, Manon Buck, Catherine Bargen, and Valarie Binder, provides an overall national perspective. Second, the next group of four articles, authored by Emily Snyder; Alan Edwards and Jennifer Haslett; Simon Owen; and Nicole Watson, provides insight on selected critical issues. Third, a far-reaching discussion of community practices is explored in two articles, the first by Karen Erickson, Patti LaBoucane-Benson, and Fiona Hossack; and the second by Matthew Wildcat. Fourth, Jennifer Llewellyn and Jocelyn Downie confront conventional constraints in advocating for the substantive expansion of the application of restorative justice. Finally, to conclude the articles, Jonathon Rudin critically analyzes a recent Alberta Court of Appeal case against the jurisprudence arising from *R. v. Gladue*.[1]

Turning now to the articles, beginning with its incorporation into the formal criminal justice system well over 30 years ago, Tomporowski, Buck, Bargen, and Binder provide a very concise and helpful history of restorative justice in Canada.[2] Today, restorative justice week is celebrated by at least 18 countries and has expanded beyond criminal justice to include sectors such as child welfare and conservation. First articulated and implemented in Ontario in a case of youth vandalism, restorative justice is primarily a grassroots, community-based movement involving victim advocacy, offender rehabilitation, and social justice. Restorative justice may be defined as "an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by a crime — victim(s),

---

* LL.B., Ph.D. (Law). Val Napoleon is of Cree heritage and is an adopted member of the Gitksan nation. She is a cross-appointed associate professor with the University of Alberta teaching in the faculties of native studies and law. Her doctoral research focused on a substantive articulation of Gitksan law and the development of a Gitksan legal theory. In June 2010, Val was awarded the University of Victoria's Governor General's Gold Medal for her dissertation entitled *Ayook: Gitksan Law, Legal Order, and Legal Theory*. She publishes and teaches in areas of Aboriginal legal issues, Indigenous legal traditions, Indigenous feminism, oral histories, restorative justice, and governance. She is very grateful to the amazing and hard-working Co-Editors-in-Chief, Holly Juska and Steven Rohatyn, who have ably brought this issue to its conclusion.

1 [1999] 1 S.C.R. 688 [*Gladue*].

2 Barbara Tomporowski, Manon Buck, Catherine Bargen & Valarie Binder, "Reflections on the Past, Present, and Future of Restorative Justice in Canada" (2011) 48 Alta. L. Rev. 815.

offender and community — to identify and address their needs in the aftermath of a crime."[3] From this perspective, the extent to which a justice program might be restorative depends on (1) the involvement of offenders, communities, and victims; and (2) how the expressed values of inclusion, democracy, responsibility, reparation, healing, safety, and reintegration are practically acted on. Programs vary in their operations, but there are four main types: victim-offender mediation, conferences, circles, and justice committees.

According to Tomporowski, Buck, Bargen, and Binder there are a number of challenges in the field of restorative justice: (1) the need for ongoing funding and national data collection, (2) expanding the use of restorative justice to more contested areas such as sexual and physical abuse, (3) determining the relationship between Aboriginal justice and restorative justice, and (4) engaging victims and victim service agencies. Each of these challenges requires careful study to deal with eternal issues such as power and gender dynamics, the applicability of restorative justice to crimes involving sexual assault and intimate (or domestic) violence, further training and skill development, and concerns with netwidening. Furthermore, there is continued potential for the development of restorative justice, particularly for its possible application to human rights abuses and cases of collective violence. This is a perspective that traces restorative justice to its early criminal justice roots and creates a sturdy foundation for where restorative justice is today in Canada.

The next four articles take up new and very thought-provoking discussions about varying aspects of restorative justice. This section begins with Snyder, who argues that the reconciliatory process, as advanced in Canada by the newly established Truth and Reconciliation Commission of Canada (TRC), would be more effective as a social justice process if it deliberately created space for dissent.[4] In other words, discussions about reconciliation and residential schools alongside the accompanying racialization, sexualization, and violence are subjects that are profoundly conflicted, not because of some failure on the part of the discussants, but because they are topics that have been experienced and remembered in different ways by both Indigenous and non-Indigenous peoples. While the task of the TRC is enormous and complex, Snyder observes that it has an opportunity "to be attentive to conflict, and how it might be able to create *and utilize* space for understanding not only history, but also how colonialism and racism run through current norms and values, and thus the institutions and relationships in Canada."[5]

According to Snyder, while the first national event hosted by the TRC did allow some space for conflict to arise, there was no positive or practical response, so people did not know how to proceed and, consequently, opportunities for constructive and informative dialogue were missed. Snyder suggests that the varying responses to conflict, including its suppression or disregard, reveal seriously divergent approaches to reconciliation that remain unexamined. Another of Snyder's observations regards the absence of any gendered perspective or analysis. Snyder's piece offers a careful and sophisticated discussion of one national event,

---

3 *Ibid.* at 817, citing Robert B. Cormier, "Restorative Justice: Directions and Principles — Developments in Canada" (Paper presented to the 11th Session of the Commission on Crime Prevention and Criminal Justice, Vienna, 16-25 April 2002), (Ottawa: Public Works and Government Services Canada, 2002) at 1.

4 Emily Snyder, "Reconciliation and Conflict: A Review of Practice" (2011) 48 Alta. L. Rev. 831.

5 *Ibid.* at 832 [emphasis in original].

and she concludes with a series of recommendations for future TRC events. Snyder's thoughts may be extrapolated beyond this special issue to other deliberative struggles on difficult social justice topics.

In the next article of this grouping, Owen asks whether and how restorative justice practices might be incorporated into Canadian plea-based sentencing courts.[6] Owen's overarching concern is with how, as a result of a lack of both financial and political support, restorative justice remains stalled at the margins of the justice system. According to Owen, the biggest problems are an ideological resistance to restorative justice combined with a reluctance to shift away from centralized power towards more decentralized, non-state justice practices, regardless of their promise and successes.

Owen inquires about whether restorative justice values can find traction in the mainstream criminal legal system, specifically in the law and practice of sentencing. Taking this "maximalist" view of restorative justice, Owen conducts extensive empirical research into three British Columbia sentencing courts. Owen argues that while courts are creatures of the state, they are nonetheless located in communities and therefore, those that "are able to openly address, integrate, and communicate their responsibilities to both the state-based law and the local human needs that are caught up in almost every crime will be engaged in furthering restorative values, even if in an insufficient or incomplete way."[7] Some of Owen's findings are an interesting challenge to the standard rhetoric of restorative justice and its often dichotomous positioning against state law. For example, according to Owen, "the mere fact that a process is controlled by the state rather than a local community does not, by itself, dictate its ability to endorse or reflect [Howard] Zehr's criteria of 'restorativeness.'"[8] Given the complexities of Owen's research issues, it is not surprising that his final conclusions are mixed and not easily classified into either retributive or restorative. He writes:

> None of the hearings that I observed embodied an ideal restorative practice, wherein the normative and practical dimensions of wrongdoing are comprehensively enunciated, not merely with regard to court and offender perspectives, but including those of victims and community representatives. It is unlikely that any sentencing court, given the many constraints I have noted as impinging upon their work, could ever sustain such expressiveness. Indeed, as First Nations Court in particular taught me, there is not, and perhaps in a flexible justice system need not be, one overarching ideal or appropriate practice in the resolution of criminal wrongs. That said, the most communicative hearings were those least fettered by the law's expectations of uniformity, and most creative in their use of the law's discretion.[9]

This very valuable article is empirically grounded and offers a substantive discussion of restorative justice within the practicalities of the courtroom. Owen's research also generates many questions that encourage further empirical and theoretical work, and that are critical for those engaged in furthering restorative justice goals both inside and outside of judicial structures. One such question is about how one might draw further on the intellectual resources of Indigenous legal traditions in order to inform restorative justice practices and

---

6 Simon Owen, "A Crack in Everything: Restorative Possibilities of Plea-Based Sentencing Courts" (2011) 48 Alta. L. Rev. 847.
7 *Ibid.* at 850.
8 *Ibid.*
9 *Ibid.* at 892.

theory, and to examine and perhaps build a constructive relationship between the legal processes examined by Owen (that is, plea-based sentencing courts) and those of Indigenous societies.

Edwards and Haslett succeed in teasing out and interrogating a very problematic issue in the work of restorative justice.[10] Drawing from their years "in the trenches" as practitioners working with serious and violent crimes, Edwards and Haslett ask about the unintended consequences of conflating violence with conflict in the practice of restorative justice. In the rapid growth of restorative justice initiatives, Edwards and Haslett have observed the troublesome and interchangeable use of "violence" and "conflict," particularly in cases of interpersonal violence, including family violence and sexualized violence. According to Edwards and Haslett, such an unexamined practice has the potential to cause further harm to people and communities because practitioners focus on the conflict rather than the violence — thereby leaving the violence unaddressed. In this way, violence is hidden and invisible even though it is actually in full view — and, usually, it is the least powerful who bear the consequences of such hygienic recasting of violence behaviours.

Edwards and Haslett provide a detailed exploration of this issue, and they set out scenarios that allow the reader to better imagine and see how the varying approaches to conflict and violence can play out in people's lives. They advocate for a reflective practice where people engage in conversations about what violence is, what conflict is, and how violence is normalized. Edwards and Haslett write: "Being witness to so many violence stories in peoples' lives has been a privilege for us and has provided us with a unique opportunity to think about the complexities of violence."[11] This article is a finely grained and wise distillation of Edwards' and Haslett's experiences and reflections over many years and, hopefully, these will be thoroughly deliberated by restorative justice practitioners and theorists alike. While there are many questions that arise from this article, one is about how we might think about collective responsibilities in the normalization of violence in our communities and society. Another question is about how deliberate violence is thought through and responded to in a restorative justice approach.

Turning to the last of this group of articles, Watson takes a critical and hard-hitting look at the nexus between the Australian federal government's apology for historic wrongs and the continued on-the-ground oppression experienced by Aboriginal peoples living under the Northern Territory Emergency Response (NTER) legislation that it unilaterally imposed in 2007.[12] Watson lays bare a basic contradiction in the Australian reconciliation discourse: differential political and legal power structures have remained intact and privileged despite a national apology. Watson describes how the NTER was introduced in response to allegations of widespread and horrific child sexual abuse that generated a full-blown moral panic which thrived on, and perhaps was only made possible by, a foundation of racist assumptions about Aboriginal peoples.

---

10 Alan Edwards & Jennifer Haslett, "Violence is Not Conflict: Why It Matters in Restorative Justice Practice" (2011) 48 Alta. L. Rev. 893.

11 *Ibid.* at 902.

12 Nicole Watson, "The Northern Territory Emergency Response: The More Things Change, The More They Stay the Same" (2011) 48 Alta. L. Rev. 905.

In effect, with an emphasis on law and order, the NTER enlarges the role of the state in community governance and the daily lives of Aboriginal peoples in the Northern Territory. Among other things, in the name of child protection, the legislation prohibits alcohol and pornography, controls the payment of meagre income support payments, controls personal spending, and gives the Commonwealth powers to acquire Aboriginal lands. The repercussions of the NTER are said to have "created a feeling of 'collective existential despair' … characterised by a widespread sense of helplessness, hopelessness and worthlessness, and experienced throughout entire communit[ies]."[13] At the end of the day, there is no reported improvement to the safety and well-being of children as a result of the NTER and, furthermore, malnutrition, suicide, and mental illness have actually increased.

Despite Prime Minister Kevin Rudd's apology and Australia's reconciliatory efforts,[14] Aboriginal peoples continue to be caught in the "tension between inadequate protection and excessive regulation."[15] As with Canada, Australia's current political and legal structures are steeped in colonial history and, according to Watson, colonialism is alive and well in today's governmental policies and actions. This article provides important insights into the gulf that can exist between apology and action in the name of restorative justice. Watson's article raises questions about types of apologies and their effects — substantive, general, superficial, etc. In this case, Rudd's apology did not appear to be connected to history or recognize the material or substantive effects on Aboriginal peoples (for example, dispossession of land, loss of governing authority, etc.) described by Watson. Given this, Rudd's apology seems to skate over Aboriginal peoples' experiences with, among other things, the NTER. So, what would a substantive apology to Aboriginal peoples in Australia require?

The next grouping of two articles presents examples of creative community justice initiatives with insightful perspectives and in-the-trenches, practical experience. In the first fabulous article, Wildcat contextualizes the restorative justice work of the Miyo Wahkotowin Community Education Authority, which operates three schools for the Ermineskin Cree Nation in Maskwacis (Hobbema, Alberta), within a larger theoretical analysis of citizenship and political formations of legitimacy.[16] Wildcat carefully sets out Miyo Wahkotowin and Maskwacis historically and politically in order to prevent further pathologizing of Indigenous peoples as inherently incapable and dysfunctional. Maskwacis has been plagued with colonially wrought violence, which in recent years takes the form of gang activities and addictions. Accordingly, the staff at Miyo Wahkotowin have set out to develop and apply a restorative justice approach to the way violence in the larger community plays out in the lives and behaviours of the children and youth.

According to Wildcat, Miyo Wahkotowin's restorative justice initiative is a way for the community of Maskwacis to rebuild a local, horizontal citizenship (as opposed to a form of

---

13 *Ibid.* at 916, citing Aboriginal Indigenous Doctors' Association, *Submission to the Northern Territory Emergency Response Review Board* (Canberra: Australian Indigenous Doctors' Association, 2008) at 7.

14 See generally Val Napoleon, "Who Gets to Say What Happened? Reconciliation Issues for the Gitxsan" in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 176.

15 Watson, *supra* note 12 at 918.

16 Matthew Wildcat, "Restorative Justice at the Miyo Wahkotowin Community Education Authority" (2011) 48 Alta. L. Rev. 919.

citizenship that relies entirely on recognition of individuals by centralized state processes). He writes: "Rather, as Nehiyaw [Cree] peoples and Maskwacis residents, we must broaden our conception of citizenship to a place where our focus is forming relationships of governance with each other in the pursuit of shared practices and values."[17] According to Wildcat, Miyo Wahkotowin's restorative justice initiative holds potential precisely because "it is shaping subjectivities toward a conception of citizenship" capable of fostering governance and self-determination, and the reinvigoration and revival of Indigenous legal orders.[18] This article is a critical must-read for anyone wanting a broader framework through which to analyze Indigenous and non-Indigenous restorative justice programs. In particular, the elements that Wildcat defines as necessary to the formations of legitimacy are very helpful to practitioners, community members, politicians, or academics who are interested in examining what makes an effective restorative justice initiative. One of the many questions generated by Wildcat is how we might more fully and critically engage with Indigenous legal orders as part of the work of citizenship and governance.[19]

Next, Erickson, LaBoucane-Benson, and Hossack describe Pohna: Keepers of the Fire (Pohna), an initiative of Native Counselling Services of Alberta.[20] This program is designed for youth aged 11-17 who have some history of criminal activity, such as swarming, robbery, assault, and selling drugs. This is a fascinating article because it really does draw from the everyday, lived experiences of struggling young people. Through the use of case studies, Erickson, LaBoucane-Benson, and Hossack outline the complicated web of issues that surround each of a number of the typical youth that the initiative reaches out to — each strand of the web represents another struggle that the youth is simultaneously dealing with, such as a lack of family support, addicted or otherwise problematic parents, school expulsions, depression or other mental health problems, past gang involvement, probation breaches, poverty, or addictions. Failure to deal with any of these strands can cause the youth to spiral inexorably toward a lifetime of incarceration or extreme violence. Pohna works to create effective, individualized "wrap around" supports that help the youth deal with the realities that they struggle with.

Erickson, LaBoucane-Benson, and Hossack write: "While youth facing serious issues and involvement with the criminal justice system may want to change, the forces within their lives can derail these desires. Their intentions alone cannot create the change needed. Adolescents cannot 'will' their way to change. They need ongoing adult support and guidance."[21] The work of Pohna identifies the context that makes the youth vulnerable and works with the youth to build resiliency in that particular vulnerability context.[22] Erickson, LaBoucane-Benson, and Hossack explain that the work with the youth is far too complex to simply focus on finding answers to the problems of youth criminal and gang activity. Rather, Pohna's aim is to work with the youth in the hopes of creating new realities from the actual

---

17 *Ibid.* at 938.
18 *Ibid.* at 939.
19 For further discussion on this, see generally Val Napoleon *et al.*, "Where is the Law in Restorative Justice?" in Yale D. Belanger, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3d ed. (Saskatoon: Purich, 2008) 348.
20 Karen Erickson, Patti LaBoucane-Benson & Fiona Hossack, "Creating a Path by Walking It — A Year in Review of Pohna: Keepers of the Fire" (2011) 48 Alta. L. Rev. 945.
21 *Ibid.* at 959.
22 *Ibid.* at 962-63.

realities of their lives. Part of what Pohna's work reveals is that these youth need help to survive and navigate their very worlds and the adults, well-intentioned or otherwise, in those worlds. And, since the worlds of these youth are not created in a vacuum and they do not somehow exist separately from the rest of Canada, critical questions about larger collective responsibilities are again raised. This article allows the reader to learn from the direct and incredibly valuable experiences of Erickson, LaBoucane-Benson, and Hossack, as well as the youth they interact with.

The eighth article in this special issue explores the potential application of restorative justice to the controversial and emotionally charged issue of euthanasia and assisted suicide.[23] Llewellyn and Downie describe the difficult paralysis or stasis created by the current legal and political responses to euthanasia and assisted suicide wherein the public discourse careens dichotomously between the familiar and well-entrenched walls of the debate. In the current criminal justice approach, the focus is on the individual who committed the act without any consideration of the wishes or circumstances of the deceased individual. Consequently, "the current approach polarizes the parties (the person who died and the accused) and limits the range of those included in the process (directly, the state and the accused; indirectly, the deceased; and even more indirectly those close to the deceased)."[24] According to Llewellyn and Downie, this approach not only ignores the web of complex factors that led to the person's dying, it also completely ignores society's responsibility for end of life care.

In contrast, Llewellyn and Downie argue that the idea or theory of justice, as represented in the field of restorative justice, deserves examination and application to euthanasia and assisted suicide. In other words, what restorative justice offers is a different conception of justice, one that is rooted in relational theory, which offers a more effective way to respond to euthanasia and assisted suicide. The work of justice becomes about ascertaining, in each case, "what is required by the context and circumstances of the parties affected by a situation to build restored relationships — relationships of equal respect, concern, and dignity."[25] Llewellyn and Downie advocate for a broader understanding of harm, responsibility, relationships, accountability, and inclusive democracy, and they are realistic in recognizing that in some circumstances, euthanasia or assisted suicide is not appropriate. This is a brilliant and important article with major implications for expanding how we think about restorative justice, and justice more broadly. Llewellyn and Downie provide a nuanced analysis of the resulting dilemmas and practical consequences for the criminal justice system and, at a human level, for all of the people involved.

Turning now to the last article, Rudin brings us back to Alberta with an extensive critical analysis of the sexual assault case of *R. v. Arcand*,[26] and the failure of the Alberta Court of Appeal to apply the principles set out by the Supreme Court of Canada in *Gladue* in its

---

23 Jennifer J. Llewellyn & Jocelyn Downie, "Restorative Justice, Euthanasia, and Assisted Suicide: A New Arena for Restorative Justice and a New Path for End of Life Law and Policy in Canada" (2011) 48 Alta. L. Rev. 965.

24 *Ibid.* at 967.

25 *Ibid.* at 971.

26 2010 ABCA 363, 264 C.C.C. (3d) 134 [*Arcand*].

decision.[27] Rudin argues that the Court of Appeal was wilfully blind in its refusal to acknowledge the fact that the accused was Aboriginal and its refusal to consider legislative, judicial, or penological factors.[28] While the decision itself is very problematic on many counts, and Rudin ably sets this out for the reader, it is what is described as the Court's legal revisionism that, according to Rudin, "virtually ignores the substantive aspects of *Gladue*."[29] Rudin carefully explains how a consideration of *Gladue* should lead to a reconsideration of *Arcand*, specifically with regard to issues of proportionality, Aboriginal concepts of sentencing, the circumstances of the Aboriginal offender, general deterrence, and the way sentences reflect harm to victims.[30]

Rudin provides many important and incisive observations in this case analysis, such as: "Sentencing based on the principle of general deterrence uses the offender as the vehicle through which a message is sent to others, regardless of the detriment that increased punishment may have on the offender's rehabilitation."[31] Another observation concerning the problem of linking harm and sentencing is that "there is no reason to believe that the length of a sentence somehow reduces the harm experienced by the victim"[32] and, instead, it would be more useful to provide support to the victim to heal the trauma they have experienced. *Arcand* is at one end of the spectrum of possible responses to crime and at the other end are the alternative approaches advocated by Wildcat and Erickson, LaBoucane-Benson, and Hossack. Together, Rudin; Wildcat; and Erickson, LaBoucane-Benson, and Hossack create a compelling larger picture about the importance of rethinking law and justice through a restorative lens.[33]

To conclude, these nine articles comprise a rich resource for those who care about and work with restorative justice. The authors make it clear that restorative justice is not a panacea or simple formula. Rather, the work of restorative justice is just as complex as any other approach to justice — but the starting places, processes, consequences, and results are fundamentally different. These articles challenge all of us to think more deeply about people, justice, crime, harms, relationships, citizenship, democracy, and responsibilities — and hopefully they will provoke many more conversations. As a society, we can only benefit from such deep engagement with the things that should matter to us in the world.

---

27 Jonathan Rudin, "Eyes Wide Shut: The Alberta Court of Appeal's Decision in *R. v. Arcand* and Aboriginal Offenders" (2011) 48 Alta. L. Rev. 987.

28 *Ibid.* at 990.

29 *Ibid.* at 998.

30 *Ibid.* at 1001.

31 *Ibid.* at 1005.

32 *Ibid.* at 1006.

33 However, this is not to suggest conflating restorative justice with Aboriginal justice. For a discussion on this issue, see generally Jonathan Rudin, "Aboriginal Justice and Restorative Justice" in Elizabeth Elliott & Robert M. Gordon, eds., *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Cullompton, U.K.: Willan, 2005) at 89.