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# Restorative Justice in Domestic Violence Cases

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## RESTORATIVE JUSTICE IN DOMESTIC VIOLENCE CASES

Roni A. Elias

### INTRODUCTION

Social institutions fail to adequately address or remedy the serious, widespread problem of domestic violence, including and especially the criminal justice system. However, increased concern with domestic violence has led to advocacy for law reform in the criminal justice system, including the definition of new offenses and stricter punishments.<sup>1</sup> Further, refinements in the criminal prosecution and punishment of offenders, as valuable as they may be, are nowhere near sufficient to solve all of the problems associated with domestic violence. In particular, these changes to the criminal justice system have done little to address the social and family dynamics underlying abusive and violent behavior, and they have generally not been especially responsive to the needs of victims.

The shortcomings of recent reforms in criminal justice practice towards domestic violence leave some important questions unanswered. Thus, we are left with the question: will the traditional approach of criminal justice be effective in reducing the incidence of domestic violence and in helping victims? In particular, does the retributivist approach of criminal justice really help address the core problems of domestic violence?

For several reasons, it is safe to say that more is needed to further reduce the incidence of domestic violence and to help victims recover from their emotional and psychological injuries. This paper addresses how the practices of the “restorative justice” movement can be applied to improve the ways in which the criminal justice system addresses the problem of domestic violence. “Restorative justice” names a broad category of informal, dialogue-based practices that seek to address the social harms caused by crime. Restorative justice practices, which have spread

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<sup>1</sup> Loretta M. Frederick & Kristine C. Lizdas, *The Role of Restorative Justice in the Battered Women’s Movement*, BATTERED WOMEN’S JUSTICE PROJECT 5 (September 2003), available at [http://www.bwjp.org/files/bwjp/articles/Role\\_of\\_Restorative\\_Justice\\_Battered\\_Women's\\_Movement.pdf](http://www.bwjp.org/files/bwjp/articles/Role_of_Restorative_Justice_Battered_Women's_Movement.pdf) (last visited May 23, 2015); see also Constance Johnson, Law and Disorder, 116 U.S. NEWS 35 (1994); *Crime and Punishment*, THE ECONOMIST, June 8, 1996; *The Craze for Imprisonment*, THE ECONOMIST, May 16, 1998.

rapidly since the early 1990s, are commonly used in cases involving youth crime. However, its animating ideas can provide important implications for improving the way in which the criminal justice system responds to domestic violence.

Among the most important aspects of restorative justice practices are the developments of corrective and rehabilitative action for the offender through the cultivation of dialogue between victim and offender and between the victim and professionals associated with the criminal justice system. In this way, restorative justice solves a particular problem of the criminal justice system in domestic violence cases – the tendency to focus all action on the needs of the offender and society. Thus, the offender-focused approach of traditional criminal law can exacerbate the problems of domestic violence in the sense that it involves a disregard or even a negation of the victim's identity – and this is one of the most psychologically injurious aspects of domestic violence. Additionally, criminal punishments often fail to address the real problems associated with domestic violence for both the offender and the victim. The use of social forces to prohibit and punish violent acts does not help either the offenders or the victims understand how to develop relationships without violence.

Ultimately, restorative justice practices are directed at treating criminal acts as fissures in a community, calling for the community members themselves to play a role in healing such fissures, rather than as individual acts of deviance subject to castigation.<sup>2</sup> Restorative justice practices also aim at striking a necessary balance between serving the state's interest in controlling harmful behavior and the victim's interest in preserving individual dignity, personal integrity and the development of a healthy family life.

## I. THE CRIMINAL JUSTICE SYSTEM AND THE PROBLEM OF DOMESTIC VIOLENCE

When considering how to address the problem of domestic violence through the criminal justice system, one must consider that many domestic violence incidents are unreported to police. Because the criminal justice system extends to only a small percentage of domestic violence incidents, it is unrealistic to conclude that a different approach to punishment will alone ameliorate the problem of domestic violence. If reforms in criminal law are to have a meaningful effect across the entire scope of domestic violence, those reforms must have an exponential and lasting effect on victims and perpetrators outside the courtroom.

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<sup>2</sup> Frederick & Lizdas, *supra* note 1 at 5.

For instance, a recent survey from 1993 to 2005 showed that, among persons aged 12 or older, the annual incidence of domestic violence rate per 1,000 persons for intimate partners and/or relatives was 5.9 for females and 2.1 for males.<sup>3</sup> Among those victims, approximately two-thirds reported that they had been threatened with a physical attack or death, and about one-third reported that they were physically attacked.<sup>4</sup> Further, among those who had been physically attacked, just over half of the female victims (50.5%) suffered any kind of injury and 4.5% were seriously injured.<sup>5</sup> Additionally, sexual assaults occurred in more than 3% of physical attacks.<sup>6</sup> The injury rate for the male victims of physical attacks was lower than for females – 41.5%; but the incidence of serious injuries among male victims was about the same as it was for females – 5%.<sup>7</sup> Fewer male victims — 41.5% — reported injuries, of which less than 5% were serious injuries. Lastly, for both men and women, nonfatal domestic violence was more likely to occur between intimate partners who were divorced or separated than between those who were together.<sup>8</sup>

Certainly, not every incident of domestic violence is reported to authorities. Indeed, a statistical analysis of survey data shows that the majority of incidents of domestic violence are under reported to law enforcement. Data shows that victims do not go to authorities when they are first subject to domestic violence, rather, they suffer through multiple assaults or related victimizations before making an official report or seek a protective order.<sup>9</sup> For example, according to the National Violence Against Women Survey (“NVAWS”), among those who had been physically assaulted by an intimate partner, only 27% of women, and 13.5% of men reported such an assault to law enforcement.<sup>10</sup> Less than one-fifth of the women raped by their intimate partner filed police

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<sup>3</sup> NATIONAL INSTITUTE OF JUSTICE, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors & Judges* (June 2009), available at <http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/pages/toc.aspx> (last visited May 23, 2015).

<sup>4</sup> NATIONAL INSTITUTE OF JUSTICE, *supra* note 3.

<sup>5</sup> *Id.* at 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims in DO ARRESTS AND RESTRAINING ORDERS WORK?* 214-243 (Eve S. Buzawa & Carl G. Buzawa, eds., 1996); *see also* S. KEILITZ, *ET AL.*, *CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE* (U.S. Department of Justice, National Institute of Justice) (1997).

<sup>10</sup> NATIONAL INSTITUTE OF JUSTICE, *supra* note 3 at 1.

reports.<sup>11</sup> With respect to incidents of stalking, reporting rates were higher, but still far from comprehensive, as only 52% of women and 36% of men went to law enforcement officials to file reports when subject to stalking.<sup>12</sup> The National Crime Victimization Survey (“NCVS”) made similar findings. Multiple NCVS surveys over the past several decades find that reporting rates are increasing but remain low, with reporting rates for both men and women of all nonfatal partner victimization reaching no more than 62%.<sup>13</sup> Among subgroups involved in the surveys, the highest reporting rate is for black females (70.2%) and the lowest is for black males (46.5%).<sup>14</sup>

Additionally, even when law enforcement responds to a report of domestic violence, victims frequently deny that any abuse occurred. Researchers who compared hundreds of police domestic violence incident reports with victim statements at four sites in three different states found that 29% of victims reported that no assault had actually occurred, even when a police investigation found the occurrence of an assault.<sup>15</sup> In fact, the alleged assailants were more likely to admit to police that an assault had occurred with only 19% reporting “no assault.”<sup>16</sup> Even so, the alleged assailants were much more likely to minimize the severity of the assault.<sup>17</sup> Also, researchers found that victims do not report abuse or assault even when subjected to repeated incidents.<sup>18</sup> Furthermore, even when victims of repeated assaults finally do contact authorities, the previous unreported incidents of domestic violence may be more severe than the incident that precipitated the report.<sup>19</sup>

This suggests that victims of domestic violence have various reasons for declining to report their abuse. Some believe that the incidents of abuse were a private or personal matter (22% for females, 39% for males).<sup>20</sup> Others cite a fear of reprisal as the reason for failing to report (12% for females, 5% for males),<sup>21</sup> whereas some assert that they did not report the incident because they wanted to protect the assailant (14% for females, 16% for

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 5.

<sup>15</sup> Ricahrd B. Felson, et al., *Police Intervention and the Repeat of Domestic Assault: Final Report for National Institute of Justice* (2005).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> NATIONAL INSTITUTE OF JUSTICE, *supra* note 3.

<sup>21</sup> *Id.*

males).<sup>22</sup> Finally, many believe that reporting such incidents are meaningless due to the presumption that the police cannot or will not respond effectively.<sup>23</sup>

Of course, not every incident of reported domestic violence leads to arrest and prosecution. This is because police arrest rates vary across jurisdictions, at least in part because the definitions of domestic violence vary among jurisdictions.<sup>24</sup> For example, the rate of domestic violence arrests per 1,000 persons ranged from 3.2 in Omaha, Nebraska in 2003 to 12.2 in Wichita, Kansas in 2000.<sup>25</sup> Similarly, prosecution rates also vary. One researcher, who reviewed 26 domestic violence prosecution studies from across the country, found that the number of prosecutions per arrest ranged from 4.6% in Milwaukee in 1992 to 94% in Hamilton, Ohio, in 2005. The average rate was 63.8%, and the median rate was 59.5%.<sup>26</sup>

When a domestic violence case is prosecuted, the nature of the dispositions varies. In Chicago, slightly less than one-third of all cases ended with a conditional discharge; slightly less than a quarter of cases ended with a sentence of probation or court supervision; and 23% of cases resulted in a jail sentence (although some sentences amounted only to time served pending trial).<sup>27</sup>

For example, in Massachusetts, where three-quarters of the suspects were charged with some form of assault and/or battery, one-fourth of the defendants wound up in criminal diversion programs, another one-fourth placed on probation, and 13.5% imprisoned.<sup>28</sup> In Ohio, among defendants convicted of a domestic violence charge, nearly 70% were incarcerated. The majority of those sent to jail were incarcerated between 30 and 45 days, but 18.8% were incarcerated 150 to 180 days.<sup>29</sup> The number of domestic violence offenders sent to Ohio prisons increased nine-

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 5.

<sup>24</sup> ANDREW KLEIN, *THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE* (Wadsworth, 1st ed. 2003).

<sup>25</sup> *Id.*

<sup>26</sup> NATIONAL INSTITUTE OF JUSTICE, *supra* note 3 at 5; *see also* Joel H. Garner & Christopher D. Maxwell, 34 *CRIM. JUST. REV.* 44, 49 (2009).

<sup>27</sup> Carolyn C. Hartley & Lisa Frohman, *Cook County Target Abuser Call (TAC): An Evaluation of a Specialized Domestic Violence Court*, Final Report for the National Institute of Justice 92 (2003).

<sup>28</sup> Eve Buzawa et al., *Response to Domestic Violence in a Pro-Active Court Setting*, Final Report for the National Institute of Justice (table 6.9) (1999).

<sup>29</sup> Joan Belknap & Dee L.R. Graham, *Factors Related to Domestic Violence Court Dispositions in a Large Urban Area: The Role of Victim/Witness Reluctance and Other Variables*, Final Report for the National Institute of Justice (table 2.3) (2000).

fold between 1991 and 2005.<sup>30</sup> In three different states with specialized prosecution programs, 52% to 76% of convicted abusers were incarcerated.<sup>31</sup>

Furthermore, the degree of supervision varies widely for domestic violence offenders placed on probation, and special conditions are common. Certainly, offenders are routinely prohibited from having contact with their victim while on probation, and they are required to hold a job.<sup>32</sup> Additionally, probation conditions can include mandatory participation in many kinds of programs designed to treat or modify the offender's behavior, including: batterer treatment; drug and alcohol abstinence and testing; fatherhood programs or, for female offenders, participation in women's support groups; and mental health evaluations.<sup>33</sup>

## II. RESPONSES WITHIN THE TRADITIONS OF THE CRIMINAL JUSTICE SYSTEM

One of the objectives of the women's movement during the middle and later 20th century was to address the problem of domestic violence by seeking reform of the criminal justice system. These early reform efforts focused using the power of the state, through the criminal justice system, to act as a deterrent force to protect women from assaults.<sup>34</sup> At the time, state and local governments were reluctant to modify their approaches to handling domestic violence as a criminal matter.<sup>35</sup> In fact, before the 1970s, law enforcement officials acted under the assumption that domestic violence was a private, family matter, which did not invoke a crime.<sup>36</sup> Consequently, the standard law enforcement response concentrated on "separation and mediation."<sup>37</sup> However, persistent and persuasive advocacy by many aspects of the women's movement eventually effected change in the standard approach.

As a result, such changes initially affected the methods for arresting and prosecuting perpetrators of domestic violence.

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<sup>30</sup> J. Wooldredge, *Convicting and Incarcerating Felony Offenders of Intimate Assault and the Odds of New Assault Charges*, 35 J. CRIM. JUST. 379 (2007).

<sup>31</sup> Barbara E. Smith, et al., *Evaluation of Efforts to Implement No-Drop Policies: Two Central Values in Conflict*, Final Report for the National Institute of Justice 51 (2001).

<sup>32</sup> Adele Harrell, et al., *Final Report on the Evaluation of the Judicial Oversight Demonstration: Executive Summary*, National Institute of Justice 13 (2008).

<sup>33</sup> *Id.* at 6-7.

<sup>34</sup> Frederick & Lizdas, *supra* note 1 at 14-15.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Changes included the following: the government established legislation permitting warrantless arrests for misdemeanor assaults; lawsuits were filed that challenged the constitutionality of standard police practices in domestic violence cases; police policies changed to arrest offender(s) whenever probable cause of a domestic assault existed; prosecutors developed strategies for pursuing cases even when victims declined to testify for the government or even chose to testify on behalf of their assailant.<sup>38</sup>

Second, sentencing practices changed, too. Courts began to require that domestic violence offenders attend newly developed counseling programs for batterers.<sup>39</sup> Additionally, probation agencies created new ways to supervise the conduct of those convicted of domestic assault to diminish the chances of new offenses.<sup>40</sup> Courts and community organizations both worked to keep victims involved in the prosecution and sentencing process, and liaisons were made available to victims to increase their sense of empowerment in the criminal justice process.<sup>41</sup>

These changes to procedure and policy of the criminal justice system contributed to a broader social and cultural change – the transformation of the popular understanding of domestic violence. Certainly, as a direct result of reforms in the criminal justice system, police, prosecutors and courts developed new understandings of domestic violence offenders and their victims.<sup>42</sup> Specifically, women developed a new awareness that the institutions of the criminal justice system recognized that women were not abused because they “asked for it,” but rather because men violated a standard of behavior.<sup>43</sup> This empowering awareness contributed to a stronger sense of personal integrity and self-esteem for women in general and, in particular for the victims of abuse.<sup>44</sup>

However salutary such awareness is, it is not enough to completely address the problem of domestic violence. While awareness is the first step in a much more comprehensive problem, a more fundamental challenge is determining how to change the behavior of abusers to decrease domestic violence incidents overall.

As noted, traditional methods of punishment and deterrence in the criminal justice system have always operated as a blunt instrument for changing offender behavior. Moreover, although

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<sup>38</sup> *Id.* at 15.

<sup>39</sup> *Id.*

<sup>40</sup> Frederick & Lizdas, *supra* note 1 at 14-15.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



such methods impose external restraints on conduct, they are not terribly effective at bringing about fundamental change in an offender's underlying attitudes. Thus, if the criminal justice system is to effectuate greater progress in dealing with the problem of domestic violence, it must develop new methods that contribute to changing offenders' inward attitudes and behaviors as well as outwards.

### III. NATURE OF RESTORATIVE JUSTICE

One promising method for effectuating lasting, fundamental change in the attitudes of domestic violence offenders involves the collection of practices known as "restorative justice."<sup>45</sup> In these informal processes, the primary objective is to repair the harm done to the victim. Towards this end, victims have the opportunity to engage in dialogue with the offender and explain how the crime affected them. Thus, the nature of restorative justice practices seek to enhance the involvement of families and communities in the response to crime, and decrease the role of the state.

Restorative justice practices are notable for their flexibility. In fact, they developed from a variety of sources around the world, drawing on many different cultural traditions.<sup>46</sup> This makes such practices adaptable to many different kinds of relationships. Additionally, these practices can be utilized in a flexible way, at different points in the criminal justice process: as a means for resolving conflicts before form prosecution begins; as an aspect of the sentencing; or even as a part of the process for re-integrating an offender into the community after a sentence is over.<sup>47</sup>

Moreover, three particular practices are more commonly used in restorative justice. The first is victim-offender mediation.<sup>48</sup> As its name suggests, victim-offender mediation involves a face-to-face meeting between a victim and an offender in the presence of a trained mediator.<sup>49</sup> As a form of dispute resolution, victim-offender mediation frequently results in signed mediation agreement, which

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<sup>45</sup> James Ptacek & Loretta Frederick, *Restorative Justice and Intimate Partner Violence*, VAWNET, January 2009, [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_RestorativeJusticeIPV.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_RestorativeJusticeIPV.pdf).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Ptacek & Frederick, *supra* note 45; Frederick & Lizdas, *supra* note 1 at 8. This practice is also known "victim-offender reconciliation" and "victim-offender dialogue."

<sup>49</sup> Ptacek & Frederick, *supra* note 45; Frederick & Lizdas, *supra* note 1 at 8.

binds the offender in the same way as a probation contract.<sup>50</sup> Thus, the primary purpose of victim-offender mediation is to create dialogue that can improve the victim-offender relationship.<sup>51</sup> Proponents of this approach to mediation note that it encourages offenders to empathize with their victims.<sup>52</sup> Further, it provides an opportunity for victim empowerment by permitting them to contribute to the corrective measures taken towards the offender.<sup>53</sup>

The second practice is family group conferencing.<sup>54</sup> This practice involves a trained facilitator guiding dialogue among family members, friends, justice officials and service providers.<sup>55</sup> Similar to victim-offender mediation, the objective of these conferences is to empower victims, hold offenders accountable and come to an agreement over how the offender can make amends.<sup>56</sup> A distinguishing feature of this practice is that they are designed to broaden the dialogue to promote community involvement, as well as dialogue between the victim and offender.<sup>57</sup> Thus, family group conferencing is premised on the idea that there are “primary” and “secondary” victims to the offense, and “secondary” victims include community members.<sup>58</sup> Therefore, because a wider circle of people are involved in the conference, victims are more likely to receive comprehensive support services.<sup>59</sup> This kind of practice is often helpful when victims are reluctant to challenge their abusers, and the collective, solidified presence of others can often encourage the victim to express thoughts or feelings that might otherwise remain unspoken.<sup>60</sup>

Lastly, the a third common restorative justice practice is the peacemaking circle.<sup>61</sup> Derived from practices used by indigenous cultures in Canada and the United States, peacemaking circles are important because they facilitate dialogue among the victim, offender and members of the community.<sup>62</sup> The process involved

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<sup>50</sup> MARK S. UMBREIT, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER VICTIM OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE, (Center For Restorative Justice and Peacemaking 2007).

<sup>51</sup> Ptacek & Frederick, *supra* note 45.

<sup>52</sup> *Id.*

<sup>53</sup> Ptacek & Frederick, *supra* note 45; UMBREIT, *supra* note 50.

<sup>54</sup> Ptacek & Frederick, *supra* note 45.

<sup>55</sup> Ptacek & Frederick, *supra* note 45; Frederick & Lizdas, *supra* note 1 at 9; MARK S. UMBREIT, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS (U.S. Department of Justice 2000).

<sup>56</sup> Ptacek & Frederick, *supra* note 45.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Frederick & Lizdas, *supra* note 1, at 9.

<sup>60</sup> Ptacek & Frederick, *supra* note 45.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

in a peacemaking circle is more complex than the process involved in victim-offender mediation and family group conferencing.<sup>63</sup> A peacemaking circle can have sub-circles involving different portions of the entire group, and one person might participate in multiple sub-circles.<sup>64</sup> A circle that involves a victim and an offender may be the outcome of separate circles previously held for the victim and for the offender.<sup>65</sup> In addition, another circle may be held to create an appropriate sentence.<sup>66</sup>

Thus, characteristic practices of restorative justice were all developed for the purpose of changing the treatment of offenders within the criminal justice system. What is now called victim-offender mediation evolved from an alternative sentence proposed by a probation officer in Kitchener, Ontario in 1974, who believed that a face-to-face meeting with the victims would have therapeutic value for the offenders.<sup>67</sup> Additionally, New Zealand adopted family group conferencing as the standard way to address youth crime in 1989, following Maori opposition to the racism of the juvenile justice system and its negative impact on Maori youth and families.<sup>68</sup> In the legal opinion that established circle sentencing as a viable option in the Canadian courts, a judge reasoned that this restorative justice approach could have important effects in reducing recidivism.<sup>69</sup>

The restorative justice movement has grown rapidly in the last 20 years.<sup>70</sup> One survey notes that over 1,200 restorative justice programs exist globally.<sup>71</sup> However, there are more restorative justice programs in the United Kingdom, Germany, France, China and India than in the U.S.<sup>72</sup>

The principles informing the restorative justice movement are similar to those underlying that of the feminist antiviolence movement. This is because both movements argue that existing legal remedies fail both victims and offenders. Further, both aspire to make the criminal justice system more victim-centered,

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<sup>63</sup> 63P. McCold, *The Recent History of Restorative Justice: Mediation, Circles, and Conferencing*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 23-51 (D. Sullivan & L. Tift eds., 2006).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> D. E. Peachey, *The Kitchener Experiment in A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT* 178-86 (G. Johnstone, ed., 2006).

<sup>68</sup> Ptacek & Frederick, *supra* note 45.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> J. Braithwaite, *Restorative Justice and a Better Future in A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT* 83-97 (G. Johnstone, ed., 2006).

contending that existing practices of the criminal justice system neglect the needs of victims and fail to promote offender accountability to the victim as well as to the state and community as a whole.<sup>73</sup> Similarly, both the antiviolence movement and the restorative justice movement conclude that the criminal justice system fails to take adequate account of the effect of crime on individual community members other than the victim.<sup>74</sup> In this connection, some have argued that restorative justice practices can “widen the circle” of persons immediately concerned with domestic violence and re-establish support for victims and control for offenders who have been isolated by violence, secrecy and economic hardship.<sup>75</sup>

However, restorative justice practices do not go unchallenged. For instance, some argue that these informal practices do not meaningfully reduce the risk of future violence against victims, and that they are too similar to older forms of mediation that treated domestic violence as something for which both the offender and victim were responsible.<sup>76</sup> In the U.S., the organization Incite! Women of Color Against Violence has criticized existing restorative justice models for failing to adequately address issues of safety and accountability.<sup>77</sup>

#### IV. APPLICATION OF RESTORATIVE JUSTICE PRINCIPLES

Most contemporary literature includes little research on the effectiveness of restorative justice programs in domestic violence cases.<sup>78</sup> On the other hand, an Austrian study of 30 cases involving victim-offender mediation illustrated mixed results. While some victims found mediation empowering, studies show such mediation practices had little impact on abusive men. The study concludes that such mediation efforts will be futile if adequate resources for both victims and offenders are lacking.<sup>79</sup>

However, in a study of intimate partner violence cases in South

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<sup>73</sup> Ptacek & Frederick, *supra* note 45.

<sup>74</sup> *Id.*

<sup>75</sup> Joan Pennell & Gale Burford, *Widening the Circle: The Family Group Decision Making Project*, 9 J. CHILD & YOUTH CARE 1, 1-13 (1994).

<sup>76</sup> Julie Stubbs, *Restorative Justice, Gendered Violence, and Indigenous Women in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN* (2009); Ptacek & Frederick, *supra* note 45.

<sup>77</sup> Ptacek & Frederick, *supra* note 45.

<sup>78</sup> *Id.*

<sup>79</sup> C. PELIKAN, VICTIM OFFENDER MEDIATION IN DOMESTIC VIOLENCE CASES-- A RESEARCH REPORT, *United Nations Crime Congress: Ancillary Meeting, Vienna, Austria* (2000).

Africa, 21 women who completed victim-offender mediation reported high levels of satisfaction with the process.<sup>80</sup> Furthermore, a study of Native American communities found that the use of peacemaking circles in fact does promote women's autonomy and helps to improve the material conditions of abused women's lives. Nevertheless, Coker also found that some abused women feel coerced to partake in the mediation practices. Further, the agreements created through Peacemaking were difficult to enforce, and some peacemakers discouraged women from separating from their abusers.<sup>81</sup>

Other studies investigate the effects of restorative justice programs in cases outside the domestic violence context. Some of the most illuminating research in this context comes from the Reintegrative Shaming Experiments in Canberra, Australia.<sup>82</sup> In these experiments, police officers randomly assigned cases of property and violent crime to either conferencing or courts.<sup>83</sup> Researchers compared the experiences of victims who attended family group conferencing with those of victims whose cases went to the courts.<sup>84</sup> Victims whose cases were assigned to conferencing reported more satisfaction than victims whose cases went to court. Victims who participated in conferences reported a marked decrease in feelings of fear and anxiety and increased feelings of dignity, self-respect and self-confidence.<sup>85</sup> Offenders whose cases went to conferences also found these practices more beneficial than offenders whose cases went to court.<sup>86</sup>

Other research suggests mixed results from restorative justice practices. For example, one survey of several research studies found that, while some studies illustrate that restorative justice practices did not meaningfully reduce recidivism, few showed any increase in recidivism rates, either.<sup>87</sup> A second review, which also focuses largely on youth property crime, found that restorative interventions on average have small but significant effects on recidivism, and that the effect is more pronounced in the most

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<sup>80</sup> Amanda Dissel & Kindiza Ngubeni, *GIVING WOMEN THEIR VOICE: DOMESTIC VIOLENCE AND RESTORATIVE JUSTICE IN SOUTH AFRICA* (2003).

<sup>81</sup> D. Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 *UCLA L. REV.* 1 (1999).

<sup>82</sup> See HEATHER STRANG, *REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE*, (Clarendon Press, 2002).

<sup>83</sup> *Id.* (Crimes of sexual and domestic violence were ineligible for inclusion in this study.)

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Ptacek & Frederick, *supra* note 45.

recent studies.<sup>88</sup>

Despite the lack of any extensive data about the use of restorative justice practices in domestic violence cases, some research suggests models of what this kind of practice could look like. Joan Pennell, a founder of the first shelter for abused women and their children in Newfoundland and Labrador, Canada and Burford, a social worker and community activist, have developed a restorative approach to child abuse and domestic violence.<sup>89</sup> In developing their model, Pennell and Burford brought together feminist anti-violence organizations, advocates for children and youths, offender programs, police and court personnel and researchers.<sup>90</sup> This extensive community organizing and involvement of state and social service agencies has much in common with the feminist coordinated community response pioneered by the Domestic Violence Intervention Project in Duluth, Minnesota.<sup>91</sup>

Pennell has described her model as an extension of the elements of a coordinated community response:

Restorative practices do not require disengagement from state intervention. Instead, "widening the circle" of those committed to stopping family violence is a way to create a coordinated response of informal and formal resources.<sup>92</sup>

Drawing on the approaches of aboriginal groups in New Zealand and Canada, Pennell and Burford have emphasized that the family group conference is a planning forum – not mediation, and not therapy:

The Family Group Conference (FGC) model is not a strategy for mediating conflicts between perpetrators and persons whom they have abused, nor does it aim to divert the perpetrator away from being punished. It is not the intent of the Family Group Conference to keep nuclear families together at all costs. The model does aim to include all family members in making important decisions that affect their lives while at the same time offering supports and protection in carrying out these decisions.<sup>93</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> Pennell & Burford, *supra* note 76.

<sup>90</sup> Ptacek & Frederick, *supra* note 45.

<sup>91</sup> *Id.*

<sup>92</sup> J. Pennell, *Stopping Domestic Violence or Protecting Children? Contributions from Restorative Justice in* HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE (D. Sullivan & L. Tift, eds., 2006).

<sup>93</sup> Ptacek & Frederick, *supra* note 45.

Thus, according to Pennell and Burford, the family group conference breaks the silence surrounding abuse and widens the support base of people who can protect survivors and hold offenders accountable. While maintaining legal protections, it instills concern within communities to carry out the plan that is developed by the conference. Further, this model provides more "eyes" to monitor reoffending.<sup>94</sup> Ultimately, these results can be integrated into the criminal justice system by permitting representatives from battered women's programs to participate and by providing mandated approval by the participating state authorities of any agreements developed through the conference.<sup>95</sup>

Pennell's and Burford's research indicates that family group conferencing is effective in both diminishing new incidences of abusive behavior and repairing the underlying relationships of those involved in the conference. In a study involving three culturally distinct regions in Newfoundland and Labrador in 1993 and 1994, families with conflict or abuse issues were compared to families without.<sup>96</sup> The families who participated in conferences were compared with a group of families known to child protection workers, and, in general, the families assigned to the conferences were involved in the more difficult cases.<sup>97</sup> No violence took place at the conferences, and there were no reports of violence caused by the conferences.<sup>98</sup> Thus, reports of abuse and neglect declined by half in the families who went to conferences, while reports of abuse of adults and children increased in the control group.<sup>99</sup> Overall, about 66% of family members interviewed reported that the family was "better off" as a result of the conference; 19% said the family was the "same"; and 6% said the family was "worse off."<sup>100</sup>

More recently, Pennell has brought the family group conferencing method to North Carolina, working in collaboration with the North Carolina Coalition Against Domestic Violence. In this new model, the use of restorative justice practices has developed through cooperation among a community-wide advisory board, as well as through focus groups with abused women staying in a shelter, focus groups with shelter staff and input from

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<sup>94</sup> Ptacek & Frederick, *supra* note 45.

<sup>95</sup> *Id.*

<sup>96</sup> JOAN PENNELL & GALE BURFORD, FAMILY GROUP DECISION MAKING: NEW ROLES FOR 'OLD' PARTNERS IN RESOLVING FAMILY VIOLENCE: IMPLEMENTATION REPORT (1995).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

domestic violence counselors.<sup>101</sup> To emphasize the importance of safety planning to this project, this new model has been called "safety conferencing."<sup>102</sup> In these conferences, collaborators have identified several enhanced safety measures, such as: consulting with survivors about whether to hold a conference, and whether the abuser should be welcomed to participate; using legal safeguards, such as protective orders, alongside the process; notifying the police to stand by during and after conferences; inviting support people, domestic violence advocates and therapists to attend; and keeping the safety plans for survivors confidential.<sup>103</sup>

As one commentator suggests, these models offer significant hope for the restorative justice process in domestic violence cases:

These feminist-restorative justice hybrid projects address many of the concerns raised by antiviolence activists. By developing the design of these projects with input from women's groups, advocates and survivors, these models of intervention place victims at the center of the process, and prioritize the safety of women and children. The partnerships for both projects included abused women's and children's advocates and batterers' service providers along with legal officials. Pennell has created protocols for cases involving family violence, with extensive recommendations for safety measures (Pennell, 2005). She has also developed methods for evaluating family group conferencing (Pennell & Anderson, 2005). A number of scholars and antiviolence activists who are otherwise skeptical of restorative justice have found Pennell's work compelling (Busch, 2002; Herman, 2005; Stubbs, 2004).<sup>104</sup>

Furthermore, batterer intervention programs may establish another important prospect for restorative justice programs. In recent years, there have been more than 35 evaluations of batterer intervention programs, although they have yielded inconsistent results. Two meta-analyses of the more rigorous studies find the programs have, at best, a "modest" treatment effect, producing a

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<sup>101</sup> Joan Pennell, et al., *North Carolina Family-Centered Meetings Project: Annual Report to the North Carolina Division of Social Services* (2007).

<sup>102</sup> J. Pennell & S. Francis, *Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard Women and Children*. 11 VIOLENCE AGAINST WOMEN 666 (2005).

<sup>103</sup> Pennell, *supra* note 102; Ptacek & Frederick, *supra* note 45.

<sup>104</sup> Ptacek & Frederick, *supra* note 45.



minimal reduction in rearrests for domestic violence.<sup>105</sup> In one of the meta-analyses, the treatment effect translated to a 5% improvement rate in cessation of re-assaults due to the treatment.<sup>106</sup> In the other meta-analyses, it ranged from none to 0.26, roughly representing a reduction in recidivism from 13% to 20%.<sup>107</sup> On the other hand, a few studies have found that batterer intervention programs make abusers more likely to re-abuse<sup>108</sup> or have found no reduction in abuse at all.<sup>109</sup>

Moreover, a multistate study of four batterer programs concluded that approximately a quarter of batterers appear unresponsive to any kind of intervention program.<sup>110</sup> In this long-term study, based on victim and/or abuser interviews and/or police arrests, approximately half of the batterers re-assaulted their initial or new partners sometime during the study's 30-month follow-up.<sup>111</sup> Most of the re-assaults occurred within the first six months of program intake. Nearly a quarter of the batterers repeatedly assaulted their partners during the follow-up and accounted for nearly all of the severe assaults and injuries.<sup>112</sup>

In one of the largest studies to date, the Office of the Commissioner of Probation in Massachusetts studied a sample of 945 defendants arraigned for violating a protective order. As part of their subsequent disposition, these defendants were ordered into a certified batterer intervention program, anger management program and/or a mental health treatment or substance abuse treatment program.<sup>113</sup> 13% of the defendants were sent to multiple programs.<sup>114</sup> The study found that those referred to 12 to 20 week

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<sup>105</sup> Julia Babcock, et al., *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 *CLINICAL PSYCHOLOGY REV.* 1023 (2004); Lynette Feder & David B. Wilson, *A Meta-Analytic Review of Court-Mandated Batterer Intervention Programs: Can Courts Affect Abusers' Behaviors?* 1 *J. EXPERIMENTAL CRIMINOLOGY* 239 (2005).

<sup>106</sup> Babcock, *supra* note 106.

<sup>107</sup> Feder & Wilson, *supra* note 106.

<sup>108</sup> Jill Gordon & Laura Moriarty, *The Effects of Domestic Violence Batterer Treatment on Domestic Violence Recidivism: The Chesterfield County Experience*, 30 *CRIM. JUSTICE & BEHAVIOR* 118 (2003).

<sup>109</sup> Jennifer Daly & Susan Pelowski, *Predictors of Dropout Among Men Who Batter: A Review of Studies With Implications for Research and Practice*, 15 *VIOLENCE & VICTIMS* 137 (2000).

<sup>110</sup> Edward Gondolf, *30-Month Follow-Up of Court-Referred Batterers in Four Cities*, 44 *INT'L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY* 111 (2000).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> STEPHEN BOCKO, ET AL., *RESTRAINING ORDER VIOLATORS, CORRECTIVE PROGRAMMING AND RECIDIVISM* 4 (Massachusetts Office of the Commissioner of Probation 2004).

<sup>114</sup> *Id.*

anger management programs had a higher completion rate than those referred to the much longer 40-week batterer intervention programs. Higher completion rates notwithstanding, there was no difference in re-arrest rates for those who completed anger management programs and those who failed to complete one. Furthermore, those who completed anger management programs re-offended at higher rates than those who completed batterer intervention programs, even though those referred to batterer intervention programs had significantly more extensive criminal histories and less education than those referred to anger management programs.<sup>115</sup> An earlier study of a program in Pittsburgh found that abusers who relied on anger management control techniques were more likely to re-abuse their partners than those who relied on increased empathy, a redefinition of their manhood and more cooperative decision-making as a means to ending their abuse.<sup>116</sup>

## CONCLUSION

In recent decades, numerous reforms of the criminal justice system have made it easier to prosecute and punish those who engage in domestic violence. This change in prosecution practices yields many significant effects, including more effective control of the most egregious kinds of violent and abusive behavior and an increased public awareness of the nature and extent of domestic violence. However, as important as these improvements have been, they are only the first step. In other words, they illustrate that the state, in fact, condemns domestic violence and considers it a severe offense, although the current measures do not adequately heal victim's injuries, especially emotional and psychological ones. Furthermore, the current practices do not ameliorate offender attitudes and inclinations that led to the violent acts in the first place. Thus, such measures do not effectively reach the root of the problem.

Therefore, restorative justice practices can be an important part of a second step that addresses these outstanding problems more comprehensively. By providing opportunities for constructive dialogue that engages the offender, the victim and members of the community, restorative justice practices have optimistic potential to change attitudes, viewpoints and perhaps even cultural elements that may contribute to domestic violence. To be sure, restorative

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<sup>115</sup> *Id.* at 6.

<sup>116</sup> E. GONDOLF, HOW SOME MEN STOP BATTERING: AN EVALUATION OF A GROUP COUNSELING PROGRAM (Paper presented at Second National Conference on Family Violence, Durham, NH, August 1984).

justice is far from a foolproof solution. The results of studies yield that its beneficial effects do not extend to every individual that participates, and it certainly does not prevent recidivism. However, such practices do accomplish substantial good for a substantial portion of those who engage in it. Consequently, an approach to the criminal justice system through restorative justice practices deserves an important place in the collection of rehabilitative programs available for the sentencing process for domestic violence offenders.