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# PROFESSIONAL DISCRETION AND THE USE OF RESTORATIVE JUSTICE PROGRAMS IN APPROPRIATE DOMESTIC VIOLENCE CASES: AN EFFECTIVE INNOVATION

Jean Ferguson\*

## Introduction

### The Crisis

Despite the frequency and consequences of domestic violence, current responses to the problem are ineffective. Scholars widely agree that institutions dedicated to addressing family violence are over-burdened and under-funded.<sup>1</sup> Mandatory arrest and prosecution policies deprive police officers and prosecutors of the ability to individualize their responses to domestic violence situations in order to most effectively prevent future incidents of violence.<sup>2</sup> Batterer's treatment programs suffer from time constraints, and the limited information available on their long-term results indicates that they are often insufficient to meet the long-term needs of families.<sup>3</sup> Additionally, the dropout rates in these programs tend to be high.<sup>4</sup> While researchers differ as to solutions, they agree that the problems with the systems that address domestic violence are complex.<sup>5</sup>

The statistics are startling. Women are significantly more likely than men to report being raped, physically assaulted and/or stalked by a current or former intimate partner, whether the time frame is a lifetime or the previous twelve months.<sup>6</sup> One out of every five women in the United States has been physically assaulted by an intimate partner, compared with one out of every fourteen men in the United States.<sup>7</sup> Violence against women is predominantly intimate partner violence. Sixty-four percent of the women who were raped, physically assaulted and/or stalked since age eighteen were victimized by a current or former husband, cohabitating partner, boyfriend, or date.<sup>8</sup>

In 2005, the United States Department of Justice published a compendium of the most recent family violence statistics from the Bureau of Justice Statistics, and two databases maintained by the FBI.<sup>9</sup> While the study maintains that family violence rates fell between 1993 and 2002, forty-nine percent of violent crimes committed against a family member between 1998 and 2002

were committed against a spouse.<sup>10</sup> Seventy-three percent of family violence victims between 1998 and 2002 were females.<sup>11</sup> This study also reviewed inmates in local jails in 2002 and found that twenty-two percent of the population had been convicted of a crime of family violence.<sup>12</sup> Their victims were mostly female (seventy-nine percent).<sup>13</sup>

Children are also affected by domestic violence in their homes. Each year, an estimated 3.3 million children are exposed to domestic violence acts.<sup>14</sup> Although most victims try to hide the abuse from their children, one study found that children are present in almost half of all battery incidents.<sup>15</sup> Children who are victimized, by watching intimate partner abuse of parents, are likely to later become victims again later in life, or become perpetrators, themselves.<sup>16</sup> Battered women are six times more likely to have witnessed violence as children.<sup>17</sup> Similarly, batterers are ten times more likely to have witnessed domestic violence as children.<sup>18</sup> In addition, children growing up in violent homes are at greater risk for depression, anxiety, school problems, running away from home, teenage pregnancy, substance abuse, and attempted suicide.<sup>19</sup>

Domestic violence not only affects the assaulted women and their children; it affects us all.<sup>20</sup> Domestic violence results in worker loss of productivity, turnover, absenteeism, and excessive use of medical benefits, costing American businesses four billion dollars each year.<sup>21</sup> In light of the pervasiveness and impact of physical assault by intimate partners, domestic violence should be treated as a chief criminal justice and public health concern.<sup>22</sup>

### The History of Domestic Violence Law in the United States: Looking the Other Way

The American legal systems have a long history of complicity in intimate abuse, where the abuse was perpetrated by men against their wives and children.<sup>23</sup> From the early colonial period onward, American courts

followed British common law in allowing husbands the right of domestic abuse.<sup>24</sup> It was not until the late nineteenth century that states finally began to move away from actually condoning a man's use of physical force against his wife.<sup>25</sup> However, many states still clung to the position that in the absence of serious violence, the government should not interfere in the private family realm.<sup>26</sup> See further discussion on the history of domestic violence law *infra*.

## Part I

The domestic violence movement came into being by the late 1960s and early 1970s, and reformers made substantial improvements in statutory law.<sup>27</sup> Once the laws were in place, a campaign was put in place to make certain the laws were properly enforced, and around the 1970s, advocates began demanding that law enforcement officials "treat domestic violence like any other crime."<sup>28</sup> For example, police officers often ignored domestic violence calls or delayed responding to the calls.<sup>29</sup> In response, battered women's advocates successfully advocated in the 1980s for mandatory arrest policies. These policies frustrated the common police practice of failing to make an arrest in cases of domestic violence.<sup>30</sup>

### Domestic Violence Law in the United States Today: "One Size Fits All"

The 1960s and 1970s were periods of reform, but some of the policies and programs that have grown out of those reforms have proven ineffective or even counter-productive at addressing domestic violence. The tendency of both mandatory arrest and prosecution policies and batterer's treatment programs is to respond identically in all domestic violence situations. This can be frustrating for police, prosecutors, and perhaps most of all, victims, all of whom know that each case is unique.

Indeed, mandatory arrests and prosecutions do not always have positive results.<sup>31</sup> Some research suggests that mandatory arrests may actually increase violence.<sup>32</sup> Further, when prosecutors force victims to participate in prosecutions against their will, it may affect the victims' safety and autonomy.<sup>33</sup> Current research suggests that mandatory arrest and prosecution policies are not successful crime reduction strategies because these policies eliminate the professionals' discretion and the victims' desires from the state's

decision-making process.<sup>34</sup>

In sum, mandatory arrest and prosecution policies treat each incident and each batterer as meriting an equivalent response, and thus these policies fail to take the unique circumstances of each family into account. Without taking the disposition of a particular batterer or victim into account, however, police officers and prosecutors cannot ascertain the response that will be least likely to provoke more violence. See further discussion of the problems with mandatory arrest and prosecution policies *infra* Parts II and IV.

The effectiveness of batterer's treatment programs is questionable. Unfortunately, the programs often do not address the causes and effects of domestic violence. Despite the fact that many batterers use drugs or alcohol on the day of assault, and many have prior arrests related to substance abuse, addiction is rarely dealt with in batterer's treatment programs.<sup>35</sup>

The "one size fits all" approach to batterer's treatment programs (particularly in California, where all persons convicted of a crime of family violence are required to participate in a fifty-two week program)<sup>36</sup> fails to allow for the fact that each family situation and each batterer is different. By ignoring the specific causes and effects of domestic violence incidents and instead meting out a standard program designed to reach all program participants, everyone loses. See further discussion of the problems with batterer's treatment programs *infra* Part VI.

### A Call for Change: Police and Prosecutorial Discretion, and Restorative Justice

The "one size fits all" response to domestic violence is not working, and consequently the United States needs to implement a policy change. First, police officers should be allowed to exercise some discretion at the scene of a domestic violence call. See *infra* Part III. Second, prosecutors should be allowed to use non-coercive no-drop policies and to use their professional discretion in deciding which cases to prosecute and the manner and level they should be prosecuted. See *infra* Part V. Third, restorative justice models should be implemented to deal with domestic violence when appropriate. See *infra* Part VII.

## Part II - Problem: Mandatory Arrest Policies

### Pre-1980s United States: Arrest as a Last Resort in Domestic Violence Cases

An estimated two million American women are victims/survivors of domestic violence at the hands of their male partners.<sup>37</sup> Historically, domestic violence was often ignored by law enforcement. United States police rarely made arrests in cases of misdemeanor domestic violence.<sup>38</sup>

“As recently as 1967, the leading police professional organization, the International Association of Chiefs of Police, declared in its training manual that ‘in dealing with family disputes, the power of arrest should be exercised as a last resort.’”<sup>39</sup> Law enforcement viewed domestic violence as a private matter. “This position was endorsed by the American Bar Association, whose 1973 *Standards for the Urban Police Function* said that police should ‘engage in the resolution of conflict such as that which occurs between husband and wife . . . in the highly populated sections of the large city, without reliance upon criminal assault or disorderly conduct statutes.’”<sup>40</sup> Generally, police agencies believed that in a family dispute, an arrest did not resolve the bigger problems and could aggravate matters, because the husband could seek retribution when released.<sup>41</sup>

### **Mandatory Arrest Policies**

In the 1980s, mandatory and preferred arrest policies became the favored law enforcement responses to domestic violence calls for service.<sup>42</sup> These policies require an officer to arrest a suspect if there is probable cause to believe that an assault or battery has occurred, regardless of the victim’s wishes.<sup>43</sup> In 1982, five states had mandatory arrest statutes, and that number increased to twenty-one states and the District of Columbia by 1994.<sup>44</sup> Today, all states and the District of Columbia permit warrantless arrest in certain circumstances, and most also allow mandatory or preferential arrest.<sup>45</sup>

### **Sherman and Berk’s Experiment**

Mandatory and preferred arrest policies were inspired in part by a Minneapolis experiment done by Lawrence W. Sherman and Richard A. Berk from 1981 to 1982.<sup>46</sup> In their study, 314 couples were randomly assigned one of three domestic violence responses: advising the couple, separating the couple by ordering the offender to leave for 8 hours, or arresting the offender.<sup>47</sup> They interviewed victims every two weeks following the intervention.<sup>48</sup> Official records showed that six months after police responded to misdemeanor domestic violence, ten percent of those arrested, nineteen percent

of those advised, and twenty-four percent of those removed from the scene had subsequently repeated their violence.<sup>49</sup> Sherman and Berk concluded that arrest was the most effective means of preventing batterers from becoming violent again.<sup>50</sup>

Despite their conclusions, the authors actually recommended three policies. First, all states should change their laws to allow warrantless arrests for misdemeanor domestic violence. Second, police departments should adopt pro-arrest policies allowing officers to retain some discretion and the victim to retain some input into the charging decision. Third, the Minneapolis experiment should be replicated in other cities.<sup>51</sup> Although Sherman and Berk recommended all three measures, “[their] findings resulted in a great deal of attention nationwide and led to the establishment of mandatory arrest policies throughout the country.”<sup>52</sup> The federal government encouraged this by providing federal funds to jurisdictions that adopted stringent domestic violence policies.<sup>53</sup>

### **Tracy Thurman: Sues the Police**

Policy changes may also have been partly a result of highly publicized jury verdicts against police departments that failed to make arrests in cases of domestic violence.<sup>54</sup> In 1984, Tracy Thurman was awarded 2.9 million dollars after suing the police department of Torrington, Connecticut and twenty-four city police officers. Thurman argued that the city’s policy and practice of nonintervention and non-arrest was unconstitutional.<sup>55</sup> Thurman’s estranged husband was on probation for breaking the windshield of her car while she was inside of it. He violated the protective order on many previous occasions, but he was never arrested. On June 10, 1983 Thurman called the police, but by the time they arrived she had been stabbed numerous times.<sup>56</sup>

### **The National Institute of Justice Experiments**

From 1985 to 1990, the National Institute for Justice funded six police replication experiments, of which five were published.<sup>57</sup> These experiments were conducted in Omaha, Nebraska; Milwaukee, Wisconsin; Colorado Springs, Colorado; Metro-Dade, Florida; and Charlotte, North Carolina to determine the deterrent value of three different police responses to domestic violence: arrest of the abuser, mediation between the parties, and physical separation of the parties.<sup>58</sup> Many



researchers argue that the results of the published studies indicate that mandatory arrest may actually increase the incidence of violence in some women's lives.<sup>59</sup> Opponents maintain that arrest is generally the superior method of deterring future violence, and they also sometimes claim that studies showing otherwise are fatally flawed.<sup>60</sup>

The Milwaukee experiment was conducted in 1992 by Sherman and his associates to examine the effects of arrest on batterers in that city.<sup>61</sup> The study included 1,200 cases.<sup>62</sup> They found that arrests had a short-term deterrent effect.<sup>63</sup> Over the long term, however, violence increased in some cases in which the perpetrator had been arrested.<sup>64</sup> Sherman and his associates concluded that there is no overall long-term deterrence from arrest.<sup>65</sup> Thus, the Milwaukee experiment is strong evidence that arrest has different effects on different kinds of people. The results of the study also showed that employed, married, high school graduate, and white suspects are all less likely to have any repeat violence than unemployed, unmarried, high school dropout, and black suspects.<sup>66</sup>

The Charlotte experiment was conducted by J. David Hirschel and Ira W. Hutchison, III from 1987 through 1989.<sup>67</sup> It compared the rate of recidivism of 650 offenders who received three different responses from law enforcement: advise and separation, issuance of a citation to appear in court, and arrest at the scene.<sup>68</sup> Hirschel and Hutchison concluded that arrest is not a significant deterrent to misdemeanor spouse assault; however, it may still be the conscionable choice versus non-arrest.<sup>69</sup>

The Omaha replication, conducted by Franklyn W. Dunford and his colleagues,<sup>70</sup> began in early 1986 and studied 327 suspects.<sup>71</sup> In cases of misdemeanor spousal violence, suspects were either arrested, separated, or mediated.<sup>72</sup> The authors claimed that no treatment proved more successful than any other.<sup>73</sup>

The Colorado Springs experiment, conducted by Richard A. Berk, began in 1987 and lasted about two years.<sup>74</sup> 1,658 persons suspected of misdemeanor spousal violence were assigned to one of four treatments; an emergency protective order with arrest, an emergency protective order coupled with crisis counseling, an emergency protective order only, or a simple restoration of order at the scene.<sup>75</sup> Berk concluded that

arrest did not deter unemployed batterers, and that arrest can sometimes actually make things worse.<sup>76</sup>

The Metro-Dade experiment was conducted by Antony M. Pate and Edwin E. Hamilton<sup>77</sup> from 1987 through 1989.<sup>78</sup> The Metro-Dade Police Department selected 907 cases in which officers would have the discretionary authority to either arrest or not where probable cause existed to arrest for misdemeanor spousal battery.<sup>79</sup> The researchers found results similar to those found in the Colorado Springs experiment with regard to unemployed batterers, in that arrest only marginally affected recidivism after six months.<sup>80</sup>

Overall, these studies point to the benefits of an individualized intervention strategies over a "one size fits all" approach.<sup>81</sup> Additionally, the studies indicate

that mandatory arrest is likely to be a deterrent only for men who have something to lose from arrest.<sup>82</sup> Finally, the studies suggest that mandatory arrest laws should be implemented with regard to the characteristics of the jurisdiction. For example, in a geographic area where unemployment is prevalent, mandatory arrest might actually lead to more incidents of domestic violence among the poor.<sup>83</sup> Critics of these studies thus maintain that mandatory arrest statutes should be implemented in tandem with coordinated efforts like the Duluth model.<sup>84</sup> See *infra* next section in Part II.

*The results of the [Milwaukee experiment] also showed that employed, married, high school graduate, and white suspects are all less likely to have any repeat violence than unemployed, unmarried, high school dropout, and black suspects.*<sup>66</sup>

### **The Duluth Domestic Abuse Intervention Project (DAIP)**

The Duluth Domestic Abuse Intervention Project ("DAIP"), which began in 1981, made Duluth, Minnesota the first jurisdiction to enact a mandatory arrest policy for misdemeanor assaults.<sup>85</sup> DAIP utilized mandatory arrest policies, police training, prosecutorial and judicial guidelines, support services for victims, and counseling for batterers.<sup>86</sup> The program was successful in that "77 percent of those arrested for misdemeanor crimes of domestic violence pled guilty, and repeat offenses dropped significantly."<sup>87</sup> The Duluth Project points us in the direction of discretion as well as a coordinated community response. It also indicates that any coordinated community response must include addressing the issue of unemployment.

### Part III - Solution: Discretion for Police Officers at Arrest

The idea that all cases should be treated alike ignores the fact that every criminal case is different. Every family has different circumstances. If a victim does not want her partner arrested, a police officer should be able to take the victim's position, and the myriad reasons for it, into consideration. A victim may be dependant on her batterer financially, she may have immigration concerns, and/or she may hope that police intervention will send a message or possibly diffuse an escalating situation. While mandatory arrest policies force the police to treat the crime of domestic violence seriously, the fact that a police officer cannot take a victim's concerns into consideration may serve to disempower the victim by eliminating her choices.

Sherman and his colleagues have suggested a policy that would allow officers to retain a number of options at the scene of a potential domestic violence arrest.<sup>88</sup> For example, they should be able to provide the victim with transportation to a shelter, offer transportation to a detox center for the offender, or grant the victim the option to decide if an arrest should be made with suggested options for future safety.<sup>89</sup> Sherman advocates for a more "victim-directed" arrest that would allow the person who is more directly affected by the decision to determine whether or not an arrest is beneficial.<sup>90</sup>

While it is clear that too little state intervention can be detrimental to the safety of victims, too much intervention in the form of mandatory arrest may intrude on the autonomy of victims in a way that calls these policies into question. A pro-arrest or preferred arrest policy may be the answer. "Allowing officers some discretion would provide consequences for batterers as well as protection for women who do not want their partners arrested."<sup>91</sup> Clearly there are cases, however, where even if the victim does not want the batterer arrested, officers should evaluate the community's interest in safety, and make the arrest when safety outweighs the concerns of the victim.<sup>92</sup> While the pro-arrest policy delivers the message to the officer that arrest is the preferred response, it also allows the officer to use discretion in the situation where arrest may actually further endanger the victim.<sup>93</sup>

As a prosecutor of domestic violence crimes, I commonly hear police officers complain about the frustration of returning to the same residences over and over

again. It is frustrating to them that even with mandatory arrest policies and mandatory programs, recidivism remains high. This frustration often translates into apathy and lack of empathy for the victim. If officers were allowed to exercise discretion at the scene of the arrest and participate in restorative justice programs,<sup>94</sup> this might reduce burnout and give them a sense of purpose and accomplishment. They would be able to participate in not only the punishment of the offender but the rehabilitation as well.

### Part IV - Problem: Mandatory Prosecution Policies, A Prosecutor's Duty to a Victim

Prosecutors have different responsibilities and roles. Generally a prosecutor is primarily responsible to the interests of society as a whole; however the prosecutor must also protect the interest of victims.<sup>95</sup> ABA Standard 3-3.2(h) states, "Where practical, the prosecutor should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the prosecution prior to the decision of whether or not to prosecute."<sup>96</sup> ABA Standard 3-3.9 (b)(v) lists the reluctance of a victim to testify as valid reason for a prosecutor to exercise discretion not to prosecute a case.<sup>97</sup> Prosecutors are also faced with the reality that victims of domestic violence crimes are in greater need of protection because they are at greater risk of future abuse due to their relationships with the perpetrators.<sup>98</sup>

#### Mandatory Prosecution Policies, or "No Drop" Policies

Following the development of mandatory arrest policies, prosecutor's offices began to develop mandatory, or "no drop," policies. These policies encourage prosecutors to pursue domestic violence cases regardless of battered women's wishes.<sup>99</sup> It became common practice for prosecutors to prosecute cases without the victims. Developments in various penal and evidentiary codes allow prosecutors to present a victim's statements made at the time of the incident through the testimony of other witnesses, generally police officers. Recently, a landmark United States Supreme Court case, *Crawford v. Washington*, has frustrated prosecutors' efforts to present victims' statements through other witnesses.<sup>100</sup>

A survey, conducted by Donald R. Rebovich and

published in 1996, found that two-thirds of all prosecution offices had adopted no-drop policies.<sup>101</sup> The survey suggests that larger jurisdictions are more likely to prosecute without the victim's cooperation, while smaller jurisdictions still need the victim's testimony.<sup>102</sup> Consequently, the outcome of a case could be determined by the degree to which a prosecution office were willing to either force or encourage a woman to testify.<sup>103</sup> A second study, conducted by D. Ford and M.J. Regoli in 1992, analyzed the relationship between prosecution policies and rates of recidivism.<sup>104</sup> They used official records and victim interviews to compare outcomes in 678 cases under four different prosecutorial tracks, including no-drop and drop-permitted policies.<sup>105</sup> The study found that in cases where some type of prosecutorial action was taken, the risk of re-abuse decreased by 50%.<sup>106</sup> Ford and Regoli concluded that the "victim[s] who *chose* to prosecute derived a kind of personal power from this decision."<sup>107</sup>

In 1998, Davis, Smith, and Nickles published their findings from reviewing more than one thousand cases of domestic violence misdemeanors.<sup>108</sup> They concluded that prosecuting the batterer "had no effect on the likelihood of rearrest . . . within a six-month period."<sup>109</sup> In a second, smaller study, published in 2000, McFarlane, Willson, Lemmey, and Malecha found that whether the police arrested the suspect or the prosecutor accepted the case made no difference in the amount of violence reported at the time the victim filed charges or in the months that followed.<sup>110</sup>

## Part V - Solution: Prosecutorial Discretion

Prosecutors should be able to use their discretion to consider victims' wishes in prosecuting domestic violence for several reasons. First, ABA Standard 3-3.9 (b)(v) lists the reluctance of a victim to testify as valid reason for a prosecutor to exercise discretion not to prosecute a case.<sup>111</sup> Second, a prosecutor has a duty to consider the safety interests of a victim in a domestic violence case because she is likely to be victimized again in the future.<sup>112</sup> Third, when a victim wants her case dropped, her concerns coincide with the pragmatic concerns of scant prosecutorial resources and judicial efficiency.<sup>113</sup> Prosecution offices should use non-coercive policies that balance crime control and the victims' interests.

Over the past ten years, I have witnessed the varying approaches of many prosecutors to mandatory prosecution policies with regard to domestic violence

crimes. No matter what the approach, it is clear that, like police officers, prosecutors face frustration and burnout, which can translate into a variety of abuses against victims. Some prosecutors choose to simply ignore the victim and move ahead with the prosecution of the case, looking at statistics, and ignoring what desires or feelings the victim may have with regard to the prosecution of the case. Others, carry out their role by adopting demeaning attitudes that only further victimize the victim. If prosecutors were given discretion as to which cases should be prosecuted, and the opportunity to participate in the rehabilitation of offenders through the restorative justice process, *see infra* Part VII, this might eliminate some of the problems associated with the frustration and burnout of prosecutors.

## Part VI - Problem: Batterer's Treatment Programs *The Popularity of Batterer's Treatment Programs Around the Country*

It is not uncommon for courts to require that upon batterers' convictions, they attend batterer's treatment programs, also referred to as batterer's intervention programs. In the United States by 1997, seventeen states had mandatory standards to regulate the process of working with domestic violence offenders in batterer's treatment programs.<sup>114</sup> By 2001, twenty-four states had implemented mandatory guidelines for batterer's treatment programs to follow, and twelve more states were in the process of developing such guidelines.<sup>115</sup>

In California, convicted batterers must attend a fifty-two week batterer's treatment program pursuant to California Penal Code section 1203.097.<sup>116</sup> In many jurisdictions in California, there are specialized courts for domestic violence cases. In these courts, "[d]efendants . . . return to court regularly for compliance reviews before the domestic violence judge, and failures to comply with court orders result in swiftly imposed sanctions."<sup>117</sup> As a sanction, the court may order a defendant to come to court more frequently, to do community service work, or possibly to be incarcerated.<sup>118</sup>

### The Duluth Model

Many batterer's treatment programs follow the Duluth Model, which follows a "psycho-educational and skills building curriculum."<sup>119</sup> The curriculum focuses on changing the batterer's "ideology on power and

control,” and also includes discussions about relationships between men and women.<sup>120</sup> Many of the programs are taught by two people, a man and a woman who model a healthy and respectful relationship.<sup>121</sup> Generally, these programs use similar procedures, which include “intake and assessment, victim contact, orientation, group treatment, leaving the program, and completion.”<sup>122</sup>

### **“One Size Fits All:” No Substance Abuse Component to Batterer’s Treatment Programs**

Despite the fact that “some research suggests that different types of batterers may respond differently to existing programs,”<sup>123</sup> batterer’s treatment programs tend to take a “one size fits all” approach toward domestic violence, which results in certain offenders lacking the rehabilitative services that they need. For example, most batterer’s treatment programs do not have a substance abuse component,<sup>124</sup> even despite the close connection between domestic violence and substance abuse. One study found that ninety-two percent of domestic violence perpetrators had used alcohol or drugs on the day of the assault and seventy-two percent had a record of prior arrests related to substance use.<sup>125</sup>

### **The Effectiveness of Batterer’s Treatment Programs at Stopping Physical Violence: Problems with Program Monitoring and Reporting**

The goal of batterer’s treatment programs should be to stop domestic violence. One of the only ways to determine whether or not the physical violence has stopped after a batterer has entered into and/or completed a treatment program is to obtain information from the victim. However, using victims as a source of information can skew results because victims may have many reasons to give false information. Many programs rely on self-reporting as well as victim reporting, which obviously has the potential for skewed results.<sup>126</sup> Additionally, many of the manipulative and controlling behaviors may continue, even when the physical violence may have stopped.<sup>127</sup> Not much is required to graduate from the program. If the batterer attends, pays, and at least appears to remain violence-free, he or she is likely to graduate.<sup>128</sup>

Thus, batterer’s treatment programs are largely

untested and often not properly monitored. In California, for example, the courts must rely on information from the service providers it utilizes in order to monitor compliance.<sup>129</sup> The quality of the program operations and reporting is critical to this component.<sup>130</sup> While the court can easily determine if it is receiving sufficient information regarding a defendant’s attendance and participation, it is difficult for the court to monitor the performance of the program.

### **The Effectiveness of Batterer’s Treatment Programs at Stopping Physical Violence: Other Studies**

Very little in-depth research about the success of batterer’s treatment programs exists.<sup>131</sup> What research has been done is inconclusive and controversial,<sup>132</sup> and indeed, “[m]ost studies define cessation of physical abuse as the primary criterion for judging effectiveness of efforts . . . [while others] consider reduction of violent behavior a success.”<sup>133</sup> In either event, because the victim or the offender is generally the one reporting the cessation or reduction of the violent behavior, batterer’s treatment programs’ reported rates of success are subject to suspicion.<sup>134</sup> That said, researchers have studied the effectiveness of batterer’s treatment programs, and their results provide insight into these programs’ capacity to prevent violence.

Studies conducted by Richard M. Tolman and Jeffrey L. Edleson in 1989 and 1990 found that based on victim reporting, fifty-three to eighty-five percent of domestic violence offenders stopped their physically abusive behavior after they completed a batterer’s treatment program.<sup>135</sup> However, another study completed by Feld and Straus in 1990, revealed that in the general population, there were also high rates of cessation of physical abuse, even though there had been no formal intervention.<sup>136</sup>

In 1991, Adele Harrell conducted a study and concluded that batterers who completed short-term court-mandated groups were as likely to commit subsequent physical abuse as men who were found guilty by the court but were not mandated to treatment.<sup>137</sup> In her study she not only evaluated physical abuse and threats of violence, but also considered psychological abuse, conflict resolution skill, beliefs about spousal abuse, and the victims perceived safety.<sup>138</sup>



## **The Effectiveness of Batterer's Treatment Programs at Stopping Physical Violence: Conclusion**

The evidence that appears to be favorable for batterer's treatment programs should be viewed with caution due to the methodological shortcomings in the studies that are currently available.<sup>139</sup> For example, success is reported with lower percentages in programs where the follow-up is longer and where victims were relied upon for reports versus where police records of re-arrest were relied upon for reports.<sup>140</sup>

The bottom line when it comes to batterer's treatment programs is that no approach has clearly proven successful in reducing long-term battering behavior.<sup>141</sup> It remains unclear whether treatment reduces physical abuse.

## **Part VII - Solution: Restorative Justice**

### **Introduction to Restorative Justice**

Restorative justice involves "restoring victims, restoring offenders, and restoring communities,"<sup>142</sup> and thus justice realized through "those who have a 'stake in a particular offense.'"<sup>143</sup> Family violence is not eliminated from the criminal justice system with the use of the restorative justice processes. Use of these processes in conjunction with the criminal justice system can better serve victims as well as the community. Violence in a familial setting is complex, and often presents risks due to the imbalance of power inherent within families, as well as the potential for future violence.<sup>144</sup> These issues, however, can be dealt with and addressed through the process. Although acceptance of restorative justice models has grown rapidly, the complex nature of family violence has resulted in a limited application of restorative justice to family violence.<sup>145</sup> However, there are a number of restorative justice models, and this paper serves to promote the use of restorative justice models in conjunction with formal legal intervention. Prosecutors and judicial officers should be able to incorporate restorative justice programs into the resolution of appropriate cases.

### **The History of Restorative Justice**

Restorative justice has been a model of criminal justice throughout most of human history. It is grounded in traditions of justice from the ancient Arab,

Greek, and Roman civilizations.<sup>146</sup> The Norman Conquest of Europe at the end of the Dark Ages saw a move away from these principles and the transformation of crime into a felony against the king instead of a wrong done to another person.<sup>147</sup> Beginning in 1200, European princes began to centralize criminal justice and, in turn, demolished the restorative justice of local communities and churches.<sup>148</sup> The crown used public torture of felons to inspire compliance in their subjects.<sup>149</sup> The result of this public punishment was high crime rates by modern standards.<sup>150</sup> Two things occurred from the time of the rise of Napoleon to World War II which seemed to have an effect on crime reduction: the rise of the reintegrative welfare state and the development of professional police forces.<sup>151</sup>

From 1820 to 1970, punishment of all kinds declined in the West, corporal punishment disappeared, and capital punishment disappeared as a public spectacle.<sup>152</sup> In the 1970s, the term restorative justice was used to describe one-on-one mediation programs between the victim and the offender with a professional mediator present.<sup>153</sup> Restorative justice became a global social movement in the 1990s as a result of examples of indigenous practice from the oral justice traditions of the New Zealand Maori and North American native peoples.<sup>154</sup> Since 1995, thousands of people have been trained in restorative justice "conferencing" by two organizations in particular: Ted Wachtel's Real Justice in the United States and John MacDonald's Transformative Justice in Australia.<sup>155</sup>

Today in the international arena, restorative justice principles are being used to address human rights violations in the context of truth commissions. These principles were applied in Argentina after the country's defeat in the Falklands Islands war and in Brazil, Chile and El Salvador. The South African Truth and Reconciliation Commission ("TRC") is perhaps the most successful example of a Truth Commission which employed restorative justice ideals to date. It "was established to uncover the truth about past violations of human rights to enable the process of reconciliation . . ."<sup>156</sup>

The aims of the TRC were. . . to produce a record of the violations of the past and make recommendations to prevent them from ever happening again; to acknowledge the suffering of the victims and to assist in the rehabilitation of those victims; to offer amnesty to past perpetrators; and to

facilitate healing and reconciliation for the nation.<sup>157</sup>

The founders of the TRC examined the successes and failures of the more than twenty truth commissions used worldwide prior to its formulation.

Restorative justice is developing in many parts of the world. “The United Nations, the Council of Europe, and the European Union have been addressing restorative justice for a number of years.”<sup>158</sup> In 2000, the United Nations Congress on Crime Prevention developed a draft proposal for UN Basic Principles on the Use of Restorative Justice Programs in Criminal Matters. This proposal was adopted by the United Nations in 2002.<sup>159</sup> The policy calls for member nations of the European Union to promote mediation in criminal cases and integrate this practice into their laws by 2006.<sup>160</sup>

More recently in the United States, as early as the 1970’s, experimental programs have incorporated restorative justice programs into the criminal justice system. In the late 1970s in Elkhart, Indiana a program known as Victim Offender Reconciliation program (“VORP”) was developed. The program stemmed from a case in Elmira, Ontario in which two young men vandalized twenty-two properties. Members of the probation department and the community suggested to the judge that the offenders meet with their victims.<sup>161</sup> Today, although the approaches and names vary, there are numerous programs in the United States using victim-offender mediation as an element of resolution in criminal matters. The Department of Justice, Office of Justice Programs estimates that there are more than 300 programs in the United States and more than 700 in Europe.<sup>162</sup>

Through the mid-1980s, in many jurisdictions restorative justice initiatives remained small in size and number, and few justice officials viewed these program as credible.<sup>163</sup> In 1994, the American Bar Association (“ABA”) endorsed victim-offender mediation. The ABA recommended the use of victim-offender mediation throughout the country and provided guidelines for its use and implementation.<sup>164</sup> In 1995, the National Organization for Victim Assistance also approved the use of restorative justice when it published a document entitled, “Restorative Community Justice: A Call to Action”.<sup>165</sup>

### Defining Restorative Justice

Restorative justice is commonly defined as “a

process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offense and its implications for the future.”<sup>166</sup> Howard Zehr defines it as “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>167</sup> Restorative justice is a social movement that taps into cynicism about the capacity of state institutions to solve problems like crime. It demands that law and order politicians to produce evidence that the tax dollars spent on building prisons actually prevent crime.<sup>168</sup> “Restorative justice is not a specific program or set of programs; it is a way of thinking about responding to the problem of crime, a set of values that guides decisions on policy, programs and practice.”<sup>169</sup> It requires a different way of viewing, understanding and responding to crime.<sup>170</sup> It offers a way of transforming the entire legal system, while also impacting family life, workplace behavior, and even political conduct.<sup>171</sup>

Instead of focusing upon the weaknesses or deficits of offenders and crime victims, restorative justice attempts to draw upon the strengths of these individuals and their capacity to openly address the need to repair the harm caused. Restorative justice denounces criminal behavior yet emphasizes the need to treat offenders with respect and to reintegrate them into the larger community in ways that can lead to lawful behavior.<sup>172</sup>

Restorative justice is generally viewed in two ways: one is known as process conception and the other is a value conception.<sup>173</sup> Generally, the process conception view is more widely used and accepted. The process conception view of restorative justice brings together all of the stakeholders affected by some harm to discuss how they have been affected and come to an agreement as what should be done to right any wrongs suffered.<sup>174</sup> The value conception view holds that values distinguish restorative justice from traditional punitive state justice. In other words, a person committed to value justice would not approve of a group of stakeholders who meet and in the end decided to cane or incarcerate, because the value is placed on healing versus punishment.<sup>175</sup>

The goal of a criminal justice system is to con-

trol crime. Many countries, including the United States, use a retributive legal framework for the criminal justice system. Our current system focuses on controlling crime, defined as an act against the state, through the threat of punishment. Proponents of restorative justice argue that in our criminal justice system, we do not focus on the actual harm done or on what the victim and offender have experienced; rather, we focus on the act of breaking the law.<sup>176</sup> The result is that the focus on crime in legal terms eliminates a focus on social and moral issues.<sup>177</sup> In a restorative justice system, crime is defined as a conflict between individuals that results in injury to the victim as well as to the community and the offender. Because the crime is considered an act against both the individual and the community, “justice is defined in terms of reparation and restoration.”<sup>178</sup> The community and the victim engage in the process of justice in an effort to repair the harms suffered.<sup>179</sup>

*The participation of community members is essential, because the offender may care more about their opinion than the opinion of a criminal justice professional.*<sup>181</sup>

Direct involvement of both victims and offenders is essential to the process. Victims’ direct participation allows them to acknowledge the importance of what happened to them, and gives them control over the outcome. Offenders must take responsibility for their actions and attempt to restore the relationships that are injured due to the criminal conduct.<sup>180</sup> The participation of community members is essential, because the offender may care more about their opinion than the opinion of a criminal justice professional.<sup>181</sup>

Historically, the term “retributive justice” emerged to define the current criminal justice system, and it was seen as a complete polarization to restorative justice. Conrad G. Brunk argues that on a theoretical level, retribution and restoration are not the polar opposites that many might assume.<sup>182</sup> He points out that the commonality is the desire to vindicate by some type of reciprocal action and some type of proportional relationship between the criminal act and the response to it. Where they differ is how to “even the score.”<sup>183</sup>

### Challenges for Restorative Justice Programs

There are significant barriers to the adoption of restorative justice principles in the United States. Stud-

ies have shown that most Americans link lower crime rates to increasing punitive policies.<sup>184</sup> While there may be a link between increasing punitive policies and drops in the crime rate, many scholars believe that there are other social factors, such as improvements in the economy and changes in the drug culture, that are mainly responsible for falling crime rates.<sup>185</sup> Further, the media has a heavy focus on crime and violence, and the political system rewards candidates who indicate they are “tough on crime.” These things tend to increase public fear of crime and strengthen the support for punitive measures.<sup>186</sup>

Other challenges in bringing restorative justice programs into the criminal justice system manifest themselves as organizational or procedural challenges. Most corrections agencies are not oriented toward grassroots participation and are generally hierarchical organizations.<sup>187</sup> Because restorative justice programs require community support, the institutions interested in embracing restorative justice practices must be committed to community education and outreach. Kay Pranis suggests that one-page informational pieces, radio shows, and local cable access are some of the venues to raise community support and awareness.<sup>188</sup> Pranis points out that while the restorative justice movement has seen many recent gains in awareness and interest, the broader public policy trend around the nation is the expansion of the prison system. With resources being directed towards incarceration, there is little remaining to focus on working with victims and offenders in the community.<sup>189</sup>

The role of criminal justice professionals in the restorative justice system is another area that requires analysis. In the current system, professionals have distinct, specialized roles. In a restorative justice system, however, people work together “holistically and fluidly,” making the specialized knowledge of professionals less necessary.<sup>190</sup> At the least, the use of a restorative justice system would significantly change the roles of professionals in the system.<sup>191</sup> Professionals would have to be educated differently if they are to play a role in the restorative justice process. Generally, professionals in the criminal justice system are not trained with regard to the social, psychological, economic and planning disciplines related to victim and community reparation, as well as community organizing and volunteer coordination.<sup>192</sup> After researching and examining the emerging role of professionals in two restorative justice programs, Susan M. Olson and Albert W. Dzur concluded that professionals must remain a part of the process, that the authority and responsibility for the restorative justice

process should be shared between professionals and community members, and that the need for the conventional criminal justice procedure remains necessary.<sup>193</sup>

While a tough stance on crime may serve as a roadblock for prosecutors to the implementation of restorative justice programs, defense attorneys may also serve as roadblocks. Their participation may turn on “whether they believe that redemption, forgiveness, and conciliation are more important to their clients than the ultimate resolution of the criminal charge.”<sup>194</sup>

Another question that poses a challenge for the implementation of restorative justice programs is whether restorative justice should act as a complement to the existing court system or as a candidate to replace it. A realistic approach is to offer restorative justice programs as a tool in the tool box of options.<sup>195</sup> Positioning restorative justice as a complement to the traditional criminal justice system is a point for gaining greater systemic acceptance.<sup>196</sup>

Legal systems change slowly, and this may impede the adoption of restorative justice within the criminal justice system.<sup>197</sup> Also, issues of constitutionality, due process, legality, equality, presumption of innocence and confidentiality must be considered.<sup>198</sup>

Another issue is how restorative justice programs will be held accountable. Some argue that current methods of accountability are not sufficient. Zvi D. Gabbay argues that the programs are asked to collect the wrong data and that the supervision and evaluation of the programs are inadequate.<sup>199</sup> He argues that the public has a right to know what these programs actually accomplish.<sup>200</sup> Gabbay studied four programs that were established and well integrated within the criminal justice system and had sustained a substantial number of referrals each year.<sup>201</sup> All four programs used evaluations as a method of collecting information and all programs submitted reports to their funders.<sup>202</sup> He concluded that the data was collected from the wrong individuals and it was not properly analyzed.<sup>203</sup>

### **Restorative Justice and Family Violence**

Only recently has there been some openness to considering the use of restorative justice methods in the area of family violence. A variety of restorative justice models are currently being used throughout the world. Those most commonly used in the context of domestic violence are the victim-offender mediation, Family Group Conferencing, community accountability boards, restorative justice circles and victim impact panels.

### **Victim Offender Mediation**

Victim-offender mediation, also referred to as “victim-offender dialogue,” usually involves a victim, an offender, and one or two mediators. Sometimes the mediation takes place through a third party who carries information back and forth.<sup>204</sup> In face-to-face meetings, support persons for victims or offenders are present.<sup>205</sup> A 1999 survey of victim offender mediation programs in the United States indicates that support persons were present in nine out of ten cases.<sup>206</sup>

The Surrogate Victim/Offender Dialogue Program (“SVODP”) is used in Washington County, Oregon. In SVODP, victims meet with imprisoned perpetrators of domestic violence with whom they have had no relationship.<sup>207</sup> The victims are carefully screened to make sure that they are ready for the meeting.<sup>208</sup> The offenders are screened as well. The offender must have accepted responsibility for his actions, expressed a desire to make a change in his life, attended a batterer’s treatment program, met with a counselor about how he may become angry during the session, and expressed a personal outcome for the session.<sup>209</sup>

### **Family Group Conferencing**

Another model known as Family Group Conferencing (“FGC”) has been used in cases of child abuse cases that include domestic violence.<sup>210</sup> Time is spent on safety planning and preparing the victim for the conference, and the offender is encouraged to take responsibility.<sup>211</sup> The conference is attended by the victim, the offender, and family and friends of both parties, as well as institutional representatives. The family meets alone and develops a plan. The plan is then approved by the institutional representatives.<sup>212</sup>

Since 1989, two primary models of Family Group Conferencing/Decision making have been practiced worldwide in the context of child welfare. They include Family Group Conferences and Family Unity Meetings. The Family Group Conference model (“FGC”) was developed and legislated in New Zealand in 1989.<sup>213</sup> The Family Unity Model originated in Oregon in 1990.<sup>214</sup>

FGC is a model that appeals to many restorative justice advocates. FGC involves the community of people most affected by a crime—the victim and the offender, and the family, friends, and key supporters of both—in deciding the resolution of a criminal or delin-



quent act. The facilitator contacts the victim and offender to explain the process and invites them to the conference; the facilitator also asks them to identify key members of their support systems who will be invited to participate as well. Participation by all involved is voluntary. The offender must admit to the offense in order to participate. The parties affected are brought together by a trained facilitator to discuss how they and others have been harmed by the offense and how that harm might be repaired.<sup>215</sup>

FGC has four key principles: (a) the process is family centered and moves away from the negative perceptions and a blame-placing approach to a strength-based model; (b) respect and value is placed on cultural ideals and practices; (c) family and community involvement is encouraged; and (d) the community is seen as a family support resource.<sup>216</sup> FGC differs from the traditional model of victim-offender mediations programs in that FGC uses public officials, police officers, probation officers, and school officials rather than trained volunteers as facilitators.<sup>217</sup> This allows for a more directed facilitation.

The conference begins with the offender describing the incident, and then each participant describes the impact of the incident on his or her life. The offender is faced with the human impact of his or her behavior on the victim, on those close to the victim, and on the offender's own family and friends. The victim has the opportunity to express feelings and ask questions about the offense. After the discussion, the victim is asked to identify desired outcomes from the conference. All participants may contribute to the determination of how the offender will repair the harm he or she has caused. In the end, participants form an agreement outlining their expectations and commitments.<sup>218</sup>

### **Restorative Justice Circles**

Restorative justice circles are often referred to as “‘peacemaking circles,’ ‘restorative justice circles,’ ‘repair of harm circles,’ and ‘sentencing circles.’”<sup>219</sup> They differ from FGC in that the people asked to participate are from a wider group of community members. The process involves the use of a “talking piece” that is passed around.<sup>220</sup>

Circles are used by the Tubman Family Alliance in Minnesota in certain domestic violence cases. Generally, the victim, offender, family and friends of both the victim and offender, and members of the criminal

justice system are involved in the process.<sup>221</sup> The group decides what the sentence will be and what the offender needs to do to repair the harm to the victim.<sup>222</sup> Follow-up meetings are held to oversee compliance with the agreement reached.<sup>223</sup> Twenty domestic violence cases have been handled through the program and only 5% of those offenders have re-offended.<sup>224</sup>

### **Victim Impact Panels**

Victim impact panels are a collaboration between the court, batterer's treatment programs, victim advocates, and a restorative justice expert.<sup>225</sup> These panels involve victims talking to domestic violence offenders, but they are not the offenders in the victim's case.<sup>226</sup> These panels have been expanded to include family members, community members, law enforcement, business leaders, and faith leaders.<sup>227</sup> All panel members are screened for appropriateness to participate in the panel. This program is similar to FGC and the outcomes are anticipated to be similar.<sup>228</sup>

### **Research**

Some recent studies are encouraging. The final report on a project done by John Braithwaite and Lawrence Sherman entitled “Reintegrative Shaming of Violence, Drink Driving and Property Crime: a Randomized Controlled Trial”, concluded that restorative justice can work, and can even reduce crime by violent offenders.<sup>229</sup> The report describes findings on the recidivism of offenders involved in the Canberra Reintegrative Shaming Experiments, which compared the effects of standard court processes with the effects of a diversionary conference in four kinds of cases: drunk driving at any age, juvenile property offending with personal victims, juvenile shoplifting offenses detected by store security officers, and youth violent crimes.<sup>230</sup> The violence cases excluded cases of family violence.

Across the four experiments that make up the Reintegrative Shaming Experiments project (“RISE”), very different results have emerged for the different offense categories. In the youth violence experiment, those offenders who were assigned to conference subsequently offended at substantially lower levels—thirty-eight fewer offenses per year per one-hundred offenders—than did the offenders assigned to court.<sup>231</sup> This was not true for any of the other experiments.<sup>232</sup> The report recommended repeating the violence experiment in many other venues and with more refined types

of violent offenses, including robbery, assault and grievous bodily harm.<sup>233</sup> A subsequent study conducted in 2000 replicated RISE in the context of juvenile offenders and showed significant declines in re-offending rates for juvenile offenders.<sup>234</sup> This suggests that restorative justice has wide-reaching possibilities for reducing recidivism rates for even those who commit more violent crimes.

### Victim-Offender Mediation

Several victim-offender mediation studies reflect that victim's participation ranges from 40% to 60% and in some cases rates as high as 90% have been reported.<sup>235</sup> Coates, Burns and Umbreit found that the victim's reasons for choosing to participate were, in order of importance, to possibly help the offender, to hear why the offender did the crime, to communicate to the offender the impact of the crime, and to be sure the offender would not return to commit a repeat offense.<sup>236</sup>

A number of studies report satisfaction on the part of both the victim and the offender with the victim-offender mediation process.<sup>237</sup> Eight or nine out of ten participants report being satisfied with the process and the final agreement.<sup>238</sup>

### Family Group Conferencing

Joan Pennel and Gale Burford argue that the outcomes from the Family Group Decision Making Project ("FGDMP") reveal that FGC can be an effective strategy for stopping child maltreatment and domestic violence.<sup>239</sup> Over a one-year period thirty-two families took part in the project.<sup>240</sup> The referrals came from Child Welfare, Adult Probation and Parole, and Youth Corrections. Upon referral, family members engaged in extensive pre-conferencing work with conference coordinators to prepare all participants and to ensure the safety of all participants.<sup>241</sup> The actual conference had four phases: first, the professionals outlined the ground rules and the factual basis for the family's participation; second, the professionals outlined problems identified and the services available to family members; third, the family group was left alone to develop a plan to address the problems; and fourth, the professionals reviewed the plan to ensure that all the issues were addressed.<sup>242</sup> In twenty-one of the thirty-two families, there was an adult

abusing an adult. These families were followed for a one to two year period after the conferencing and were compared to thirty-one families in which child maltreatment or domestic violence had occurred where the families did not participate in conferencing. According to Pennel and Burford, all of the data sources agreed that in general FGC benefited the families, including but not limited to a reduction of indicators of child abuse and domestic violence.<sup>243</sup> Incidents of violence in the families who participated in conferencing were cut in half, and in contrast, violent events in the comparison group rose.<sup>244</sup> The results of this study point to the benefits of FGC and address some of the concerns for victim safety and controlling behaviors on the part of the offender.

*Incidents of violence in the families who participated in conferencing were cut in half, and in contrast, violent events in the comparison group rose.*<sup>244</sup>

The study also measured outcomes that relate to beliefs about male domination that may lead to domestic violence and behaviors that reflect who possesses the power and controls in the relationship.<sup>245</sup> The study measured the abuser's domination of conversation and control of economic resources.<sup>246</sup> Participants revealed that domination of the conversation was reduced from four to two incidents post conference, and control of economic resources was reduced from four to zero incidents.<sup>247</sup>

The study also measured batterer's minimization of violence, transference of responsibility for the violence to the victim, and refusal to accept responsibility for the abuse. These incidents were reduced from eight to three, while incidents in the comparison group increased from four to six.<sup>248</sup>

In a meta-analysis covering both victim-offender mediation and group conferencing programs in Canada, Latimer, Dowden and Muise found that satisfaction rates were somewhat higher in victim-offender mediation than in group conferencing. The authors felt that one reason might be that conferences typically have more people participating, making it more difficult to reach satisfaction with the final agreement.<sup>249</sup> A total of twenty-two studies that examined the efficacy of thirty-five restorative justice programs were included in the meta-analysis.<sup>250</sup> The results of the meta-analysis demonstrated that a majority of victims and offenders were more satisfied with restorative justice programs than the traditional justice system, and that restitution compliance was higher among those who participated in the restorative justice program.<sup>251</sup> Perhaps most im-

portant, the recidivism rates were lower among the group in the restorative justice program.<sup>252</sup>

In 2007, The Smith Institute published a non-governmental assessment by Sherman and Strang of the evidence on restorative justice in the UK and internationally.<sup>253</sup> Among the programs they commented on was the “Dove Project,” which is an example of family group conferencing being applied to cases of domestic violence.<sup>254</sup> This project, sponsored by the Hampshire County Council, has supported up to 600 conferences per year.<sup>255</sup> The project has demonstrated substantial reductions in family violence relative to similar families not participating in restorative justice programs.<sup>256</sup>

### **Restorative Justice Circles**

Fewer studies have examined the success of restorative justice circles. Some research suggests that the various types of circles have positively impacted those who participate in them.<sup>257</sup> In Manitoba Canada, the Hollow Water First Nation uses circles to work with sex abuse victims and their victimizers. These circles were held with the offender and their families as well as the victim and their families, community members and representatives from the justice system. Some participants reported benefiting immensely from the circle process and having a stake in the justice outcomes, while other cited negative aspects of the process as difficulty working with family and close friends, embarrassment and religious conflict.<sup>258</sup>

The Healing Sentencing Circles Program in Whitehorse, Yukon Territory report very high satisfaction with participants for low-risk juvenile offenders.<sup>259</sup> In South St. Paul, Minnesota the South Saint Paul Restorative Justice Council has established a number of types of circles for a variety of purposes.<sup>260</sup> A study of the program revealed that there was a high degree of satisfaction with participants.<sup>261</sup> The study indicated that it might be difficult for the circles to process a high volume of people, however, the data gathered in the study supports the contention that the circles had a positive impact on those who participated.<sup>262</sup>

### **Special Challenges for Restorative Justice Programs in Domestic Violence Cases**

The use of restorative justice principles in the context of family violence presents special challenges. The pitfalls derive from the inherent difficulty in bal-

ancing the interests of victims, offenders, the community and the state.<sup>263</sup> Victim safety is an immediate and long-term issue that manifests itself differently from other types of criminal cases.<sup>264</sup> Further, family violence cases usually involve a long-standing pattern of behavior versus a single incident.<sup>265</sup> The relationship between the victim and the offender is almost by definition different from relationships in other types of cases and can be expected to be ongoing. The face-to-face concept of community conferencing may create the opportunity for further acts of violence against the victim.<sup>266</sup>

A family experiencing violence already has inappropriate family power dynamics and victims can easily be intimidated due to the imbalance of power that already exists.<sup>267</sup> Batterers may also intimidate or harm those close to the victim; consequently, obtaining participation from some stakeholders may be problematic. Since isolation from family and friends is also a common dynamic, it may be difficult to find individuals to participate in the process.<sup>268</sup>

There are many potential risks when an abuser participates in a family group conference. The survivor may feel limited in what he or she can safely say, he or she may give up trying to get what he or she wants or need, he or she may agree to plans that he or she knows will put him or her or the children in danger, the abuser may manipulate the proceedings, and the abuser may retaliate after the family group conference.<sup>269</sup> Consequently, the victim may not be able to hold his or her own in the face-to-face meeting.

Restorative justice relies in part on a component of therapeutic intervention with perpetrators.<sup>270</sup> However, as discussed above, there is only some evidence that batterer’s treatment programs are effective.<sup>271</sup> Therefore, the question remains, if treatment of perpetrators is only moderately effective, why embrace an approach to intimate violence that relies in part on treatment?<sup>272</sup>

If some variation of the restorative justice principals are to be applied in the family violence context, what role should they play? Some of the restorative justice literature promotes restorative justice as an alternative to the criminal justice system.<sup>273</sup> Others argue that community conferencing should be offered at an intermediate stage in a hierarchy of responses with other criminal justice processes and sanctions invoked where conferencing fails.<sup>274</sup> Pennell and Burford suggest a process for family conferencing that intersects with the formal legal intervention.<sup>275</sup>



The most fundamental question at the root of this problem is, how should society respond to criminal behavior, particularly when the crime is committed among those who see themselves as family? This complex question clearly requires a multifaceted response. In order to permanently reduce the prevalence of family violence, achieving the right combination of professional discretion, legal interventions, and restorative justice remedies is essential.<sup>276</sup> The failure of three decades of reform to change the prevalence of family violence suggests that alternative approaches to the problem of intimate violence need to be explored.<sup>277</sup>

In many contexts, the criminal justice system seeks to protect the victim from all blame, especially in cases of domestic violence. The system assumes that the only limited role the victim desires to play is in convicting and sentencing the offender.<sup>278</sup> This assumption results in the aggressive arrest and prosecution of offenders even if the victim does not seek it.<sup>279</sup>

The preliminary evidence from the limited studies on restorative justice programs that address family violence demonstrates that it may be more effective than incarceration-based approaches.<sup>280</sup> Domestic violence and child protection response systems and the criminal justice system frequently function independently and in conflict with each other.<sup>281</sup> Restorative justice practices, in particular family group conferencing, provide both systems with a cohesive, integrated approach.

The restorative justice movement is having an increasing impact upon the criminal justice system throughout the world.<sup>282</sup> Programs throughout the United States have found ways to integrate elements of restorative justice into the current criminal justice system and/or provide restorative justice alternatives with positive results.<sup>283</sup>

The science of victimology supports the proposition that expanding criminal justice systems to include programs that restore victims provides new avenues for fighting crime.<sup>284</sup> Further, healing victims and offenders offers the greatest potential for reducing recidivism rates.<sup>285</sup> Victims who participate in a criminal justice process designed to restore are more satisfied with the justice system overall.<sup>286</sup> The data underscores the idea that we need to revisit the conception of victims as passive and helpless to direct the justice process.<sup>287</sup> One of the primary strengths of restorative justice programs is

that they give victims an opportunity to perform active roles that they define.<sup>288</sup> Professionals both at the time of arrest and prosecution should be allowed to take into consideration the desires of the victim, as well as be able to recommend and to participate in restorative justice programs. If this were the case, the criminal justice system would better serve both the victims and the professionals who work within the system. Criminal justice and restorative justice systems, when used in conjunction, can complement one another to punish and rehabilitate offenders, allow victims' recovery, and interrupt the cycle of violence.<sup>289</sup>

"Our adversarial system of justice, while necessary to protect the right of defendants, insulates both the victim and the defendant from the very real human contact that is often necessary."<sup>290</sup> Exclusively looking at legal needs may not bring us to justice but restorative justice can get us closer.<sup>291</sup> A realistic goal is to move toward a process that is restorative and to do that by utilizing both the criminal justice and restorative justice system.

Forgiveness has a place in criminal law.<sup>292</sup> The principles of restorative justice provide a background for forgiveness to become a part of the criminal justice system.<sup>293</sup> There are challenges, but they can be overcome if the professionals in the system are willing to explore alliances that cut across traditional boundaries.

<sup>1</sup> See Gordon Bazemore & Twila Hugley Earle, *Balance in the Response to Family Violence: Challenging Restorative Principles*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 153, 155-56 (Heather Strang & John Braithwaite eds., 2002) (describing how time limits in the system are inadequate to handle problems and how there is a lack of information detailing the long term results of interventions).

<sup>2</sup> See LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 33 (Princeton Univ. Press 2003) (recounting how years of indifference have produced a uniform response by police officers, judges, prosecutors, physicians, and judges with respect to crimes between intimate partners).

<sup>3</sup> Bazemore & Earle, *supra* note 1, at 156.

<sup>4</sup> *Id.*

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

<sup>6</sup> See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., NCJ 181867, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE* 9, 17 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (summarizing the results of a National Violence Against Women survey that found that women were significantly at a greater risk to be the victim of intimate partner violence than their male counterparts, and noting that the seriousness of physical violence increased as the rates increased).

<sup>7</sup> *Id.* at 9-10 (analyzing the findings of a National Violence Against Women Survey).

<sup>8</sup> *Id.* at 46.

<sup>9</sup> MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUST., NCJ 207846, *BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES* 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.



<sup>10</sup>*Id.*

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

<sup>12</sup>*Id.* at 3.

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

<sup>14</sup>INTRODUCTION TO DO ARRESTS AND RESTRAINING ORDERS WORK? 1, 3 (Eve S. Buzawa & Carl G. Buzawa eds., Sage Publications 1996).

<sup>15</sup>*Id.* (describing how children present during intimate partner violence become “hidden victim[s]” of the violence).

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

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

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

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

<sup>20</sup>Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 298-99 (2004).

<sup>21</sup>Malinda L. Seymore, Isn’t it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence, 90 Nw. U. L. Rev. 1032, 1037 (1996).

<sup>22</sup>PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUST., NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 55 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (describing the number of partner rapes, assaults, and stalking committed against women warrants treating the issues as a public health concern).

<sup>23</sup>Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Role of Prosecutors, Judges and the Court System*, 11 YALE J.L. & FEMINISM 3, 9 (1999) (explaining that until recently little to nothing was done to alleviate the problem of domestic violence).

<sup>24</sup>*See id.* at 10 (noting the words of the Mississippi Supreme Court, which stated the rule allowed a husband to “use salutary restraints in every case of a wife’s misbehavior, without being subject to vexatious prosecutions resulting in the mutual discredit and shame of all parties concerned”).

<sup>25</sup>Fulgam v. State, 46 Ala. 143, 146-147 (1871); Commonwealth v. McAfee, 108 Mass. 458, 461 (1871).

<sup>26</sup>State v. Oliver, 70 N.C. 60, 61-62 (1874); State v. Hussey, 44 N.C. 123, 126-27 (1852).

<sup>27</sup>Epstein, *supra* note 23, at 11.

<sup>28</sup>*Id.* at 13.

<sup>29</sup>*Id.* at 14.

<sup>30</sup>Mordini, *supra* note 20, at 312-13 (explaining how an arrest resulting from a family situation does not solve the underlying problem and only aggravates the matter once the offender is released); *see also* further discussion of the reforms in domestic violence law that began in the 1960s *infra* Part II.

<sup>31</sup>*Id.* at 299 (“The move towards mandatory arrest and mandatory prosecution of domestic violence perpetrators may have increased the legal system’s participation in the lives of domestic violence victims, but this involvement is not always wanted and does not always lead to reduced violence and safer victims.”).

<sup>32</sup>Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 25 (1992).

<sup>33</sup>MILLS, *supra* note 2, at 33.

<sup>34</sup>*Id.*

<sup>35</sup>Daniel Brookoff et al., *Characteristics of Participants in Domestic Violence Assessment at the Scene of Domestic Violence Assault*, 277 J. AM. MED. ASS’N 1369, 1371 (1997).

<sup>36</sup>*See* CAL. PENAL CODE § 1203.097 (West 2008) (confirming that a person granted probation for a crime of domestic violence shall successfully complete an appropriate counseling program designated by the court, for a period of not less than a year with periodic progress reports to the court every three months or less and weekly sessions of a minimum of two hours class time duration).

<sup>37</sup>Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159-159-

160 (2003).

<sup>38</sup>*See* Sherman, *supra* note 32, at 10 (recounting customs enforced in the sixties by federal sponsorship of training in police mediation of domestic disturbances that encouraged not making arrest in domestic situations).

<sup>39</sup>*Id.* at 10 (quoting INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TRAINING KEY 16: HANDLING DISTURBANCE CALLS (1967)).

<sup>40</sup>*See id.* at 10 (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARD FOR THE URBAN POLICE FUNCTION 12 (1973)).

<sup>41</sup>*See id.* at 15 (summarizing the views of police officers that were interviewed on the subject of domestic violence).

<sup>42</sup>*See id.* at 23-24 (concluding that as a result of the Duluth, Minnesota experiment and Attorney General’s Task Force on Family Violence, states began to change their policies to reflect mandatory arrest in domestic violence was preferred).

<sup>43</sup>MILLS, *supra* note 2, at 33.

<sup>44</sup>Mordini, *supra* note 20, at 314.

<sup>45</sup>Kimberly d. Bailey, *The Aftermath of Crawford and : Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1, 9 (2009).

<sup>46</sup>Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 934 (1994); Sherman, *supra* note 32, at 23.

<sup>47</sup>*See* Sherman, *supra* note 32, at 2 & 16 (detailing the 1984 U.S. National Institute of Justice survey analyzing arrest for misdemeanor domestic violence charges).

<sup>48</sup>*See id.* at 17 (reciting the interview process which included an initial face-to-face interview, followed by telephone follow-up-interviews every two to twenty-four weeks, which were designed to measure the frequency and seriousness of victimizations caused by a suspect after police intervention).

<sup>49</sup>*See* Zorza, *supra* note 46, at 934 (relating how the victims in the crimes felt that arresting their abusers put them at considerably less risk, and how studies show that arresting was the most effective police effort and had the strongest deterrent effect).

<sup>50</sup>MILLS, *supra* note 2, at 36.

<sup>51</sup>Sherman, *supra* note 32, at 21-22. The Minneapolis experiment did not make arrest mandatory in 100 percent of cases, but did require police to file a written report detailing why that did not make an arrest when it was legally possible to do so. *Id.*

<sup>52</sup>Mordini, *supra* note 20, at 313.

<sup>53</sup>MILLS, *supra* note 2, at 36.

<sup>54</sup>*See* Sherman, *supra* note 32, at 23 (explaining how the threat of civil liability is mentioned frequently by police officers when discussing this issue, even among those who have never heard of the Minneapolis experiment).

<sup>55</sup>MILLS, *supra* note 2, at 37.

<sup>56</sup>*Id.*

<sup>57</sup>Zorza, *supra* note 46, at 929 & 937. The experiments have been cited for the propositions that (1) arrest does not deter abusers or that (2) arrest does not deter unemployed abusers. *Id.*

<sup>58</sup>*Id.* at 929.

<sup>59</sup>MILLS, *supra* note 2, at 37.

<sup>60</sup>Zorza, *supra* note 46, at 929, 931, 932, 965-86.

<sup>61</sup>Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 144 (1992).

<sup>62</sup>Sherman et al., *supra* note 61, at 145-46; Sherman, *supra* note 32, at 28.

<sup>63</sup>*See* Sherman et al., *supra* note 61, at 152-53, 167 (noting that “thirty days or more after the presenting incidents the prevalence . . . of repeat violence reported in victim interviews is substantially lower for arrest groups”).

<sup>64</sup>*See id.* at 153-54, 167 (describing how both arrest and non-arrest groups did worse with recidivism about seven to nine months after the presenting incident).

<sup>65</sup>*See id.* at 167 (analyzing the results of the Milwaukee domestic violence experiment which showed that the initial deterrence effect ob-

served in the thirty days after disappear quickly, and by one year later there is an escalation).

<sup>66</sup> See *id.* at 160-66; 167-68 (interpreting results that show arrested whites produce 2,504 fewer acts of domestic violence a year than warned whites, while blacks produce 1,803 more acts of violence per year than warned blacks. Employed suspects that were arrested committed 958 fewer acts of violence than those who were warned, while arrested unemployed offenders had 2,274 more acts of violence than unemployed offenders who were warned).

<sup>67</sup> See J. David Herschel & Ira W. Hutchison III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina, Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 74, 99 (1992).

<sup>68</sup> *Id.* at 74, 88, 100-101. Police officers in North Carolina are, by law, permitted to arrest a spouse abuser for misdemeanor offenses committed in the officer's presence. *Id.* The officers have similar authority for misdemeanors committed out of their presence, if that officer has probable cause to believe that: the offender committed the misdemeanor and that the officer will either (i) not apprehend the offender unless he is immediately released, or (ii) the offender might cause physical injury to himself or other, or damage property, unless immediately arrested. *Id.*; see also Sherman, *supra* note 32, at 28.

<sup>69</sup> See Herschel & Hutchinson, *supra* note 67, at 118-19.

<sup>70</sup> See Zorza, *supra* note 46, at n.34; Richard A. Berk et al., *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170, 172 n.8 (1992).

<sup>71</sup> See Berk et al., *supra* note 70, at 172.

<sup>72</sup> See Zorza, *supra* note 46, at 938 (observing that the Omaha experiment expanded the Minneapolis experiment where police officers responded randomly to eligible domestic violence situations where both parties were present when the police arrived).

<sup>73</sup> See Berk et al., *supra* note 70, at 172-73 (describing how in no case could the hypothesis of equal "failure" rates across the three treatments be rejected at conventional statistical confidence levels..

<sup>74</sup> See Zorza, *supra* note 46, at 956.

<sup>75</sup> See Berk et al., *supra* note 70, at 174 (summarizing the choices an assailant was eligible for after a police officer arrived at the crime scene, determined the case was eligible for the experiment, and called the dispatcher to learn what the treatment should be used).

<sup>76</sup> Berk et al., *supra* note 70, at 198-99.

<sup>77</sup> Zorza, *supra* note 46, at 959 n.154.

<sup>78</sup> *Id.* at 958.

<sup>79</sup> See *id.* at 959 n.154 (noting criteria that had to be considered included: no felony had occurred, that probable cause to believe that a misdemeanor spouse battery existed; that both parties were present when the police arrived; that the victim was a female over the age of eighteen; that the officer had not been assaulted by either party; that the victim was not in immediate danger; and that there was no outstanding arrest warrant, injunction, or criminal protective order against either party.); Sherman, *supra* note 32, at 28.

<sup>80</sup> MILLS, *supra* note 2, at 39.

<sup>81</sup> *Id.* at 39-40.

<sup>82</sup> Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1156 (1994) (examining the Exchange Theory, which says men with something to lose, a job for example, are more likely to fear arrest from mandatory arrest and subsequent prosecutions because they have more at stake).

<sup>83</sup> See *id.* at 1157-58 (analyzing studies performed in Milwaukee and Omaha that suggest that mandatory arrest for domestic violence is counterproductive for the unemployed, increase recidivism and undermine the goals of mandatory arrest).

<sup>84</sup> See *id.* at 1157 (detailing the successful results of an experiment conducted in Duluth, where recidivism rates were reduced by 47%).

<sup>85</sup> *Id.* at 1150.

<sup>86</sup> See *id.* at 1151 (recounting the Duluth's program initiation under the premise holding batterers responsible for their actions sends a message

to the community, victims, assailants, and children that battering is not acceptable, even when it takes place within the family).

<sup>87</sup> See *id.* at 1152 (describing how prior to arrest, police had contact with 73% of the assailants, compared to 36% within six months after the arrest, and only 16% from seven to twelve months after the arrest).

<sup>88</sup> MILLS, *supra* note 2, at 40.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Mordini, *supra* note 20, at 317 (discussing the position that police officers should have discretion to make an arrest in intimate partner abuse calls, but the victims wishes should be considered). This is not to say that the victims desires should always be granted when deciding whether to make an arrest. *Id.*

<sup>92</sup> See *id.* (remarking that the police should consider the victims wishes whether to make an arrest or not, but the victims wish and concern for economic safety should not outweigh the community's interest in safety).

<sup>93</sup> See Welch, *supra* note 82, at 1160 (examining pro-arrest policies and noting they do not eliminate all problems associated with mandatory arrest). However, the pro-arrest policy approaches the problem while recognizing that there is an appropriateness and utility of the arrest in domestic violence, without mandating arrest in cases where an arrest would increase the risk of violence to the victim. *Id.*

<sup>94</sup> See *infra* Part VII.

<sup>95</sup> Han, *supra* note 37, at 171-72 (summarizing National Prosecution Standards suggesting that prosecutors should not only protect the rights of individuals, but also must place the rights of society in a paramount position when exercising prosecutorial discretion).

<sup>96</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(b) (3d ed. 1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE].

<sup>97</sup> *Id.* at 3-3.9(b)(v).

<sup>98</sup> Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB. L.J. 953, 961 (2000).

<sup>99</sup> MILLS, *supra* note 2, at 40.

<sup>100</sup> Crawford v. Washington, 541 U.S. 36 (2003).

<sup>101</sup> Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 182-83 (Eve S. Buzawa & Carl G. Buzawa eds., Sage Publications 1996).

<sup>102</sup> See *id.* at 183, 186 (observing that only 8% of respondents from jurisdictions with populations over 500,000 thought that 'victim cooperation' affected their decision to prosecute while 36% of respondents in jurisdictions with populations between 250,000 and 500,000 thought that victim cooperation affected their decision to prosecute); see also MILLS, *supra* note 2, at 41 ("[T]he larger the city, the less likely the victim's cooperation would affect the decision to prosecute. Smaller jurisdictions will need the woman's testimony because they have limited resources to gather corroborative evidence from neighbors or family members.").

<sup>103</sup> MILLS, *supra* note 2, 41.

<sup>104</sup> See Richard M. Tolman & Jeffrey L. Edleson, *Intervention for Men Who Batter: A Review of Research*, in UNDERSTANDING PARTNER VIOLENCE: PREVALENCE, CAUSES, CONSEQUENCES AND SOLUTIONS 262-273 (S.R. Stith & M.A. Straus eds. 1995), available at <http://www.mincava.umn.edu/documents/toledl/toledl.html> (last visited April 18, 2009).

<sup>105</sup> *Id.*

<sup>106</sup> See *id.* (noting that in cases that did not permit victims to drop charges, "20% of the cases were still dropped, because the victim refused to testify or disappeared").

<sup>107</sup> See MILLS, *supra* note 2, at 41-42 (categorizing the power as: "(1) providing women with the possibility of prosecution as a bargaining chip, (2) providing women a means of allying with others (including police, prosecutors, and judges, and (3) providing women a voice in determining sanctions for the batterer").

<sup>108</sup> *Id.*

<sup>109</sup>*Id.* at 43.

<sup>110</sup>*Id.*

<sup>111</sup>ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.9(b)(v).

<sup>112</sup>Han, *supra* note 37, at 172-73.

<sup>113</sup>*Id.* at 173.

<sup>114</sup>See Ileana Arias et al., *Concurrent Sessions: Preventing Injuries and Abuse: Violence Against Women: The State of Batter Prevention Programs*, 30 J.L. MED. & ETHICS 157, 159 (2002) (describing the various programs offered in different state jurisdictions across the country).

<sup>115</sup>Amanda Dekki, *Punishment or Rehabilitation? The Case for State-Mandated Guidelines for Batter Intervention Programs in Domestic Violence Cases*, 18 ST. JOHN'S J. LEGAL COMMENT. 549, 582 (2004).

<sup>116</sup>CAL. PENAL CODE § 1203.097 (West 2008).

<sup>117</sup>Lisa Lightman & Francine Byrne, *Addressing the Occurrence of Domestic Violence and Substance Abuse: Lessons From Problem-Solving Courts*, 6 J. CENTER FAM. CHILD. & CTS. 53, 56 (2005), available at [http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/CFCC\\_Journal6\\_.pdf](http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/CFCC_Journal6_.pdf).

<sup>118</sup>*Id.* at 57 (discussing ways to keep victims safe while holding batterers accountable).

<sup>119</sup>Dekki, *supra* note 115, at 568.

<sup>120</sup>*Id.* at 568-69.

<sup>121</sup>*Id.* at 569-70.

<sup>122</sup>*Id.* at 570.

<sup>123</sup>Arias, *supra* note 114, at 158.

<sup>124</sup>Brookoff et al., *supra* note 35, at 1371.

<sup>125</sup>*Id.*

<sup>126</sup>Kristina C. Evans, *Queer Theory, Feminism, and the Law: Note: Can a Leopard Change His Spots?: Child Custody and Batterer's Intervention*, 11 DUKE J. GENDER L. & POL'Y 121, 130 (2004).

<sup>127</sup>See Arias, *supra* note 114, at 161 (explaining how batterers manage to complete treatment programs without actually reforming their abusive ways).

<sup>128</sup>Evans, *supra* note 126, at 130.

<sup>129</sup>See Lightman & Byrne, *supra* note 117, at 58 (emphasizing the importance of provider feedback in treatment programs).

<sup>130</sup>*Id.*

<sup>131</sup>Arias, *supra* note 114, at 161.

<sup>132</sup>*Id.*

<sup>133</sup>Tolman & Edleson, *supra* note 104.

<sup>134</sup>Evans, *supra* note 126, at 130.

<sup>135</sup>Tolman & Edleson, *supra* note 104.

<sup>136</sup>*Id.*

<sup>137</sup>ADELE V. HARRELL, EVALUATION OF COURT-ORDERED TREATMENT FOR DOMESTIC VIOLENCE OFFENDERS. FINAL REPORT (The Urban Institute 1991).

<sup>138</sup>*Id.*

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

<sup>141</sup>See *supra* notes 131-38 (summarizing various studies that came to different conclusions about the utility of batterer's treatment programs).

<sup>142</sup>John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 6 (1999) [hereinafter Braithwaite, *Restorative Justice*].

<sup>143</sup>*Id.* at 5-6 (remarking that those with a "stake" include not only "victims, offenders, and affected communities," but also "the families of victims and offenders").

<sup>144</sup>See Kay Pranis, *Restorative Values and Confronting Family Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 1, at 23-32 (listing the factors that make family violence unique compared to other violent crimes).

<sup>145</sup>*Id.* at 38-39 (remarking that victims' groups oppose the use of restorative justice in family violence situations).

<sup>146</sup>See Braithwaite, *Restorative Justice*, *supra* note 142, at 1 (noting that these ancient civilizations were even receptive to the idea of restorative justice in homicide cases).

<sup>147</sup>*Id.* at 2.

<sup>148</sup>John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1730 (1999) [hereinafter Braithwaite, *A Future where Punishment is Marginalized*].

<sup>149</sup>*Id.*

<sup>150</sup>*Id.*

<sup>151</sup>*Id.* at 1730-1731.

<sup>152</sup>*Id.* at 1731.

<sup>153</sup>*Id.* at 1743.

<sup>154</sup>*Id.*

<sup>155</sup>Braithwaite, *Restorative Justice*, *supra* note 142, at 3.

<sup>156</sup>Chris Cunneen, *Reparations and Restorative Justice*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY 83, 86 (Heather Strang & John Braithwaite, eds., 2001).

<sup>157</sup>Carrie J. Niebur Eisnagle, *An International "Truth commission": Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT'L L. 209, 225 (2003).

<sup>158</sup>Mark Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 521 (2007) [hereinafter Umbreit et al., *Restorative Justice*].

<sup>159</sup>*Id.* at 521-22.

<sup>160</sup>*Id.* at 522.

<sup>161</sup>Susan C. Taylor, *Alternative Dispute Resolution Symposium: Article: Victim-Offender Reconciliation Program—A New Paradigm Toward Justice*, 26 U. MEM. L. REV. 1187-88 (1996).

<sup>162</sup>OFFICE FOR VICTIMS OF CRIME BULLETIN, THE RESTORATIVE JUSTICE AND MEDIATION COLLECTION: EXECUTIVE SUMMARY 9 (2000).

<sup>163</sup>Umbreit et al., *Restorative Justice*, *supra* note 158, at 519.

<sup>164</sup>*Id.* at 520.

<sup>165</sup>*Id.*

<sup>166</sup>TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW, A REPORT BY THE HOME OFFICE 5 (1999) (original emphasis omitted).

<sup>167</sup>HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE, 19-20 (2002) [hereinafter ZEHR, THE LITTLE BOOK].

<sup>168</sup>*Id.* at 3.

<sup>169</sup>Kay Pranis, *Building Community Support for Restorative Justice: Principles and Strategies* (Minnesota Dept. of Corrections), <http://www.iirp.org/library/building.html>.

<sup>170</sup>Umbreit et al., *Restorative Justice*, *supra* note 158, at 518.

<sup>171</sup>*Id.*

<sup>172</sup>*Id.* at 516.

<sup>173</sup>Heather Strang & John Braithwaite, *Restorative Justice and Civil Society*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY, *supra* note 156, at 1.

<sup>174</sup>*Id.*

<sup>175</sup>*Id.* at 1-2.

<sup>176</sup>HOWARD ZEHR, CHANGING LENSES 80 (Herald Press 1990) [hereinafter ZEHR, CHANGING LENSES].

<sup>177</sup>*Id.*

<sup>178</sup>Eisnagle, *supra* note 157, at 213.

<sup>179</sup>*Id.* at 213-214.

<sup>180</sup>Susan M. Olson & Albert W. Dzur, *The Practice of Restorative Justice: Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 63 (2003).

<sup>181</sup>*Id.*

<sup>182</sup>Conrad G. Brunk, *Restorative Justice and the Philosophical Theories of Criminal Punishment*, in THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE 31, 58 (Michael L. Hadley ed., 2001).

<sup>183</sup>*Id.* at 59.

<sup>184</sup>Sara Sun Beale, *Interdisciplinary Perspectives on Restorative Justice: Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 417 (2003).

<sup>185</sup>*Id.* at 424.

<sup>186</sup>*Id.* at 427.

<sup>187</sup>See generally Pranis, *supra* note 144, at 23-41 (examining the role of community organizations in restorative justice).



- <sup>188</sup>*Id.*
- <sup>189</sup>*Id.*
- <sup>190</sup>Olson & Dzur, *supra* note 180, at 62-63.
- <sup>191</sup>*Id.* at 64.
- <sup>192</sup>*Id.* at 88.
- <sup>193</sup>*Id.* at 89.
- <sup>194</sup>Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 689 (2005).
- <sup>195</sup>*Id.* at 671.
- <sup>196</sup>*Id.* at 672.
- <sup>197</sup>*Id.* at 681.
- <sup>198</sup>*Id.*
- <sup>199</sup>Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT RESOL. 85, 86-87 (2006).
- <sup>200</sup>*Id.* at 87.
- <sup>201</sup>*Id.* at 99-100.
- <sup>202</sup>*Id.* at 111.
- <sup>203</sup>*Id.* at 113.
- <sup>204</sup>Umbreit et al., *Restorative Justice*, *supra* note 158, at 529.
- <sup>205</sup>*Id.*
- <sup>206</sup>See Mark S. Umbreit & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 MEDIATION Q. 235, 241 (1999). The National Survey of Victim-Offender Mediation Programs in the United States describes the characteristics of various nationwide victim-offender mediation programs and the functioning of the programs. *Id.* at iii.
- <sup>207</sup>See Judge Bennett Burkemper & Nina Balsam, *Examining the Use of Restorative Justice Practices in Domestic Violence Cases*, 27 ST. LOUIS U. PUB. L. REV. 121, 129 (2007). The co-sponsored pilot program (by Washington County Community Corrections and the Center for Victims Services) allows victims of domestic violence to request to participate (through a local shelter) to meet incarcerated perpetrators of domestic violence, where they may maintain control of the session by terminating it at any time. *Id.*
- <sup>208</sup>*Id.*
- <sup>209</sup>*Id.*
- <sup>210</sup>See *id.* at 130. Cases are referred by Child Welfare, Adult Parole and Probation, and Youth Corrections, and the outcomes have shown to be promising for reducing child maltreatment and domestic violence; child welfare files showed a reduction from 84 to 34 events in mother/wife abuse versus an increase in the comparison group from 45 to 52. *Id.* at 130-31.
- <sup>211</sup>*Id.*
- <sup>212</sup>*Id.* The plan focuses on how the family will help the victim take care of the children, support the victim to live violence-free, and support the offender in transforming. *Id.*
- <sup>213</sup>MARK S. UMBREIT, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS (U.S. Dept. of Justice, Office of Justice Programs 2000).
- <sup>214</sup>PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, FAMILY GROUP CONFERENCING/DECISION-MAKING AS A PRACTICE WITH FAMILIES EXPERIENCING SEXUAL ABUSE AND DOMESTIC VIOLENCE 1 (2005).
- <sup>215</sup>UMBREIT, *supra* note 212.
- <sup>216</sup>See PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, FAMILY GROUP CONFERENCING/DECISION-MAKING AS A PRACTICE WITH FAMILIES EXPERIENCING SEXUAL ABUSE AND DOMESTIC VIOLENCE 1 (2005). Each of the four principles has shaped the essential elements of FGC. *Id.*
- <sup>217</sup>*Id.*
- <sup>218</sup>See, e.g., Robert Victor Wolf, *Promoting Permanency*, 4 J. Ctr. Fam. Child. & Cts. 133, 134-35 (2003) (outlining one possible model for FGC).
- <sup>219</sup>Umbreit et al., *Restorative Justice*, *supra* note 158, at 530.
- <sup>220</sup>*Id.*
- <sup>221</sup>See Burkemper & Balsam, *supra* note 207, at 132. Circle Sentencing is employed in criminal cases where the victim wishes to participate and where the offender both admits guilt and has a desire to change. *Id.*
- <sup>222</sup>*Id.*
- <sup>223</sup>*Id.*
- <sup>224</sup>See *id.*
- <sup>225</sup>*Id.* Missouri has implemented Victim Impact Panels in domestic violence cases. *Id.*
- <sup>226</sup>*Id.*
- <sup>227</sup>*Id.*
- <sup>228</sup>See *id.* Missouri's Victim Impact Panel approach is similar to the Family Group Conferencing Model, as it includes survivors, family members or a survivor, a grown child of a survivor, a family member of an offender, a prior rehabilitated offender, and community members. *Id.*
- <sup>229</sup>See LAWRENCE W. SHERMAN ET AL., RECIDIVISM PATTERNS IN THE CANBERRA REINTEGRATIVE SHAMING EXPERIMENTS (RISE) (2000). The report presents information about the effects of diversionary restorative justice conferences on repeat offending; cases were accepted until July 1, 2000 allowing for most cases to have had at least one follow up period. *Id.* at 1.
- <sup>230</sup>*Id.* at 4.
- <sup>231</sup>*Id.* at 18.
- <sup>232</sup>*Id.*
- <sup>233</sup>*Id.* at 19. The substantive conclusion of RISE is that restorative justice can work and can reduce crime by violent offenders, but there is no guarantee that it will work for all offenses until the experiments are expanded and repeated. *Id.* at 18-19.
- <sup>234</sup>Heather Strang & John Braithwaite, *A New and Troubling Political Context, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 3 (Heather Strang & John Braithwaite eds., 2002) (noting that the study "reveal[ed] a reoffending rate for cases randomly assigned to a restorative justice conference 40 percent lower than in the control group after six months, declining to 25 percent lower after 12 months"). Additionally, another study that did not randomly assign cases also noted that the reoffending rates declined by a third. *Id.*
- <sup>235</sup>ROBERT B. COATES ET AL., VICTIM PARTICIPATION IN VICTIM OFFENDER CONFERENCING: WASHINGTON COUNTY, MINNESOTA COMMUNITY JUSTICE PROGRAM (2002).
- <sup>236</sup>*Id.*
- <sup>237</sup>See Umbreit et al., *Restorative Justice*, *supra* note 158, at 533. The expression of satisfaction is consistently high for both victims and offenders across sites, cultures, and seriousness of offenses. *Id.*
- <sup>238</sup>*Id.*
- <sup>239</sup>Joan Pennell & Gale Burford, *Family Group Decision Making: Protecting Children and Women*, 79 CHILD WELFARE 131 (Mar./Apr. 2000) [hereinafter Pennell & Burford, *Family Group Decision Making*].
- <sup>240</sup>C. Quince Hopkins et al., *Responding: Two New Solutions: Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 306 (2004).
- <sup>241</sup>*Id.*
- <sup>242</sup>*Id.* at 307.
- <sup>243</sup>Joan Pennell & Gael Burford, *Feminist Praxis: Making Family Group Conferencing Work, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 108, 110 (Heather Strang & John Braithwaite eds., 2002) [hereinafter Pennell & Burford, *Feminist Praxis*].
- <sup>244</sup>Hopkins et al., *supra* note 240, at 307-08.
- <sup>245</sup>Burkemper & Balsam, *supra* note 207, at 131.
- <sup>246</sup>*Id.*
- <sup>247</sup>*Id.*
- <sup>248</sup>*Id.*
- <sup>249</sup>Jeff Latimer et al., *Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 25 PRISON J. 127 (2001), available at [http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/Articles/rj\\_meta%20analysis.pdf](http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/Articles/rj_meta%20analysis.pdf).
- <sup>250</sup>*Id.*
- <sup>251</sup>*Id.*
- <sup>252</sup>*Id.*
- <sup>253</sup>See LAWRENCE S. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE (Smith Institute ed. 2007). The Smith Institute is an



independent think tank which undertakes research and education in issues regarding the changing relationship between social values and economic imperatives; this report reviews restorative justice techniques and draws conclusions as to their effectiveness. *Id.* at Preface.

<sup>254</sup> See *id.* at 52. The “Dove Project” is centralized on reducing family violence in New Hampshire, and is based on the Pennell and Burford family group conferences model. *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 53.

<sup>258</sup> THERESE LAJEUNESSE AND ASSOCIATES LTD., EVALUATION OF COMMUNITY HOLISTIC CIRCLE HEALING, HOLLOW WATER FIRST NATION, VOLUME 1: FINAL REPORT (1996).

<sup>259</sup> STEPHEN A. MATTHEWS & GAYLE LARKIN, GUIDE TO COMMUNITY-BASED ALTERNATIVE FOR LOW-RISK JUVENILE OFFENDERS (1999). The program is for both juveniles and adults, and over the two-year pilot program there was an 80% decrease in recidivism. *Id.*

<sup>260</sup> MARK S. UMBREIT, BETTY VOS & ROBERT B. COATES, RESTORATIVE JUSTICE DIALOGUE: EVIDENCE BASED PRACTICE 2 (Univ. of Minnesota Center for Restorative Justice & Peacemaking 2006), available at [http://www.cehd.umn.edu/ssw/rjp/PDFs/RJ\\_Dialogue\\_Evidence-based\\_Practice\\_1-06.pdf](http://www.cehd.umn.edu/ssw/rjp/PDFs/RJ_Dialogue_Evidence-based_Practice_1-06.pdf).

<sup>261</sup> *Id.* at 5.

<sup>262</sup> *Id.*

<sup>263</sup> Umbreit et al., *Restorative Justice*, *supra* note 158, at 558.

<sup>264</sup> Bazemore & Earle, *supra* note 1, at 156.

<sup>265</sup> *Id.* at 157.

<sup>266</sup> Hopkins et al., *supra* note 240, at 302-03.

<sup>267</sup> *Id.* at 303.

<sup>268</sup> *Id.*

<sup>269</sup> LUCY SALCIDO CARTER, FAMILY TEAM CONFERENCES IN DOMESTIC VIOLENCE CASES: GUIDELINES FOR PRACTICE, 5 (Kelly Mitchell-Clark ed., 2003). Before the facilitator can conduct an FTC with the family, the child welfare agency must conduct a thorough risk and safety analysis for the family. *Id.*

<sup>270</sup> Hopkins et al., *supra* note 236, at 303.

<sup>271</sup> See *supra* Part VI (examining the effectiveness of batterer’s treatment programs).

<sup>272</sup> Hopkins et al., *supra* note 240, at 303.

<sup>273</sup> Lode Walgrave, *Extending the Victim Perspective Towards a Systemic Restorative Justice Alternative*, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE: INTERNATIONAL DEBATES 253-84 (A. Crawford & J. Goodey eds., 2000).

<sup>274</sup> Julie Stubbs, *Domestic Violence and Women’s Safety*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, at 44-45.

<sup>275</sup> Pennell & Burford, *Feminist Praxis*, *supra* note 243, at 108 (remark- ing that family conferencing is based on the idea that “protecting women and children means promoting their empowerment through creating just societies”).

<sup>276</sup> Hopkins et al., *supra* note 240, at 293.

<sup>277</sup> *Id.* at 310. However, any restorative justice process must be sensitive to addressing the transformative power of a justice process on changing social norms and must create a process by which the sufferings of the individual are generalized to the treatment of women as a group. *Id.* at 311.

<sup>278</sup> Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 483 (2006). The protectionist approach underpins the limited role a victim currently plays in convict- ing an offender, because it is assumed the victim is too traumatized to make appropriate decisions on their own. *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> Hopkins et al., *supra* note 240, at 310.

<sup>281</sup> Lisa Merkel-Holguin et al., *Learning with Families: A Synopsis of FGDM Research and Evaluation in Child Welfare*, 18 PROTECTING CHILD 2, 11 (2003).

<sup>282</sup> Umbreit et al., *Restorative Justice*, *supra* note 158, at 564.

<sup>283</sup> Mills, *supra* note 278, at 464.

<sup>284</sup> *Id.* at 465.

<sup>285</sup> *Id.*

<sup>286</sup> Heather Strang & Lawrence Sherman, *The Practice of Restorative Justice: Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 24 (2003) (noting that evidence shows that the main factor influencing satisfaction with the sentence is the perception of fair- ness with the sentencing process, but victims do not usually seek a deci- sive role in the outcome of their cases).

<sup>287</sup> Mills, *supra* note 278, at 492.

<sup>288</sup> *Id.* at 496.

<sup>289</sup> *Id.* at 468.

<sup>290</sup> Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORD- HAM URB. L.J. 1651, 1652 (2000).

<sup>291</sup> Reimund, *supra* note 194.

<sup>292</sup> David M. Lerman, *Forgiveness in the Criminal Justice System: If it Belongs, Then Why Is it so Hard to Find?*, 27 FORDHAM URB. L.J. 1663, 1675 (2000).

<sup>293</sup> *Id.*

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