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## APPLYING RESTORATIVE JUSTICE TO ONGOING INTIMATE VIOLENCE: PROBLEMS AND POSSIBILITIES

C. QUINCE HOPKINS,\* MARY P. KOSS,\*\* AND KAREN J. BACHAR\*\*\*

### I. IDENTIFYING THE PROBLEM:

#### THE LIMITS OF EXISTING REMEDIES FOR DOMESTIC VIOLENCE

The prevalence of domestic violence is certainly well documented.<sup>1</sup> While Western historical accounts of domestic violence intervention efforts focus primarily on events of the last few decades, women and men have in fact been working to eradicate intimate abuse for over 2000 years.<sup>2</sup> The first known tort-like remedy for domestic violence was enacted over two millennia ago, in 200 B.C.E.<sup>3</sup> The first criminal prohibition against all domestic battering (other

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1. See *infra* notes 5–7 and accompanying text.

2. For a full discussion of this subject, see C. Quince Hopkins, *Rescripting Relationships: Towards a Nuanced Theory of Domestic Violence as Sex Discrimination*, 9 VA. J. SOC. POL'Y & L. 411, 419-20 (2002) (describing historical reform efforts over the past two millennia). For a discussion of reform efforts of battered women's advocates in the United States during the last three decades of the 20th century, see LORETTA FREDRICK & KRISTINE C. LIZDAS, BATTERED WOMEN'S JUST. PROJECT, THE ROLE OF RESTORATIVE JUSTICE IN THE BATTERED WOMEN'S MOVEMENT 6, 11, 15 (Sept. 2003) (describing the battered women's movement as focused primarily on criminal justice reform along with the following issues: community education, shelters and support groups, advocacy for protection orders, and to a lesser degree, victim compensation, and restitution).

3. Hopkins, *Rescripting Relationships*, *supra* note 2, at 420.

than in self-defense) was established in the Puritan's Bodies of Liberties of 1641.<sup>4</sup> But it is not until the latter part of the 20th century that one can observe a concerted global effort to address the wide-spread prevalence of domestic violence that was perhaps not present in these prior reform movements.<sup>5</sup> However, although these more recent efforts may seem substantial, there is only minimal evidence that these reforms have yielded low prevalence rates of family violence in any significant way, at least in the United States.<sup>6</sup> In 1993, for example, almost forty percent of all reported violent assaults against women in the United States resulted from family violence: intimate partners perpetrated approximately twenty-nine percent of reported violent assaults against women, and other relatives perpetrated an additional nine percent of violent assaults against women.<sup>7</sup>

Further, existing legal responses to family violence provide incomplete redress for survivors. For instance, as witnesses rather than parties in criminal cases, victims' control over prosecution is limited; in fact the traditional criminal justice system, at the urging of battered women's advocates, affirmatively displaces battered women from the center of prosecutions in a noble effort to take on the primary responsibility of confronting batterers about their violence.<sup>8</sup> Second, when prosecutions do take place, and domestic violence defendants are actually convicted, the penalty "paid" by the defendant rarely devolves to the victim's benefit outside of criminal "stay-away" orders.<sup>9</sup> The only other direct benefit to victims, when it is ordered, is restitution; this is a remedy rarely sought by victims, particularly when family resources are

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4. *Id.*

5. *Id.* at 422.

6. *Id.* at 423.

7. See DIANE CRAVEN, U.S. DEP'T OF JUSTICE, SELECTED FINDINGS, FEMALE VICTIMS OF VIOLENT CRIME 2 (1996) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvvc.pdf>. An additional 40% of assaults on women appear to have been committed by an "acquaintance/friend." *Id.* This category might include perpetrators that were not clearly identified as an intimate partner, but who would in fact fit into that category. Thus the figure for incidents of domestic violence against women might well be much closer to 78% of assaults against women. *Id.* Statistics for the same period indicate that in contrast to female assaults, male victimizations more frequently involved strangers. *Id.* Male victims are about as likely to be victimized by a stranger, at 49%, as by someone they know (51%). *Id.* More recent statistics indicate that 20% of non-fatal violence against women is committed by their intimate partners (including spouses, former spouses, boyfriends, and girlfriends). CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001, at 2001, at 1 (Feb. 2003) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>. Concerning the controversy over prevalence measures, see Hopkins, *Rescripting Relationships*, *supra* note 2, at 423.

8. FREDERICK & LIZDAS, *supra* note 2, at 28; Hopkins, *Rescripting Relationships*, *supra* note 2, at 435.

9. Hopkins, *Rescripting Relationships*, *supra* note 2 at 436.

limited.<sup>10</sup> In addition, empirical research demonstrates that what most victims really want, beyond stopping the violence itself, is not punishment in the form of jail time or a fine, but an opportunity to speak about what has happened to them and to receive an acknowledgement of wrongdoing and/or an apology from the defendant.<sup>11</sup> Third, existing remedies are problematic because they often base relief on an essentialized conception of a victim of domestic violence which can exclude many survivors from protection.<sup>12</sup> One can attempt to describe the prototypical domestic violence case, and these efforts are laudable and not without value, but any such attempt is necessarily ham-fisted when applied to real victims and real perpetrators; each victim presents her own particular concerns and circumstances.<sup>13</sup> Existing remedies such as civil rights remedies and battered woman syndrome defenses often fail to adequately accommodate these differences.<sup>14</sup>

10. *Id.*; FREDERICK & LIZDAS, *supra* note 2, at 11 (noting that victim compensation is rarely sought by victims since family resources often barely meet existing needs).

11. Hopkins, *Rescripting Relationships*, *supra* note 2, at 436; *see also* FREDERICK & LIZDAS, *supra* note 2, at 33-34 (noting that most women do not want the men who batter them to be penalized and critiquing some battered women's programs for insisting on an approach that emphasizes separation from the abuser, thus merely replacing one view of what she should do – that of the batterer, with another – that of the program); *accord* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. Rev. 1, 67 - 73 (discussing Navajo Peacemaking as a justice approach that avoids the problem of forcing women to choose between competing loyalties and identities). *See also* Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOLOGIST 1332 (2000). This is discussed more at length in C. Quince Hopkins, *Remembering and Forgetting: The Role of Public Truth-Telling in Law*, at 9 (unpublished manuscript, on file with author).

12. On the variation among domestic violence victims, *see* MICHELE HARWAY, *BATTERED WOMEN: CHARACTERISTICS AND CAUSES; BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE*, 29-31, 35-36 (M. Hansen & M. Harway eds., 1993) *reprinted in* CLARE DALTON & ELIZABETH SCHNEIDER, *BATTERED WOMEN AND THE LAW* 96-97 (2001).

13. *See* Hopkins, *Rescripting Relationships*, *supra* note 2, at 424 (discussing variation among victims). Concerning variation among perpetrators, *see, e.g.*, DONALD DUTTON, *THE BATTERER* 12-14, 22-38 (1995) (describing different kinds of batterers); HARWAY, *supra* note 12, at 95-97 (describing victims of intimate violence); Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 24 (1991) (“‘Battered woman’ is not a simple term”); Elizabeth Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 529-31 (1992) (objecting to the essentializing nature of the term “battered woman”).

14. Evidentiary rules that allow introduction of expert testimony on Battered Woman Syndrome have proven particularly problematic in criminal defense cases involving battered women who fight back: a woman who strikes back or demonstrates some financial independence may not appear to fit the model helpless victim that Lenore Walker, who first developed the theory of battered woman syndrome, portrayed. *See, e.g.*, DALTON & SCHNEIDER, *supra* note 12, at 743 (2001) (pointing out that battered woman syndrome contains the risk of creating a new stereotype of a “real” battered woman as “dependant, passive, psychologically as well as physically damaged by the abuse, and helpless . . . [which] in turn creates the risk that women

Fourth, most legal remedies fail to account for the ongoing nature of both the violence and, in some cases, the relationship itself. The failure to address the ongoing nature of domestic violence is largely evident in procedural and evidentiary rules. When physical acts of violence do occur, evidentiary rules, which exclude prior bad acts, imply that each attack should be viewed as a flare up, a loss of control, a discrete act of violence that can be treated in the same regard as any other single criminal act.<sup>15</sup> Legislatures have begun to develop statutes aimed at behaviors that are part of an ongoing pattern, typically in the form of harassment and stalking statutes,<sup>16</sup> but these efforts have not gone far enough because they normally become relevant only after the relationship has ended. Moreover, these statutes do not address the regime of “private tyranny” under which a victim has lived *prior* to separating from her abuser, nor are they typically sensitive to the possible ongoing relationship between the parties.<sup>17</sup> This is not to say that we should dismantle feminist reform efforts of the past few decades that have moved towards insuring that criminal acts of violence against intimate partners are not brushed under the rug as mere private squabbles. However, to the extent victims need legal remedies to account for this reality of their lives, we should do our best to insure that responses to intimate violence do so.

Fifth and finally, existing civil and criminal remedies tend to account for physical and economic harm to victims, but almost entirely fail to account for psychological harm from intimate violence despite the fact that the emotional damage from intimate violence typically lasts long after physical injuries have healed. In fact, victims report that the psychological abuse causes them the

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who do not conform to the helpless stereotype may be unable to benefit from expert testimony about battering”); *see generally* LENORE WALKER, *THE BATTERED WOMAN* (1979). Recent civil rights remedies for domestic violence similarly rely upon this trope of the “real” or paradigmatic battered woman, while simultaneously creating a large sub-set of battered women who fall outside their boundaries, and therefore now look less victimized in contrast. *See* Hopkins, *Rescripting Relationships*, *supra* note 2, at 418.

15. In practice, the situation for victims is actually often much worse than if they had been the victim of a stranger assault. In cases of stranger assault, police often take into account past documented assaults by a suspect in deciding whether to arrest the suspect. *See* FED. R. EVID. 404(a)(1). Generally, character evidence cannot be used to show action in conformity with the stated characteristic. *Id.*

16. *See, e.g.*, CAL. PENAL CODE § 646.9 (1999 and Supp. 2003) (stalking and harassment); 720 ILL. COMP. STAT. 5/12-7.3 (2000 and Supp. 2003) (stalking).

17. I borrow the term “private tyranny” from Jane Maslow Cohen. *See* Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?* 57 U. PITT. L. REV. 757, 762-67 (1996). For a cogent discussion of the importance of taking account of the ongoing nature of the relationship and the potential for future violence, see FREDERICK & LIZDAS, *supra* note 2, at 29, 34.

most harm.<sup>18</sup> The number of women who suffer from clinical depression as a result of physical abuse is extremely high.<sup>19</sup> Furthermore, studies have shown that almost thirty percent of suicide attempts among females involve battered women.<sup>20</sup> Despite this fact, physical acts that violate bodily integrity alone form the basis of typical criminal felony and misdemeanor charges.<sup>21</sup> When a punch or sexual assault also causes psychological damage, some tort actions may incorporate a remedy for it, but this is of limited availability.<sup>22</sup> Just as legislatures should consider the ongoing, cumulative nature of abusive conduct, non-physical or psychological harm should also shape the process of defining legal remedies.

18. See generally DUTTON, *supra* note 13; Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433 (1998).

19. See Mary P. Koss et al., *Depression and PTSD in Survivors of Male Violence: Research and Training Initiatives to Facilitate Recovery*, 27 PSYCHOL. WOMEN Q. 130, 134-135 (2003) (reviewing rates of depression). See also discussion *infra* Section II(C).

20. See Evan Stark & Anne Flitcraft, *Killing the Beast Within: Woman Battering and Female Suicidality*, 25 INT'L J. HEALTH SERV. 43, 50 (1995).

21. See, e.g., VA. CODE ANN. § 18.2-57.2 (2001 & Supp. 2003) (classifying assault and battery against a family or household member as a Class One misdemeanor); VA. CODE ANN. § 18.2-67.2:1 (2001 & Supp. 2003) (classifying marital rape in Virginia as punishable by not less than five years in a state correctional facility, although further providing for probation in lieu of incarceration where the defendant obtains counseling). For general descriptions of battering behavior, see generally WALKER, *supra* note 14.

22. See, e.g., Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 124 n.7 (2001) (citing Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 189 n.16 (1995)). As William Prosser opines in his classic tome on the law of torts:

It does not lie within the power of any judicial system to remedy all human wrongs . . . . Trivialities must be left to other means of settlement, and many wrongs which in themselves are flagrant – ingratitude, avarice, broken faith, brutal words, and heartless disregard of the feelings of others – are beyond any effective legal remedy, and any practical administration of the law.

W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 4 (5th ed. 1984); *but cf.* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (“one who by extreme . . . conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”). See generally SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); SUSAN ESTRICH, *REAL RAPE* (1987). See, e.g., Mary Ann Dutton et al., *Court-Involved Battered Women’s Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse*, at 3 (1999) (unpublished manuscript, on file with author); C. Quince Hopkins, *Domestic Violence as Torture: Possibilities and Limits of the Law in Combating the Psychological Harm and Patterned Nature of Domestic Violence* (1998-99) (unpublished L.L.M. thesis, Stanford Law School) (on file with author). Stalking is a now-classic example of “non-violent” and yet threatening behavior. See, e.g., Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49, 63-64 (1997) (describing the effect of non-actionable stalking behavior).

In order to reduce permanently the prevalence of this problem and to provide survivors with comprehensive remedies, advocates must continue to press for novel legal reforms in the hope that the right combination of legal interventions will someday be achieved that will finally reduce the prevalence of this public health problem and at the same time meet the needs of individual victims. One such possibility is applying restorative justice to family violence. The possibilities and limits of such an approach are the focus of the remainder of this article.<sup>23</sup> Section II explains the concepts underlying and models implementing restorative justice. Sections III and IV assess feminist theories and particular critiques of the application of restorative justice to intimate violence, identifying them as primarily empirical ones. Finally, Section V discusses empirical evidence of successes in using restorative justice in violence against women cases.

## II. WHAT IS RESTORATIVE JUSTICE?

Restorative justice is a philosophy that places emphasis on repairing harm, empowering a victim-driven process, and transforming the community's role in addressing crime. It approaches offender accountability through making reparations and undergoing rehabilitation rather than by punishment.<sup>24</sup> Recent literature reveals numerous thoughtful considerations of the application of restorative justice to crimes against women.<sup>25</sup> Restorative justice models

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23. Other scholars, many of whom are cited in this article, have addressed the potential theoretical benefits and detriments of restorative justice for family violence cases. Some authors advocate against using restorative justice in this venue, while others advocate for such an approach. One scholar who takes the latter position is Linda Mills. See LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 134-142 (2003). Mills's work might well reach the right result, but not necessarily for the right reasons. Her call for restorative justice for intimate violence rests in part on claims of women's culpability in the violence they experience and women's equal use of physical violence against their partners. The research on which she rests her argument has been discredited on a number of bases, which unfortunately undercuts the strength of her contribution to this field. See Walter DeKeseredy, Book Review, *Insult to Injury: Rethinking our Responses to Intimate Abuse*, 44 BRIT. J. CRIMINOLOGY (forthcoming 2004) (on file with author).

24. For a more complete discussion of restorative justice, see Mary P. Koss, Karen J. Bachar, & C. Quince Hopkins, *An Innovative Application of Restorative Justice to the Adjudication of Selected Sexual Offenses*, in CRIME PREVENTION, NEW APPROACHES 321 (Helmut Kury & Joachim Obergfell-Fuchs eds. 2003).

25. See generally Gordon Bazemore & Twila Hugley Earle, *Balance in the Response to Family Violence: Challenging Restorative Principles*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 153 (John Braithwaite & Heather Strang eds., 2002); John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communitarian Control*, in CRIME CONTROL AND WOMEN 151 (Susan L. Miller ed., 1998); Kathleen Daly, *Sexual Assault and Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra*, at 62; Lauren Snider, *Feminism, Punishment, and the Potential of Empowerment*, in CRIMINOLOGY AT THE CROSSROADS 246

include (a) civil proceedings, (b) victim-offender reparation through mediation, and (c) community conference approaches.<sup>26</sup>

Civil justice for intimate violence is pursued only with responsible parties with substantial financial assets, which limits its applicability as a prevention tool.<sup>27</sup> Furthermore, civil justice is an adversarial process that shares the traumatizing features of retributive justice. It also often involves comparative fault doctrine, a new way to promote victim blame that is not part of criminal trials.<sup>28</sup> On a more theoretical level, a tort action expresses a fundamentally different notion than does a criminal action. That is, a tort claim is entirely private, personal, and individual in nature and aims to adjust rights as between private persons rather than vindicate larger public or community interests.<sup>29</sup>

With respect to the second major form of restorative justice, mediation's conceptual foundation is *inappropriate* for application to crimes against women because it fails to acknowledge the structural inequalities between the victim and offender and wrongly presumes that there is "voice parity" between the parties such that they have the same "truth-telling capacity."<sup>30</sup> That is, most feminists subscribe to the theory that a batterer uses violence as a tool to maintain power and control over his victim and that the physical violence can be understood as a method of maintaining and reinforcing patriarchal gender roles in particular.<sup>31</sup> Mediation theory, however, rests on the assumption of

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(Kathleen Daly & Lisa Maher eds., 1998); Michael Cavadino & James Dignan, *Reparation, Retribution and Rights*, 4 INT'L REV. VICTIMOLOGY 233 (1996); Coker, *supra* note 11; Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 J.L. & SOC'Y 237 (1998); Koss, *supra* note 11; Einat Peled et al., *Choice and Empowerment for Battered Women Who Stay: Towards a Constructivist Model*, 45 SOC. WORK 9 (2000).

26. See Koss et al., *supra* note 24, at 325.

27. Hopkins, *Rescripting Relationships*, *supra* note 2, at 437.

28. Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1414 (1999).

29. I do not mean to overstate or misstate the matter here; tort law does embody some public values such as financial cost-sharing concepts.

30. See, e.g., FREDERICK & LIZDAS, *supra* note 2, at 26, 29, 38 (using the terms "voice parity" and "truth-telling capacity"). Frederick and Lizdas also argue that restorative justice that encompasses face-to-face meetings between victim and offender might encourage confusion over responsibility for the violence and inadvertently suggest that the victim is somehow responsible for the violence. *Id.* at 29. This result is evidenced in Linda Mills's call for restorative justice because it in part incorporates the idea that women are partly to blame for the violence. See Mills, *supra* note 23. For a procedural critique of mediation, see Jennifer Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1273-79 (1994); Evelyn Zellerer, *Community-Based Justice and Violence Against Women: Issues of Gender and Race*, 20 INT'L J. COMP. & APPLIED CRIM. JUST. 233, 236 (1996).

31. See ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 94 (1994) (describing that women are beaten when they attempt to resist control or when they refuse to comply with a batterer's demands or expectations); accord FREDERICK & LIZDAS, *supra* note



equal or near-equal bargaining power between the parties.<sup>32</sup> The underlying power dynamic in domestic violence cases thus makes it inappropriate for mediation.

By contrast, many experts believe community conferencing comes the closest to achieving restorative justice ideals, addressing the power disparities often present in crimes of violence against women, and avoiding the trauma and other problems of traditional civil justice.<sup>33</sup> Community conferencing is a coming together of identified family and other supporters for the victim and offender in a professionally facilitated meeting to address the wrong done and the harm that resulted from that wrong – to all parties and their relationships with others – and to identify what the offender is going to do to make right the wrong.<sup>34</sup> Proper and complete preparation is key to a successful outcome of community conferencing, and this is even truer in the case of conferencing applied to violence against women, where underlying belief systems need to be challenged.

In the following Section, we outline key feminist concepts relevant to a restorative justice response to violence against women. In Section IV, we will then address the central concerns expressed by feminists about such an approach.

### III. FEMINIST THEORY AND CONCERNS ABOUT APPLYING RESTORATIVE JUSTICE TO VIOLENCE AGAINST WOMEN

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2, at 11, 26, 27; see also Evan Stark, *Re-Presenting Women Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 991-92 (1995) (discussing child and marital abuse throughout history, and the patriarchal structure that accompanies it). *But cf.* Deborah M. Hanrahan, *Gender and Spousal Violence: A Test of Social Control and Resource Theories*, at 90-96 (1996) (unpublished Ph.D. dissertation, Louisiana State University) (on file with author) (arguing that power/dominance theory alone does not explain domestic violence, but rather, the combination of power/dominance and social control theory provide a better and more complete account of intimate abuse). As to the ostensible willing acquiescence to this patriarchal structure, some feminist scholars question whether this kind of a choice reflects a true exercise of free will. See, e.g., Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 329-30 (1995) (stating that feminist women often question whether their own willing assimilation to the patriarchal structure makes their own oppression more or less likely).

32. *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1602-03 (1993); accord FREDERICK & LIZDAS, *supra* note 2, at 25, 26, 29.

33. Cavadino & Dignan, *supra* note 25, at 253.

34. Thomas J. Scheff, *Community Conferencing: Shame and Anger in Therapeutic Justice*, 67 REV. JUR. U.P.R. 97, 98 (1998). For a critique of the role of community in restorative justice for domestic violence, see FREDERICK & LIZDAS, *supra* note 2, at 25, 27, 29, 32 (noting that the relevant community in fact may not understand the dynamics of domestic violence, and might even engage in victim-blaming behavior and collusion with the offender).

Feminist theory comprises different, but overlapping, philosophical and political stances. Although there are several ways one might separate these strands, scholars often divide them into three categories: liberal, cultural, and radical feminism.<sup>35</sup> Liberal feminists, also referred to as “sameness” or “rule equality” feminists, argue that formal equal treatment of men and women will result in formal and functional equality between the sexes.<sup>36</sup> “‘Sameness feminists’ focus on the similarities between individual men and individual women [leads] them to advocate ‘gender-neutral’ categories that do not rely on gender stereotypes to differentiate between men and women.”<sup>37</sup> In the eyes of liberal feminists, the goals of law reform are laws and practices that respond to violence against women in the home in the same way that those laws and practices respond to stranger violence against men.

Cultural feminists, also referred to as “substantive equality” or “difference” feminists, disagree that alteration of formal rules will result in actual equality for women; equal treatment, they argue, disadvantages women because the baselines favor men.<sup>38</sup> Cultural feminists claim that traditional religious, economic, political, and judicial institutions are both masculinist by nature and masculinist in practice.<sup>39</sup> For instance, these institutions are masculinist *in nature* in that they are structured hierarchically rather than on a collaborative model.<sup>40</sup> For some feminists, such as Catharine MacKinnon, who is often referred to as a “dominance” feminist, these structural frameworks undergird as well as create men’s dominance over women.<sup>41</sup> For cultural feminists relying on Carol Gilligan’s work on women’s ethic of care, collaboration and interpersonal relationships are particularly valued by women;

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35. Barbara Ann White, *Feminist Foundations for the Law of Business: One Law and Economics Scholar’s Survey and (Re)View*, 10 UCLA WOMEN’S L.J. 39, 44 (1999); cf. Patricia Cain, *The Future of Feminist Legal Theory*, 11 WIS. WOMEN’S L.J. 367 (1997).

36. Maxine Eichner, *On Postmodern Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 32 (2001).

37. Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1, 2 (1985); but see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984); Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 837 (1989).

38. Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 27 (1998); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 811-12 (1983).

39. White, *supra* note 35, at 45.

40. *Id.* at 46.

41. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161-64 (1989) (claiming that her dominance theory *is* feminism, as opposed to one form or strand of feminist theory); Ertman, *supra* note 38, at 93 n.314.

whereas hierarchy is particularly embraced by men.<sup>42</sup> Most (but not all) cultural feminists today, however, claim not that women are in fact different from men but that certain traits and values are perceived as “feminine” or “female” or as “masculine” or “male” and that “male/masculine” traits are embraced by legal and other institutions, while “female/feminine” traits are devalued, marginalized, or even excluded by those institutions.<sup>43</sup> In this sense, for cultural feminists these institutions are masculinist *in practice* to the extent that the rules under which they function exclude women’s unique voice and lived experience; Robin West argues, for instance, that ostensibly neutral legal evidentiary rules do not accommodate women’s particular narrative method, thus yielding a crabbed account of any given woman’s experience.<sup>44</sup> From a cultural feminist perspective, then, recognition of women’s experiences and contributions promotes equality.<sup>45</sup>

To the extent that women’s experiences of intimate violence are thus only partially considered by a theoretically objectively neutral legal system, this formal system often fails in providing any redress, much less a feminist response.<sup>46</sup> The failure of the system, in turn, may bolster the notion that physical intimate violence against women is not a serious crime. A victim-centered restorative justice response that not only incorporates a survivor’s full experience, but also holds an offender accountable to her and their relevant community may yield the opposite outcome. In addition, insofar as cultural feminism insists on the importance of human interconnectedness and relationships, a justice system response would be feminist if it emphasizes the damage that sexual or physical violence causes to relationships rather than only recognizing the wrong done to the abstract state. Restorative justice takes exactly this approach.

Contemporary radical feminist scholars, also referred to as “postmodern” feminists, seek to eradicate inequality by undermining the existing binary construct of male and female that have the effect of subordinating women to men.<sup>47</sup> Postmodern feminists thus advocate a complete restructuring of what society understands as available gender roles.<sup>48</sup> To the extent that intimate violence towards women arises out of and relies upon polarized gendered roles of maleness and femaleness, breaking down those constructs – the argument

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42. CAROL GILLIGAN, IN A DIFFERENT VOICE 163-64 (1982); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 50 (1988).

43. West, *supra* note 42, at 13.

44. *Id.* at 18.

45. Ertman, *supra* note 38, at 27; West, *supra* note 42, at 2-3.

46. Cain, *supra* note 35, at 367.

47. *See generally* Eichner, *supra* note 36.

48. Ertman, *supra* note 38, at 27.

goes – may result in reductions of men’s physical assaults on women.<sup>49</sup> In a more general sense, however, restorative justice maps onto the postmodern drive to break down categories. That is, by providing for a particularized response to a crime of intimate violence, restorative justice insists that survivors and responsible parties be viewed as something other than predetermined caricatures of victim and offender.

As demonstrated by the foregoing discussion, feminism embraces multiple perspectives and theories, such that the appropriate term is not the singular but the plural: “feminisms.”<sup>50</sup> Despite these various strands, a few precepts tend to thread through them. First, each theory – with the exception of a narrow strand of “difference feminism” that holds fast to pure biological determinism – incorporates the understanding that gender is socially, historically, and culturally constructed.<sup>51</sup> Thus, gendered harm such as physical or sexual violence against women is similarly socially, historically, and culturally constructed. Second, social life and institutions are inextricable from gender and gender relations.<sup>52</sup> That is, not only do gendered social systems support rape and domestic violence, so also do legal institutions’ failure to implement effective remedies create and support that belief system.<sup>53</sup> Third, social and institutional structures are grounded on notions of men’s superiority over women; in this vein, violence against women often (although not always) represents the perpetrator’s belief about male dominance and female subordination.<sup>54</sup>

Fourth, descriptions of and responses to social and legal constructs, institutions, and practices must be grounded in women’s lived experiences.<sup>55</sup> Thus, a feminist response to intimate violence against women must take account of, and where possible, map onto survivors’ expressed preferences for

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49. Eichner, *supra* note 36, at 76.

50. See Kathleen Daly & Meda Chesney-Lind, *Feminism and Criminology*, 5 JUST. Q. 497, 501-02 (1988); Susan Ayers, *Incest in a Thousand Acres: Cheap Trick or Feminist Re-vision*, 11 TEX. J. WOMEN & L. 131, 134-35 (2001).

51. Daly & Chesney-Lind, *supra* note 50, at 501.

52. *Id.* at 504.

53. Braithwaite & Daly, *supra* note 25, at 166-67; cf. FREDERICK & LIZDAS, *supra* note 2, at 34 (noting that the criminal justice system’s message that violence is intolerable is not overt in most domestic violence cases, and even less so with respect to non-criminal but otherwise controlling or intimidating behavior on the part of the batterer).

54. Daly & Chesney-Lind, *supra* note 50, at 499-500; Braithwaite & Daly, *supra* note 25, at 172-73; accord FREDERICK & LIZDAS, *supra* note 2, at 23-24.

55. Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1630 (1991); Julie Stubbs, *Domestic Violence and Women’s Safety*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 25, at 47-48.

redress.<sup>56</sup> Further, however, most feminist theorists understand that women's *lived experiences* are not monolithic and universal, but culturally diverse, highly contextual, and socially constructed.<sup>57</sup> This insight triggers two additional considerations. First, a feminist response to the experience of intimate violence accommodates this variety by providing multiple options for survivors, rather than one single cookie-cutter response. Second, however, this "positionality" – that is, that any individual woman's experience is always and already contingent and constructed – suggests that although experience remains an important and a "useful . . . basis for knowledge, [it must be] coupled with the insight that the knowledge thus obtained is limited by context."<sup>58</sup> For purposes of constructing a feminist response to intimate violence against women, this means that an individual victim's preference may diverge from what, in the abstract, might be thought of as a "true" feminist response, one which accounts for the larger systemic and institutional history and practice of male physical dominance over women.<sup>59</sup> Whether a response to intimate violence might nonetheless be able to address both the individual preferences of women and the larger systemic issues is no small matter, but this is an unavoidable tension once we insist that women's voices and preferences matter.

#### IV. PARTICULAR FEMINIST CONCERNS ABOUT RESTORATIVE JUSTICE RESPONSES TO VIOLENCE AGAINST WOMEN

Although restorative justice is now used widely and with some success with juveniles, including juvenile sex offenders,<sup>60</sup> experience with restorative

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56. Cain, *supra* note 35, at 367; accord FREDERICK & LIZDAS, *supra* note 2, at 30, 33; but cf. *id.* at 33 (arguing that battered women's autonomy and choice to enter a restorative justice program are not straightforward since fear of reprisal should she not participate may drive her to "choose" to participate).

57. Nan Seuffert, *Lawyering and Domestic Violence: Feminist Integration of Experiences, Theories and Practice*, in WOMEN, MALE VIOLENCE AND THE LAW 80 (Julie Stubbs ed., 1994).

58. *Id.* at 81.

59. Stubbs, *supra* note 55, at 60. For a discussion of the need to address the larger systemic issues of gender, race, and cultural oppression at work in domestic violence, see FREDERICK & LIZDAS, *supra* note 2, at 23-24, 34, 37-38. In some contexts, a victim's expressed preference may not only be mediated and formed through cultural influence, but also may be compromised or constrained by immediate circumstances. Stubbs, *supra* note 55, at 44. For instance, a victim of domestic violence may feel her choices are limited because of the potential future violence from her abuser; in addition, if she has children with her abuser, her connection to those children may further limit her full atomistic agency. *Id.* Accord FREDERICK & LIZDAS, *supra* note 2, at 33.

60. FREDERICK & LIZDAS, *supra* note 2, at 6; see generally Mary Koss, Karen Bachar, & C. Quince Hopkins, *Disposition and Treatment of Juvenile Sex Offenders from the Perspective of*

justice in response to violence against adult women is limited.<sup>61</sup> As when moving into any new area of research where lives may be at stake, it is important to maintain a balance between the hope of success and prudence in applying restorative justice to new areas. One must at all times be mindful of the potential risk of harm to participants.<sup>62</sup> Some feminist scholars have raised important questions about the wisdom of using of restorative justice in response to gendered violence. The majority of these concerns center on whether restorative justice is an effective and safe response to violence against women.<sup>63</sup> Whether it is in fact safe or effective is, of course, an empirical question.<sup>64</sup> In her careful study of Navajo Peacemaker courts' handling of domestic violence cases, Donna Coker identifies the coerced attendance of battered women coupled with the lack of safety screening as problematic aspects of that program. After arguing that a peacemaking program could be modified to correct these problems, Coker then rightly notes that with such a modified program we may still ultimately find that the potential benefits of restorative justice exist only in theory, but not in practice.<sup>65</sup> The same is true for the potential detriments of restorative justice for intimate violence: whether the detriments will be borne out in practice must be evaluated empirically,

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*Restorative Justice*, in HANDBOOK ON THE TREATMENT OF JUVENILE SEXUAL OFFENDERS (Howard Barbaree ed. (publication forthcoming 2004)); Koss et al., *supra* note 24, at 322-29.

61. Compare the work of Donna Coker discussing Navajo Peacemaking for cases of family violence in Coker, *supra* note 11, at 1. Coker's evaluation of the Navajo Peacemaker courts does not address whether or not these programs are effective in reducing battering. She thus urges caution in moving forward until that empirical evidence has been established.

62. See John Braithwaite & Heather Strang, *Restorative Justice and Family Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 25, at 1; cf. FREDERICK & LIZDAS, *supra* note 2, at 40 (arguing that restorative justice for domestic violence cases should, at a minimum, "do no harm" to victims).

63. See, e.g., Hudson, *supra* note 25, at 242; Stubbs, *supra* note 55, at 56-58; Coker, *supra* note 11, at 114-15 (categorizing feminist concerns about informal adjudication for battered women into four types: "the coercion problem, the cheap-justice problem, the normative problem, and the communitarian/social-change problem"); see generally FREDERICK & LIZDAS, *supra* note 2.

64. Braithwaite & Strang, *supra* note 62, at 1-2; cf. FREDERICK & LIZDAS, *supra* note 2, at 32 (inaccurately noting that because of flaws in restorative justice practice, the utility of restorative justice has not yet been tested). Others who have studied restorative justice in indigenous contexts similarly question whether restorative justice will work in all cultural contexts. See Coker, *supra* note 11, at 107-111. Further, whether restorative justice will undercut or bolster class, race, gender, and other oppressions also must be carefully watched. Stubbs, *supra* note 55, at 48, 56.

65. Coker, *supra* note 11, at 77-80, 103-07, 111 (discussing the problem of coerced participation and absence of safety screening, advocating for corrections of these problems, and pointing out that the benefits may not be realized in practice). Peacemaking and sentencing circles are two justice interventions employed by First Nations in the United States and Canada. These approaches are versions of restorative justice. *Id.* at 3-4.

something Coker does not purport to undertake. Cognizant of Coker's caution, however, in undertaking such a project, it is critical that restorative justice's foray into the new territory of violence against women takes these concerns seriously. Such a foray must be guided by these caveats in choosing those types of cases that pose the lowest potential risks to participants and the format for responding to them.

In developing our own research on restorative justice for sex offenses between acquaintances, funded by a \$1.5 million dollar grant from the Centers for Disease Control, we placed these concerns front and center. In developing our pilot research demonstration project, entitled RESTORE, we specifically chose to focus on a very narrow class of cases which posed the least risk of harm to participants and the highest possible success rate. We have explained the structure of this program and its theoretical grounding at length elsewhere.<sup>66</sup> In brief, we specifically chose to address sexual assaults between acquaintances, rather than cases of physical violence between intimates. We chose to do so precisely because many of the concerns about restorative justice for violence against women, discussed at length below, are less applicable to acquaintance sexual assault. We discuss these distinctions at length in another article but note here just one illustrative distinction.<sup>67</sup> Two of the feminist concerns, discussed below, are that restorative justice will give an offender an opportunity to engage in further violence and to psychologically abuse and manipulate the survivor. In the narrow class of cases eligible for RESTORE – most notably, only cases where the offense was not part of an ongoing pattern of ongoing domestic violence – there is a reduced likelihood of deep emotional, economic, and psychological enmeshment between the parties. Where the parties' interaction with each other is thus less intertwined, the opportunity for the offender to engage in further physical violence or psychological control of the survivor is significantly reduced.<sup>68</sup> It was our conclusion, therefore, that in moving forward with an as yet untested application of restorative justice – that is, its application to gendered violence generally — sexual assault between acquaintances was a “safer” test venue than was ongoing physical violence between intimates.<sup>69</sup>

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66. See Koss, *supra* note 11; Koss et al., *supra* note 24; Mary P. Koss, Karen J. Bachar & C. Quince Hopkins, *Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable*, 989 ANNALS N.Y. ACAD. SCI. 384 (2003).

67. See C. Quince Hopkins, Mary P. Koss & Karen J. Bachar, *Incorporating Feminist Theory Into a Restorative Justice Response to Sex Offenses*, 10 VIOLENCE AGAINST WOMEN (forthcoming 2004) (on file with author).

68. *Id.*

69. *Id.* For a careful presentation of the argument that restorative justice will not necessarily account for the possibility of future violence in cases of domestic violence and urging that

Joan Pennel and Gale Burford's work, discussed in Section V, by contrast, applies restorative justice to cases of family violence. Similarly, however, their approach also takes seriously the feminist concerns about using restorative justice for violence against women and proceeds cautiously in implementing such a program for domestic violence. Pennel and Burford's research is yielding preliminary evidence of being more effective than traditional justice for intimate violence.

The specific feminist concerns raised about restorative justice in connection with family violence are the following. First, and primarily, if one chooses to address cases of intimate violence where the violence has occurred on more than one occasion already, the face-to-face concept of community conferencing simply creates an opportunity for further acts of violence against the victim.<sup>70</sup> Second, even if the violence has occurred just one time, the face-to-face approach may either intentionally or unintentionally pressure the victim into returning to a potentially dangerous relationship.<sup>71</sup> Third, the psychological impact on victims from ongoing domestic violence may negatively affect her ability to present and protect her interests and wishes during the course of the community conference.<sup>72</sup> Fourth, the power and control dynamics in many domestic violence cases mean that the process of conferencing will yield poor results for victims unable to hold their own in the face-to-face meeting.<sup>73</sup> In addition, not only might fear constrain a victim's full agency, her connection to her children may compromise her otherwise more free choice, as might economic and other enmeshment between the victim and perpetrator.<sup>74</sup> Fifth, to the extent that restorative justice relies on a component of therapeutic intervention with perpetrators, there is only moderate evidence that batterer's treatment is at all effective: this evidence can be found in very high quality programs and only where an offender actually completes the program – a mere 10% of all program participants. Assessment of these programs reveals that treated and non-treated abusers were not significantly different in their future rates of re-offending nor were there differences in the frequency of severe violence or threats of violence.<sup>75</sup> If such treatment is only

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domestic violence cases be screened out of restorative justice programs unless the program is carefully structured, see FREDERICK & LIZDAS, *supra* note 2, at 26, 29, 30.

70. Stubbs, *supra* note 55, at 57.

71. *Id.* at 59-60.

72. *Id.* at 56.

73. *Id.* at 57; FREDERICK & LIZDAS, *supra* note 2, at 11, 26, 27.

74. Stubbs, *supra* note 5 at 44.

75. Daly, *supra* note 25, at 68-69; Adele Harrell, *The Impact of Court-Ordered Treatment for Domestic Violence Offenders*, in LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS, NCJ171666, at 73-74 (A.B.A. & U.S. Dep't of Just. eds.



moderately effective, the argument goes, why should we embrace an approach to intimate violence that relies upon what is only a moderately effective intervention? Sixth, to the extent apology might be important to restorative justice concepts, a debatable question,<sup>76</sup> the use of apology in cases of domestic violence is often coercive rather than healing.<sup>77</sup> An approach to intimate violence that facilitates or encourages apology as an element of restitution (in the colloquial, rather than legal sense of that term) may be ineffective or harmful at worst. Seventh and finally, a restorative justice response to intimate violence against women violates the central tenet of liberal feminism that crimes of interpersonal violence against women receive the same treatment as crimes of interpersonal violence against men.<sup>78</sup> That is, if incarceration and fines are the norm for male on male violence, then taking incarceration and fines off the table constitutes justice “lite” for female victims of male violence.<sup>79</sup>

These concerns have merit and thus cannot and should not be ignored. However, a restorative justice response that is designed with feminist concepts in mind, and that responds to those concerns to the extent possible, is worth considering if early evaluations of its acceptability to participants, safety, and effectiveness in reducing repeat offending are reproducible. The following section describes the preliminary evidence.

#### V. EVIDENCE THAT RESTORATIVE JUSTICE IS SUCCEEDING WHERE TRADITIONAL PRO-PROSECUTION APPROACHES HAVE NOT

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2000). On the extent to which batterer’s programs are effective, see also R. EMERSON DOBASH ET AL., CHANGING VIOLENT MEN 69-88, 107-145 (2000).

76. See, e.g., Coker, *supra* note 11, at 15. Researchers have studied the occurrence of apologies in community conferences and other restorative justice responses and have compared the outcomes of those cases with those where apology does not take place. Whether or not apology in fact is an inherent component of a restorative justice response, however, is as yet undertheorized in the literature. For one analysis on the impact of the apology in the criminal justice system, see Carrie Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. L. 337 (2002).

77. Stubbs, *supra* note 55, at 58-60. Donna Coker describes this particular problem of overvaluing apologies in the context of battering. See Coker, *supra* note 11, at 85-88. The same argument can be made with respect to the often concurrently discussed phenomenon of forgiveness. See, e.g., FREDERICK & LIZDAS, *supra* note 2, at 39.

78. See *supra* notes 35-37 and accompanying text.

79. If, however, violence between intimates causes a unique harm, it might thus warrant a particularized remedy that addresses that harm. In this sense, then, restorative justice would not be treating similar crimes differently, but treating different crimes differently. A victim-centered restorative justice response that yields reduced trauma to victims than traditional criminal justice, responds to victims’ express preferences, and fashions redress in accordance with those preferences could thus be consistent with liberal feminism.

Given the foregoing criticisms and concerns about applying restorative justice to adult-to-adult family violence, and particularly the concern that victimized women may be pressured into forgiving and reconciling with their violent partners, it is not surprising that researchers have shied away from testing those concerns.<sup>80</sup> As a result, there is little empirical evidence *either* supporting *or* rebutting them. In addition to Donna Coker's study of Navajo Peacemaking discussed above, Joan Pennell and Gale Burford's innovative work in Canada and Pennell's continuing work in the United States provides a notable exception to this dearth of hard data on using restorative justice methods for adult domestic violence.<sup>81</sup>

The discussion below focuses on Pennell and her colleagues' work for a number of reasons. First, Pennell and her colleagues' work has not yet been discussed thoroughly in the legal literature. Second and more substantively, Pennell's empirical research provides data on non-indigenous as well as indigenous groups' use of restorative justice that adds to, and complements, Coker's earlier study that focused exclusively on restorative justice within an indigenous justice system. Third, the programs Pennell and her colleagues describe, and thus their scholarship itself, benefit from the fact that the programs were designed as research-based programs from the outset. Several inter-related benefits arise from this inter-linking of program development and research. For instance, Pennell and her colleagues were able to establish comparison groups so that the effectiveness of their programs could (and can) be carefully measured and evaluated. In addition, Pennell and her colleagues' scholarship describes programs and program development from the outset of those programs onward thus providing us with a ground up view of the theoretical and practical undergirding of their programs followed by data on their implementation and effectiveness. Finally, Pennell and her colleagues intentionally and methodically consulted with domestic violence advocates in the development of their research programs. In so doing, they attempted to incorporate program-design elements that address some of the feminist

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80. See Joan Pennell & Gale Burford, *Feminist Praxis: Making Family Group Conferencing Work*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 25, at 108-09 [hereinafter *Feminist Praxis*] (noting that feminists approach with caution new approaches to family violence that involve bringing perpetrators and victims together).

81. See *generally id.* Notably, however, Pennell and Burford's innovative use of restorative justice for cases of adult domestic violence came about inadvertently rather than by design. The initial Canadian project aimed solely at cases of child abuse, neglect, and "youth unmanageability," but adult domestic violence soon became an equal focus of research, as described below. *Id.* at 110 (describing how the initial focus of the Family Group Decision Making Project was on child abuse, neglect, and delinquency, but that evidence of adult domestic violence quickly emerged as a prevalent co-occurring phenomenon in the families referred to the Project). Coker's work is discussed in Part IV, *supra*.

concerns about restorative justice that Coker and others so eloquently identify. Their work thus represents the next stage in the development of a feminist-defined restorative justice response to violence against women.

A. *Canadian Family Group Decision Making Project*

In the early-1990s Pennell and Burford developed and implemented the Family Group Decision Making Project in Canada (“FGDMP” or the “Canadian Project”),<sup>82</sup> a quasi-experimental program that employed the form of restorative justice known as family group conferencing (“FGC”) initially directed at cases of child abuse, neglect, and dependency.<sup>83</sup> In the early stages of the Project, however, it quickly became apparent that adult domestic violence was a prevalent co-occurring event in the cases referred to the Project, occurring in twenty-one of the thirty-two families referred.<sup>84</sup> Pennell and Burford embraced this development and incorporated into the FGDMP the adult family violence they uncovered.<sup>85</sup> They ultimately concluded that failure to address the co-occurrence of child and spouse abuse shortchanged

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82. Joan Pennell & Marie Weil, *Initiating Conferencing: Community Practice Issues*, in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 253, 255-57 (Gale Burford & Joe Hudson eds., 2000) [hereinafter *Initiating Conferencing*] (noting the early 1990s as the beginnings of the Family Group Decision Making Project, and the dearth of empirical data on the effectiveness of conferencing at that point in time). “The term ‘family group decision making’ was coined to emphasize that the family group, made up of the immediate family and its relatives, friends, and other close supports, would decide what steps needed to be taken to stop the maltreatment.” Joan Pennell & Gale Burford, *Family Group Decision Making: Protection Children and Women*, 79 CHILD WELFARE 131, 137 (2000) [hereinafter *Family Group Decision Making*].

83. *Feminist Praxis*, *supra* note 80, at 118.

84. *Id.* at 110; *see also Family Group Decision Making*, *supra* note 82, at 148. This finding mirrors others’ research into the co-occurrence of adult domestic violence and child abuse. *Feminist Praxis*, *supra* note 80, at 114 (citing Jeffrey Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134 (1999); PETER JAFFE, DAVID WOLFE, & SUSAN WILSON, CHILDREN OF BATTERED WOMEN (1990); MURRAY STRAUS & RICHARD GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES (1990); Susan Ross, *Risk of Physical Abuse to Children of Spouse-Abusing Parents*, 20 CHILD ABUSE AND NEGLECT 589 (1996)).

85. *See Family Group Decision Making*, *supra* note 82, at 137 (“From the outset, child welfare services, women’s groups, police, parole officers, youth advocates, and others developed a consensual statement of philosophy that stressed that everyone within a family should be safe from abuse, no one in a family was safe if others were being victimized.”). Pennell and Burford have elaborated on the importance of addressing child abuse and adult abuse jointly rather than as discrete phenomena in this same article. *Id.* at 133-36.

families.<sup>86</sup> Pennell and Burford's holistic intervention yielded marked reductions in both child and spouse abuse.<sup>87</sup>

The Canadian Project conducted family group conferences with thirty-two families over the course of a one year implementation period, coupled with a one to two-year follow-up period.<sup>88</sup> The Project requested that the most difficult cases be referred to the FGDMP.<sup>89</sup> Pennell and Burford also established a comparison group, consisting of another set of families who did not go through FGCs.<sup>90</sup> The families were distributed roughly evenly between three different implementation locales.<sup>91</sup>

Upon referral to the Canadian Project, family members engaged in extensive pre-conferencing work with conference coordinators, continuing over a period of weeks, to guarantee that all participants were prepared and that safety of participants was ensured.<sup>92</sup> The conference consisted of three basic phases. First, the coordinator and other professionals outlined the ground rules and the factual basis for referring the family to the Project in the first place.<sup>93</sup> Second, professional outlines provided background material on the problems identified and social and therapeutic services available to address them. Third, the family group was left alone to deliberate and develop a plan to address the identified problems.<sup>94</sup> Fourth, the professionals reviewed the plan developed by the family to ensure that it addressed all issues of concern and, further, that it included adequate monitoring provisions.<sup>95</sup> Once approved, the plan was then implemented. Plans typically included expected components such as mental health and substance abuse services and material assistance from government agencies, but often also included plans for recreation and leisure events with family members.<sup>96</sup> This latter component, when it was included, may have helped in promoting family unity, which

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86. *See id.* at 134.

87. *Id.* at 143-51; *see also infra* notes 98-109 and accompanying text (discussing the project results).

88. *Family Group Decision Making*, *supra* note 82, at 138; *Feminist Praxis*, *supra* note 80, at 110.

89. *Feminist Praxis*, *supra* note 80, at 110.

90. *Id.*

91. *Family Group Decision Making*, *supra* note 82, at 138. The three locales were Nain, Port au Port Peninsula, and St. John's. *Id.* *See also infra* notes 113-17 and accompanying text (discussing the diversity of populations residing in these three locations).

92. *Family Group Decision Making*, *supra* note 82, at 139-40.

93. *Id.* at 140.

94. *Id.*

95. *Id.*

96. *Id.* at 141.

Pennell and Burford identified as important to the reduction of family violence.<sup>97</sup>

The results of the Canadian Project were encouraging and provide some evidence of an intervention program that is effective in reducing family violence. The results of the Project also provided welcome answers to some of the concerns posed by feminists and victim advocates about the application of restorative justice to family violence. First, the concern that batterers would use the conference as an opportunity to further abuse their partners was not borne out: in none of the conferences was any violence reported.<sup>98</sup> This is particularly striking given that the families were left alone to work on the issues presented without the oversight of service providers or the conference coordinator.<sup>99</sup>

Second, and more importantly, significant actual reductions in post-conference partner and child abuse were demonstrated.<sup>100</sup> These reductions in family violence were in direct contrast with the comparison group, in which *increased* incidents of violence during the study period were noted.<sup>101</sup> The families referred for FGC presented more incidents of violence (233 events) prior to entering the Canadian Project than did the comparison families (129 events).<sup>102</sup> By the conclusion of the Canadian Project, violent events within the study families were not eliminated, but were cut almost in half (117 events);<sup>103</sup> by contrast, violent events in the comparison group families rose (165 events).<sup>104</sup> This finding provides important evidence of the effectiveness of restorative justice in reducing the prevalence of family violence.

Third, the study measured some of the controlling behaviors by batterers that feminist advocates are concerned would not be accounted for, much less reduced by restorative justice methods, and found marked reductions in all behaviors studied.<sup>105</sup> For instance, the study measured family functioning including offender's domination of conversation, resistance to her meeting with program personnel without his being present, and control of economic resources. In each of these categories, interviews with the participants in the study group revealed significant improvement: during the average one-year follow up period, domination of the conversation reduced from four to two incidents pre- versus post-conferencing, and control of economic resources

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97. *Family Group Decision Making*, *supra* note 82, 144-45.

98. *Id.* at 140.

99. *Id.* at 140.

100. *Id.* at 145-50.

101. *Id.* at 145-47.

102. *Family Group Decision Making*, *supra* note 82, at 145-47.

103. *Id.* at 145.

104. *Id.* at 147.

105. *Id.* at 146, 149-50.

reduced from four to zero incidents.<sup>106</sup> By contrast, the comparison group saw little to no improvement, and, in some instances, evidenced a worsening: control of discussion stayed constant at two incidents pre- and post-study, whereas control of economic resources increased from three to four incidents pre- versus post-study.<sup>107</sup> Emotional abuse – unrecognized by traditional criminal justice response – saw similar reductions in the study families and increases in the comparison families. Men in the study families belittled their partner (describing her as stupid, crazy, incompetent, and so on) in five incidents pre-study versus three times post-study and were otherwise overly solicitous and condescending to them in four incidents pre- versus two incidents post-study.<sup>108</sup> The comparison group numbers again demonstrate the reverse trend: no incidents of belittling were indicated pre-study; whereas one incident was noted post-study period, and rates of condescension stayed level at three incidents throughout.<sup>109</sup> The study also measured batterer's minimization of his violence, transference of responsibility for the violence to the victim, and/or refusal to accept responsibility for it. As with the prior non-physical abuse measures, study families saw a reduction from eight to three incidents, pre- versus post-study, whereas the comparison group saw an increase from four to six incidents.<sup>110</sup> Finally, feminist concerns that restorative justice would fail to account for, respond to, or change underlying patriarchal belief systems proved unfounded. The Project tested for offenders' "rigid" adherence to traditional sex roles, including "expecting or demanding that [his partner] serve him."<sup>111</sup> While these beliefs reduced from three to one in the study families pre- versus post-study, these sexist and gendered notions of male/female relationships remained constant at five in the control group.<sup>112</sup> All of these findings from the Canadian Project begin to give us some answers to feminist concerns about using restorative justice in response to gendered violence. Those answers uniformly point to the benefits of such an approach and provide evidence that those concerns, while conceptually well-founded, are empirically not supported.

*B. Applicability of Family Group Conferencing with Culturally and Regionally Diverse Populations*

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106. *Id.* at 141-42, 146.

107. *Family Group Decision Making*, *supra* note 82, at 146.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* For a cogent presentation of the feminist concern that restorative justice would leave a batterer's belief system intact, see FREDERICK & LIZDAS, *supra* note 2, at 25-26.

112. *Family Group Decision Making*, *supra* note 82, at 146.

In addition to the foregoing concerns about applying restorative justice to gendered violence, at least one commentator has questioned whether restorative justice methods, originally the province of indigenous peoples, would ultimately prove feasible or effective in non-indigenous contexts.<sup>113</sup> Pennell and Burford's Canadian study provides at least a preliminary answer to that question. In the Canadian Family Group Decision Making Project, Pennell and Burford deployed the Project in three culturally and regionally diverse locales in the Canadian province of Newfoundland & Labrador: an Inuit community located on the coast of Labrador, a rural area consisting of a mix of British, French, and Micmac populations, and an urban setting, the capital of the province consisting primarily of residents of Irish and British derivation.<sup>114</sup> Upon completion of the Canadian Project, Pennell joined forces with Marie Weil in developing a United States-based family group conferencing program, the North Carolina Family Group Conferencing Project ("NCFGCP"). The NCFGCP sought to mainstream the Canadian Projects' approach but again included diverse groups within its purview.<sup>115</sup> Early analysis of the North Carolina program indicates that it yields similarly positive outcomes.<sup>116</sup> The diversity of populations included in the Canadian and U.S. studies suggests that FGC can be used with good effect in various cultural and regional milieus.<sup>117</sup>

## VI. CONCLUSION

The foregoing discussion proposes that we listen to the voices of victims of domestic violence and that we honor those voices in true feminist fashion, by crafting responses to the violence they suffer that mirror the remedies victims request. Further, the failure of three decades of legal reform to change prevalence rates in any significant way suggests that we need to explore alternative, even risky, approaches to the problem of intimate violence. The preliminary evidence from restorative justice programs that address family violence demonstrate that it may be more effective than all of the heavier handed pro-incarceration efforts to which feminists in the United States have been directing their efforts.

But what might we sacrifice if we focus on an individualized response tailored to the needs of particular victims? We are faced with the question of

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113. Coker, *supra* note 11, at 107-08.

114. *Family Group Decision Making*, *supra* note 82, at 138.

115. *Initiating Conferencing*, *supra* note 82, at 255-57; *Feminist Praxis*, *supra* note 80, at 115.

116. *Feminist Praxis*, *supra* note 80, at 115; Joan Pennell & Stephanie Francis, *Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard Women and Children*, 10 VIOLENCE AGAINST WOMEN (forthcoming 2004) (on file with author).

117. *Feminist Praxis*, *supra* note 80, at 109.

whether the infliction and/or resultant harm of intimate assault is merely the expression and result of local rage of an individual towards a particular victim for a set of relationship-specific reasons, or whether it is group-based with some broader cause or effect. We risk reverting to a focus on the relationship rather than the violence. We miss the impact of intimate violence on women as a group, not just in terms of its disparate impact on women, but also how it more subtly serves to perpetuate patriarchal notions of men's dominance over women.<sup>118</sup> We risk losing the expressive function of law in combating domestic violence and thereby potentially neglect the transformative power of law to change social norms rather than individual behavior. Thus, 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. In our own work on sexual assault, for example, we decided to issue quarterly press releases in which the functioning of the program, general types of cases received, and actions taken are communicated to the citizenry. In addition, we aim to emphasize empowering the program's community oversight board, not just to respond to individuals, but to take a lead in energizing the community's social change agenda when they see certain patterns of rape that are re-occurring such as alcohol related rape. We continue to seek out new and better ways to expand the transformative potential of RESTORE to alter prevailing social norms that undergird violence against women.

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118. See generally E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexual" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56 (1997). The idea that battering one's intimate partner is an act of sexism or a projection of discriminatory animus toward the larger group might seem, at first glance, to be in conflict with the traditional idea of intimate relationships, where there is a presumption of liking. See Hopkins, *Rescripting Relationships*, *supra* note 2, at 465. In contrast to cases of racist violence, most batterers and victims of intimate assault, would not say the assault was committed because of the victim's gender. *Id.* Putting aside whether batterers would acknowledge the gender motivation for their violence, domestic violence victims would find extremely odd the idea that, "he beat her because she was a woman." *Id.* at 466. A punch is also gender (and race or sexual orientation) neutral. Without the surrounding context, the violence cannot easily be seen as discriminatory and can more easily be understood as the product of a single bad agent acting out violently for localized, individual reasons. *Id.* The violence can be seen as a statement that the perpetrator is more dominant than the victim, both physically and socially: "I beat you because I am bigger than you (perhaps because I am male and you are female)," or "I beat you because I am allowed to beat you because it is my privilege as a man to beat my woman." *Id.* As discussed above, many feminist advocates for victims put forward this combined sense of entitlement, rooted in patriarchal ideas. Violence is clearly oppressive. *Id.* at 467. In combination with a theory of entitlement that violence in an otherwise sexist world suggests, perhaps this may be sufficient for one to infer that it is gender discrimination, and thus more appropriate for expressive and symbolic civil justice rather than individualized response. *Id.*



These are not small concerns, however, and not subject to an easy fix. They also are not as subject to empirical test as is effectiveness in individual cases, or even effectiveness in reducing overall prevalence rates. On the other hand, to the extent that the harm at issue affects women as a group rather than individually, intimate violence differs from stranger assault, which requires that women be careful about where they walk, and when, and how, and with whom. In this way, the sexual assault or rape of one woman serves to put all women in fear of a similar assault.<sup>119</sup> This same systemic or political concern is not so clear in the case of intimate violence, but it is nonetheless present. Because of that, we need to move slowly and cautiously in applying new methods like restorative justice to intimate violence against women, despite its great promise. We have to cautiously apply new methods and carefully evaluate them so that we are aware of the impacts of our work both positive and negative. The scholarly debate cannot move much further forward without implementation and empirical evaluation to provide new evidence to move the dialogue forward. Our research in the RESTORE program, where we are using restorative justice for a narrow class of sexual crimes, employs just such an incremental approach to developing empirical data to guide future theorizing and practice.

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119. MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 2-3 (1988).

