



The Role of Restorative Justice in the Battered Women's Movement

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I. INTRODUCTION

The year is 1971. Police are summoned to a home where a domestic assault incident is alleged to have occurred. It is apparent that the male resident has just hit his wife in the face, causing her a bloody nose and a cut lip. Following instructions received at the police academy and from their superiors, the officers ask the woman whether she wants her husband arrested. When she declines, the officers sit down with the couple to mediate the dispute and then ask the man to agree to spend the night somewhere else. No charges are ever filed.

The year is 1981. Police are summoned to a similar incident. They interview both parties separately and upon establishing probable cause to believe that a crime was committed, arrest the husband and give the wife referrals to the new local battered woman's shelter. Charges are dropped at the request of the wife.

The year is 1991. Police respond to a similar call and after conducting a thorough investigation, including taking photographs and recording the victim-wife's excited utterances to the effect that it was her husband who had just inflicted upon her the bruises and abrasions on her face, arrest the husband. The prosecutor ignores the wife's pleas that she dismiss the case, takes the matter to trial without using her as a witness and obtains a conviction. The sentence consists of a thirty day jail term, which is suspended on condition that the defendant complete a twenty-four session batterer's intervention program while he is on probation. A subsequent violation of the terms of probation causes the husband to serve 15 days in jail.

The year is 2001. When police arrive at a similar scene, they do a thorough investigation and, finding probable cause, arrest the husband. Before the pre-trial hearing, the prosecutor determines the matter is appropriate for restorative justice treatment, and refers the man to a group which holds a meeting involving the husband, the wife, an advocate from the local shelter, the husband's brother and best friend, and five other people who live in the same city as the couple. The husband tells the group that he did hit his wife and the wife tells the husband that she wants him to stop being abusive, calling her names and trying to control her life. The community members tell the couple how much it hurts the whole community when someone hurts a family member. The group, including the husband and wife, decides that the husband will attend batterer's intervention services classes for 24 weeks, will be more respectful of his wife when they have disagreements, and that he will also check in with one of the community members each week to report on his progress.

These scenarios illustrate the approaches sometimes taken by the criminal justice system over the past 25 years in response to the crime of domestic violence. The first three cases represent various stages in the evolution of the criminal law as it has been applied to domestic violence incidents and as advocated by battered women's advocates. However, the last case represents a very different approach, which has arisen from the restorative justice movement. While the battered women's movement has turned to the traditional criminal justice system to

affect community norms related specifically to domestic violence, restorative justice has evolved as an alternative approach to crime generally.

Even as criminal justice system reform efforts comprise a large proportion of the work of domestic violence activists, many voices within the battered women's movement argue that the traditional criminal justice system is too limited in providing safety to battered women and children and has even resulted in disaster for battered women whose partners lost jobs or were deported because of convictions. Meanwhile, proponents of restorative justice propose that restorative justice might be effectively applied in domestic violence cases.

While popular sentiment in the U.S. continues to favor more aggressive law enforcement and ever-harsher penalties for criminal offenders generally,¹ pockets of retribution-worn community members are piloting alternative programs. These are directed at treating criminal acts as fissures in a community, calling for the community members themselves to play a role in healing these fissures, rather than as individual acts of deviance subject to castigation. These emerging practices fall under the rubric of "restorative justice." Restorative justice encompasses a broad spectrum of activities and programs designed as responses to crime that are alternatives to the approaches of the criminal justice system. "Restorative justice is a problem-solving approach to crime, which involves the parties themselves, and the community generally, in an active relationship with statutory agencies."²

Beginning in the decade prior to the emergence of the restorative justice movement, battered women and their advocates coalesced to form what proved to be a growing campaign to stop domestic violence. Advocates had identified a specific form of violence that occurs in the intimate partner setting. Most intimate relationship violence by men against women is committed in the context of the offender's use of power and control tactics including intimidation and threats.³ While most of the new "battered women's movement" activities involved the provision of support, advocacy and safe housing to battered women, a predominant theme of the movement was and is the need to shift community norms away from tolerance and support of this violence. One of the most sustained foci of that effort was the reform of what many would argue is the penultimate norms-defining force: the criminal justice system. In fact, for the past several decades, the battered women's movement has pushed the criminal justice system to treat domestic violence as a crime against the state and as a matter of public concern, rather than a private, family matter. In order to accomplish this transformation, battered women's advocates worked to create partnerships with criminal justice system professionals.

These collaborations, however, were approached with ambivalence by some advocate activists; others objected outright to joint work with law enforcement and prosecution. This tension has several points of origin. Firstly, the results of such collaborations sometimes clash with other fundamental tenets of the battered women's movement, such as the need to promote women's autonomy and to resist the gender based oppression of women. Secondly, activists saw that different groups of battered women experienced criminal justice system involvement in their lives differently. Often these differences reflected their class, race, immigration status or sexual

¹ See generally, Constance Johnson, *Law and Disorder*, 116 U.S. NEW S 35 (1994); *Crime and Punishment*, THE ECONOMIST, June 8, 1996; *The Craze for Imprisonment*, THE ECONOMIST, May 16, 1998.

² MARSHALL, TONY F., RESTORATIVE JUSTICE: AN OVERVIEW 1 (1998).

³ R. Emerson Dobash & Russell P. Dobash, *RETHINKING VIOLENCE AGAINST WOMEN* 161, Sage Publications, 1998; Michael Paymar & Ellen Pence, *EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL*, Springer Publishing Company (1993).

orientation. Thirdly, civil legal remedies (and other non-legal remedies) were sometimes seen as far more useful to women than those available through the criminal justice system.

Despite these concerns, however, many activists were encouraged by the growing evidence that a well-designed criminal justice system response to domestic violence could actually deter batterers⁴ and might, in the long term, contribute to a shifting of community norms through the criminalization of domestic violence. Advocates viewed reform of the criminal justice system as best accomplished through training and other advocacy activities designed to change police, prosecution, probation, and court practices. The resulting collaborations became some of the most important work of many domestic violence programs. To this day, the battered women's movement's attempts to reform the criminal justice system in partnership with its professionals continue to flourish.

For several reasons,⁵ restorative justice proponents are looking to the area of domestic violence as a potential arena for the application of restorative justice practices. At its outset, restorative justice took root in cases involving juveniles, and within indigenous communities.⁶ Its practitioners felt that the restorative justice principles were especially compatible in these contexts. Aware that domestic violence cases have begun to be and might continue to be subjected to these new practices, advocates within the battered women's movement have been watching the evolution of the restorative justice movement with both interest and apprehension.

While many proponents of restorative justice assert that this model helps empower battered women and encourages community accountability, many battered women's advocates express concern that while the principles underlying restorative justice are compatible with the principles of the battered women's movement, many of the applications are not.⁷ The goal of this article is twofold: 1) to examine the principles underlying the battered women's movement, the restorative justice movement and the criminal justice system; and 2) to propose an interpretation of what is effective, redemptive and liberating about the practices of each. Part II of this paper outlines the practices which have been used in each of the two movements and in the traditional criminal justice system. Part III explores the philosophical basis of the battered women's movement and the restorative justice movement through a comparison of three shared principles. Part IV of this paper offers a critique of current practices of the battered women's movement, the restorative justice movement and the criminal justice system and explores how each can become more effective, redemptive and liberating. Part V concludes the discussion by suggesting a direction for future work within all three fields.

⁴ See Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 115-49 (Eve S. Buzawa, et al. eds., 1996).

⁵ Discussed *infra*, section 3. See also Emily Gaardner & Lois Presser, *Restorative Justice and Battering*, in 27 SOCIAL JUSTICE 175-195 (2000); Loraine Gelsthorpe & Allison Morris, *Re-visioning Men's Violence Against Female Partners*, HOWARD JOURNAL OF CRIMINAL JUSTICE, 39 (4):412-428.

⁶ For example, see L. Walgrave, *Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative?* HOWARD JOURNAL OF CRIMINAL JUSTICE, 34(3) 228-249 (1005).

⁷ See generally Ruth Busch & Stephen Hooper, *Domestic Violence and Restorative Justice Initiative: The Risks of a New Panacea*, 4 WAIKATO LAW REVIEW 1 (1996); Susan S. Russell, *Using Restorative Justice in Family Violence Situations*, 4 CRIME VICTIMS. REPORT . 65, 75-76 (2000).

II. OVERVIEW OF THE PRACTICES: THE RESTORATIVE JUSTICE MOVEMENT, THE BATTERED WOMEN'S MOVEMENT, THE TRADITIONAL CRIMINAL JUSTICE SYSTEM

A. *Practices of the Restorative Justice Movement*

Restorative justice practices were developed over the past several decades in response to dissatisfaction with the “traditional approach” of the criminal justice system (CJS). Restorative justice proponents primarily argue that the goals of reformation and rehabilitation of offenders, as well as of restoration of victims, are not ideally addressed by the standard CJS response. In the context of the criminal justice system, the term “restorative justice” originally arose as a description of early efforts at victim-offender mediation.⁸ Interestingly, the practices now known as restorative justice existed prior to the evolution of much of the theory in this area. Instead of programs developing from the implementation of an alternative criminal justice philosophy, the theories and principles derive from people's experiences in implementing various alternative practices.⁹ As a result, much of the academic descriptions of restorative justice consist of summaries and explanations of the elements of those alternative practices that have been deemed to have had a positive effect on both victims and offenders.

The emergence and popularity of restorative justice is due to several factors. Most importantly, there is a growing community of people who, although likely a minority of the population, are disillusioned with the current CJS. Restorative justice initially focused primarily on the rehabilitation of the offender¹⁰ although this focus contravened popular sentiment that continued to favor the most retributive aspects of the system. In response, restorative justice programs began emphasizing the restoration of victims and the healing of the community, making restorative justice more palatable to the public.¹¹ Finally, the growing popularity of this movement also can be credited to the interest of criminal justice system practitioners in any new effort that might ease the pressure on their dockets and jails and that offer the promise of effectiveness.

The practices currently described as “restorative justice” are many and varied in nature. These are inherently pliable, and intended to be adapted to the particular situation involved. There is no consensus on the specific form a practice must take, or who must be involved. The many sources, including journals and brochures, which describe restorative justice practices, outline general parameters in which most programs operate. Because restorative justice practices are ultimately bound with the human experience, rules and regulations proscribing them have little place. Often, people rely heavily on the experiences of other restorative justice programs when developing their own projects. General methods for the oversight of the various practices

⁸ *Supra* note 2 at 3 (citing M. WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME, Bristol, Pa: Open University Press (1991). “Restorative Justice” as a concept can also be traced to efforts within the international community to aid nations in their transition from colonial-based to independent (e.g. The Truth and Reconciliation Commission in South Africa).

⁹ *Supra* note 2 at 3.

¹⁰ *Id.* Notably, one of the stronger footholds of the restorative justice movement is in communities of faith, and of particular note, the Mennonite community.

¹¹ *Id.*

do exist. For example, many programs require significant training for all participants, such as intensive weekend-long workshops on the principles and practices of a specific restorative justice model. In addition, in some communities, facilitators undergo considerably more hours of training and further immersion into the theories, as well as field experience.

Despite the wide variation among restorative justice practices, most fall within one of the following four categories: 1) victim-offender mediation; 2) family group conferencing; 3) sentencing and healing circles; and 4) victim impact panels. The practices have many definitions and some of the names describe different practices. It is important to note that while what follows are basic descriptions of each type of practice, the same terms might be used to describe a wide array of practices.

(1) Victim-Offender Mediation (VOM)

Victim offender mediation (VOM) is the oldest of the restorative justice practices, having emerged even before the concept of restorative justice was fully realized. Most simply, VOM involves a meeting between a victim and offender with a trained facilitator primarily for the purpose of giving the offender an opportunity to make reparations, financial and otherwise, to a victim.¹² Allowing for a “greater capacity for creativity than court processes,”¹³ VOM allows for greater input from victims, and for the opportunity for the parties to see each other as more than stereotypes. Proponents hope that the process encourages offenders to be more personally affected than they would in a traditional CJS.¹⁴

Proponents also argue that in VOM, the involved parties are not “disputants;” rather, one party has clearly committed a criminal offense and admitted to doing so, and the other has clearly been victimized.¹⁵ It is not a matter of proving guilt or innocence, but how the offender can undo the harm he or she caused. Further, “victim offender mediation is primarily ‘dialogue driven,’ with the emphasis upon victim healing, offender accountability, and restoration of losses.”¹⁶

Typically, VOM uses trained volunteers as mediators,¹⁷ although some programs are able to hire staff. Because VOM functions similar to negotiation or dispute resolution, most sessions result in a signed mediation agreement. The offender is bound to this agreement much as he would be under a probation contract. Notably, many forms of restorative justice are linked to some criminal justice system intervention. In many of these instances, offenders are also bound to resulting agreements as they would be to any court order. Notably, however, “research has

¹² Mark S. Umbreit, *Victim Offender Mediation: ‘Restorative Justice Through Dialogue,’* Center For Restorative Justice and Peacemaking (1997), *fact sheet*. “Victim offender mediation is a process which provides interested victims of primarily property crimes the opportunity to meet the offender, in a safe and structured setting, with the goal of holding the offender directly accountable for their behavior while providing important assistance and compensation to the victim. With the assistance of a trained mediator, the victim is able to let the offender know how the crime affected him or her, to receive answers to questions they might have, and be directly involved in developing a restitution plan for the offender to be accountable for the losses they incurred.” *Id.*

¹³ *Supra* note 2 at 8.

¹⁴ *Id.* at 9.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Mark S Umbreit, *FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS*, U.S. Department of Justice, (2000).

consistently found that the restitution agreement is less important to crime victims than the opportunity to talk directly with the offender about how they felt about the crime.¹⁸

Research suggests that VOM can have powerful effects on both a victim and an offender.¹⁹

(2) Family Group/Community Conferences

Family Group Conferencing (FGC) began in New Zealand in 1989 in the area of child welfare and youth justice. Originally, FGC was seen as an opportunity to let affected youth, and the families of the affected youth, decide what actions should be taken by child welfare or the juvenile justice system. Conferencing is seen very broadly as a fluid process through which in almost any context a group of individuals, who have been involved in or affected by some past action, meet to discuss any issues which have arisen from this.²⁰

FGC differs from VOM in several ways. FGC uses public officials, or criminal justice system professionals, as facilitators (e.g. police officers, probation officers, school officials).²¹ It involves considerably more members than VOM. A wider circle of people is recognized as being victimized by the offense – identified as “primary” and “secondary” victims in FGC. Victims are more likely to receive comprehensive support services because a wider net of people is involved.

By way of example of a typical FGC structure, the three distinct phases in a typical youth justice FGC in New Zealand include: 1) information giving²²; 2) private discussion time²³; and 3) the reconvening of the full conference.²⁴ Mark Umbreit, Director of the Center for Restorative Justice and Peacemaking at the University of Minnesota, describes the FGC process, which can also be used with adult offenders, as follows:

The conference typically begins with the offender describing the incident, followed by each participant describing the impact of the incident on his or her life. Through these narrations, the

¹⁸ *Supra* note 12 at 2.

¹⁹ *Id.* Specific findings include:

1. Victims of crime who meet with their offender are far more likely to be satisfied with the justice system response to their case than similar victims who go through the normal court process.
2. After meeting the offender, victims are significantly less fearful of being revictimized.
3. Offenders who meet their victim are far more likely to successfully complete their restitution obligation, to be held directly accountable to the victim for their behavior.
4. Considerably fewer and less serious crimes are committed by offenders who meet their victim. *Id.*

²⁰ *Supra* note 17. “It has become increasingly recognized that by facilitating the open expression and discussion of feelings with which we are all too often left following some event, conferencing offers a powerful tool for healing and transforming conflicts, and for generating and strengthening communities.” *Id.*

²¹ *Id.*

²² *Id.* A police officer is invited to read the summary of facts and outline the offense. This is open to discussion and can be altered; but ultimately, responsibility must be acknowledged. Victims are then free to speak – talk about their experiences and feelings. Someone else may present the victim’s perspective if the victim is absent. At this point, the offender may comment on what has been said and offer apologies, etc.

²³ *Id.* The family is then left alone to produce a plan. Plans predominantly last for three months and include action which is intended ‘put things right’ such as restitution or reparation, and offense-related limitations, such as curfew and non-association, which will make a re-occurrence difficult for the plans duration.

²⁴ *Id.* Everybody then hears the full plan, which can be modified.

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 a thorough discussion of the impact of the offense on those present, the victim is asked to identify desired outcomes from the conference and thus helps to shape the obligations that will be placed on the offender. All participants may contribute to the process of determining how the offender might best repair the harm he or she has caused. The session ends with participants signing an agreement outlining their expectations and commitments.²⁵

(3) Sentencing and Healing Circles

Sentencing circles²⁶ are another popular restorative justice practice. They can take many forms and can occur at almost any time in the CJS. Different types of circles include: sentencing circles, review of sentence compliance circles, circles of understanding, and healing circles.²⁷ These circles are groups or communities of people brought together to determine how an offender should atone for his or her wrongdoings. Typically, people sit in a circle around the offender.

Circles incorporate many of the components of restorative justice reform efforts of the past decades: placing a strong emphasis upon local community member participation, making the circle community based; bringing victim and offender together in face-to-face interaction as does victim/offender mediation; and involving victim and offender family members and friends, such as in family group conferencing. Yet advocates of circles purport to do more by reaching back to Native American and First Nation traditions of doing justice, which predate Western criminal justice. These practices explicitly empower each individual in the circle as an equal and lift up the relationship between justice and the physical, emotional and spiritual dimensions of the individual in the context of community and culture.²⁸

As with the other restorative justice practices, different projects and communities follow different procedures or rituals in holding a circle. Sentencing circles typically occur post-conviction. Victims have the choice whether to be present and what "community" should be present on their behalf. Depending on the program, the offender is present voluntarily or involuntarily. His "community" will not only involve his family and close friends, but will often also involve members of the justice system involved in his case (e.g. his probation officer). Similar to both VOM and FGC, sentencing circles provide the victim and the full community a means to confront the offender with the full impact of his crime. They give the offender an opportunity to offer reparations to the victim. In many sentencing circle programs, the circle itself makes recommendations to the court regarding the probationary conditions for the offender.

Restorative justice proponents strongly emphasize the need to develop a "centrality of shared values"²⁹ in the formation of a circle. The circle must act as a whole: the people involved must agree upon the injury suffered by the victim and community and the level of accountability

²⁵*Id.*

²⁶ Also called "peacemaking circles" or "restorative justice circles."

²⁷ Robert B. Coates, Mark S. Umbreit & Betty Vos, RESTORATIVE JUSTICE CIRCLES IN SOUTH ST. PAUL, MINNESOTA, Center for Restorative Justice and Peacemaking (2000) *unpublished manuscript*.

²⁸ *Id.*

²⁹ *Id.* at 21.

owed from the offender. There must be consensus on the harm caused and the accountability due.

(4) Victim Impact Panels

Victim impact panels rose in popularity in the 1990s and offer another model of restorative justice. These panels provide a forum for crime victims to tell a group of offenders about the impact of the crime on their lives and on the lives of their families, friends, and neighbors. Panels typically involve three or four victim speakers, each of whom spends about 15 minutes telling their story in a non-judgmental, non-blaming manner. The particular offenders of the victim presenters are not present. While some time is usually dedicated to questions and answers, the panel is structured for the victims to speak, rather than for the victims and offenders to engage in a dialogue.³⁰

Originally a creation of Mothers Against Drunk Driving, many communities have established victim panels as a response to various forms of crime.

B. Practices of the Battered Women's Movement

While violence in intimate relationships can occur in several different contexts,³¹ the battered women's movement evolved out of the need to address the most common and deadly kind of violence, that which is accompanied by a pattern of intimidation and threats. This kind of violence, called "battering," is chiefly a problem of violence against women by men³² and should be understood in the wider social context of men's subordination of women. According to many advocates in this field, domestic violence exists because of the belief that men have the right to control women.³³ This control is ultimately attained through the use of intimidation, coercion and violence. The battered women's movement, informed by decades of work directly with both men and women, argues that domestic violence, as a whole, is not caused by anger management problems, the dysfunction of a relationship or chemical dependency. Rather, the movement understands that battering is the deliberate and calculated exertion of control by one person over his or her intimate partner and that it usually succeeds in creating a power imbalance that can poison forever the relationship between the parties.

³⁰ Restorative Justice Online Notebook, National Institute of Justice, online resource, <http://www.ojp.usdoj.gov/nij/rest-just/index.htm>

³¹ Loretta Frederick, *Context is Everything*, online resource, <http://www.BWJP.org>.

³² It is for this reason that the authors choose to use gendered pronouns when describing victims and offenders. See the Redesignated National Crime Victimization Survey. See also Greenfeld, Lawrence A., et al, *Violence by Intimates*, BUREAU OF JUSTICE STATISTICS FACTBOOK (1998).

³³ "Wifebeating is not, in the strictest sense of words, a 'deviant', aberrant', or 'pathological' act. Rather, it is a form of behaviour which has existed for centuries as an acceptable, and, indeed, a desirable part of a patriarchal family system within a patriarchal society, and much of the ideology and many of the institutional arrangements which supported the patriarchy through the subordination, domination and control of women are still reflected in our culture and social institutions." R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 VICTIMOLOGY 426, 427 (1978).

This analysis leads advocates to emphasize that communities desiring to end domestic violence should focus on deterring offenders' behaviors rather than modifying victims' behaviors and that the battered woman should not stand alone in her efforts to stop the abuse. Advocates have long held that battered women must have the right to confidential, woman-centered advocacy and support and that the individual battered woman is in the best position to make decisions about her safety, her life and her future; moreover, women's autonomy is a goal of any advocacy effort.

One purpose for the battered women's movement's emphasis on woman-defined practices is to contravene public sentiment that a victim is in some way responsible for causing or stopping the violence. Many responses to domestic violence seem to imply that the reason a victim is being abused is that she has self esteem or other problems with her mental health. In fact, many battered women experience real peace of mind soon after they are delivered or escape from being beaten, threatened and controlled by their partners. Any community effort pushing a victim to examine her behavior as if it provokes or exacerbates the violence is deeply re-victimizing and a complete inversion of reality.

In addition, a community can place a battered woman in great danger if it focuses its intervention on efforts to convince her to leave the abuser. Many battered women seriously increase their chances of being beaten or killed when they attempt to leave their relationships.³⁴ The community must permit a battered woman to make these decisions, without pressure, when she feels it is safe.

The following are the practices of the battered women's movement: 1) community education/media campaigns; 2) shelters, safe-home networks and support groups; 3) advocacy; 4) civil legal relief; 5) reform of the criminal justice system; 6) victim compensation/restitution. These practices include the remedies designed for use by institutions to administer and were created to restore safety and autonomy to the victim. The actual availability or prevalence of these practices often depends on those resources that local advocates can manage to secure to support their work.

(1) Community Education/Media Campaigns

Some of the earliest efforts of battered women's advocates were designed to convince communities that domestic violence was a significant problem, that women did not deserve to be beaten, and that the community had a role to play in supporting services for women and their children. Posters, billboards, radio talk shows, and live presentations to service clubs, church groups, and community groups were and are favored media. In recent years, the use of television and the Internet to disseminate this and related messages has increased.

(2) Shelters, Safe-home Networks and Support Groups

An enormously important aspect of the battered women's movement is the provision of safe housing. Battered women's shelters (or private safe-home networks) offer women and children a safe place to stay after fleeing their abusers. The first shelter was Chiswick Women's

³⁴ See generally Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICHIGAN LAW REVIEW (1991).

Aid, opening in 1972 in Britain, and offered a wonderful example of the fundamentally grass-roots nature of the movement's work.³⁵ Originally an office space for a women's consciousness-raising group, a battered woman came to the space, looking for a place to stay after leaving her abusive husband. Not long after that, more and more women began arriving, and the office space soon became a living space.³⁶

In the United States, a similar phenomenon was occurring. As women began organizing around the issue of domestic violence, the need for safe shelter for women and children became ever more apparent. For example, Women's Advocates in St. Paul provided battered women space in volunteers' homes for a couple of years before finally securing adequate funding to purchase a house in 1974.³⁷ Within a few months of opening, the shelter was filled to capacity with twenty-two women and fifteen children.³⁸

By 1989 there were 1,200 shelters in the U.S., housing over 300,000 women and children a year.³⁹ Shelter and safehome programs not only house and feed women and children, but also offer a variety of other services such as support groups to women and children, day care services, legal assistance and job training. Shelters and community advocate programs represent a creative and direct response to the needs of battered women.

In response to the paucity of safe, affordable housing for women who were leaving shelters and couldn't return to their homes, advocates moved to provide transitional housing programs that gave victims a stable living environment during the time required for battered women to make the transition to living independently.

(3) Advocacy

Basic advocacy, both legal and other, has proven essential to women's safety, autonomy and restoration, especially as many of the institutions to which they go for help are not designed to respond with alacrity and with sensitivity. Many women need financial security, as well as employment, health and child care services in order to survive in safety. Much of advocacy work is shaped by the principles of agency and autonomy for battered women. In other words, advocacy as a specific service is distinguished by its prioritization of a battered woman's own decision-making process. Advocates help provide women with the best environment for making safety decisions for themselves and their children. Advocates also serve an important role as battered women's liaisons to other resources in the community.

Advocates work both within institutions and outside of them. The scope of the work of nongovernmental advocates with women is far broader than that provided by any other institution or agency. Confidentiality, a critical attribute of an advocate's relationship to a battered woman, is often not present in the relationship between a governmental advocate and a battered woman. Many battered women will refuse any services that aren't completely confidential because disclosure creates the risks of retaliation by the abuser and other grave consequences.

³⁵ R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* (1992), 63.

³⁶ *Id.*

³⁷ *Id.* at 64.

³⁸ *Id.*

³⁹ *Id.* at 70.

(4) Civil Legal Relief

Another path forged by battered women's advocates beginning in the late 1970s involves the enactment of legislation creating several different forms of civil legal relief for battered women. One of the most significant forms of relief is the civil protection order (CPO). The CPO remedies arose in part out of the recognition that the CJS was not really designed to focus on ensuring individual women's safety, exclusive occupancy of her residence, custody of her children, and financial child or spousal support. Moreover, existing family court remedies, such as divorce, were not adequate. All fifty states now allow a victim of domestic violence to petition for a court order restraining the abuser from further abuse of the victim. In many states, courts may grant other kinds of relief as part of the civil protection order, including temporary possession of property and child custody and visitation issues. Civil protection order statutes also allow a petitioner to secure an ex parte order almost immediately upon petitioning, so that a victim has some kind of protection during the pre-hearing period. In this instance, the respondent is offered the opportunity to be heard at a hearing within a short statutorily-designated period of time. By law, no court filing fee may be charged and victims can apply without attorneys.

This CPO path appeals to domestic violence victims because it addresses their immediate safety issues. It offers relief particular to the needs of battered women who seek immediate separation and court-sponsored protection, while addressing the complications of the separation (e.g. where the victim may reside during this period, whether the victim may have temporary custody of the children, what the respondent's support/visitation obligations are during this period, etc.) as well. It is also a helpful option because the findings necessary to support the order are made on the basis of the lower civil evidentiary standard of proof than that applied in criminal court. Violation of this CPO order, as distinct from violations of many other types of civil orders, is an arrestable criminal offense in many jurisdictions and so has the potential for enforceability by law enforcement and courts.

The battered women's movement also pushed for another significant civil law reform: the inclusion of "domestic violence" as a factor courts must consider when determining the best interests of a child in custody contests. In some states, advocates and sympathetic attorneys successfully argued for laws creating rebuttable presumptions against awards of custody to abusers. In recognition of the fact that exchanges of children can provide abusers dangerous access to the battered mother, advocates lobbied for legislation which would require courts to consider domestic violence when ordering visitation and exchanges between the two parents. As a result, in some states, courts now order supervised visitation for many batterers and require that exchanges occur through safe exchange programs.

(5) Reform of the Criminal Justice System

Since the beginning of the battered women's movement, advocates have focused their reform efforts on the criminal justice system for two purposes: 1) to respond to the dangerous emergency which battered women face during an assault; and 2) to place the state as a protective shield between the offender and the victim, as a deterrent force, in order to discourage future violence. The CJS was very resistant to changing its response to domestic violence. Until the 1970s, separation and mediation were the standard law enforcement responses to domestic

violence calls. This response was based upon the same assumption that guided all institutional responses: that domestic violence was a private, family issue, the victim's problem alone, and certainly not a crime against the state. But as a result of a number of advocacy efforts such as legislation permitting warrantless arrests for misdemeanor assaults, lawsuits challenging the constitutionality of discriminatory police practices, changes in law enforcement departmental policy and training on effective responses to domestic violence, law enforcement officers started arresting when they had probable cause to believe a domestic assault occurred. In fact, some states and many law enforcement departments now mandate arrest under these circumstances.

At the encouragement of battered women's advocates, other criminal justice system agencies and players reconsidered their responses to domestic violence cases. Prosecutors explored strategies for pursuing cases even when victims chose not to testify or to testify for the defense, such as the use of excited utterance exceptions to the hearsay rule. Probation agencies examined means such as specialized and intensive supervision, to keep offenders from re-offending. Courts began taking advantage of emerging batterers' programs as they considered what sentences were appropriate.⁴⁰ Legal advocates, both within the system and from community based programs, started working with victims in criminal court, keeping victims abreast of the proceedings and serving as liaisons between the victims and various agencies.

Ultimately, the goal of these reforms was to convince the community-at-large to understand that domestic violence was a public issue deserving of attention and action by the whole community, especially the state in its formal role as enforcer of laws prohibiting violence.

(6) Victim Compensation/Restitution

Two of the most purely and directly restorative remedies for battered women are victim compensation and restitution. Now nearly universally available are procedures in criminal or civil court whereby battered women can seek restitution from their abusers for certain harms caused to them, such as damage to property and medical costs. In addition, victims can also receive restitution (crime victim compensation) directly from the state which, in turn, may seek reimbursement from offenders. Relatively few battered women actually utilize the restitution remedy, however, largely because their families do not have the resources to pay both restitution and financial support for the children and the victim.

C. Criminal Justice System

The United States' criminal legal system is designed to discourage vigilantism by vesting designated public officials with the power to enforce the laws against certain anti-social acts: crimes. The police are to act in the place of a harmed person or institution to intervene, to investigate suspected crimes, and to arrest or charge people whom they have probable cause to

⁴⁰ Batterers programs evolved primarily in the 1980s. Established to work with men to change their violent and controlling behavior, they also assist probation and the courts in monitoring an offender's behavior while on probation. Researchers debate as to whether batterers programs do, in fact, reduce recidivism. Loretta Frederick, personal interview, 4 November 2002.

believe have committed crimes. Crime victims (to the extent that there is an identifiable victim of a crime) are not responsible for bringing lawsuits against offenders, and, in fact, are not parties to the action at all. The status of the victim is as witness or as physical evidence.

The law-making bodies of state and local government decide what acts can give rise to state intervention or prosecution. They establish the range of penalties for those crimes. The community norms, at least as reflected in the population that dominates the legislative process, are enshrined in the list of acts deemed criminal and in the penalties set therefrom.

The practices of the CJS include the gathering of evidence by police and prosecution, decision-making about charging (based upon the likelihood that the case can be successfully prosecuted), pre-trial negotiations, post-sentencing supervision and monitoring and, in a few cases, trials to a judge or jury. These practices are undertaken almost exclusively by employees of local or state units of government (as well as private defense counsel) who have the obligation to administer the system.

In U.S. systems, there exists a presumption of innocence and a presumption against pre-trial detention in most cases. These rules originate from the same values as the existence of the very high “beyond a reasonable doubt” standard of proof and the right to counsel for the defendant.

The last two decades have seen the evolution of a body of victim-rights laws which detail how the victim is to be offered the opportunity to be involved in the process. Most victim-rights laws create the obligation for the state to inform victims at various stages of a proceeding. However, other rights, such as the right to inform the plea bargain or sentencing process, are also common.

III. THREE PRINCIPLES COMMON TO THE RESTORATIVE JUSTICE AND BATTERED WOMEN'S MOVEMENTS AND THEIR RESPECTIVE INTERPRETATIONS

Analyses of the principles underlying the restorative justice and battered women's movements reveal that there are at least three strong points of commonality. These are the movements' interests in (1) restoring victims of crime; (2) promoting the role of the community in responding to crime; and (3) addressing the social context in which crime is committed. Each movement, however, implements these principles in vastly different ways and through disparate practices. As outlined below, these differences are the result of each movement having arisen from a unique political vantage point and in response to different social problems.

A. Principle One: Restoring Victims of Crime

While restorative justice proponents and battered women's advocates both seek to improve the condition of the victim, it is not clear whether the notion of "restoration" is limited to returning to a victim only those things which she once had and lost, or whether it can be interpreted to involve providing those things a victim might have needed all along. In many instances, victims (by virtue of their gender, race, class, or other circumstances) have never had the tangible and intangible necessities for being safe, whole and vested with full human rights. Practices which are truly "restorative" of the victim must be effective, redemptive and liberating.

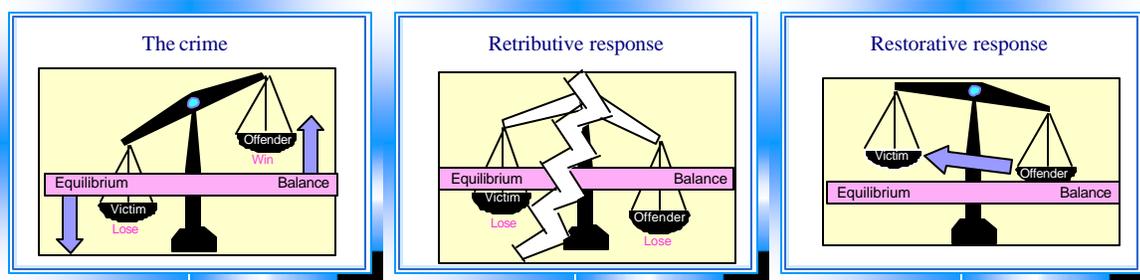
(1) The Restorative Justice Movement

Restorative justice proponents criticize the traditional criminal justice system response for focusing on holding the offender accountable to the state for violation of codified norms (criminal laws), while ignoring the need to repair the harm done to victims. Restorative justice, on the other hand, is seen as offering a mechanism through which an offender, the offender's family and/or friends, or the community at large can provide those things lost to the victim as a result of suffering the crime, be they tangible (money, property, medical expenses) or intangible (sense of worth, safety, closure).⁴¹

Whether restorative justice practices, especially as administered by correctional or prosecutorial arms of government, truly promote victim restoration depends on the community, the program and the participants, how much they are invested in this aspect of restorative justice, and whether they fully understand the problem and respect the victim's autonomy.

Restorative justice proponents take the position that crime damages the balance and equilibrium between victim and offender, the traditional ("retributive") response damages both victim and offender, and restorative justice restores the equilibrium.

⁴¹ *Supra* note 2 at 10 (Describing an organization called Victim Support that offers victims practical and emotional support).



(2) The Battered Women's Movement

The language of "restoration" has not often been used by this movement,⁴² although the primacy of battered women's interests has been advocated quite strongly by its activists. An intervention that is effective, redemptive and liberating promotes victim safety and meets other victim needs. CJS reform work, to the extent that it promotes victim safety, is "restorative." Other activities such as advocacy for financial stability, safehousing and civil legal relief for the battered woman are truly restorative.

Battered women's advocates believe that application of the notion of victim restoration to domestic violence cases must account for the fact that battering deprives women of their safety, their autonomy, their liberty and, often, their very lives. Because the stakes are so high, and because women's needs are clear, the battered women's movement has spent much of its political capital encouraging, cajoling, and, where necessary, shaming communities into providing battered women with the services and assistance they need in order to restore fully their safety, freedom and autonomy. Even in their criminal justice system reform work, advocates have repeatedly found themselves in the awkward but necessary position of advocating, on the one hand, with prosecutors to prosecute all cases regardless of victim interest, and, on the other hand, with prosecutors to drop the charges when an individual woman objects to CJS intervention.

B. Principle Two: The Role of the Community in Mending Harms Caused by Crime

Both social movements share a goal of involving the community more meaningfully in addressing social problems. How they differ is in their definitions of and attention to different social problems.

(1) The Restorative Justice Movement

The philosophy of restorative justice focuses largely on mending the harm caused by crime through utilizing the resources available within the parties' communities. The community becomes involved in exploring all aspects of the crime, as well as understanding its role or responsibility in the crime. The word "communities" is used very broadly in the restorative justice context. It can mean family, friends and neighbors, or representatives from various aspects of the community – e.g., spiritual institutions, criminal justice institutions, social services or businesses.

⁴² *But see* Hart, Barbara, "Arrest? What's the Big Deal?" 3 WM & MARY J. OF WOMEN & LAW 207 (1997).

Healing relationships, as opposed to balancing hurt with hurt, is one core value of restorative justice. So is community deliberation: putting the problem in the center of the circle rather than putting the criminal at the center of the criminal justice system.⁴³

Restorative justice places less emphasis on the use of a legal hierarchy to respond to criminals and more emphasis on community. It employs a relational model that its proponents believe is most adept at creating real personal change. Mark Umbreit describes the role of the community as follows:

Restorative justice is a victim-centered response to crime that provides opportunities for those most directly affected by crime – the victim, offender, their families, and representatives of the community – to be directly involved in responding to the harm caused by the crime. Restorative justice is based upon values that emphasize the importance of providing opportunities for more active involvement in the process of: offering support and assistance to crime victims; holding offenders directly accountable to the people and communities they have violated; restoring the emotional and material losses of victims (to the degree possible); providing a range of opportunities for dialogue and problem-solving among interested crime victims, offenders, families, and other support persons; offering offenders opportunities for competency development and reintegration into productive community life; and strengthening public safety through community building.⁴⁴

It is this collective, relational process that most distinguishes restorative justice from the standard CJS response. “Restorative justice is a process whereby the parties with a stake in a particular offense resolve collectively how to deal with the aftermath of the offense and its implications for the future.”⁴⁵

One issue raised by the involvement of community, of course, is the question of what persons or group constitutes a “community” at any given time. Surely the most committed, involved and dedicated “community” to address a particular offense or offender would be one which understands four things: (1) the crime committed; (2) the harm done in the past and the likelihood of harm in the future; (3) the likely response of the offender to any proposed resolution; and (4) the dynamics, both political and personal, which might affect the process or the result.

Many in the restorative justice movement stand strongly on the principle that crime affects everyone in the community and that the harm caused can be mended by that same community in concerted action with the offender.⁴⁶ This is one area in which they differ from the battered women’s movement’s approach to harm and to the community’s role therein.

⁴³ John Braithwaite, *Restorative Justice and Social Justice*, 63 SASKATCHEWAN LAW REVIEW, 185 at 185-186 (2000).

⁴⁴ Mark S. Umbreit, WHAT IS RESTORATIVE JUSTICE? Center for Restorative Justice and Peacemaking (1999), unpublished manuscript.

⁴⁵ *Supra* note 2 at 1.

⁴⁶ Pranis, Kay, ENGAGING THE COMMUNITY IN RESTORATIVE JUSTICE, Office of Juvenile Justice and Delinquency Prevention (1998).

(2) The Battered Women's Movement

Changing the climate of tolerance toward domestic violence has always been a primary goal of the battered women's movement.⁴⁷ In pursuing these goals, advocates and battered women have turned to the community, recognizing that individual women alone, advocates alone, police alone, batterers' intervention services alone, or the courts alone are unlikely to be successful at stopping individual batterers or keeping individual women safe. As communities become more engaged in providing victims safety and holding offenders accountable, they make progress in reducing their own tolerance for violence within their communities.

Accordingly, the battered women's movement strongly encourages a community-wide response to this social issue. One prominent model of community intervention in domestic violence evolved from an experiment in Duluth, Minnesota, in the early 1980s, now referred to as the "Coordinated Community Response" (CCR) model. The CCR model reflected the aforementioned goals and principles of the battered women's movement. Advocates have developed specific principles for community intervention in domestic violence cases.⁴⁸

Most CCR efforts have focused on various criminal justice system strategies -- whether it is linking police and prosecution more closely, developing stronger communication between probation departments and offender programs, or increasing courts' accountability to victims. Unfortunately, the "community" typically involved in most Coordinated Community Response efforts only includes criminal justice system agencies, and too rarely includes other aspects of a

⁴⁷ This goal is described in Ellen Pence & Kristine Lizdas, *THE DULUTH SAFETY AND ACCOUNTABILITY AUDIT: A GUIDE TO ASSESSING INSTITUTIONAL RESPONSES TO DOMESTIC VIOLENCE* 5-21 (1998), *unpublished manuscript*.

⁴⁸ Below are sample guidelines:

1. Intervention practices must reflect a commitment of accountability to the victim, whose life is most impacted by our individual and collective actions. Victims must have access to safe housing and the advocacy services necessary to navigate in the court system.
2. Whenever possible, the burden of offender accountability from the initial response through placing restrictions on their behavior should rest with the *institutional response* and not the victim. Focus on changing the system, not the victim.
3. All intervention policy/practice development must consider /recognize the differential impact of intervention depending on the economic, cultural, ethnic, immigration, sexual orientation, and other status of victims & offender and should be reviewed by members of the community not represented by the majority culture.
4. Most incidents of violence are part of a larger pattern and history of violence. The intensity of the intervention should be based on the need for protection from further harm and what is needed to create a deterrent to the assailant.
5. Intervention practices should balance the need for standardized institutional responses with individualized responses that recognize potential victim consequences for confronting the offender, validate victim input and support victim autonomy.
6. The intervention response must be built on cooperative relationships with others that intervene in these cases and should have identified communication linkages and procedures to ensure consistency between the civil/criminal responses.
7. Intervention policies and procedures should be continually monitored by a group outside the judicial system that is guided by input from advocates and battered women.

Connie Sponsler, *DULUTH DOMESTIC ABUSE INTERVENTION PROJECT*, *unpublished manuscript*, 2001.

community such as health care providers, faith communities or community organizations. And CCR models notably fail to incorporate families, friends, employers, and others with a personal connection to a victim or offender.

Advocates themselves have long worked directly with battered women to help them identify the people who might support them. Battered women, assisted in many cases by their advocates, have long tried to enlist their allies (friends, family and community members) in stopping the violence and persuading their batterers to play a more positive role in the family. Advocates in communities of color have employed and refined this approach in ways that mainstream advocates have not, and the programs serving more isolated and disempowered communities have a lot to teach others about the benefits of helping a woman to organize her community.

Of course, the notion of community involvement in the provision of truly restorative services raises the issue of the definition of the term "community." "Community" does not mean "white, middle class, able bodied, heterosexual" for the purposes of responding to the needs of batterers or to battered women who do not have those characteristics. However, race and other biases have been as visible within many service-providing institutions, including the battered women's movement. This has meant that the communities of color have not been in a position to lead the movement's decisions about what would be truly effective interventions for them. Most mainstream programs for women or men have only recently begun to make themselves more accessible and responsive to all parts of their communities. Many communities of color are now organizing to ensure that culturally competent services are being offered to men who use violence, to battered women and to their children, and many of these same communities are leading in the effort to find non-CJS methods to address violence in their communities.

The most confounding and problematic aspect of community involvement in domestic violence is the prevalence in the community of norms that support violence against women, excusing such violence as private or as deserved by the victim. For the past several decades, battered women's activists have documented society's proclivity for blaming victims of domestic violence for the abuse they suffer, asking not "Why did he hurt her?" but instead, "Why didn't she leave?"⁴⁹ Additionally, some researchers have turned their attention to how acceptance of violence by men and women is transmitted intergenerationally, such as by witnessing violence in their own homes as children.⁵⁰

C. Principle Three: Addressing the Context of Crime

Both movements share a social analysis that criminal incidents must be examined in the context in which they occur. Historically, work of the battered women's movement world-wide has been based on the knowledge that violence in intimate relationships is simply one form of the nearly universal gender-based discrimination which operates to keep women in subservient roles in the world. The restorative justice movement has understood the role that other biases, notably classism and racism, play in the creation of conditions which lead to crime.

⁴⁹ See e.g. Jones, Ann *NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT*, Beacon (1994).

⁵⁰ See e.g. Markowitz, Fred., "Attitudes and Family Violence: Linking Intergenerational and Cultural Theories," 16 *JOURNAL OF FAMILY VIOLENCE* 2 (2001).

(1) The Restorative Justice Movement

At its most fundamental, the restorative justice movement promotes dealing with crime holistically, addressing both the context of a crime and the entire community the crime affects. Restorative justice involves:

- making room for the personal involvement of those mainly concerned (particularly the offender and victim, but also their families and communities).
- seeing crime problems in their social context.
- promoting a forward-looking (or preventative) problem-solving orientation.
- encouraging flexibility of practice (creativity).⁵¹

Restorative justice differs from more traditional responses of the criminal justice system in yet another way: it acknowledges a broader social context to crime. However, its analysis of the social context is largely limited to class and ethnicity. The theory and practice has not evolved to reflect an understanding of other aspects of social identity such as gender.

The focus of restorative justice is not on challenging an individual act of deviance or aberrance, but understanding the crime in a broader social context. For example, within some

⁵¹ *Supra* note 2 at 1. Various literature describe different elements or factors that should be present in a restorative justice programs.

Five elements that must be present in order to consider an initiative to be restorative in nature:

- Restorative justice invites full participation and agreement.
- Restorative justice attempts to heal what has been broken.
- Restorative justice initiatives seek full and direct accountability.
- Restorative justice also seeks to reunite that which has been divided.
- Restorative justice initiatives strive to strengthen community in order to prevent further harm by building relationships and addressing the underlying social problems.

Stephanie Coward, *Restorative Justice in Cases of Domestic and Sexual Violence: Healing Justice?* On-line article, www.hotpeachpages.org/resources/rs_cases_dv_sv.htm (2000).

Another publication asserts the following belief informing restorative justice programs:

- Victims and the community have been harmed and need restoration.
- Victims, offenders and the affected communities are the key stakeholders in justice.
- Offenders' obligations are to make things right as much as possible.
- The community's obligations are to victims and to offenders and for the general welfare of its members.
- The needs of victims for information, validation, vindication, restitution, testimony, safety and support are the starting points for justice.
- The process of justice maximizes opportunities for exchange of information, participation, dialogue and mutual consent between victim and offender.
- Offenders' needs and competencies are addressed.
- The justice process belongs to the community.
- Justice is mindful of the outcomes, intended and unintended, or its responses to crime and victimization.

Howard Zehr & Harry Mika, *FUNDAMENTAL CONCEPTS OF RESTORATIVE JUSTICE*, Mennonite Central Committee (1997).

juvenile justice circles, restorative justice proponents seek to incorporate the “social and economic conditions in a community that significantly effect the inclusion or exclusion of young people with respect to society,” and promote the concept of a “restorative community justice model of intervention.”⁵²

(2) The Battered Women’s Movement

Like restorative justice proponents, advocates in the battered women’s movement have long striven to assert the relevance of social context in domestic violence crime. Specifically, advocates encourage the community to understand domestic violence within the larger context of sexism. As discussed earlier, many battered women’s advocates understand heterosexual domestic violence as a form of gender-based oppression, stemming from the belief that men have the right to control women. The battered women’s movement, joining its voices with those of other feminist thinkers, has exposed the extent to which cultural institutions such as the legal system have perpetuated female subordination to men.⁵³ An examination of case law demonstrates the long-standing legal condonation of men’s violence against women.⁵⁴

While many activists of color see the subordination of women in their communities as resulting from the introduction of European values to their communities,⁵⁵ it is clear that wherever it originated and however it is maintained, domestic violence is a world-wide phenomenon affecting women in every nation. The battered women’s movement sees it as arising directly from social and historical contexts.

Women of color have led the battered women’s movement to a greater understanding of the context of crime, including the interrelatedness of various forms of oppression. Seeing sexism as inextricably linked to racism, classism, homophobia and ageism is fundamental to much feminist thought and literature, including that on battering.⁵⁶ This awareness shapes much

⁵² White, Rob, *Restorative community justice: Community building approaches in juvenile justice* (2001). Paper presented at the 4th National Outlook Symposium on Crime in Australia.

⁵³ See generally Catharine MacKinnon, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); Patricia Hill Collins, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* (1990). For a discussion on institutionalized oppression on the basis of race and ethnicity by the legal system, see Cheryl I. Harris, *Whiteness as Property*, 106 *HARVARD LAW REVIEW* 1707 (1993).

⁵⁴ See *State v. Black*, 60 N.C. 262 (Win. 1864) (permitting violence, to a specified degree, against wives for the sake of discipline); and see *People v. Berry*, 18 Cal. 3d 509 (1976) (mitigating a sentence from murder to manslaughter, asserting the wife’s infidelity provided sufficient provocation for the killing).

⁵⁵ “In the beginning the continent and sub-continent were populated largely by peaceful tribes, nations and confederacies. Early travelers reported that the native people were open, friendly, warm, and innocent. Travelers also reported that these very traits made them vulnerable and easily exploited. The conquest of tribes and nations by Anglo-Europeans was accompanied by its analog, the conquest and degradation of Indian women by men, Indian and otherwise. At every stage of conquest the disempowerment of women progressed...from an egalitarian, gynocentric social structure to a Christian, patriarchal one . . .

I do not justify the abuse that Indian women suffer at the hands of Indian men. I will not excuse the claim that some of the abuse is actually traditional religious practice. But I also will not ignore the historical realities which are relevant to that abuse. For the abuse of Indian women and children by Indian men can be traced to the introduction into Indian culture of alcohol and Christianity. The message of the conquerors was that female subservience was the will of God.” Paula Gunn Allen, *Violence and the American Indian Woman*, *THE SPEAKING PROFITS US: VIOLENCE IN THE LIVES OF WOMEN OF COLOR* at 5,6 (1986).

⁵⁶ See, e.g., Schechter, Susan, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT*, South End Press, Boston (1982); and Edelson, Jeff, et. al., *THE FUTURE OF INTERVENTION*

of the analysis and strategy of many battered women's advocates. This analysis has not, however, been reflected in the CJS reform work of advocates who have largely neglected to address class, race and other biases in the CJS response to domestic violence.

It should also be noted that there is a trend in the battered women's movement to move away from the notion that domestic violence involves gender based oppression. This "de-genderization" of the problem is reflected in everything from the language used in community education materials to the content of battered women's support group curricula. It is not clear what is causing this shift. Perhaps it is influenced by the fact that, increasingly (1) the foundations and government agencies funding services and reforms downplay the relevance of gender in intimate partner violence; or (2) advocacy programs are moving towards seeing themselves less as activists and more as parts of the larger social-services network in a community. Whatever the cause, the failure of domestic violence programs and the community at large to address the role of gender in the prevalence of domestic violence and on its effect on victims will inhibit attempts to end domestic violence.

D. Conclusion

It is not a coincidence that restorative justice proponents look to the field of domestic violence as a fitting forum for the application of restorative justice practices. And it is no coincidence that some battered women advocates are more than a little curious about the burgeoning restorative justice movement. Many of the principles and much of the language of each movement resonate for the other. While each takes a different approach to each of the three principles listed, the areas of overlap are still clear. Where the movements diverge substantially is in the application of the principles to actual practice. The following section details areas of conflict between the practices of the criminal justice system, the restorative justice movement and the battered women's movement.

IV. A CRITIQUE OF CURRENT RESPONSES TO DOMESTIC VIOLENCE AND A PROPOSAL TOWARD MORE EFFECTIVE, REDEMPTIVE, AND LIBERATING RESPONSES TO BATTERED WOMEN

A. Generally

While the traditional criminal justice system acts in some ways that are effective, redemptive and liberating, such as the use of victim impact statements and the occasional restitution orders, it is not primarily focused on victims' needs. The battered women's movement does so almost exclusively, but has in recent years centered many of its activities on CJS reform. Sometimes this has been to the exclusion of advocacy for practical resources such as affordable housing and government benefits and has not often included individual advocacy designed to assist a battered woman to galvanize her own community in order to protect her and to hold her abuser accountable. Restorative justice practices are designed to be restorative, although the degree to which they truly are in domestic violence cases is questionable for three reasons. Firstly, the involvement of the community in intervening might be dangerous or ineffective because of a lack of community consensus that domestic violence is wrong. Secondly, the power imbalances between the victim and offender make most facilitative processes involving them problematic at best. Thirdly, demonstrating to most batterers the ways in which their actions harmed their partners, children or communities is not always related to, or does not necessarily meaningfully address, their belief that they have the right to control their partners through violence and intimidation.

The premise underlying this discussion is that any response to domestic violence (whether by the restorative justice movement, the battered women's movement or the criminal justice system) cannot be effective, redemptive and liberating unless it is focused on three goals. These goals are to (1) address the safety of the battered woman and her children, which includes holding the individual batterer accountable to her and the state; (2) restore to the victim the autonomy which the abuser has stripped from her and to which she is entitled as a person with full human rights; and (3) promote a change in community norms which currently tolerate and even support the concept that men have the right to control their female partners through violence and intimidation, including deterring individuals from using violence. Every practice that implements the three common principles of the restorative justice and battered women's movements detailed in Part III (restoration of victims, involvement of the community and addressing the context of crime) can be evaluated against these three goals.

Review of the work of the *battered women's movement* reveals that it has since its origin focused heavily on victim safety by pushing communities to fund shelters, create civil restraining order remedies, and to offer supportive services such as support groups and advocacy. Advocates have often been the only community members promoting the agency and autonomy of individual victims and urging all community members to stop tolerating domestic violence. Finally, a very strong component of the movement's work has been criminal justice reform, which was designed to promote all three of the above goals. Increasingly, however, it has become clear that in addition to CJS reform work, which must be continued, advocates need to develop more sophistication in their work at the micro-political level to engage in organizing individual

women's own communities to support and protect them. In addition, many battered women's programs have not yet examined the policies they are promoting with respect to their special impact on the most marginalized of battered women.⁵⁷

An examination of the current status and direction of the *criminal justice system* in response to domestic violence shows three things as measured by the above goals. Firstly, its function as a force to shift community norms and to deter specific people from committing acts of domestic violence appears to be succeeding by some measures.⁵⁸ For example, court-ordered batterer intervention programs do make some women safer.⁵⁹ Secondly, even communities that have made vast improvements in the treatment of battered women and their assailants (because most of the reforms are of the criminal justice system's response to batterers) do not operate, in most cases, to restore battered women's autonomy. Thirdly, the effectiveness of current practices, particularly those of the criminal justice system, to protect women and their interests varies with the class, race, or sexual orientation of the parties.⁶⁰

A parallel examination of *restorative justice practices* shows that while restoration of victims is a major goal to date, restorative justice practices are not primarily designed to account for (or protect from) the real and ongoing risks that battered women often face long after the crimes have been committed against them. While the principles of restorative justice might be applied in a way that could hold batterers accountable and keep women safe, the practices employed currently are problematic. For example, the predominance of mediation based practices (those which assume the ability of the victim to identify, articulate and argue her needs and interests) ignores the terrible impact that battering can have on the victim. Finally, the role of community in interceding to hold the offender accountable and restore the victim in domestic violence cases may be quite limited because of the prevailing community views that the use of violence to control a woman partner is not really so criminal as other violent acts might be.

Therefore, it appears that new practices, as well as variations of old practices, need to be designed in order to make good on the promise of the truly coordinated community response to domestic violence: the restoration or creation of true safety for battered women and their children; the restoration or creation of autonomy and freedom for victims of domestic violence; a shift in community norms; and the restoration of egalitarianism and peace as a standard for conduct in relationships. Most of these goals are only reachable in the context of efforts to hold the abuser accountable in some way: to the victim and to the community.

The battered women's movement, the restorative justice movement, and the criminal and civil justice systems all need to look anew at their approaches so as to incorporate effective, redemptive and liberating practices into systems which also serve to deter violence and promote battered women's safety and autonomy.

⁵⁷ Loseke, Donileen R., *THE BATTERED WOMAN AND SHELTERS: THE SOCIAL CONSTRUCTION OF WIFE ABUSE*, State University of New York Press (1992); Pence, Ellen, *Advocacy on Behalf of Battered Women*, in *SOURCEBOOK ON VIOLENCE AGAINST WOMEN*, Sage Publications (2001).

⁵⁸ Puzone, Carol A., et al., *National Trends in Intimate Partner Homicide*, 6 *VIOLENCE AGAINST WOMEN* 4 (2000) (summarizing research showing declines in domestic violence-related homicide).

⁵⁹ Gondolf, Edward W., *BATTERER INTERVENTION SYSTEMS*, Sage (2002).

⁶⁰ Crenshaw, Kimberle, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," 43 *STAN. L. REV.* 1241 (1991).

B. Goal 1: The Restoration of Battered Women's Safety

Interventions which promote battered women's safety will be those which are tailored to the context in which their abusers have committed the violence. Most intimate relationship violence against women is committed in the context of the offender's use of power and control tactics, including intimidation and threats.

Such battered women are subject both to batterer-generated risks and life-generated risks.⁶¹ Risks which are batterer-generated are those not only of further violence, but of other negative outcomes of attempts to separate from their abusers: eviction, loss of housing or employment, inability to find decent child care, and being reported to child protection by their abusers or loss of custody to their abusers. Some battered women whose children have witnessed the battering fear that if they disclose this fact while seeking help, they risk losing their children to child protection services. Life-generated risks are those which arise from the circumstances in a woman's life over which she has little or no control, such as economics, education/training, discrimination, language, gender, immigration status, housing, physical health, mental health, access to services, legal status, history, social circumstances and status, and socio-cultural practices.

A batterer can and often does manipulate these life-generated risks to punish or control his or her victim, with such tactics as keeping a partner who can't speak English from taking classes which might make her more independent, and engineering her entire family or community (especially with insular, immigrant, rural or small communities) to reject his or her battered partner for her attempt to terminate the relationship.

Therefore, battered women's safety is promoted where (1) the offender is stopped from committing other violent and intimidating acts; (2) her life-generated risks are minimized; and (3) the social, legal and moral climate in her and his communities supports the cessation of the violence by the abuser and by all of its members.

(1) Restoring the Battered Woman's Safety by Preventing the Batterer from Using Violence Against Her

Because batterers are themselves responsible for the choice to use violence (regardless of their histories and of the existence of factors which place them at greater risk of choosing violence), interventions designed to stop battering must be directed at batterers and not at their victims. Furthermore, no intervener can ignore the reality that the batterer's violence serves a purpose and that there are significant benefits which the batterer believes arise from his violence.

Because violence often escalates when the batterer's control is being challenged, any intervention must take into account the real possibility that the violence will be repeated.

⁶¹ Jill Davies, INTRODUCTION TO POLICY ADVOCACY AND ANALYSIS: IMPROVING HOW SYSTEMS RESPOND TO BATTERED WOMEN (1999), *unpublished manuscript*.

(a) *Criminal Justice System Practices*

Criminal justice system practices which can promote individual battered women's safety are those which convey to the abuser the clear expectation that the violence must stop.

Practices which promote safety can include the kind of law enforcement practices which are now being promoted in many U.S. communities: prioritization of domestic violence calls for immediate response; separate interviews with all parties and witnesses in a manner reflective of the potential seriousness of the incident; sensitive and competent approaches to victims on the scene and afterward; careful collection of evidence and assessment of probable cause to believe a crime has been committed, including whether the violence was motivated by self defense; follow up investigations and contacts with victims; and competent testimony at trial.⁶²

Prosecutorial practices which can assist in conveying the message to the abuser that his actions are not acceptable are: recognition and respect for the ongoing risks and other concerns which the victim may be facing; charging decisions which take into account the history behind and context of the incident; and ensuring that the victim is not placed in a central role in the case against her partner.⁶³

The courts' messages to and treatment of those accused of domestic violence crimes may be the most critical. Practices which convey the clearest message to abusers include: control of the offender's behavior towards the victim in the courtroom; the issuance of clear court orders which are unequivocal in their message that repeated violence will not be tolerated; the insistence on complete information on the offender, the incident, and any history of abuse; and the adoption of consistency and fairness in response to violations of court orders. The role of incarceration in the CJS response to domestic violence, which has been minimal to date, should be limited to situations in which it is likely to improve public or victim safety or to convey the message of society's concern to a serial or serious abuser.

Many of these interventions, because they are based upon the belief that the abuser alone has the ability to stop his/her violence and that the victim will usually be unable or unwilling in leading the charge to hold her abuser accountable, essentially circumvent the victim in order to deal directly with the abuser. Warrantless misdemeanor arrests (made in the absence of the victim's express request or even assent) and evidence-based prosecution (wherein the case is brought forward based upon the available evidence, including the victim's out of court statements such as excited utterances) are both directed at the abuser and increasingly minimize the role of the victim in holding the offender accountable or confronting him in order to stop his violence.

It should be noted that most of the CJS interventions which discourage future violence, such as close supervision and appropriate treatment or batterer's intervention programs, may be utilized in some cases even in the absence of a conviction. In light of the severe collateral consequences of even a misdemeanor conviction (such as deportation of a legal immigrant, ineligibility for government benefits or public housing, prohibition from certain jobs such as child care), the CJS must assess in each case whether conviction is necessary to obtain the kind of relief that will ensure victim safety.

⁶² See generally Eve S. Buzawa & Carl G. Buzawa, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE, 135-67, Sage Publications, 2d ed. 1996; MARY B. MALEFYT, et al., PROMISING PRACTICES: IMPROVING THE CRIMINAL JUSTICE SYSTEM'S RESPONSE TO VIOLENCE AGAINST WOMEN 37-104, STOP-TA Office, Washington, D.C. (1998).

⁶³ *Id.*

One of the serious unintended consequences of CJS intervention has been the arrest and prosecution of battered women who fight back, whether legally or illegally. These practices undermine the community's ability to prevent the batterer's future violence.

(b) Restorative Justice Movement Practices

Restorative justice practices which promote individual battered women's safety are those which convey to the abuser the clear expectation that the violence must stop and which provide the kind of protective support the woman desires. Some of the current restorative justice practices do have potential in this regard, but some can actually increase the danger to the victim in several ways.

Firstly, practices which engage the victim and the abuser together in discussion can easily confuse the messages carried to the abuser and victim, implying that both parties have a role in creating the problem and in finding a solution. The only hope for change in a batterer can come from his realization that what he has done is wrong and that he, and not his partner, is fully responsible for the act and for making changes. Practices which encourage confusion about responsibility for the violence and its effects are dangerous.

Secondly, because experience shows that a batterer represents a real threat of future violence to his victim, practices which do not assume, in the absence of information to the contrary, that such a danger exists will further endanger her. The chief weakness in the restorative justice movement's practices as applied to domestic violence cases is that, while they attempt to focus on restoration of victims, they have not accounted for one of the chief characteristics of most domestic violence cases: the existence of ongoing danger occasioned by the victim's resistance to the batterers' authority and control.

The restorative justice movement should start to centralize victim safety by committing to work directly with battered women and their advocates to examine and critique the current practices with the goal of ensuring that women's safety is central to the process. For example, mediation-based practices must not be applied to domestic violence cases in the absence of clear and convincing evidence that the victim is, in a truly informed manner, affirmatively seeking to participate with her abuser in such a process.

Restorative justice practitioners must not engage a community in domestic violence cases unless and until the battered women's movement is satisfied that the norms of the engaged community include opposition of gender based violence and an understanding of the dynamics of battering and other systems of oppression.

(c) Battered Women's Movement Practices

Battered women's advocacy practices which promote individual battered women's safety are those which reflect the core principles of the movement, the promotion of women's safety and autonomy. Because the existence and accessibility of advocacy programs and shelters is likely the most fundamental safety guarantor for battered women, every program must ensure that it is truly accessible and that it creates true safety for women.

There is ample evidence that the same biases that have infected other institutional responses to domestic violence are present in the programming decisions of many battered women's programs. Many communities of color, lesbian and gay victims of domestic violence,

and other groups have made it clear that they are not being adequately served by existing programs. As a result, some have created their own options. The battered women's movement must invest significantly more energy in ensuring full accessibility to culturally competent services for all battered women.

Programs must adopt and implement policies which ensure that battered women can obtain confidential help. This may require advocacy for legislation that creates testimonial privilege for battered women's advocates in their relationships with battered women.⁶⁴ It also requires that programs ensure that any collaboration with criminal justice system actors or child welfare agencies, for example, do not jeopardize the fundamental right of women to a confidential relationship with an advocate.

The battered women's movement does and should resist institutional responses which are not grounded in the reality of their contexts, especially those which look only to the couple's relationship or at the batterer's behavior in terms of individual pathology or deviance. A more recent way that advocates are asking the criminal justice system to consider the social context of an incident is the promulgation of laws or police procedures which require officers who are confronted with situations involving the use of violence by both parties to analyze the historical context in which the incident occurred. A history of battering of one party upon the other might, for example, lead to the conclusion that one party acted in self defense or that arrest should be reserved for the battering partner, who is the more dangerous, the primary/predominant aggressor.

Because many battered women would choose civil legal remedies such as child custody and civil protection orders, advocates must redouble their efforts to ensure that women have access to competent legal advocates and attorneys.

Most importantly, advocates must begin to engage with women to look beyond the civil and criminal justice systems to their (or their abusers') families, friends, employers, faith communities, and neighbors to build support for the women, to increase their safety, and to encourage the batterers to cease their violence. Creation of real safety for women does ultimately depend on effective intercessions directly with abusers. Many men may respond very favorably to community based interventions.

Because the community to which a woman and her advocate might go for support and protection may disagree that she is entitled to it, the community education efforts which the movement has been making for years should be tailored to the message that all women deserve to live free of violence and intimidation and that the immediate community of each battered woman and each batterer must take steps to make this safety and freedom a reality.

Finally, battered women's advocates must avoid relying too heavily on the criminal justice system for women's protection, recognizing that it is not an option for many women, and must supplement their CJS reform work with a more holistic approach that not only seeks to reform institutions but to organize communities to protect women.

⁶⁴ For example, Pennsylvania grants domestic violence advocates an absolute privilege from forced disclosure of communications made to the advocate by a battered woman. CHAPTER 23 PENNSYLVANIA. STATUTES, §6116 (1995).

(2) Addressing life-generated risks

Many people from both movements as well as the CJS now clearly see the physical and even life threatening risks that batterers can pose to their partners. But all community members must also begin to pay closer attention to the “life-generated risks” that battered women face. These are the subjects of much of the assessment, negotiation, and work that women do every day to keep themselves and their children safe.⁶⁵

The battered women’s movement has been dealing directly with these risks in many ways for many years, but to the extent that it relies heavily on criminal justice system interventions to limit this kind of risk to women, it is less than effective.

(a) Criminal Justice System Practices

As with other institutions and intervenors, it has not been seen as the function of the CJS to identify or address crime victims’ life-generated risks. The traditional CJS has not until very recently begun in some communities to assess and account for these risks and the methods for doing this are just now beginning to evolve.

Restitution, which could be characterized as a restorative justice practice, can address the economic aspects of some life-generated risks and is now theoretically available in many traditional CJS court proceedings. Of course, its usefulness depends heavily on (1) the availability of advocates to assist the victim in assessing the financial costs associated with the crime; (2) the ability of the victim and her advocate to articulate the need for recompense and to advocate for it; (3) the willingness of the court to entertain the request and to rule appropriately; and (4) the ability of the defendant to pay restitution (in addition, perhaps to child support, batterer’s intervention program fees, and costs associated with defense).

The CJS must become more accessible to battered women whose life-generated conditions might otherwise exclude them from help or meaningful participation. For example, interpreters must be available to assist law enforcement, prosecutors, defense counsel and victim witness staff and advocates to respond properly to cases involving non-English speaking parties, including hearing impaired persons. Conditions of relief pending trial and sentencing orders should reflect consideration of the life-generated risks that may be complicating the lives of battered women victims of crime. Courts, the larger venue within which the CJS functions, must also improve their response to these life-generated risks. For example, child care should be available in courthouses so that parents with few resources can participate in hearings, both civil and criminal. Scheduling of hearings and trials must take into account the fact that battered women who are working class or poor might have extreme difficulty holding on to jobs if they must repeatedly take time off for court appearances. The immigration and other collateral consequences of the handling of a domestic violence cases must be considered by practitioners at every level.

In the last analysis, the CJS remedies are not those that can best address life-generated risks directly. Civil protection orders, custody and other civil remedies might be more helpful. The CJS must work with the rest of the coordinated community response intervenors to ensure that victims of domestic violence get counsel and legal advocacy so that they can access the civil courts for relief that best addresses life-generated risks and batterers’ use of them to punish and control women.

⁶⁵ See Davies, *supra* note 61.

(b) *Restorative Justice Movement Practices*

One existing restorative justice practice, mentioned above, is restitution, which could help battered women recover from the financial devastation wrought by their abusive partners. Other restorative justice practices, especially those that involve mediation-like activities, would not address battered women's life-generated risks for the reasons detailed earlier.

Restorative justice practices which might have the most potential for addressing life-generated risks would include those which involve the community in a real and productive fashion. The risks associated with this community involvement are many, however, ranging from victim-blaming and offender collusion to lack of follow-through and enforceability of agreements.

Applied properly, the principles of the restorative justice movement might lead its practitioners or any system to identify and address these life-generated risks, but because current restorative justice practices suffer from other flaws which inhibit their effectiveness in domestic violence cases, the utility of applying the principles has not been tested.

The extent to which any restorative justice practice which could be developed is effective, redemptive and liberating for battered women depends on whether: (1) the definition of what is effective, redemptive and liberating to any individual woman is determined by her, in a process which involves, at her discretion, working with an advocate from a program outside the criminal justice system; (2) any agreements which would bind either the community or the offender to taking specific steps are enforceable and enforced; (3) the process itself does not make her uncomfortable or endanger her; and (4) she is provided, as part of the process, with the resources which are necessary to her restoration.

(c) *Battered Women's Movement Practices*

Life-generated risks have been addressed directly by most battered women's programs for years, in part because advocates talk (and live, if in a shelter) every day with battered women whose lives are overwhelmed with such risks. It is critical that programs advocate even more strongly for housing, adequate financial supports and other practical needs of battered women.

Despite some progress in this area, most mainstream battered women's programs are not fully accessible to women with limited English speaking capacity and to women with disabilities, especially mental disabilities. This must be remedied if the life-generated risks women face can be addressed by the very programs that should be the most accessible and helpful. Programs must begin offering their assistance to communities—offering to help to organize around the issues chosen by the women in the community—which will serve to cement relations and inform later organizing to stop battering in those communities.

The recent trend in some programs toward depoliticizing violence against women by treating it as a mental health issue will substantially weaken advocates' ability to address life-generated risks faced by women every day. Women who are poor, disabled, discriminated against, undereducated, or immigrant—and because of their gender are at high risk of being assaulted by their partners—have real problems *of a political nature* which seriously compromise their safety and that of their children. Engagement with the community to address these and related risks, not just to raise the funds necessary to shelter and counsel women, is a critical component of the movement to end violence against women.

C. Goal Two: Restoring Battered Women's Autonomy and Freedom

A community's intervention with a battered woman must address her loss of autonomy as an individual as well as stopping the violence perpetrated against her. A primary facet of battering is the abuser's restriction of his partner's liberty—controlling how she spends her time, whom she sees, where she goes. A battered woman often must account for every minute of her day to her batterer. Consequently, a successful intervention is one that focuses on respecting a battered woman's freedom to make choices for herself and restoring to her some of the control she lost over her own life.

(a) Criminal Justice System Practices

The chief challenge presented by interjecting battered women's autonomy into the process of holding the batterer accountable and stopping his violence is the reality that most battered women do not want their partners penalized.

Many domestic violence incidents are dangerous ones. Many women who contact police do so without expectation of anything other than removal of the abuser, and battered women have been saying for years that they do not want to be responsible for directing the removal of their partners.

Therefore, police should continue to make warrantless arrests where they have probable cause to believe that a crime has been committed, that the person using violence did not act in self-defense, and that the person arrested is the primary or predominant aggressor in the incident.

It is beyond the arrest stage of the intervention that the role of women's autonomy should increase in importance. Victims of domestic violence must be consulted as to their safety concerns and life-generated risks and the decisions (prosecutorial and otherwise) which reflect those risks and concerns. The battered women's movement and the CJS need to engage in a re-examination of their goals for CJS intervention so as to ensure that current practices reflect what has been learned from the past twenty years of reform work.

(b) Restorative Justice Movement Practices

Restorative justice practitioners must also examine the role victim autonomy plays in these cases and in restorative justice practices in order to ensure that they take into account the control which the domestic abuse may have wrested from the victim and awarded to the offender and the impact that community and legal system expectations may have in these circumstances.

Most restorative justice practitioners assert that participation in any process must be voluntary. The choice to participate is one which is very complex for battered women; autonomy as applied to this choice is often difficult to ensure. Years of experience with mediation as utilized in family law cases has taught that many battered women "elect" mediation because they think that it is expected of them and that they will be penalized somehow if they resist participating.

Because of the power balance implications of battering, it is critical that all current restorative justice practices should include screening for and exclusion of cases involving domestic violence. Any process that places the battered woman in a negotiating relationship with her source of fear offers her a false promise of hope and might, therefore, place her in danger. To date, the restorative justice movement has failed to adequately address these concerns.

(c) Battered Women's Movement Practices

To the extent that the practical services which the battered women's movement provides, such as shelter, support and individual advocacy, actually help women become safer and more autonomous, they are doing very "restorative" work. To the extent that battered women's programs are effective, redemptive and liberating for women, they are so because it has long been the highest value to provide services that are "women-directed" or "women-centered." Difficulties have arisen for two reasons. Firstly, there is a trend in some programs, especially some shelters, towards the treatment of battered women as primarily in need of mental health or psychological therapy which pressures women not to reconcile with their abusers. This is truly not restorative; rather, it merely substitutes one view of what women should do and be for another (that of the abusive partner). Secondly, by focusing heavily on criminal justice reform work, many programs have not done enough to address other needs women repeatedly express, such as safe, affordable housing and other community-provided necessities. In some cases, the programs' collaborations with the CJS are such a dominating and consuming activity in the program that advocating for the autonomy of battered women becomes secondary.

Systems and individual advocacy which result in the creation of real life options including autonomy for women is crucial, especially because it is only the battered women's movement whose chief work this is. Advocating for women's autonomy would certainly be the most effective, redemptive and liberating of all activities from the perspective of the local community of battered women.

D. Goal Three: The Restoration of Egalitarianism and Peace as a Community Standard for Conduct in Relationships

Both movements and the criminal justice system must reassess the extent to which they are engaging in the work without addressing the prevailing norms of the culture.

(a) Criminal Justice System Practices

Most central to this discussion should be the role the criminal justice system plays in shifting community norms away from tolerance of violence against women. "Community," however defined, must be transformed in order to stop the violence. The degree to which the battered women's movement has relied on the criminal justice system to accomplish the goal of changing a community's thinking about violence against women must be reviewed and rethought.

The CJS has not engaged at all in activities addressing this goal, except to the extent that it communicates, either directly or indirectly, to the offender that he does not have the right to control his partner through violence. Those messages are not overt in most cases, at least regarding behavior which is not criminal but merely harmful to the victim, such as financial controls, isolation, and threats of harm which do not rise to the level of crimes. It is questionable whether the CJS could or should undertake activity which would forward this goal, considering that social change of this kind is not within its mission.

(b) Restorative Justice Movement Practices

While restorative justice practices seek to engage the community in the process of restoring peace to the community, they do not acknowledge the role of gender in the origin of

domestic violence. Neither do they directly address the challenges associated with involving, in these cases, a gender-biased and uninformed community.

The restorative justice movement should engage in this discussion with the battered women's movement, but must learn to interject the social context of battering into its analysis and to figure out how to prioritize victim safety while transforming community response to crime.

(c) *Battered Women's Movement Practices*

Nearly every aspect of the battered women's movement's practices reflects a commitment to this goal. However, to the extent that services become gender neutralized, the ability of the movement to directly address the causes of power imbalances in relationships (gender role distinctions and patriarchal notions about family), will be weakened.

V. CONCLUSION

To the extent that practices of the CJS, the battered women's movement and the restorative justice movement (when applied to domestic violence cases) are effective, redemptive and liberating, they must address the range of risks women face and create a hope that in the short and long term, intimate violence against women can be reduced. Practices should be measured by their effectiveness in creating true safety for battered women and their children, restoring or creating autonomy and freedom for victims of domestic violence, and shifting community norms to the acceptance of egalitarianism and peace as a standard for conduct in relationships. An analysis of the practices of these three systems shows that some of the approaches of each have flaws, some lesser and some greater, and strengths from which the others could learn. In addition, the practices of all three systems need to better reflect the context within which domestic violence occurs, especially gender, class and race-based oppression.

While the effectiveness of the *criminal justice system* response to domestic violence has improved dramatically in the last 30 years, to be most effective, prosecutors and courts must improve their ability to gather sufficient information, including victim preferences, and risk or danger assessment in order to distinguish among cases. Closer scrutiny would allow CJS practitioners to better tailor their responses to the needs of each offender (to treatment or education programs, sanctions, and limits on freedom where appropriate) and to increase the likelihood that the offender's treatment of his partner will change.

Secondly, CJS responses need to recognize and reflect the vast differences among defendants, their cultures, their languages, classes and other characteristics in order to ensure that remedies are truly effective, truly restorative, and do not wreak more havoc on the family and community than does the battering itself.

Thirdly, the criminal justice system's responsiveness to the expressed needs of victims can be greatly improved. The authors recognize that inherent in the use of the CJS in most of these cases is the conflict between, on one hand, the interests of the state in holding batterers accountable, in controlling or supervising them, and even sometimes punishing them for violating norms codified in the criminal laws, and, on the other hand, the interests of many committed and sensitive CJS practitioners in making battered women's lives better in the short and long term. In many cases, it is this latter interest that is often subordinated when in conflict with the former, especially in cases where there is an ongoing relationship between domestic violence victim and offender and the victim is either neutral about or very opposed to CJS intervention.

Generally, it is the risk that is generating battered women's opposition to CJS involvement in her life and that of her partner. And life-generating risks are often as real and threatening as are batterer generated risks. To complicate things further, the CJS's interventions themselves can create or increase risks of both types. The CJS should enter into conversations with battered women's movement activists and determine together what specific changes in CJS locally could address all three of these kinds of risks.

To the extent that the CJS is perceived by battered women to be tailoring its responses to the needs of individual defendants and victims (to the extent possible and fair), battered women will be more likely to seek its protections and see the CJS as a resource. A contextually

informed, individualized response to domestic violence would engage more victims, who would, in turn, further inform the CJS's efforts. The result would be a system more liberating for battered women and more effective at encouraging batterers to change.

The *battered women's movement* has struggled for decades with the conflict that sometimes exists between the goal of encouraging the state to set new norms for the use of violence in intimate relationships and the goal of promoting individual battered women's immediate and long term safety and autonomy. The movement's alliances with the CJS, which are so critical to the evolution of CJS practices, have taken on such importance in some programs that other, potentially more effective and liberating approaches may have been given short shrift. If asked, many battered women might well say that besides immediate and sensitive police response, what they want is the financial security to afford them true options, including independence from their violent partners, safe and affordable housing apart from their abusers and meaningful and effective support for and monitoring of their partners to prevent future violence. The CJS interventions, indeed even many of the civil legal remedies the battered women's movement has promoted, can't really address these needs because society has not seen fit to dedicate the resources necessary to ameliorate the batterer and life-generated risks battered women face. Battered women's movement activists could increase their efforts to advocate for more affordable housing and other services which battered women need, joining in stronger alliances with others such as anti-poverty, anti-racism, disability rights and housing activists.

Secondly, other implications of battered women's advocates' alliances with the CJS must be addressed if the movement's work is going to be truly liberating for battered women. For example, of legal and moral necessity the CJS must avoid discrimination on the basis of gender in the enforcement of criminal law. Accordingly, although battering is rooted in gendered notions of entitlement and of the roles men and women should play in heterosexual relationships and although the vast majority of such crimes are committed by men against women, violent criminal behavior by one intimate against another is not defined in gendered terminology. Although it would be a natural outcome of close alliances with the CJS, battered women's advocates must take care to avoid unwittingly slipping into the use of de-gendered terminology themselves. The elimination of battering, which is rooted in notions of oppression mirroring other forms of oppression in our culture, will only be possible if the role of gender in the battering and in society's support for it is kept central to its mission and work.

Thirdly, having in many communities accomplished so much in pressing for reform of the CJS, battered women's movement activists could expand their views of what kinds of interventions can keep women safe. Informed by efforts taken in some communities of color, more advocates could learn to work with battered women to organize women's immediate communities, families, neighbors, and friends to help protect and support them and to monitor and guide their abusers. This direct engagement with the woman's own very immediate community is a potentially very effective and liberating approach, though complicated significantly by the prevalence of sexism and other biases in the very communities which the woman would rely upon.

The *restorative justice movement*, though premised in part on the recognition that to some extent, crime causes and is caused by community dysfunction, has not evidenced a clear understanding of the role of gender in domestic violence nor demonstrated a commitment to addressing the pervasiveness of gender bias as it seeks to engage communities. The well documented prevalence of community acceptance of (if not overt support for) some level of

violence in intimate relationships, especially if it is by a man against his female partner, seriously compromises the efficacy of restorative justice practices, especially those which involve the community at large in the processes of (1) deciding what remedies would best restore the community, the offender to the community and the victim; and (2) participating in the implementation of this decision and relating appropriately to the victim and offender in the future.

The principles of the restorative justice movement, many of which hold great promise as applied to domestic violence cases, need to be reexamined and altered to reflect and account for the reality of the patriarchy and other socially-sanctioned forms of oppression, the life and batterer generated risks which are so commonly experienced, and the effects of these factors on the lives of men and women.

Practices which assume parity in the voice of victim and offender, as with mediation, group or circle based practices need to be examined for evidence that they endanger victims and embolden perpetrators. For example, assuming that battered women will be willing or able to express the truth about their lives in sessions where the offender, his allies, and other of the public are present is very dangerous because of the nearly universal phenomenon of batterer's beliefs that they have the right to control what their victims think and say. "Voice parity" is also problematic as applied to these cases because it feeds the misperception that women have the same, not more or less, "truth" telling capacity; which is completely contrary to what we have know for years about batterers—they are great minimizers and liars who misrepresent their actions and intentions as a tactic to avoid accountability. Both of these outcomes, victim intimidation and offender control of victim and process, are inimical to the principles of restorative justice and must be absolutely avoided.

Many of the most worthwhile, laudable goals of the restorative justice movement relate to the reclaiming, as opposed to rejection and isolation, of the offender. The restorative justice practices which implement these goals include the VOM or healing circle which has, in part, the goal of rehabilitating the offender by exposing him/her to the truth about what harm his crime has wrought in the lives of the victim and community.

The application of this notion to domestic violence cases is particularly flawed in three ways. Firstly, many, if not most, batterers are fully cognizant of their actions' meaning to and effect on the victim.⁶⁶

Secondly, nothing in existing research suggests that the "change process" for batterers is affected through a couple sessions with the victim and/or members of the community. Rather, we have noted the process of change for batterers (from violent and controlling lawbreaker to non-violent, non-controlling partner) is more likely linked to the repetition and consistency of our message against domestic violence.⁶⁷ A few sessions with the victim or even with some

⁶⁶ Much of the batterer intervention program curricula in the U.S. are oriented to addressing a batterer's sense of entitlement to use violence, or his reasoning supporting his choice to use violence. See e.g., Healy, Karen, et. al., *BATTERER INTERVENTION: PROGRAM APPROACHES AND CRIMINAL JUSTICE STRATEGIES*, National Institute of Justice (1998); Lindsey, Michael, et. al., *AMEND: PHILOSOPHY AND CURRICULUM FOR TREATING BATTERERS*, Gylantic Publishing Company, (1993); and Paymar, Michael, et. al., *EDUCATION GROUPS FOR MEN WHO BATTER*, Springer Publishing Company, (1993).

⁶⁷ Gondolf, Edward W., *BATTERER INTERVENTION SYSTEMS*, Sage (2002); Bancroft, Lundy, *WHY DOES HE DO THAT?*, G.P. Putnam's Sons (2002).

community members is not likely to create such a change. The practitioners who assume otherwise only serve to collude with the abuser and feed false hopes to the endangered victim.

It is difficult to measure the outcomes of restorative justice practices which purport to facilitate personal transformations for the victim or offender, or both. The concept that both victim and offender (or oppressed and oppressor) find redemption through the acceptance of each other as human and equal, and through the larger process of forgiveness, is both ubiquitous and pantheistic. As an idea, it resounds for many. The concept of personal transformation in restorative justice is, at least in part, linked to the larger, and arguably more profound, concept of forgiveness.

The discussion as to whether a process of forgiveness can occur between two individuals, where one individual is in great and ongoing fear of the other, is a discussion that lies outside the scope of this article. At least for now, there is a dearth of empirical evidence to suggest that those who have deliberately chosen to employ violence or the threat of violence in their intimate relationships, so as to ultimately maintain dominance within those relationships, will undergo a change in their belief systems through engaging in restorative justice practices. In fact, those who have studied batterers most closely would argue that changes in belief systems occur predominantly over long periods of time with continuous and consistent messaging from the community (e.g. the courts, probation, batterer program facilitators, etc.).⁶⁸ The proposition that domestic violence offenders would change their behaviors if they better understood the impact of their actions on the people around them contrasts starkly with the prevailing understanding within the battered women's movement that most batterers have a strong understanding of the impact of their violence. From the perspective of many who work with batterers, batterers realize there is a causal relationship between using or threatening violence and the accomplishment of a certain goal. This is, in fact, a strong point of disjuncture between the battered women's movement and restorative justice proponents.

Thirdly, the face-to-face confrontations or conversations that are hallmarks of many restorative justice practices are promoted as providing an opportunity for victim empowerment and catharsis. While that may well be true of non-domestic violence cases, 30 years of the battered women's movement experience shows that many battered women's beliefs about their right to a separate opinion or to express disagreement are strongly altered by the batterer. While several battered women's support group meetings and a period of safety can alter this, a couple of sessions with the abuser are not likely to. "Empowerment" is promoted as a by-product of the sessions, and the word in this context often has primarily psychological meanings; that is, the woman is hoped to feel more powerful after participating in the process. The battered women's movement wants to promote the transfer of real power to the victim of domestic violence, and understands that increased self-esteem is not the path to this reality.

What restorative justice principles do offer and which seem to be the very best application to domestic violence cases is a promise of true offender awareness and change that can only result from a comprehensive strategy of support and monitoring.

Surely most effective would be those practices, whether established and maintained by the criminal justice system, the restorative justice movement or the battered women's movement, that engage, committed, knowledgeable, supportive and sensitive community members, working

⁶⁸ *Id.*

with and at the direction of the battered woman and her children to help her reclaim and retain her safety and autonomy.

Women have, for centuries, moved to support and help each other in the face of battering, usually in quiet and almost subversive ways. It is time that the CJS expands its understanding of what role it can play in the work of liberating women from the oppression that battering is rooted in and accomplishes. It is time that the battered women's movement expands its vision of what means must be employed to create true and lasting freedom and justice for all battered women. It is also time that the battered women's movement develops a richer analysis of the strengths, weaknesses and limitations of the criminal justice system, as an institution for effecting social change, from the perspective of all communities. Finally, it is time that the restorative justice movement examines the application of its practices to domestic violence cases, so as to at least do no harm and at best create new ways that are truly restorative for battered women and their communities.

These challenges loom large for all three groups. The only hope of meeting the challenges lies in our responsiveness to each other and most importantly to the battered women whose lives can best inform the direction we take. The battered women's movement needs to engage with and listen to the restorative justice movement and to rethink what remedies upon which to focus. The battered women's movement needs to engage with other progressive movements who are already advocating for the needs of battered women from other vantage points and addressing other life-generated problems. The restorative justice movement needs to engage with and learn from the battered women's movement about the central nature of domestic violence and the true needs of battered women.

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