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# Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation

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# Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation

## I. Introduction

### *The Crisis*

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

The statistics are startling. Women are significantly more likely than men to report being raped, physically assaulted and/or stalked by a current or former intimate partner, whether the time frame is a lifetime or the previous twelve months.<sup>6</sup> One out of

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<sup>1</sup>Gordon Bazemore & Twila Hugley Earle, *Balance in the Response to Family Violence: Challenging Restorative Principles*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, 153, 155 & 156 (Heather Strang & John Braithwaite eds., 2002).

<sup>2</sup>LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 33 (Princeton University Press 2003).

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

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

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

<sup>6</sup>PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at 9 & 17 (2000), *available at* <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>.

every five women in the United States has been physically assaulted by an intimate partner, compared with one out of every fourteen men in the United States.<sup>7</sup> Violence against women is predominantly intimate partner violence. Sixty-four percent of the women who were raped, physically assaulted and/or stalked since age eighteen were victimized by a current or former husband, cohabitating partner boyfriend, or date.<sup>8</sup>

In 2005, the United States Department of Justice published a compendium of the most recent family violence statistics from the Bureau of Justice Statistics, and two databases maintained by the FBI.<sup>9</sup> While the study maintains that family violence rates fell between 1993 and 2002, forty-nine percent of violent crimes committed against a family member between 1998 and 2002 were committed against a spouse.<sup>10</sup> Seventy-three percent of family violence victims between 1998 and 2002 were females.<sup>11</sup> This study also reviewed inmates in local jails in 2002 and found that twenty-two percent of the population had been convicted of a crime of family violence.<sup>12</sup> Their victims were mostly female (seventy-nine percent).<sup>13</sup>

Children are also affected by domestic violence in their homes. Each year an estimated 3.3 million children are exposed to domestic violence acts.<sup>14</sup> Although most victims try to hide the abuse from their children, one study found that children are present

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<sup>7</sup>*Id.* at 9-10.

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

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

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

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

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

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

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

in almost half of all battery incidents.<sup>15</sup> Children who are victimized are likely to later become either victims or perpetrators.<sup>16</sup> Battered women are six times more likely to have witnessed violence as children and batterers are ten times more likely to have witnessed domestic violence as children.<sup>17</sup> In addition, children growing up in violent homes are at greater risk for depression, anxiety, school problems, running away from home, teenage pregnancy, substance abuse, and attempted suicide.<sup>18</sup>

Domestic violence not only affects the women who are assaulted and their children; it affects us all.<sup>19</sup> Domestic violence results in worker loss of productivity, turnover, absenteeism, and excessive use of medical benefits, costing American businesses four billion dollars each year.<sup>20</sup> In light of the pervasiveness and impact of physical assault by intimate partners, domestic violence should be treated as a chief criminal justice and public health concern.<sup>21</sup>

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

The American legal systems have a long history of complicity in intimate abuse, where the abuse was perpetrated by men against their wives and children.<sup>22</sup> From the early colonial period onward, American courts followed British common law in allowing husbands the right of domestic abuse.<sup>23</sup> It was not until the late nineteenth century that

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

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

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

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

<sup>19</sup>Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 *DRAKE L. REV.* 295, 298-99 (2004).

<sup>20</sup>Malinda L. Seymore, *Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 *NW. U. L. REV.* 1032, 1037 (1996).

<sup>21</sup>PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at 55 (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>.

<sup>22</sup>Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Role of Prosecutors, Judges and the Court System*, 11 *YALE J.L. & FEMINISM* 3, 9 (1999).

<sup>23</sup>*Id.* at 10.

states finally began to move away from actually condoning a man's use of physical force against his wife.<sup>24</sup> Many states still clung to the position, however, that in the absence of serious violence, the government should not interfere in the private family realm.<sup>25</sup> See further discussion on the history of domestic violence law *infra* Part II.

The domestic violence movement came into being by the late 1960s and early 1970s, and reformers made substantial improvements in statutory law.<sup>26</sup> Once the laws were in place, a campaign began to see these laws properly enforced. Since the beginning of the 1970s, battered women's advocates have demanded that police and prosecutors treat domestic violence "like any other crime."<sup>27</sup> For example, often police officers ignored or delayed their response to domestic violence calls.<sup>28</sup> In response, battered women's advocates successfully campaigned in the 1980s for mandatory arrest policies. These policies frustrated the common police practice of failing to make an arrest in cases of domestic violence.<sup>29</sup> See further discussion of the reforms in domestic violence law that began in the 1960s *infra* Part II.

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

The 1960s and 1970s were a period of reform, but some of the policies and programs that have grown out of those reforms have proven ineffective or even counter-productive at addressing domestic violence. The tendency of mandatory arrest and prosecution policies and batterer's treatment programs to respond identically in all

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<sup>24</sup>Fulgam v. State, 46 Ala. 143, 146-147 (1871); Commonwealth v. McAfee, 108 Mass. 458, 461 (1871).

<sup>25</sup>State v. Oliver, 70 N.C. 60, 61-62 (1874); State v. Hussey, 44 N.C. 123, 126-27 (1852).

<sup>26</sup>Epstein, *supra* note 22, at 11.

<sup>27</sup>*Id.* at 13.

<sup>28</sup>*Id.* at 14.

<sup>29</sup>Mordini, *supra* note 19, at 312-13.

domestic violence situations can be frustrating for police, prosecutors, and perhaps most of all, victims, all of whom know that each family—and each batterer—is unique.

“The move towards mandatory arrest and mandatory prosecution of domestic violence perpetrators may have increased the legal system's participation in the lives of domestic violence victims, but this involvement is not always wanted and does not always lead to reduced violence and safer victims.”<sup>30</sup> Some research suggests that mandatory arrests may actually increase violence.<sup>31</sup> Further, when prosecutors force victims to participate in prosecutions against their will, it may affect their safety and autonomy.<sup>32</sup> Current research suggests that mandatory arrest and prosecution policies are not successful crime reduction strategies because these policies eliminate the professionals’ discretion and the victims’ desires from the state’s decision-making process.<sup>33</sup>

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

The effectiveness of batterer’s treatment programs is questionable. Unfortunately, the programs often do not address the causes and effects of domestic violence. Despite the fact that many batterers use drugs or alcohol on the day of assault,

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<sup>30</sup>*Id.* at 299.

<sup>31</sup>Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 25(1992).

<sup>32</sup>MILLS, *supra* note 2, at 33.

<sup>33</sup>*Id.*

and many have prior arrests related to substance abuse, addiction is rarely dealt with in batterer's treatment programs.<sup>34</sup>

The "one size fits all" approach to batterer's treatment programs, particularly in California, where all persons convicted of a crime of family violence are required to participate in a fifty-two week program,<sup>35</sup> fails to allow for the fact that each family situation and each batterer is different. By ignoring the specific causes and effects of domestic violence incidents and instead meting out a standard program designed to reach all program participants, everyone loses. *See* further discussion of the problems with batterer's treatment programs *infra* Part VI.

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

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

## **II. Problem: Mandatory Arrest Policies**

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

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<sup>34</sup>D. Brookoff et al., *Characteristics of Participants in Domestic Violence Assessment at the Scene of Domestic Violence Assault*, 277 JAMA 1369, 1371 (1997).

<sup>35</sup>Cal. Penal Code § 1203.097 (West 2008).

An estimated two million American women are victims/survivors of domestic violence at the hands of their male partners.<sup>36</sup> Historically, domestic violence was often ignored by law enforcement. United States police rarely made arrests in cases of misdemeanor domestic violence.<sup>37</sup>

“As recently as 1967, the leading police professional organization, the International Association of Chiefs of Police, declared in its training manual that ‘in dealing with family disputes, the power of arrest should be exercised as a last resort.’”<sup>38</sup> Law enforcement viewed domestic violence as a private matter. “This position was endorsed by the American Bar Association, whose 1973 *Standards for the Urban Police Function* said that police should ‘engage in the resolution of conflict such as that which occurs between husband and wife . . . in the highly populated sections of the large city, without reliance upon criminal assault or disorderly conduct statutes.’”<sup>39</sup> Generally, police agencies believed that in a family dispute, an arrest did not resolve the bigger problems and could aggravate matters, because the husband could seek retribution when released.<sup>40</sup>

### ***Mandatory Arrest Policies***

In the 1980s, mandatory and preferred arrest policies became the preferred law enforcement responses to domestic violence calls for service.<sup>41</sup> These policies require an officer to arrest a suspect if there is probable cause to believe that an assault or battery

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<sup>36</sup>Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159-160 (2003).

<sup>37</sup>Sherman, *supra* note 31, at 10.

<sup>38</sup>*Id.* at 10 (quoting INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, TRAINING KEY 16: HANDLING DISTURBANCE CALLS (Gaithersburg, Md.: IACP 1967)).

<sup>39</sup>*Id.* at 10 (quoting ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARD FOR THE URBAN POLICE FUNCTION 12 (1973)).

<sup>40</sup>*Id.* at 15.

<sup>41</sup>*Id.* at 23-24.



has occurred, regardless of the victim's wishes.<sup>42</sup> By 1994, officers in twenty-one states and the District of Columbia were required by statute to make arrests in domestic abuse investigations.<sup>43</sup> As of 2000, Arkansas and Washington D.C were the only two states that had not codified mandatory or pro-arrest policies with regard to domestic violence arrests.<sup>44</sup>

### ***Sherman and Berk's Experiment***

Mandatory and preferred arrest policies were inspired in part by a Minneapolis experiment done by Lawrence W. Sherman and Richard A. Berk from 1981 to 1982.<sup>45</sup> In their study, 314 couples were randomly assigned one of three domestic violence responses: advising the couple, separating the couple by ordering the offender to leave for 8 hours, or arresting the offender.<sup>46</sup> They interviewed victims every two weeks following the intervention.<sup>47</sup> Official records showed that six months after police responded to misdemeanor domestic violence, ten percent of those arrested, nineteen percent of those advised, and twenty-four percent of those removed from the scene had subsequently repeated their violence.<sup>48</sup> Sherman and Berk concluded that arrest was the most effective means of preventing batterers from becoming violent again.<sup>49</sup>

Despite their conclusions, the authors actually recommended three policies. First, all states should change their laws to allow for warrantless arrest for misdemeanor domestic violence. Second, police departments should adopt pro-arrest policies allowing

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<sup>42</sup>MILLS, *supra* note 2, at 33.

<sup>43</sup>Mordini, *supra* note 19, at 314.

<sup>44</sup>Bonnie Brandl, M.S.W. & Tess Meuer, J.D., *Domestic Abuse in Later Life*, 8 ELDER L.J. 297, 323-325 (2000).

<sup>45</sup>Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 934 (1994); Sherman, *supra* note 31, at 23.

<sup>46</sup> Sherman, *supra* note 31, at 2 & 16.

<sup>47</sup> *Id.* at 17.

<sup>48</sup>Zorza, *supra* note 47, at 934.

<sup>49</sup>MILLS, *supra* note 2, at 36.

officers to retain some discretion and the victim to retain some input into the charging decision. Third, the Minneapolis experiment should be replicated in other cities.<sup>50</sup>

Although Sherman and Berk recommended all three measures, “[their] findings resulted in a great deal of attention nationwide and led to the establishment of mandatory arrest policies throughout the country.”<sup>51</sup> The federal government encouraged this by providing federal funds to jurisdictions that adopted stringent domestic violence policies.<sup>52</sup>

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

Policy changes may also have been partly a result of highly publicized jury verdicts against police departments that failed to make arrests in cases of domestic violence.<sup>53</sup> In 1984, Tracy Thurman was awarded 2.9 million dollars after suing the police Department of Torrington, Connecticut, and twenty-four city police officers. Thurman argued that the city’s policy and practice of nonintervention and non-arrest was unconstitutional.<sup>54</sup> Thurman’s estranged husband was on probation for breaking the windshield of her car while she was inside of it. He violated the protective order on many occasions, but he was not arrested. On June 10, 1983 Thurman called the police, but by the time they arrived she had been stabbed numerous times.<sup>55</sup>

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

From 1985 to 1990, the National Institute for Justice funded six police replication experiments, of which five were published.<sup>56</sup> These experiments were conducted in Omaha, Nebraska; Milwaukee, Wisconsin; Colorado Springs, Colorado; Metro-Dade,

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<sup>50</sup>Sherman, *supra* note 31, at 21-22.

<sup>51</sup>Mordini, *supra* note 19, at 313.

<sup>52</sup>MILLS, *supra* note 2, at 36.

<sup>53</sup>Sherman, *supra* note 31, at 23.

<sup>54</sup>MILLS, *supra* note 2, at 37.

<sup>55</sup>*Id.*

<sup>56</sup>Zorza, *supra* note 47, at 929 & 937.

Florida; and Charlotte, North Carolina to determine the deterrent value of three different police responses to domestic violence: arrest of the abuser, mediation between the parties, and physical separation of the parties.<sup>57</sup> Many researchers argue that the results of the published studies indicate that mandatory arrest may actually increase the incidence of violence in some women's lives.<sup>58</sup> Others maintain that the studies are fatally flawed and/or show that arrest is generally the superior method of deterring future violence.<sup>59</sup>

The Milwaukee experiment was conducted in 1992 by Sherman and his associates to examine the effects of arrest on batterers in that city.<sup>60</sup> The sample size was 1200.<sup>61</sup> They found that full or short arrest had a short-term deterrent effect.<sup>62</sup> Over the long term, however, violence increased in some cases in which the perpetrator had been arrested.<sup>63</sup> Sherman and his associates concluded that there is no overall long-term deterrence from arrest.<sup>64</sup> The Milwaukee experiment is thus strong evidence that arrest has different effects on different kinds of people. The results of the study also showed that employed, married, high school graduate, and white suspects are all less likely to have any repeat violence than unemployed, unmarried, high school dropout, and black suspects.<sup>65</sup>

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<sup>57</sup>*Id.* at 929.

<sup>58</sup>MILLS, *supra* note 2, at 37.

<sup>59</sup>Zorza, *supra* note 47, at 929, 931, 932, 965-86.

<sup>60</sup>Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 144 (1992).

<sup>61</sup>Sherman, *supra* note 62, at 145-46; Sherman, *supra* note 31, at 28.

<sup>62</sup>Sherman, *supra* note 62, at 152-53, 167.

<sup>63</sup>*Id.* at 153, 167.

<sup>64</sup>*Id.* at 167.

<sup>65</sup>*Id.* at 160-66; 167-68.

The Charlotte experiment was conducted by J. David Hirschel and Ira W. Hutchison, III, from 1987 through 1989.<sup>66</sup> It compared the rate of recidivism of 650 offenders who received three different responses from law enforcement: advise and separation, issuance of a citation to appear in court, and arrest at the scene.<sup>67</sup> Hirschel and Hutchison concluded that arrest is not a significant deterrent to misdemeanor spouse assault; however, it may still be the conscionable choice versus non-arrest.<sup>68</sup>

The Omaha replication, conducted by Franklyn W. Dunford and his colleagues,<sup>69</sup> began in early 1986 and studied 327 suspects.<sup>70</sup> In cases of misdemeanor spousal violence, suspects were either arrested, separated, or mediated.<sup>71</sup> The authors claimed that no treatment proved more successful than any other.<sup>72</sup>

The Colorado Springs experiment, conducted by Richard A. Berk, began in 1987 and lasted about two years.<sup>73</sup> 1,658 persons suspected of misdemeanor spousal violence were assigned to one of four treatments: an emergency protective order with arrest, an emergency protective order coupled with crisis counseling, an emergency protective order only, or a simple restoration of order at the scene.<sup>74</sup> Berk concluded that arrest did not deter unemployed batterers, and that arrest can sometimes actually make things worse.<sup>75</sup>

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<sup>66</sup>J. David Hirschel & Ira W. Hutchison III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina, Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, at 74, 99, (1992).

<sup>67</sup>*Id.* at 74, 88, 100-101; Sherman, *supra* note 31, at 28.

<sup>68</sup>Hirschel & Hutchison, *supra* note 68, at 118-19.

<sup>69</sup>Zorza, *supra* note 47, at n.34; Richard A. Berk et al., *A Bayesian Analysis of the Colorado Springs Spouse Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170, 172 n.8 (1992).

<sup>70</sup>Berk, *supra* note 71, at 172 (1992).

<sup>71</sup>Zorza, *supra* note 47, at 938.

<sup>72</sup>Berk, *supra* note 71, at 172-73.

<sup>73</sup>Zorza, *supra* note 47, at 956.

<sup>74</sup>Berk, *supra* note 71, at 174; Sherman, *supra* note 31, at 28.

<sup>75</sup>*Id.* at 198-99.

The Metro-Dade experiment was conducted by Antony M. Pate and Edwin E. Hamilton<sup>76</sup> from 1987 through 1989.<sup>77</sup> The Metro-Dade Police Department selected 907 cases in which officers would have the discretionary authority to arrest or not where probable cause existed to arrest for misdemeanor spousal battery.<sup>78</sup> The researchers found results similar to those found in the Colorado Springs experiment with regard to unemployed batterers, in that arrest only marginally affected recidivism after six months.<sup>79</sup>

Overall, these studies point to the benefits of an individualized intervention strategies over a “one size fits all” approach.<sup>80</sup> Additionally, the studies indicate that mandatory arrest is likely to be a deterrent only for men who have something to lose from arrest.<sup>81</sup> Finally, the studies suggest that mandatory arrest laws should be implemented with regard to the characteristics of the jurisdiction. For example, in a geographic area where unemployment is prevalent, mandatory arrest might actually lead to more incidents of domestic violence among the poor.<sup>82</sup> Critics of these studies thus maintain that mandatory arrest statutes should be implemented in tandem with coordinated efforts like the Duluth model.<sup>83</sup> *See infra* next section in Part II.

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

The Duluth Domestic Abuse Intervention Project (DAIP), which began in 1981, made Duluth, Minnesota the first jurisdiction to enact a mandatory arrest policy for

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<sup>76</sup>Zorza, *supra* note 47, at 959 n.154.

<sup>77</sup>*Id.* at 958.

<sup>78</sup>*Id.*; Sherman, *supra* note 31, at 28.

<sup>79</sup>MILLS, *supra* note 2, at 39

<sup>80</sup>*Id.* at 39-40.

<sup>81</sup>Donna M. Welch, *Mandatory Arrest of Domestic Abusers :Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1156 (1994).

<sup>82</sup>*Id.* at 1157-58.

<sup>83</sup>*Id.* at 1157.

misdemeanor assaults.<sup>84</sup> DAIP utilized mandatory arrest policies, police training, prosecutorial and judicial guidelines, support services for victims, and counseling for batterers.<sup>85</sup> The program was deemed successful by evaluators. Seventy-seven percent of those arrested for misdemeanor crimes of domestic violence pled guilty and repeat offenses dropped.<sup>86</sup> The Duluth Project points us in the direction of discretion as well as a coordinated community response. It also indicates that any coordinated community response must include addressing the issue of unemployment.

### **III. Solution: Discretion for Police Officers at Arrest**

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

Sherman and his colleagues have suggested a policy that would allow officers to retain a number of options at the scene of a potential domestic violence arrest.<sup>87</sup> For example, they should be able to provide the victim with transportation to a shelter, offer

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<sup>84</sup>*Id.* at 1150.

<sup>85</sup>*Id.* at 1151.

<sup>86</sup>*Id.* at 1152.

<sup>87</sup>MILLS, *supra* note 2, at 40

transportation to a detox center for the offender, or grant the victim the option to decide if an arrest should be made with suggested options for future safety.<sup>88</sup> Sherman advocates for a more “victim-directed” arrest that would allow the person who is more directly affected by the decision to determine whether or not an arrest is beneficial.<sup>89</sup>

While it is clear that too little state intervention can be detrimental to the safety of victims, too much intervention in the form of mandatory arrest may intrude on the autonomy of victims in a way that calls these policies into question. A pro-arrest or preferred arrest policy may be the answer. “Allowing officers some discretion would provide consequences for batterers as well as protection for women who do not want their partners arrested”<sup>90</sup> Clearly there are cases, however, where even if the victim does not want the batterer arrested, officers should evaluate the community’s interest in safety, and make the arrest when safety outweighs the concerns of the victim.<sup>91</sup> While the pro-arrest policy delivers the message to the officer that arrest is the preferred response, it also allows the officer to use discretion in the situation where arrest may actually further endanger the victim.<sup>92</sup>

As a prosecutor of domestic violence crimes, I commonly hear police officers complain about the frustration of returning to the same residences over and over again. It is frustrating to them that even with mandatory arrest policies and mandatory programs, recidivism remains high. This frustration often translates into apathy and lack of empathy for the victim. If officers were allowed to exercise discretion at the scene of the arrest and participate in restorative justice programs, *see infra* Part VII, this might reduce

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

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

<sup>90</sup>Mordini, *supra* note 19, at 317.

<sup>91</sup>*Id.* at 317.

<sup>92</sup>Welch, *supra* note 83, at 1160.

burnout and give them a sense of purpose and accomplishment. They would be able to participate in not only the punishment of the offender but the rehabilitation as well.

#### **IV. Problem: Mandatory Prosecution Policies**

##### ***A Prosecutor's Duty to a Victim***

Prosecutors have different responsibilities and roles. Generally a prosecutor is primarily responsible to the interests of society as a whole; however the prosecutor must also protect the interest of victims.<sup>93</sup> ABA Standard 3-3.2(h) states, “Where practical, the prosecutor should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the prosecution prior to the decision whether or not to prosecute.”<sup>94</sup> ABA Standard 3-3.9 (b)(v) lists the reluctance of a victim to testify as valid reason for a prosecutor to exercise discretion not to prosecute a case.<sup>95</sup> Prosecutors are also faced with the reality that victims of domestic violence crimes are in greater need of protection because they are at greater risk of future abuse due to their relationships with the perpetrators.<sup>96</sup>

##### ***Mandatory Prosecution Policies, or “No Drop” Policies***

Following the development of mandatory arrest policies, prosecutor's offices began to develop mandatory, or “no drop,” policies. These policies encourage prosecutors to pursue domestic violence cases regardless of battered women's wishes.<sup>97</sup> It became common practice for prosecutors to prosecute cases without the victims.

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<sup>93</sup>Han, *supra* note 38, at 171-72.

<sup>94</sup>ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(b) (3 ed. 1993).

<sup>95</sup>*Id.* at 3-3.9(b)(v).

<sup>96</sup>Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 *FORDHAM URB. L.J.* 953, 961 (2000).

<sup>97</sup>MILLS, *supra* note 2, at 40.



Developments in various penal and evidentiary codes allowed prosecutors to present a victim's statements made at the time of the incident through the testimony of other witnesses, generally police officers. Recently, a landmark United States Supreme Court case, *Crawford v. Washington*, has frustrated prosecutors' efforts to present victims' statements through other witnesses.<sup>98</sup>

One survey, done by Donald R. Rebovich and published in 1996, found that two-thirds of all prosecution offices had adopted no-drop policies.<sup>99</sup> The same survey suggested that larger jurisdictions were more likely to prosecute without the victim's cooperation, while smaller jurisdictions still needed the victim's testimony because they had limited resources with which to gather corroborative evidence from neighbors or family members.<sup>100</sup> Consequently, the outcome of a case could be determined by the degree to which a prosecution office was willing to either force or encourage a woman to testify.<sup>101</sup>

Another study, done by D. Ford and M.J. Regoli in 1992, analyzed prosecution policies and rates of recidivism in Indianapolis.<sup>102</sup> They used official records and victim interviews to compare outcomes in 675 cases under no-drop and drop-permitted policies.<sup>103</sup> Under the no-drop prosecution policy, 20% of the cases were still dropped,

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<sup>98</sup>*Crawford v. Washington*, 541 U.S. 36 (2003).

<sup>99</sup>Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 176, 182-83 (Eve S. Buzawa & Carl G. Buzawa eds., Sage Publications 1996).

<sup>100</sup>*Id.* at 183 & 186.

<sup>101</sup>MILLS, *supra* note 2, 41.

<sup>102</sup>Richard M. Tolman & Jeffrey L. Edleson, *Intervention for Men Who Batter: A Review of Research*, in *UNDERSTANDING PARTNER VIOLENCE: PREVALENCE, CAUSES, CONSEQUENCES AND SOLUTIONS* 262-273 (S.R. Stith & M.A. Straus eds. 1995), *available at* <http://www.mincava.umn.edu/documents/toledl/toledl.html>.

<sup>103</sup>*Id.*

because the victim refused to testify or disappeared.<sup>104</sup> Under a drop-permitted policy, where the victim initiated the warrant, filed charges, and then chose to prosecute, she was at lower risk for re-abuse following adjudication of the case.<sup>105</sup> Under a drop-permitted policy, where the victim chose not to prosecute after proceedings had already begun, however, she was at greater risk of re-abuse.<sup>106</sup> Ford and Regoli concluded that the victim who chose to prosecute derived power from the decision.<sup>107</sup>

In 1998, Davis, Smith, and Nickles published their findings from reviewing more than one thousand cases of domestic violence misdemeanors.<sup>108</sup> They concluded that prosecution had no effect on the likelihood of re-arrest of the batterer within a six-month period.<sup>109</sup> In a second, smaller, study, published in 2000, McFarlane, Willson, Lemmey, and Malecha found that whether the police arrested the suspect or the prosecutor accepted the case made no difference in the amount of violence reported at the time of filing charges or 3 and 6 months later.<sup>110</sup>

## V. Solution: Prosecutorial Discretion

Prosecutors should be able to use their discretion to consider victims' wishes in prosecuting domestic violence for several reasons. First, ABA Standard 3-3.9 (b)(v) lists the reluctance of a victim to testify as valid reason for a prosecutor to exercise discretion not to prosecute a case.<sup>111</sup> Second, a prosecutors has a duty to consider the safety

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<sup>104</sup>*Id.*

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

<sup>106</sup>*Id.*

<sup>107</sup>MILLS, *supra* note 2, at 41-42.

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

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

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

<sup>111</sup>ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.9(b)(v) (3 ed. 1993).

interests of a victim in a domestic violence case because she is likely to be victimized again in the future.<sup>112</sup> Third, when a victim wants her case dropped, her concerns coincide with the pragmatic concerns of scant prosecutorial resources and judicial efficiency.<sup>113</sup> Prosecution offices should use non-coercive polices that balance crime control and the victims' interests.

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

## **VI. Problem: Batterer's Treatment Programs**

### ***The Popularity of Batterer's Treatment Programs Around the Country***

It is not uncommon for courts to require that upon batterers' convictions, they attend batterer's treatment programs, also referred to as batterer's intervention programs.

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<sup>112</sup>Han, *supra* note 38, at 172-73.

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

In the United States by 1997, seventeen states had mandatory standards to regulate the process of working with domestic violence offenders in batterer's treatment programs.<sup>114</sup> By 2001, twenty-four states had implemented mandatory guidelines for batterer's treatment programs to follow, and twelve more states were in the process of developing such guidelines.<sup>115</sup>

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

### ***The Duluth Model***

Many batterer's treatment programs follow the Duluth Model, which is a "psycho-educational and skills building curriculum."<sup>119</sup> The curriculum focuses on changing the batterer's "ideology of power and control," and also includes discussions about relationships between men and women.<sup>120</sup> Many of the programs are taught by two people, a man and a woman who model a healthy and respectful relationship.<sup>121</sup>

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<sup>114</sup>Ileana Arias et al., *Concurrent Sessions: Preventing Injuries and Abuse: Violence Against Women: The State of Batter Prevention Programs*, 30 J.L. MED. & ETHICS 157, 158 & 159 (2002).

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

<sup>116</sup>Cal. Penal Code § 1203.097 (West 2008).

<sup>117</sup>Lisa Lightman & Francine Byrne, *Addressing the Occurrence of Domestic Violence and Substance Abuse: Lessons From Problem-Solving Courts*, 6 J. CENTER FAM. CHILD. & CTS. 53, 56 (2005).

<sup>118</sup>*Id.* at 57.

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

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

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

Generally, these programs use similar procedures, which include “intake and assessment, victim contact, orientation, group treatment, leaving the program, and completion.”<sup>122</sup>

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

#### ***Programs***

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

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

#### ***Problems with Program Monitoring and Reporting***

The goal of batterer’s treatment programs should be to stop domestic violence. One of the only ways to determine whether or not the physical violence has stopped after a batterer has entered into and/or completed a treatment program is to obtain information from the victim. This can result in skewed results because the victim may have many reasons to give false information. Many programs rely on self-reporting as well as victim reporting, which obviously has the potential for skewed results.<sup>126</sup> Additionally, many of

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

<sup>123</sup>Arias, *supra* note 118, at 158.

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

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

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

the manipulative and controlling behaviors may continue, even while the physical violence may have stopped.<sup>127</sup> Not much is required to graduate from the program. If the batterer, attends, pays, and at least appears to remain violence-free, he or she is likely to graduate.<sup>128</sup>

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

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

Extensive research in the area of the effectiveness of batterer's treatment programs is almost nonexistent.<sup>131</sup> What little research has been done is inconclusive and controversial.<sup>132</sup> "Most studies define cessation of physical abuse as the primary criterion for judging effectiveness of efforts . . . [while others] consider reduction of violent behavior a success."<sup>133</sup> In either event, because the victim or the offender is generally the one reporting the cessation or reduction of the violent behavior, batterer's treatment

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<sup>127</sup>Arias, *supra* note 118, at 161.

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

<sup>129</sup>Lightman & Byrne, *supra* note 121, at 58.

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

<sup>131</sup>Arias, *supra* note 118, at 161.

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

<sup>133</sup>Tolman, *supra* note 106.

programs' reported rates of success are subject to suspicion.<sup>134</sup> That said, researchers have studied the effectiveness of batterer's treatment programs, and their results provide insight into these programs' capacity to prevent violence.

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

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

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

#### ***Conclusion***

The evidence that appears to be favorable for batterer's treatment programs should be viewed with caution due to the methodological shortcomings in the studies that

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

<sup>135</sup>Tolman, *supra* note 106.

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

<sup>137</sup>ADELE HARRELL, EVALUATION OF COURT-ORDERED TREATMENT FOR DOMESTIC VIOLENCE OFFENDERS. FINAL REPORT SUBMITTED TO THE STATE JUSTICE INSTITUTE (The Urban Institute 1991).

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

are currently available.<sup>139</sup> For example, success is reported with lower percentages in programs where the follow-up is longer and where victims were relied upon for reports versus where police records of re-arrest were relied upon for reports.<sup>140</sup>

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

## VII. Solution: Restorative Justice

### *Introduction to Restorative Justice*

Restorative justice involves “victims, offenders, and communities,”<sup>142</sup> and is thus justice realized through “those who have a ‘stake in a particular offense.’”<sup>143</sup> The use of restorative justice processes does not eliminate the criminal justice system from family violence. Use of these processes in conjunction with the criminal justice system can better serve victims as well as the community. Family violence situations present complex issues and potential risks due to the imbalance of power in the relationship and the potential for future violence.<sup>144</sup> These issues, however, can be dealt with and addressed through the process. Although acceptance of restorative justice models has grown rapidly, opposition by victims groups and the complexity of the issues related to family violence has resulted in a limited application of restorative justice to family

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

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

<sup>141</sup>Lightman & Byrne, *supra* note 121, at 60.

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

<sup>143</sup>*Id.* at 5.

<sup>144</sup>Kay Pranis, *Restorative Values and Confronting Family Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 23, 32 (Heather Strang & John Braithwaite eds., 2002).



violence.<sup>145</sup> There are a number of restorative justice models; however; the purpose of this paper is to promote the use of restorative justice models in conjunction with formal legal intervention. Prosecutors and judicial officers should be able to incorporate restorative justice programs into the resolution of appropriate cases.

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

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

From 1820 to 1970, punishment of all kinds declined in the West, corporal punishment disappeared, and capital punishment disappeared as a public spectacle.<sup>152</sup> In the 1970s, the term restorative justice was used to describe one-on-one mediation

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<sup>145</sup>*Id.* at 38-39.

<sup>146</sup>Braithwaite, *supra* note 147, at 1.

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

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

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

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

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

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

programs between the victim and the offender with a professional mediator present.<sup>153</sup>

Restorative justice became a global social movement in the 1990s as a result of examples of indigenous practice from the oral justice traditions of the New Zealand Maori and North American native peoples.<sup>154</sup> Since 1995, thousands of people have been trained in restorative justice “conferencing” by two organizations in particular, Ted Wachtel’s Real Justice in the United States and John MacDonald Transformative Justice in Australia.<sup>155</sup>

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

. . . to produce a record of the violations of the past and make recommendations to prevent them from ever happening again; to acknowledge the suffering of the victims and to assist in the rehabilitation of those victims; to offer amnesty to past perpetrators; and to facilitate healing and reconciliation for the nation.<sup>157</sup>

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

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

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

<sup>155</sup>Braithwaite, *supra* note 147, at 3.

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

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

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

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

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

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

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

<sup>161</sup>Susan C. Taylor, *Alternative Dispute Resolution Symposium: Article: Victim-Offender Reconciliation Program—A New Paradigm Toward Justice*, 26 UNIVERSITY OF MEMPHIS LAW REVIEW 1187,1188 (1996).

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

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

### ***Defining Restorative Justice***

“A commonly accepted definition [of restorative justice] used internationally is: *Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.*”<sup>166</sup> Howard Zehr defines it as “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>167</sup> Restorative justice is a social movement that taps into cynicism about the capacity of state institutions to solve problems like crime. It demands that law and order politicians produce evidence that the tax dollars spent on building prisons actually prevent crime.<sup>168</sup> “Restorative justice is not a specific program or set of programs; it is a way of thinking about responding to the problem of crime, a set of values that guides decisions on policy,

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<sup>163</sup>Umbreit, *supra* note 163, at 519.

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

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

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

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

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

programs and practice.”<sup>169</sup> It requires a different way of viewing, understanding and responding to crime.<sup>170</sup> It offers a way of transforming the entire legal system, while also impacting family life, workplace behavior, and even political conduct.<sup>171</sup>

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

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

The goal of a criminal justice system is to control crime. Many countries, including the United States, use a retributive legal framework for the criminal justice system. Our current system focuses on controlling crime, defined as an act against the

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

<sup>170</sup>Umbreit, *supra* note 163, at 518.

<sup>171</sup>*Id.* at 518.

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

<sup>173</sup>Heather Strang & John Braithwaite, *Restorative Justice and Civil Society*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 1, 1 (Heather Strang & John Braithwaite, eds., 2001).

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

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

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

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

Historically, the term “retributive justice” emerged to define the current criminal justice system, and it was seen as a complete polarization to restorative justice. Conrad G. Brunk argues that on a theoretical level, retribution and restoration are not the polar

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

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

<sup>178</sup>Eisnaugle, *supra* note 162, at 213.

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

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

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

opposites that many might assume.<sup>182</sup> He points out that the commonality is the desire to vindicate by some type of reciprocal action and some type of proportional relationship between the criminal act and the response to it. Where they differ is how to “even the score”.<sup>183</sup>

### ***Challenges for Restorative Justice Programs***

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

Other challenges in bringing restorative justice programs into the criminal justice system manifest themselves as organizational or procedural challenges. Most corrections agencies are not oriented toward grass-roots participation and are generally hierarchical organizations.<sup>187</sup> Because restorative justice programs require community support, the institutions interested in embracing restorative justice practices must be committed to community education and outreach. Kay Pranis suggests that one-page informational

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

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

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

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

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

<sup>187</sup>Pranis, *supra* note 175.

pieces, radio shows, and local cable access are some of the venues to raise community support and awareness.<sup>188</sup> Pranis points out that while the restorative justice movement has seen many recent gains in awareness and interest, the broader public policy trend around the nation is the expansion of the prison system. With resources being directed towards incarceration, there is little left over to focus on working with victims and offenders in the community.<sup>189</sup>

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

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<sup>188</sup>*Id.*

<sup>189</sup>*Id.*

<sup>190</sup>Olson & Dzur, *supra* note 186, at 62-63.

<sup>191</sup>*Id.* at 64.

<sup>192</sup>*Id.* at 88.



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

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

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

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

Another issue is how restorative justice programs will be held accountable. Some argue that current methods of accountability are not sufficient. Zvi D. Gabbay argues that the programs are asked to collect the wrong data and that the supervision and

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<sup>193</sup>*Id.* at 89.

<sup>194</sup>Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 689 (2005).

<sup>195</sup>*Id.* at 671.

<sup>196</sup>*Id.* at 672.

<sup>197</sup>*Id.* at 681.

<sup>198</sup>*Id.*

evaluation of the programs is inadequate.<sup>199</sup> He argues that the public has a right to know what these programs actually accomplish.<sup>200</sup> Gabbay studied four program that were established and well integrated within the criminal justice system and had sustained a substantial number of referrals each year.<sup>201</sup> All four programs used evaluations as a method of collecting information and all programs submitted reports to their funders.<sup>202</sup> He concluded that the data was collected from the wrong individuals and it was not properly analyzed.<sup>203</sup>

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

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

### ***Victim Offender Mediation***

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

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<sup>199</sup>Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT RESOL. 85, 86-87 (2006).

<sup>200</sup>*Id.* at 87.

<sup>201</sup>*Id.* at 99-100.

<sup>202</sup>*Id.* at 111.

<sup>203</sup>*Id.* at 113.

<sup>204</sup>Umbreit, *supra* note 163, at 529.

offender mediation programs in the United States indicates that support persons were present in nine out of ten cases.<sup>205</sup>

In Washington County, Oregon, in a program entitled the Surrogate Victim/Offender Dialogue Program (SVODP), victims meet with imprisoned perpetrators of domestic violence with whom they have had no relationship.<sup>206</sup> The victims are carefully screened to make sure that they are ready for the meeting.<sup>207</sup> The offenders are screened as well. The offender must have accepted responsibility for his actions; expressed a desire to make a change in his life; attended a batterer's treatment program, met with a counselor about how he may become angry during the session, and expressed a personal outcome for the session.<sup>208</sup>

### ***Family Group Conferencing***

Another model known as Family Group Conferencing (FGC) has been used in cases of child abuse cases that include domestic violence.<sup>209</sup> Time is spent on safety planning and preparing the victim for the conference, and the offender is encouraged to take responsibility.<sup>210</sup> The conference is attended by the victim, the offender, and family and friends of both parties, as well as institutional representatives. The family meets alone and develops a plan. The plan is then approved by the institutional representatives.<sup>211</sup>

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<sup>205</sup>Mark S. Umbreit & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 MEDIATION Q. 235, 241 (1999).

<sup>206</sup>Judge Bennett Burkemper & Nina Balsam, *Examining the Use of Restorative Justice Practices in Domestic Violence Cases*, 27 ST. LOUIS U. PUB. L. REV. 121, 129 (2007).

<sup>207</sup>*Id.*

<sup>208</sup>*Id.*

<sup>209</sup>*Id.* at 130.

<sup>210</sup>*Id.*

<sup>211</sup>*Id.*

Since 1989, two primary models of Family Group Conferencing/Decision making have been practiced worldwide in the context of child welfare. They include Family Group Conferences and Family Unity Meetings. The Family Group Conference model (FGC) was developed and legislated in New Zealand in 1989.<sup>212</sup> The Family Unity Model originated in Oregon in 1990.<sup>213</sup>

FGC is a model that appeals to many restorative justice advocates. FGC involves the community of people most affected by a crime—the victim and the offender, and the family, friends, and key supporters of both—in deciding the resolution of a criminal or delinquent act. The facilitator contacts the victim and offender to explain the process and invites them to the conference; the facilitator also asks them to identify key members of their support systems who will be invited to participate as well. Participation by all involved is voluntary. The offender must admit to the offense to participate. The parties affected are brought together by a trained facilitator to discuss how they and others have been harmed by the offense and how that harm might be repaired.<sup>214</sup>

FGC has four key principles: (a) the process is family centered and moves away from the negative perceptions and a blame-placing approach to a strength-based model; (b) respect and value is placed on cultural ideals and practices; (c) family and community involvement is encouraged; and (d) the community is seen as a family support resource.<sup>215</sup> FGC differs from the traditional model of victim-offender mediations

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<sup>212</sup>MARK S. UMBREIT, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS (U.S. Dept. of Justice, Office of Justice Programs 2000).

<sup>213</sup>PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, FAMILY GROUP CONFERENCING/DECISION-MAKING AS A PRACTICE WITH FAMILIES EXPERIENCING SEXUAL ABUSE AND DOMESTIC VIOLENCE, 1 (March 2005).

<sup>214</sup>MARK S. UMBREIT, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS (U.S. Dept. of Justice, Office of Justice Programs 2000).

<sup>215</sup>PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, FAMILY GROUP CONFERENCING/DECISION-MAKING AS A PRACTICE WITH FAMILIES EXPERIENCING SEXUAL ABUSE AND DOMESTIC VIOLENCE 1 (March 2005).

programs in that FGC uses public officials, police officers, probation officers, and school officials rather than trained volunteers as facilitators.<sup>216</sup> This allows for a more directed facilitation.

The conference begins with the offender describing the incident, and then each participant describes the impact of the incident on his or her life. The offender is faced with the human impact of his or her behavior on the victim, on those close to the victim, and on the offender's own family and friends. The victim has the opportunity to express feelings and ask questions about the offense. After the discussion, the victim is asked to identify desired outcomes from the conference. All participants may contribute to the determination of how the offender will repair the harm he or she has caused. In the end, participants sign an agreement outlining their expectations and commitments.<sup>217</sup>

### ***Restorative Justice Circles***

Restorative justice circles are often referred to as “peacemaking circles,” “restorative justice circles,” “repair of harm circles,” and “sentencing circles”.<sup>218</sup> They differ from FGC in that the people asked to participate are from a wider group of community members. The process involves the use of a “talking piece” that is passed around.<sup>219</sup>

Circles are used by the Tubman Family Alliance in Minnesota in certain domestic violence cases. Generally, the victim, offender, family and friends of both the victim and offender, and members of the criminal justice system are involved in the process.<sup>220</sup>

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<sup>216</sup>*Id.*

<sup>217</sup>*Id.*

<sup>218</sup>Umbreit, *supra* note 163, at 530.

<sup>219</sup>*Id.*

<sup>220</sup>Burkemper & Balsam, *supra* note 212, at 132.

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

### ***Victim Impact Panels***

Victim impact panels are a collaboration between the court, batterer's treatment programs, victim advocates, and a restorative justice expert.<sup>224</sup> These panels involve victims talking to domestic violence offenders, but they are not the offenders in the victim's case.<sup>225</sup> These panels have been expanded to include family members, community members, law enforcement, business leaders, and faith leaders.<sup>226</sup> All panel members are screened for appropriateness to participate in the panel. This program is similar to FGC and the outcomes are anticipated to be similar.<sup>227</sup>

### ***Research***

Some recent studies are encouraging. The final report on a project done by John Braithwaite and Lawrence Sherman entitled "Reintegrative Shaming of Violence, Drink Driving and Property Crime: a Randomized Controlled Trial", concluded that restorative justice can work, and can even reduce crime by violent offenders.<sup>228</sup> The report describes findings on the recidivism of offenders involved in the Canberra Reintegrative Shaming

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<sup>221</sup>*Id.*

<sup>222</sup>*Id.*

<sup>223</sup>*Id.*

<sup>224</sup>*Id.*

<sup>225</sup>*Id.*

<sup>226</sup>*Id.*

<sup>227</sup>*Id.*

<sup>228</sup>LAWRENCE W. SHERMAN ET. AL., RECIDIVISM PATTERNS IN THE CANBERRA REINTEGRATIVE SHAMING EXPERIMENTS (RISE) (2000).

Experiments, which compared the effects of standard court processes with the effects of a diversionary conference in four kinds of cases: drunk driving at any age, juvenile property offending with personal victims, juvenile shoplifting offenses detected by store security officers, and youth violent crimes. The violence cases excluded cases of family violence.

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

In 2000, McGarrell replicated certain aspects of the RISE experiment on juvenile offenders in Indianapolis. The study revealed a re-offending rate for cases randomly assigned to a restorative justice conference forty percent lower than in the control group after six months, declining to twenty-five percent after twelve months.<sup>229</sup> The John Howard Society funded a Restorative Resolutions project in Winnipeg, Canada. The re-offending rate of the group was one-third of that in a matched control group. The project did not include offenders of domestic violence but cases were referred by prosecutors where the offender faced at least six months of custodial time.<sup>230</sup>

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<sup>229</sup>Strang & Braithwaite, *supra* note 179, at 3.

<sup>230</sup>*Id.*

### ***Victim-Offender Mediation***

Several victim-offender mediation studies reflect that victim's participation ranges from 40% to 60% and in some cases rates as high as 90% have been reported.<sup>231</sup> Coates, Burns and Umbreit found that the victim's reasons for choosing to participate were, in order of importance, to possibly help the offender, to hear why the offender did the crime, to communicate to the offender the impact of the crime, and to be sure the offender would not return to commit a repeat offense.<sup>232</sup>

A number of studies report satisfaction on the part of both the victim and the offender with the victim-offender mediation process.<sup>233</sup> Eight or nine out of ten participants report being satisfied with the process and the final agreement.<sup>234</sup>

### ***Family Group Conferencing***

Joan Pennel and Gale Burford argue that the outcomes from the Family Group Decision Making Project (FGDMP) reveal that FGC can be an effective strategy for stopping child maltreatment and domestic violence.<sup>235</sup> Over a one-year period thirty-two families took part in the project. The referrals came from Child Welfare, Adult Probation and Parole, and Youth Corrections. Upon referral, family members engaged in extensive pre-conferencing work with conference coordinators to prepare all participants and to ensure the safety of all participants.<sup>236</sup> The actual conference had four phases; first, the

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<sup>231</sup>ROBERT B. COATES ET AL., VICTIM PARTICIPATION IN VICTIM OFFENDER CONFERENCING: WASHINGTON COUNTY, MINNESOTA COMMUNITY JUSTICE PROGRAM (2002).

<sup>232</sup>*Id.*

<sup>233</sup>Umbreit, *supra* note 163, at 533.

<sup>234</sup>*Id.*

<sup>235</sup>Joan Pennell & Gale Burford, *Family Group Decision Making: Protecting Children and Women*, CHILD WELFARE (Mar./Apr. 2000).

<sup>236</sup>C. Quince Hopkins et al., *Responding: Two New Solutions: Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 306 (2004).



professionals outlined the ground rules and the factual basis for the family's participation; second, the professional outlined problems identified and the services available to them; third, the family group was left alone to develop a plan to address the problems; and fourth, the professionals reviewed the plan to ensure that all the issues were addressed.<sup>237</sup>

In twenty-one of the thirty-two families, there was an adult abusing an adult. These families were followed for a one to two year period after the conferencing and were compared to thirty-one families who did not participate in conferencing. According to Pennel and Burford, all of the data sources agreed that in general FGC benefited the families, including but not limited to a reduction of indicators of child abuse and domestic violence.<sup>238</sup> Incidents of violence in the families who participated in conferencing were cut in half, and in contrast, violent events in the comparison group rose.<sup>239</sup> The results of this study point to the benefits of FGC and address some of the concerns for victim safety and controlling behaviors on the part of the offender.

The study also measured outcomes that relate to beliefs about male domination that may lead to domestic violence and behaviors that reflect the power and control in the relationship.<sup>240</sup> The study measured the abuser's domination of conversation and control of economic resources. Participants revealed that domination of the conversation was reduced from four to two incidents post conference, and control of economic resources was reduced from four to zero incidents.<sup>241</sup> The study also measured batterer's minimization of violence, transference of responsibility for the violence to the victim, and

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<sup>237</sup>*Id.* at 307.

<sup>238</sup>Joan Pennell & Gael Burford, *Feminist Praxis: Making Family Group Conferencing Work*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 108, 110 (Heather Strang & John Braithwaite eds., 2002).

<sup>239</sup>Hopkins, *supra* note 242, at 307-08.

<sup>240</sup>Burkemper & Balsam, *supra* note 212, at 131.

<sup>241</sup>*Id.*

refusal to accept responsibility for the abuse. These incidents were reduced from eight to three, while incidents in the comparison group increased from four to six.<sup>242</sup>

In a meta-analysis covering both victim-offender mediation and group conferencing programs in Canada, Latimer, Dowden and Muise found that satisfaction rates were somewhat higher in victim-offender mediation than in group conferencing. The authors felt that one reason might be that conferences typically have more people participating, making it more difficult to reach satisfaction with the final agreement.<sup>243</sup> A total of twenty-two studies that examined the efficacy of thirty-five restorative justice programs were included in the meta-analysis.<sup>244</sup> The results of the meta-analysis demonstrated that a majority of victims and offenders were more satisfied with restorative justice programs than the traditional justice system, and that restitution compliance was higher among those who participated in the restorative justice program.<sup>245</sup> Perhaps most important, the recidivism rates were lower among the group in the restorative justice program.<sup>246</sup>

In 2007, The Smith Institute published a non-governmental assessment by Sherman and Strang of the evidence on restorative justice in the UK and internationally.<sup>247</sup> Among the programs they commented on was the “Dove Project,” which is an example of family group conferencing being applied to cases of domestic

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<sup>242</sup>*Id.*

<sup>243</sup>Jeff Latimer et al., *Effectiveness of Restorative Justice Practices: A Meta-Analysis* (2001) . <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=194505>.

<sup>244</sup>*Id.*

<sup>245</sup>*Id.*

<sup>246</sup>*Id.*

<sup>247</sup>LAWRENCE S. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* (The Smith Institute ed. 2007).

violence.<sup>248</sup> This project, sponsored by the Hampshire County Council, has supported up to 600 conferences per year. The project has demonstrated substantial reductions in family violence relative to similar families not receiving restorative justice.<sup>249</sup>

### ***Restorative Justice Circles***

Fewer studies are available with regard to the success of restorative justice circles. Some research suggests that the various types of circles have positively impacted those who participate in them.<sup>250</sup> In Manitoba Canada, the Hollow Water First Nation uses circles to work with sex abuse victims and their victimizers. These circles were held with the offender and their families as well as the victim and their families, community members and representatives from the justice system. Some participants reported benefiting immensely from the circle process and having a stake in the justice outcomes, while other cited negative aspects of the process as difficulty working with family and close friends, embarrassment and religious conflict.<sup>251</sup>

The Healing Sentencing Circles Program in Whitehorse, Yukon Territory report very high satisfaction with participants for low-risk juvenile offenders.<sup>252</sup> In South St. Paul, Minnesota the South Saint Paul Restorative Justice Council has established a number of type of circles for a variety of purposes. A study of the program revealed that there was a high degree of satisfaction with participants. Most of the criminal cases involved misdemeanors and low severity felonies, because the police department of the

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<sup>248</sup>*Id.* at 52.

<sup>249</sup>*Id.*

<sup>250</sup>*Id.* at 536.

<sup>251</sup>THERESE LAJEUNESSE AND ASSOCIATES LTD., EVALUATION OF COMMUNITY HOLISTIC CIRCLE HEALING, HOLLOW WATER FIRST NATION, Volume 1: Final Report (1996).

<sup>252</sup>Stephen A. Matthews & Gayle Larkin, (1999) "Guide to Community-Based Alternative for Low-Risk Juvenile Offenders."

prosecutorial authority was concerned about submitting serious cases for public protection reasons.<sup>253</sup> The study indicated that it might be difficult for the circles to process a high volume of people; however, the data gathered in the study supports the contention that the circles had a positive impact on those who participated.<sup>254</sup>

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

The use of restorative justice principles in the context of family violence presents special challenges. The pitfalls derive from the inherent difficulty in balancing the interests of the victims, offenders, the community and the state.<sup>255</sup> Victim safety is an immediate and long-term issue that does not manifest itself in the same way as it does in other types of criminal cases.<sup>256</sup> Further, family violence cases usually involve a long-standing pattern of behavior versus a single incident.<sup>257</sup> The relationship between the victim and the offender is typically different than those in other types of cases and can be expected to be ongoing. The face-to-face concept of community conferencing may create the opportunity for further acts of violence against the victim.<sup>258</sup>

A family experiencing violence already has inappropriate family power dynamics and victims can easily be intimidated due to the imbalance of power that already exists.<sup>259</sup> Batterers may also intimidate or harm those close to the victim; consequently, obtaining participation from some stakeholders may be problematic. Since isolation from family

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<sup>253</sup>Robert B. Coates et al., (2000), *Restorative Justice Circles in South Saint Pau, Minnesota* (2000), <http://2ssw.che.umn.edu/rip/Resources/Documents/Circles.Final.Revised.pdf>.

<sup>254</sup>*Id.*

<sup>255</sup>Umbreit, *supra* note 163, at 558.

<sup>256</sup>Bazemore & Earle, *supra* note 1, at 156.

<sup>257</sup>*Id.* at 157.

<sup>258</sup>Hopkins, *supra* note 242, at 293.

<sup>259</sup>*Id.*

and friends is also a common dynamic, it may be difficult to find individuals to participate in the process.<sup>260</sup>

There are many potential risks when an abuser participates in a family group conference. The survivor may feel limited in what he or she can safely say, he or she may give up trying to get what he or she wants or need, he or she may agree to plans that he or she knows will put him or her or the children in danger, the abuser may manipulate the proceedings, and the abuser may retaliate after the family group conference.<sup>261</sup> Consequently, the victim may not be able to hold his or her own in the face-to-face meeting.

Restorative justice relies in part on a component of therapeutic intervention with perpetrators. As I discussed in an earlier section, there is only some evidence that batterer's treatment programs are effective. Therefore, the question remains, if treatment is only moderately effective, why embrace an approach to intimate violence that relies in part on treatment?<sup>262</sup>

If some variation of the restorative justice principals are to be applied in the family violence context, what role should they play? Some of the restorative justice literature promotes restorative justice as an alternative to the criminal justice system.<sup>263</sup> Others argue that community conferencing should be offered at an intermediate stage in a hierarchy of responses with other criminal justice processes and sanctions invoked where

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<sup>260</sup>*Id.*

<sup>261</sup>LUCY SALCIDO CARTER, FAMILY TEAM CONFERENCES IN DOMESTIC VIOLENCE CASES PREPARED BY THE FAMILY VIOLENCE PREVENTION FUND, SECOND EDITION 9 (October 2003).

<sup>262</sup>Hopkins, *supra* note 242, at 303.

<sup>263</sup>Lode Walgrave, Extending the Victim Perspective Towards a Systemic Restorative Justice Alternative, *Integrating a Victim Perspective with Criminal Justice: International Debates*.(2000) 253-284.

conferencing fails.<sup>264</sup> Pennell and Burford suggest a process for family conferencing that intersects with the formal legal intervention.<sup>265</sup>

### VIII. Conclusion

The most fundamental question at the root of this problem is, how should society respond to criminal behavior, particularly when the crime is committed among those who see themselves a family? It is clear that it is a complex question that requires a multifaceted response. In order to permanently reduce the prevalence of family violence, we must advocate for the right combination of professional discretion, legal interventions, and restorative justice remedies.<sup>266</sup> The failure of three decades of reform to change the prevalence of family violence suggests that we need to explore alternative approaches to the problem of intimate violence.<sup>267</sup>

In many contexts, the criminal justice system seeks to protect the victim, especially the domestic violence victim from all blame. The system assumes that the only limited role the victim desires to play is in convicting and sentencing the offender.<sup>268</sup> This assumption results in the aggressive arrest and prosecution of offenders even if the victim does not seek it.<sup>269</sup>

The preliminary evidence from the limited studies on restorative justice programs that address family violence demonstrates that it may be more effective than

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<sup>264</sup>Julie Stubbs, *Domestic Violence and Women's Safety*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 44, 45 (Heather Strang & John Braithwaite eds., 2002).

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<sup>266</sup>Hopkins, *supra* note 214, at 293

<sup>267</sup>*Id.* at 310.

<sup>268</sup>Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 483 (2006).

<sup>269</sup>*Id.*

incarceration-based approaches.<sup>270</sup> Domestic violence and child protection response systems and the criminal justice system frequently function independently and in conflict with each other.<sup>271</sup> Restorative justice practices, in particular family group conferencing, provide both systems with a cohesive, integrated approach.

The restorative justice movement is having an increasing impact upon the criminal justice system throughout the world.<sup>272</sup> Programs throughout the United States have found ways to integrate elements of restorative justice into the current criminal justice system and/or provide restorative justice alternatives with positive results.<sup>273</sup>

The science of victimology supports the conviction that extending criminal justice systems to include programs that restore victims opens a new door into fighting crime.<sup>274</sup> Further, healing victims and offenders offers the greatest potential for impacting recidivism rates.<sup>275</sup> Victims who participate in a criminal justice process designed to restore are more satisfied with the justice system overall.<sup>276</sup> The data underscores the idea that we need to revisit the theory that victims are passive and helpless to direct the justice process.<sup>277</sup> One of the primary strengths of restorative justice programs is that they give victims an opportunity to perform active roles that they define.<sup>278</sup>

Professionals both at the time of arrest and prosecution should be allowed to take into consideration the desires of the victim, as well as be able to recommend and

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<sup>270</sup>Hopkins, *supra* note 242, at 293.

<sup>271</sup>Lisa Merkel-Holguin et al., *Learning with Families: A Synopsis of FGDM Research and Evaluation in Child Welfare*, 18 PROTECTING CHILD. 11.

<sup>272</sup>Umbreit, *supra* note 163, at 564.

<sup>273</sup>Mills, *supra* note 274, at 464.

<sup>274</sup>*Id.* at 465.

<sup>275</sup>*Id.*

<sup>276</sup>Heather Strang & Lawrence Sherman, *The Practice of Restorative Justice: Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 24 (2003).

<sup>277</sup>Mills, *supra* note 246, at 492.

<sup>278</sup>*Id.* at 496.

participate in restorative justice programs. If this were the case, the criminal justice system would better serve the victims and the professionals who work within the system. Criminal justice and restorative justice systems used in conjunction with one another can complement one another to punish and rehabilitate offenders, allow victims' recovery, and interrupt the cycle of violence.<sup>279</sup>

“Our adversarial system of justice, while necessary to protect the right of defendants, insulates both the victim and the defendant from the very real human contact that is often necessary.”<sup>280</sup> Exclusively looking at legal needs may not bring us to justice but restorative justice can get us closer.<sup>281</sup> A realistic goal is to move toward a process that is restorative and to do that by utilizing both the criminal justice and restorative justice system.

Forgiveness has a place in criminal law.<sup>282</sup> The principles of restorative justice provide a background for forgiveness to become a part of the criminal justice system.<sup>283</sup> There are challenges, but none that cannot be overcome if the professionals in the system are willing to explore alliances that cut across traditional boundaries.<sup>284</sup>

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<sup>279</sup>*Id.* at 468.

<sup>280</sup>Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1652 (2000).

<sup>281</sup>Reimund, *supra* note 200.

<sup>282</sup>David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard to Find?*, 27 FORDHAM URB. L.J. 1663, 1675 (2000).

<sup>283</sup>*Id.*

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