

What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention

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I.	INTRODUCTION	519
II.	OUR CURRENT JUSTICE SYSTEM INTERVENTIONS FAIL TO SUFFICIENTLY ADDRESS DOMESTIC VIOLENCE	523
III.	WHAT IS RESTORATIVE JUSTICE?	530
	A. Theory	530
	B. History & Typology	532
	1. Victim-Offender Mediation	535
	2. Family Group Conferences.....	537
	3. Healing Circles.....	539
IV.	RESISTANCE TO RESTORATIVE JUSTICE AS A DOMESTIC VIOLENCE INTERVENTION.....	541
	A. Restorative Justice Theory Is Inconsistent with Domestic Violence Theory and Unworkable Given the Practical Realities of Domestic Violence	542
	1. Reconciliation and Private Resolution.....	542
	2. Reliance on Meaningful Victim Participation	543
	3. Apology and Forgiveness	545
	4. Community.....	546
	B. Restorative Justice as a Response to Domestic Violence Is Antithetical to Feminist Principles that Have Informed the Anti-Domestic Violence Movement.....	548
	C. Restorative Justice Is an Ineffective Response to Domestic Violence.....	551
	D. Restorative Justice Is Unjust to Offenders	551
V.	SO WHY TRY RESTORATIVE JUSTICE?.....	552

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A.	The Theoretical Goals of Restorative Justice and the Civil Justice System Are Symbiotic	553
B.	Criticisms May Be Addressed	555
1.	Collaboration and Reconciliation.....	555
2.	Apology.....	557
3.	Feminist Critique	561
C.	Adapting Our Current Justice System Responses Would Not Provide as Effective a Remedy as Offering Restorative Justice as a Separate Civil Option, and It Would Reduce the Substantial Benefits Offered to Some Victims by Our Current System	562
D.	Although Restorative Justice Interventions Might Involve the Outlay of Substantial Resources, Failing to Provide Effective Remedies for Domestic Violence Victims Also Has Significant Financial Implications	564
E.	We Should Try Restorative Justice Because It Is Likely to Be Effective	565
1.	Perpetrator and Victim Engagement May Result in More Successful Agreements.....	565
2.	The Informality of a Restorative Justice Intervention May Enhance Its Effectiveness.....	570
3.	Restorative Justice Interventions Might Provide Increased Effectiveness Because They Can Incorporate Coordinated Community Responses	572
4.	The Evaluations of Restorative Justice Programs that Address Domestic Violence Suggest Potential for Success	573
a.	Victim Offender Conferences of South Africa.....	573
b.	Youth Justice Care and Protection Family Group Conferences, New Zealand.....	574
VI.	PROPOSAL.....	576
A.	Format.....	576
B.	Development.....	577
C.	Key Principles.....	579
D.	Eligibility	580
E.	Conference	582
1.	Facilitator Qualifications	583
2.	Preconference Meetings.....	583
3.	Community.....	584
4.	Venue.....	585
5.	Ground Rules	585
6.	Storytelling	587

2010]	<i>RESTORATIVE JUSTICE</i>	519
	7. Dialogue	587
	8. Number of Conference Sessions	588
	F. Resolution	588
	G. Enforcement	590
	H. Evaluation	594
VII.	CONCLUSION.....	594

I. INTRODUCTION

In the United States, an aggressive formal justice system has developed to respond to domestic violence. Over the last fifty years in particular, advocates and justice system decision makers have struggled to create protocols both to offer victim protection and to convey the public's reprobation of domestic violence. In that time, domestic violence has transformed from a private specter to a justice system reality. That reality has resulted in the implementation of mandatory policies and formal processes to condemn violence and protect victims. Our civil and criminal justice systems formally communicate little tolerance for family abuse. Police officers make arrests on a regular basis and indeed most state laws require them to do so.¹ Prosecutors charge and pursue criminal cases.² All fifty states and the District of Columbia now offer victims of intimate partner violence the right to petition for protection orders.³ Through these orders,

¹ In a study published by the National Institute of Justice using data from 2000, the National Incident-Based Reporting System reported that the arrest rate involving intimate partners was 49.9 percent and the arrest rate in other situations of domestic violence was 44.5 percent. DAVID HIRSCHER ET AL., EXPLAINING THE PREVALENCE, CONTEXT, AND CONSEQUENCES OF DUAL ARREST IN INTIMATE PARTNER CASES 60 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf>. The study also found that arrest rates in domestic violence incidents increased from around seven percent to fifteen percent in the 1970s and 1980s to fifty percent in 2000. *Id.* at 7.

² For example, in 2008, 3180 new misdemeanor cases were filed in the District of Columbia. District of Columbia Courts, Annual Report (2008) (on file with author).

³ ALA. CODE § 30-5-1(b)(6) (Westlaw through Dec. 1, 2009); ALASKA STAT. § 18.66.100(a) (LEXIS through 2009 1st Sess. Of the 26th State Leg. And 2009 1st Spec. Sess.); ARIZ. REV. STAT. ANN. § 13-3602(A) (Westlaw through legis. effective Feb. 9, 2010 of the 6th Spec. Sess., and legis. effective Feb. 11, 2010 of the 2d Reg. Sess. of the 49th Leg.); ARK. CODE ANN. § 9-15-101 (LEXIS through 2009 Reg. Sess.); CAL. FAM. CODE § 6300 (West 2004); COLO. REV. STAT. § 13-14-102(1.5)(b) (LEXIS through 2009 Legis. Sess.); CONN. GEN. STAT. § 46b-15(a) (West, Westlaw through Sept. 2009 Spec. Sess.); DEL. CODE ANN. tit. 10, § 1042 (1999); D.C. CODE § 16-1003(a) (Westlaw through Jan. 3, 2010); FLA. STAT. § 741.30(1) (West 2005); GA. CODE ANN. § 19-13-4(a) (LEXIS through 2009 Reg. Sess.); HAW. REV. STAT. ANN. § 586-3(a) (LexisNexis, LEXIS through 2009 Reg. & Spec. Sess.); IDAHO CODE ANN.

those who have suffered intimate abuse may attain civil injunctions offering a range of relief designed to protect the victim and to resolve issues that provoke conflict between the parties.⁴

And yet despite these enormous advances, domestic violence continues to flourish in the United States.⁵ Cases enter the civil jus-

§ 39-6304(1) (LEXIS through 2009 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 60/102 (West, Westlaw through P.A. 96-875 of 2009 Reg. Sess.); IND. CODE ANN. § 34-26-5-2(a) (LexisNexis, LEXIS through 2009 1st Reg. Sess. & 2009 Spec. Sess.); IOWA CODE ANN. § 236.3 (West, Westlaw through Jan. 21, 2010); KAN. STAT. ANN. § 60-3107(a) (Westlaw through 2009 Reg. Sess.); KY. REV. STAT. ANN. § 403.725 (West, Westlaw through 2009 Sess.); LA. REV. STAT. ANN. § 46:2136(A) (Westlaw through 2009 Reg. Sess.); ME. REV. STAT. ANN. tit. 19-A, § 4007(1) (Westlaw through 2009 1st Reg. Sess.); MD. CODE ANN., FAM. LAW § 4-506 (West, Westlaw through 2009 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West, Westlaw through ch. 19 of 2010 2d Ann. Sess.); MICH. COMP. LAWS ANN. § 600.2950(1) (West, Westlaw through 2009 Reg. Sess.); MINN. STAT. ANN. § 518B.01(4) (West, Westlaw through 2009 Reg. Sess.); MISS. CODE ANN. § 93-21-7 (West, Westlaw through 2009 Reg. Sess.); MO. ANN. STAT. § 455.020(1) (West, Westlaw through 2009 1st Reg. Sess.); MONT. CODE ANN. § 40-15-102(1) (Westlaw through 2009); NEB. REV. STAT. ANN. § 42-924(1) (LexisNexis, LEXIS through 2009 1st Sess.); NEV. REV. STAT. ANN. § 33.020(1) (LexisNexis, LEXIS through Apr. 2009); N.H. REV. STAT. ANN. § 173-B:5(I)(a) (Westlaw through ch. 4 of 2010 Reg. Sess.); N.J. STAT. ANN. § 2C:25-28, 29 (West 2009); N.M. STAT. ANN. § 40-13-3(A) (LexisNexis, LEXIS through 1st Spec. Sess. of 49th Leg., (2009)); N.Y. FAM. CT. ACT § 821(1)(d) (McKinney 2009); N.C. GEN. STAT. § 50B-2(a) (LEXIS through 2009 Reg. Sess.); N.D. CENT. CODE § 14-07.1-02.1 (LEXIS through 2009 Reg. Sess.); OHIO REV. CODE ANN. § 3113.31(E)(1) (West, Westlaw through 2010 File 28 of the 128th Gen. Assem. (2009-2010)); OKLA. STAT. ANN. tit. 22, § 60.2 (West, Westlaw through 2009 1st Reg. Sess.); OR. REV. STAT. ANN. § 107.718(1) (West, Westlaw through 2009 Reg. Sess.); 23 PA. CONS. STAT. ANN. § 6108(a) (West 2001); R.I. GEN. LAWS § 8-8.1-3(a)(1) (LEXIS through Jan. 2009 Sess.); S.C. CODE ANN. § 20-4-40 (Westlaw through 2009 Reg. Sess.); S.D. CODIFIED LAWS § 25-10-3 (Westlaw through 2009 Reg. Sess. & Supreme Court Rule 09-09); TENN. CODE ANN. § 36-3-606(a) (LEXIS through 2010 1st Extraordinary Sess.); TEX. FAM. CODE ANN. § 81.001 (Vernon, Westlaw through 2009 Reg. & 1st Called Sess. of 81st Leg.); UTAH CODE ANN. § 78B-7-103 (LEXIS through 2009 1st Spec. Sess.); VT. STAT. ANN. tit.15, § 1103(c) (LEXIS through 2009 Reg. Sess. & 2009 Spec. Sess.); VA. CODE ANN. § 16.1-279.1(A) (LEXIS through 2009 Reg. Sess. & 2009 Spec. Sess. I); WASH. REV. CODE ANN. § 26.50.030 (LexisNexis, LEXIS through 2009 Reg. Sess.); W. VA. CODE ANN. § 48-27-305 (LexisNexis, LEXIS through 2009 Reg. & 4th Extraordinary Sess.); WIS. STAT. ANN. § 813.12(4)(a) (West, Westlaw through 2009 Act 99); WYO. STAT. ANN. § 35-21-103(a) (LEXIS through 2009 Gen. Sess.).

⁴ See generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993) (providing an overview of state statutes authorizing domestic violence restraining orders).

⁵ See PATRICIA TJADEN & NANCY THOENNES, DEP'T OF JUSTICE, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 5 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (finding one out of four women will experience domestic violence in her lifetime); Will Dunham, *Quarter of U.S. Women Suffer Domestic Violence*,

tice system at an ever-increasing rate.⁶ The annual number of women who are the victims of violent crime by an intimate partner remains astoundingly high.⁷ And homicides related to domestic violence have held essentially constant.⁸

Although formal intervention systems vary from jurisdiction to jurisdiction, the consistent prevalence of intimate violence and homicide suggests that our current approach is not as effective as we might hope. Increasingly, advocates and system actors are acknowledging the shortcomings of our current interventions.⁹ Many advocates have argued for various improvements to our current systems. These arguments have included strengthening the criminal justice system's response,¹⁰ increasing the collaboration among various elements of the

REUTERS, Feb. 7, 2008, <http://www.reuters.com/article/idUSN0737896320080207> (citing a 2008 Centers for Disease Control study that found that 23.6 percent of women reported being a victim of intimate partner violence and a 1995 government survey that found that 24.8 percent of women reported suffering domestic violence).

⁶ For example, in the District of Columbia, "domestic violence protection case filings totaled 8,386 in 2005, an increase of 3.7 [percent] over 2004." D.C. Coal. Against Domestic Violence, Domestic Violence Statistics, <http://www.dccadv.org/statistics.html> (last visited Jan. 30, 2010).

⁷ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 9 (2004) (stating that in 2004, 466,600 women were victims of violent crime committed by an intimate partner).

⁸ CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 2 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv.pdf> (stating that the percentage of female murder victims killed by intimate partners has remained at about thirty percent since 1976); see also Bureau of Justice Statistics, Homicide Trends in the U.S.: Intimate Homicide, <http://bjs.ojp.usdoj.gov/content/homicide/intimates.cfm> (last visited Jan. 31, 2010) (reporting that the homicide rate for women held constant for two decades and then began a slight decline with its lowest rate in 2004 and further reporting that the homicide rate for white women has essentially held constant since 1976).

⁹ See, e.g., ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 198 (2000) (critiquing the advances of the justice system's responses to domestic violence from a feminist perspective); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001) (critiquing criminal justice responses to domestic violence and the negative implications for victims); Deborah Tuerkheimer, *Criminal Law: Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004) (arguing that the criminal justice system's treatment of domestic violence fails to comport with the reality of intimate violence and calling for a revision of the criminal system).

¹⁰ See generally Cheryl Hanna, *No Right to Choose*, 109 HARV. L. REV. 1849 (1996) (arguing that mandatory and aggressive prosecution can help keep women safe); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998) (arguing that the criminal justice system plays a critical role in domestic violence and that sentencing must be revisited and improved).

system,¹¹ and altering mandatory policies to allow for increased consideration of victim preferences.¹² Other advocates have called for a more radical transformation by reducing the involvement of formal systems of civil and criminal justice in intimate violence and returning to community-based interventions.¹³

This Article advocates another approach to the problem: developing an alternative track to the civil justice system that draws on principles of restorative justice. Such an innovation, though admittedly controversial, would allow us to complement our current intervention systems with an additional avenue of recourse that would allow for more flexibility and creativity. Although restorative justice

¹¹ See Dennis R. Falk & Nancy Helgeson, *Building Monitoring and Tracking Systems*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND 89, 91–94 (Melanie F. Shepard & Ellen L. Pence eds., 1999) (advocating coordinated community responses to domestic violence); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1517 (2008) (advocating interagency collaboration in domestic violence cases for effective enforcement of protection orders); Tritia L. Yuen, Comment, *No Relief: Understanding the Supreme Court's Decision in Town of Castle Rock v. Gonzales Through the Rights/Remedies Framework*, 55 AM. U. L. REV. 1843, 1877 (2006) (calling for interagency collaboration to help improve police response to domestic violence).

¹² See LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 111–35 (2008) (advocating for reforms to maintain the advances of the last thirty years but increase victim agency); SCHNEIDER, *supra* note 9, at 198 (suggesting that engaging the state to intervene in domestic violence must be done with care); Coker, *supra* note 9 (advocating for efforts to maintain aggressive criminal justice responses without robbing victims of their autonomy); Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 465 (2002) (arguing that it is necessary to revisit mandatory prosecution policies to incorporate a concern for women's safety); Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191 (2008) (suggesting a revision of criminal justice mandatory interventions to allow for increased victim voice).

¹³ See, e.g., Linda G. Mills et al., *Circulos de Paz and the Promise of Peace: Restorative Justice Meets Intimate Violence*, 33 N.Y.U. REV. L. & SOC. CHANGE 127, 128–30 (2009) (arguing that the criminal justice response to domestic violence is too limiting and advocating instead for a response based on restorative justice principles); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1714 (arguing that the best approach to domestic violence is not a criminal response) (citing Mills et al., *supra*, at 128–30); Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921, 934–49 (2003) (giving an overview of responses to domestic violence that are community based); see also *id.* at 934 (“These models, which often bypass or operate parallel to the criminal justice system, have the benefit of cultivating and situating resolution of violence within institutions that communities recognize and respect.”).

principles have been used extensively in the juvenile justice system, they have been suggested amidst much controversy as a response to intimate partner violence, and have been implemented in only an extremely limited way.¹⁴ The controversy evolves out of legitimate concerns, but the state of our domestic violence system response calls for facing this less popular alternative, beginning more aggressive experimentation, and determining if restorative justice could help make victims safer in the long run.

Part II of this Article sets forth our current justice system response to intimate partner violence and analyzes the significant shortcomings of that system. Part III analyzes restorative justice theory by providing an overview of some illustrative programs. In Part IV, this Article sets forth the central arguments against restorative justice as a response to domestic violence. Part V moves beyond this critique by analyzing restorative justice's potential for success. It illustrates the symbiosis between the goals of the civil justice system and restorative justice, analyzes the validity of the criticism, and explores the potential of restorative justice to meet the needs of victims and offenders. Finally, Part VI sets forth the parameters for a pilot restorative justice program that could successfully enhance the options for those who seek protection from domestic violence.

II. OUR CURRENT JUSTICE SYSTEM INTERVENTIONS FAIL TO SUFFICIENTLY ADDRESS DOMESTIC VIOLENCE

Our justice system response to family violence has progressed from nonfeasance to active engagement,¹⁵ and yet research suggests that despite these advances, a significant proportion of all victims remain unsafe and dissatisfied.¹⁶ This Part outlines current domestic

¹⁴ Some have advocated restorative justice as an alternative to domestic violence criminal justice enforcement. See, e.g., Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 473 (2006) ("This is not to say that punishment has no role in a victim's welfare, but rather that a restorative approach, when added to other options available through the criminal courts, may help victims recover in a more meaningful and complete way.").

¹⁵ See, e.g., SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 158 (1982) (noting that at the beginning of the movement, battered women complained that police refused to come when they were called or would side with the batterer and refuse to arrest).

¹⁶ See generally Kohn, *supra* note 12 (chronicling the advances made in the domestic violence movement, assessing their effectiveness, and concluding that women remain unsafe).

violence interventions in the U.S. justice system and assesses their effectiveness.

Historical resistance to intervening in family violence cases has dissipated in recent years.¹⁷ During the 1980s and 1990s, the implementation of new statutes and policies reduced justice system actors' discretion to refrain from intervening in domestic violence cases. For example, mandatory arrest statutes required police officers, who traditionally had a choice about whether to make an arrest when they found probable cause at the scene of the incident, to make arrests upon such a finding.¹⁸ Prosecutors' offices implemented no-drop prosecution policies, requiring the prosecutor to pursue a charged domestic violence case regardless of the victim's preferences.¹⁹ These policies increased the numbers of domestic violence cases that entered and were pursued within the criminal justice system.²⁰

Civil protection order statutes have continued to expand in scope of coverage and breadth of relief over the past few decades.²¹ Since their inception in the 1970s, these statutes have swelled to protect a broader array of relationships, no longer limiting protection to

¹⁷ See GOODMAN & EPSTEIN, *supra* note 12, at 29–47 (providing an overview of the domestic violence movement and its progress in breaking down the resistance of system actors to intervene); SCHNEIDER, *supra* note 9, at 9–28 (chronicling the domestic violence movement and the advances made); Kohn, *supra* note 12, at 195–99 (discussing the development of the domestic violence movement and its success in becoming a mainstream criminal and civil justice issue).

¹⁸ See Kohn, *supra* note 12, at 211–18 (providing an overview of the development of mandatory arrest statutes).

¹⁹ See *id.* at 219–24 (providing an overview of the development of no-drop prosecution policies).

²⁰ See *id.* at 211–25 (setting forth the many studies analyzing the effectiveness of mandatory arrest statutes and no-drop prosecution policies).

²¹ See Richard A. DuBose III, *Katsenelenbogen v. Katsenelenbogen: Through the Eyes of the Victim*, 32 U. BALT. L. REV. 237, 242–43 (2003) (comparing the expanded definition of “abuse” and the classes of persons eligible for relief in Maryland’s 1992 domestic violence statute with the previous 1980 Act); Michelle Aulivola, Note, *Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 FAM. CT. REV. 162, 169 (2004) (noting that within the past ten years, many states have amended their domestic violence statutes to include gender neutral pronouns and exclude phrases like “opposite sex” so that victims of same-sex domestic violence may be included under the statutes). Compare District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, § 131(a), 84 Stat. 473, 545 (offering protection order coverage only to those with familial relationships and limited relief), with D.C. CODE §§ 16-1001, 16-1005(c)(1)–(12) (Westlaw through Jan. 3, 2010) (offering coverage and widespread relief to a broad range of complainants with relationships ranging from familial to romantic and even to strangers who stalk or sexually abuse other strangers).

those in state-recognized family relationships.²² Under these expanded statutes, such as the District of Columbia protection order statute, individuals sharing a home, in same-sex relationships, and even those who share present or past relationships with the same romantic or sexual partners are entitled to seek protection orders.²³ While the early generation of protection order statutes offered aggrieved parties only limited relief, such as stay away orders, many contemporary statutes offer extremely broad relief, including child custody, visitation, spousal and child support, and participation in court-ordered alcohol, drug, and batterer intervention programs.²⁴

Further, many courts have established coordinated, centralized units to process domestic violence cases in order to enhance access to justice and reduce redundancy and conflicts between multiple judicial responses.²⁵ These efforts have included the institution of “one-stop shopping” intake centers for victims of intimate partner violence, which provide multiple services under one roof, as well as specialized domestic violence units and courts.²⁶

With all of these innovations and interventions illustrating the justice system’s commitment to eradicating family violence, one would expect domestic violence to be on the decline. One would expect a significant reduction in reabuse after a justice system intervention. One would also expect victims to feel supported and positive about their interactions with the justice system. And finally, one would hope for victims to both feel and be safer. Instead, research does not reveal such outcomes.

²² See Aulivola, *supra* note 21, at 169–70.

²³ D.C. CODE § 16-1001(6) (B) (Westlaw through Jan. 3, 2010).

²⁴ Compare District of Columbia Court Reform and Criminal Procedure Act of 1970 § 131(a), with D.C. CODE ANN. § 16-1001.

²⁵ See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 21–38 (1999) (advocating for the institution of coordinated court-based domestic violence centers); Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1296–1310 (2000) (providing an overview of domestic violence courts and profiling several illustrative programs). For a discussion of various models of specialized court-based domestic violence centers and their effectiveness, see EMILY SACK, FAMILY VIOLENCE PREVENTION FUND, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES 24–29, 42–60 (2002); ROBERT V. WOLF ET AL., CTR. FOR COURT INNOVATION, PLANNING A DOMESTIC VIOLENCE COURT: THE NEW YORK STATE EXPERIENCE (2004), available at http://www.courtinnovation.org/_uploads/documents/dvplanningdiary.pdf.

²⁶ See Epstein, *supra* note 25, at 28–34 (discussing coordinated court-based one-stop shopping domestic violence centers); Tsai, *supra* note 25, at 29–32 (providing an overview of domestic violence courts and profiling several illustrative programs).

For example, mandatory arrest studies that assess victim safety demonstrate that the policies produce mixed results at best.²⁷ Most suggest that while some victims may be at a decreased risk of reabuse under a mandatory intervention regime, the policies tend to have an insignificant effect on victim safety and may even put some victims at increased risk.²⁸

Research also reveals varied results as to whether increased prosecutions and longer case retention enhance victim safety, leading some researchers to wonder “[h]ow punishment can be justified when it escalates violence.”²⁹ While no-drop prosecution policies have increased the percentage of cases coming into the system that are charged and decreased the percentage that are dismissed, it is unclear whether these policies make women³⁰ safer.³¹ Some studies

²⁷ See JOAN ZORZA & LAURIE WOODS, NAT’L BATTERED WOMEN’S LAW PROJECT, ANALYSIS AND POLICY IMPLICATIONS OF THE NEW DOMESTIC VIOLENCE POLICE STUDIES 14–25 (1994) (noting that there was a lower frequency of arrest recidivism at twelve months in mediation and separation cases than in arrest cases); Franklyn W. Dunford, *The Measurement of Recidivism in Cases of Spouse Assault*, 83 J. CRIM. L. & CRIMINOLOGY 120, 121–23 (1992) (reporting that, in a study of mandatory arrest policies, researchers found arrest did not deter future violence any more than other police responses); Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers*, 83 J. CRIM. L. & CRIMINOLOGY 137, 152 (1992) (reporting on a study of 1200 victims that found no difference in the long-term likelihood of reabuse between the group of offenders who were arrested and those who were given only a warning). *But see* Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 930–32 (1994) (arguing that the studies of mandatory arrest policies contained flaws that undercut their accuracy in assessing the effectiveness of such policies).

²⁸ See Kohn, *supra* note 12, at 235–37 (providing an overview of the studies assessing the effectiveness of mandatory arrest policies and concluding that they result in little reduction in reabuse and may even contribute to increased reabuse).

²⁹ Sherman et al., *supra* note 27, at 169.

³⁰ Throughout this Article I refer to individuals who are battered as females and to perpetrators as males. I use this label as shorthand and do not intend to cast into doubt or denigrate the existence of female-on-male or same-sex battering. While men are victims of intimate violence and women are batterers, the statistics bear out the fact that in the majority of cases, the reverse is true. See RENNISON & WELCHANS, *supra* note 8, at 1 (stating that intimate partner crimes “primarily involve female victims” and that about “85% of victimizations by intimate partners in 2001 were against women”); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, iv (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf> (stating that approximately 1.3 million women and 835,000 men are physically assaulted by intimate partners annually); Marta B. Varela, *Protection of Domestic Violence Victims Under the New York City Human Rights Law’s Provisions Prohibiting Discrimination on the Basis of Disability*, 27 FORDHAM URB. L.J. 1231, 1234 (2000) (estimating that three-quarters of all victims of domestic violence are women).

indicate that more aggressive prosecution enhances victims' vulnerability to reabuse.³² The most notable of these studies found that for many victims, arrest resulted in an increased risk of reabuse and that the first reported act of reabuse occurred twenty percent earlier than it did in cases where the perpetrator was only warned.³³

Although protection orders offer victims an avenue for pursuing enforceable court-ordered protection against violent partners or family members, research suggests that protection orders vary in their effectiveness, and, at best, they are far from uniformly effective.³⁴ One very recent study of nearly 700 women found that three out of five women who obtained protection orders experienced recurrent violence in the ensuing period.³⁵

In assessing the effectiveness of our current interventions, it is also necessary to consider victim satisfaction with the justice system.³⁶

³¹ See David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 153 (N. Zoe Hilton ed., 1993) (in analyzing the effects of no-drop prosecution versus discretionary dismissal prosecution, researchers found that while there may be a "benefit for victims whose assailant is arrested and prosecuted, we cannot say that these victims are better off than if the men had *not* been arrested or had been arrested and not prosecuted. But given arrest with prosecution, one policy is no better than another."); Kohn, *supra* note 12, at 237–38 (providing an overview of research analyzing the recidivism rate of offenders who are prosecuted).

³² JEFFREY FAGAN, U.S. DEP'T OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 17 (1995) (reporting on studies conducted in 1989 and 1991 finding that "[m]en with prior arrest records or who had lengthy histories of severe violence toward their partners were more likely to reoffend if prosecuted compared with men not prosecuted").

³³ Sherman et al., *supra* note 27, at 167.

³⁴ See Goldfarb, *supra* note 11, at 1511–12 (presenting an overview of multiple studies showing high levels of compliance in some protection order cases as well as many illustrating significant levels of reabuse).

³⁵ T.K. Logan & Robert Walker, *Civil Protective Order Outcomes*, 24 J. INTERPERSONAL VIOLENCE 675, 675 (2009); see also JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 163 (1999) (detailing a study that found that sixty-two percent of women who obtained protection orders reported violations of the orders in the ensuing period); TJADEN & THOENNES, *supra* note 5, at 57 (detailing a national study finding approximately one-half of the orders obtained by women against intimate partners who physically assaulted them were violated and that more than two-thirds of the restraining orders against intimate partners who raped or stalked the victim were violated).

³⁶ See Joan Pennell & Gale Burford, *Feminist Praxis: Making Family Group Conferencing Work*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 108, 113–14 (Heather Strang & John Braithwaite eds., 2002) (discussing the effects of no-drop prosecution, mandatory arrest, and general treatment by justice system personnel on female domestic violence victims).

If victims are unsatisfied, they are less likely to pursue the civil cases they have filed, remain engaged as complainants in the criminal justice system, and seek assistance from the justice system in the future. A study of nearly 200 domestic violence survivors found that only thirty-eight percent of women reported being satisfied with all aspects of the civil and criminal justice systems that they encountered.³⁷ More than half of the women surveyed reported dissatisfaction with at least one aspect of the systems.³⁸

Some domestic violence victims perceive the system as emotionally inhospitable. Many domestic violence survivors find the courtroom experience to be so traumatic that they choose to abandon their cases or to refrain from using the justice system at all. Research on the criminal and civil domestic violence systems is replete with complaints about the way judges and court personnel interact with victims. For example, some women report that judges are condescending and dismissive.³⁹ Other women find the courtroom experience inherently intimidating and humiliating regardless of ill treatment by court personnel.⁴⁰ One study found that women “occasionally remarked that this fear of the court process can be so overwhelming as to cause a traumatic dissociative reaction.”⁴¹ Women who wish to remain in the violent relationship perceive the justice system to be particularly inhospitable.⁴²

³⁷ Ruth E. Fleury, *Missing Voices: Patterns of Battered Women's Satisfaction with the Criminal Legal System*, 8 VIOLENCE AGAINST WOMEN 181, 198 (2002); see also Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, in 41 CRIME & DELINQUENCY 414, 417 (1995) (citing their own study finding that ninety-five percent of women who received protection orders reported feeling confident that the police would respond to violations, that ninety-one percent felt the decision to pursue the order was a good one, and that ninety-eight percent felt more in control of their lives).

³⁸ Fleury, *supra* note 37, at 198.

³⁹ PTACEK, *supra* note 35, at 102–05.

⁴⁰ See *id.* at 147–48.

⁴¹ Fischer & Rose, *supra* note 37, at 419; see also PTACEK, *supra* note 35, at 145–48 (reporting that many of the women in their study of those seeking protection orders found themselves feeling vulnerable to judgment and humiliation in the courtroom); Goldfarb, *supra* note 11, at 1515 (stating that women find the court process embarrassing and intimidating)

⁴² See Goldfarb, *supra* note 11, at 1511 (“Indeed, many women who are not ready to end a relationship do not seek a protection order at all or fail to complete the process of obtaining one”); see also Anne L. Horton et al., *Legal Remedies for Spousal Abuse: Victim Characteristics, Expectations, and Satisfaction*, 2 J. FAM. VIOLENCE 265, 274–76 (1987) (reporting on a study suggesting that satisfaction rates with the protection order system are generally higher for women who want to leave the rela-

Victims also struggle with deciding whether to access the system at all or to remain in the system when they perceive the possible ineffectiveness of its remedy. One researcher, who studied the criminal domestic violence system, reported that “women often calculated the costs to themselves and their families of continuing a case as they became aware that the law would provide dubious protection from abusive men and might make things worse.”⁴³

In addition, some victims perceive that they lack control when they are involved in the justice system. Victims who have been abused by intimate partners often come to the system believing that they have lost control of their lives. Often the way that justice system personnel treat victims enhances this perception.⁴⁴ Instead of feeling empowered to enforce their rights, victims find themselves disempowered by mandatory policies and justice system actors who substitute their judgment for victims’ judgment.⁴⁵ This treatment drives some litigants and complaining witnesses away from the justice system. Studies have shown, however, a high correlation between women’s perceived levels of control and patterns of overall satisfaction with the justice system.⁴⁶ When women sense that they enjoy some level of

tionship or who are at least ambivalent about terminating the relationship than for those who want to continue in the relationship); Ann Malecha et al., *Applying for and Dropping a Protection Order: A Study with 150 Women*, 14 CRIM. JUST. POL’Y REV. 486, 496 (2003) (noting that over forty percent of women who dropped orders said it was because they had returned to the relationship).

⁴³ Judith Wittner, *Reconceptualizing Agency in Domestic Violence Court*, in COMMUNITY ACTIVISM AND FEMINIST POLITICS: ORGANIZING ACROSS RACE, CLASS, AND GENDER 81, 90 (Nancy A. Naples ed., 1998).

⁴⁴ See Coker, *supra* note 9, at 830–40 (discussing the effects of justice system policies that take control from victims).

⁴⁵ See GOODMAN & EPSTEIN, *supra* note 12, at 94 (discussing studies showing that survivors of abuse who chose not to report recidivist abuse to officials were those who felt they had “no voice” in a previous prosecution, whereas those who felt in control of their own choices were more likely to rate their experiences highly and to use the services again); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 556 (1999) (“[S]tate approaches that involve coercive and dismissive tactics may effectively revictimize the battered woman, first by reinforcing the batterer’s judgments of her, and then by silencing her still further by limiting how she can proceed.”).

⁴⁶ Fleury, *supra* note 37, at 201–02; David A. Ford, *Wife Battery and Criminal Justice: A Study of Victim Decision-Making*, 32 FAM. REL. 463, 469 (1983); David A. Ford & Mary Jean Regoli, *The Preventive Impacts of Policies for Prosecuting Wife Batterers*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 181 (Eve S. Buzawa & Carl G. Buzawa eds., 1992) (discussing the effect of perceived control on victims).

control over their criminal or civil case, they generally characterize the intervention in a more positive way.⁴⁷

Because our current justice system interventions provide inconsistent levels of effectiveness and victim satisfaction, it is time to reevaluate our system, and its alternatives, to ascertain if we can provide additional remedies that will achieve greater success in meeting the needs of the range of domestic violence survivors, protecting those at risk, and providing both victims and perpetrators with a fair process.⁴⁸ We have tried to tinker with the current system to keep victims engaged and meet their needs, but systemic factors prevent those changes from truly addressing the barriers that some victims face in seeking safety in the justice system. The prevalence of domestic violence demands that more radical changes to the judicial system be made.

III. WHAT IS RESTORATIVE JUSTICE?

This Part explores and defines restorative justice theory and illustrates various models of restorative justice programs.

A. *Theory*

Restorative justice, which has long been a justice system norm in indigenous populations and has increasingly appeared in juvenile justice interventions since the 1970s,⁴⁹ focuses on addressing harms caused by socially unacceptable or criminal behaviors by engaging the community, victims, and offenders themselves.⁵⁰ By addressing victims' needs and harnessing offenders' capacity for rehabilitation, restorative justice proponents seek to work outside or alongside traditional criminal and civil justice systems to achieve broader and more flexible resolutions. According to one supporter of restorative justice,

⁴⁷ See *infra* notes 238–47 and accompanying text.

⁴⁸ See *infra* notes 243–48 and accompanying text.

⁴⁹ See HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 3–4 (2002) (citing the date of the emergence of restorative justice programs in mainstream justice systems around the world in the 1970s); T. Bennett Burkemper, Jr. et al., *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128, 130 (2007) (noting that restorative justice practices arose in the U.S. juvenile court systems in the late 1970s and 1980s and that they expanded greatly in the 1990s with the creation of the Balanced and Restorative Justice Project in 1992).

⁵⁰ See ZEHR, *supra* note 49, at 13–18 (citing the roles of offender, victim, and community in restorative justice interventions).

Advocates suggest that restorative justice combines the possibilities of making the offender accept the nature and extent of the harm done by the offence and of his own responsibility for that harm; providing some measure of reparation to the victim (individual and/or community) who has been harmed, and taking steps to reduce the likelihood of a future offence, so that diversion [from the traditional justice system] is not at the expense of effective action.⁵¹

Restorative justice proponents focus on mending the rift between the parties and healing the community at large.⁵² The principle has been defined 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.”⁵³ Proponents’ efforts also seek to restore peace and the status quo prior to the triggering event.⁵⁴ Advocates, however, acknowledge the virtual impossibility of truly restoring an ongoing intimate relationship after a traumatic event.⁵⁵ Usually, the relationship is broken before the wrong occurs.⁵⁶ Instead, as one commentator noted, “[I]n order to address the wrong and ensure that it does not happen again, one must address the state of the relationship in which the wrong occurred and strive to establish an ideal state of equality.”⁵⁷

Proponents also view the traditional justice system as a vehicle that offers retribution, reprimands, and punishment; through restorative justice, one may attain reparation, reconciliation, and transformation.⁵⁸ “At its core, [restorative justice] emphasizes interdepen-

⁵¹ Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616, 620 (2002).

⁵² See ZEHR, *supra* note 49, at 28; Paul C. Friday, *Community-Based Restorative Justice: The Impact on Crime*, in CRIME PREVENTION: NEW APPROACHES 370, 371 (Helmut Kury & Joachim Obergfell-Fuchs eds., 2003) (“[T]here are three primary stakeholders from a restorative justice perspective: victim, offender and community.”).

⁵³ ZEHR, *supra* note 49, at 37.

⁵⁴ JENNIFER J. LLEWELLYN & ROBERT HOWSE, RESTORATIVE JUSTICE: A CONCEPTUAL FRAMEWORK 40–41 (1998), available at http://www.nsrj-cura.ca/nsrj-cura/mediabank/File/RJ_-_A_Conceptual_Framework_-_Law_Commission_of_Canada_1_199.pdf.

⁵⁵ *Id.* at 41.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ ZEHR, *supra* note 49, at 28–32; see also Derek Brookes, *Evaluating Restorative Justice Programs*, RESTORATIVE JUSTICE ONLINE, <http://www.restorativejustice.org/>

dence between citizens and families and assumes that all cultures will find this approach more emotionally satisfying than retribution.”⁵⁹ Restorative justice proponents seek to provide a forum that offers more holistic healing than the traditional justice system—one that is amenable to empathy, creativity, and long-term solutions.

B. History & Typology

The principles and practices now categorized as restorative justice have been used throughout history,⁶⁰ particularly in Native American and Native Canadian justice systems, as well as in indigenous populations in South Africa, Australia, and New Zealand. Restorative justice influences can be seen in contemporary high-profile criminal justice programs, such as the Truth and Reconciliation Commission in South Africa.⁶¹ In the 1970s, restorative justice programs began to appear in juvenile justice systems and over the years have infiltrated additional legal arenas.⁶² By the mid-1990s, the term “restorative justice,” and the programs associated with it, were in increasing use in

10fulltext/brookes (indicating that the aims of restorative justice are reconciliation, reparation, and transformation).

⁵⁹ Peggy Grauwiler et al., *Justice Is in the Design: Creating a Restorative Justice Treatment Model for Domestic Violence*, in *FAMILY INTERVENTIONS IN DOMESTIC VIOLENCE: A HANDBOOK OF GENDER-INCLUSIVE THEORY AND TREATMENT* 579, 580 (John Hamel & Tonia Nicholls eds., 2007) (citing John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *CRIME & JUST.* 1 (1999)).

⁶⁰ Commentators have identified many examples of criminal justice practices throughout history that have focused on the victim’s needs and restoring the relationships between offender, victim, and the community. See generally Chris Cunneen, *Reviving Restorative Justice Traditions?*, in *THE HANDBOOK OF RESTORATIVE JUSTICE* 113 (Gerry Johnstone & Daniel W. Van Ness eds., 2007); Elmar G. M. Wietekamp, *The History of Restorative Justice*, in *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* 75 (Gordon Bazemore & Lode Walgrave eds., 1999).

⁶¹ The Truth and Reconciliation Commission (TRC), though it shared the goals of restoration and individual and community healing, differed from pure restorative justice programs in significant ways. The TRC, contrary to restorative justice principles, generally placed victims and perpetrators on separate tracks so that individual perpetrators did not face their actual victims. See AMANDA DISSEL, *CTR. FOR THE STUDY OF VIOLENCE & RECONCILIATION, RESTORING HARMONY: A REPORT ON A VICTIM OFFENDER CONFERENCING PILOT PROJECT* 10 (2000), available at <http://www.csvr.org.za/docs/crime/restoringtheharmony.pdf>. Further, victim participation, though invited, was not a vital aspect of the program. See *id.*

⁶² Grauwiler et al., *supra* note 59, at 580; see generally MARLENE A. YOUNG, *RESTORATIVE COMMUNITY JUSTICE: A CALL TO ACTION* (1995); Robert Yazzie & James W. Zion, *Navajo Restorative Justice: The Law of Equity and Harmony*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 157 (Burt Galaway & Joe Hudson eds., 1996).

the United States and abroad.⁶³ In 2002, the United Nations Commission on Crime Prevention and Criminal Justice passed a declaration of basic principles stating that restorative justice programs should be an element of criminal case processing.⁶⁴ Over the past decade, many U.S. jurisdictions have begun to experiment with restorative justice principles in the criminal justice system. A large number of state statutes have been implemented that either encourage or mandate the use of restorative justice.⁶⁵ Due to resistance with-

⁶³ Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence and Restorative Justice*, 11 VIOLENCE AGAINST WOMEN 603, 606 (2005); Ted Keys & Anna Rockhill, *Family Group Decision-Making in Oregon*, in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 271, 271 (Gale Burford & Joe Hudson eds., 2000).

⁶⁴ Friday, *supra* note 52, at 370; *see also* Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, Apr. 18–25, 2005, *Report of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice*, 6, U.N. Doc. A/CONF.203/18 (May 17, 2005) (“To promote the interests of victims and the rehabilitation of offenders, we recognize the importance of further developing restorative justice policies . . .”).

⁶⁵ ALA. CODE § 12-25-32 (Westlaw through 2009 Reg. & 1st Spec. Sess.) (incorporating restorative justice principles of victim offender mediation and victim impact panels into sentencing); CAL. PENAL CODE § 13826.6 (West 2009) (providing for mediation in gang situations under a Gang Violence Suppression Program); COLO. REV. STAT. § 19-2-213 (LEXIS through 2009 Legis. Sess.) (creating a “restorative justice coordinating council” to provide assistance and education related to restorative justice programs); DEL. CODE ANN. tit. 11, § 9501 (2007) (establishing victim-offender mediation in criminal cases at the discretion of the Attorney General); FLA. STAT. ANN. § 985.155 (West 2006 & Supp. 2010) (permitting the state attorney to refer any first-time, nonviolent juvenile offender accused of committing a delinquent act to a Neighborhood Restorative Justice Center); HAW. REV. STAT. ANN. § 353H-31 (LexisNexis, LEXIS through 2009 Reg. & Spec. Sess.) (allowing for the use of restorative justice practices such as victim impact panels in adult offender reentry programs and services); LA. REV. STAT. ANN. § 46:1846 (Westlaw through 2009 Reg. Sess.) (allowing victims and offenders to communicate if participating in a restorative justice program administered through the Department of Public Safety and Corrections); MINN. STAT. ANN. § 611A.775 (West, Westlaw through 2009 Reg. Sess.) (allowing for the establishment of restorative justice programs by community-based organizations paired with the local government); MISS. CODE ANN. § 63-11-30 (LEXIS through 2009 3d Extraordinary Sess.) (allowing for the substitution of attendance at a victim impact panel for jail time in drunk driving cases); MO. ANN. STAT. § 217.777 (West, Westlaw through 2009 1st Reg. Sess.) (allowing victim-offender mediation to be a condition of probation); MONT. CODE ANN. § 2-15-2013 (Westlaw through 2009) (creating an Office of Restorative Justice to promote restorative justice principals of repairing the harm of crime, strengthening communities around the state, emphasizing accountability, and providing alternatives to incarceration for offenders who are at low risk for violence); OHIO REV. CODE ANN. § 307.62 (West, Westlaw through 2010 File 28 of the 128th Gen. Assem. (2009–2010)) (establishing victim-offender mediation as part of a crime victims assistance program); OKLA. STAT. ANN. tit. 22, § 991a (West, Westlaw through 2009 1st Reg. Sess.) (establishing victim impact panels and victim-

in the anti-domestic violence community, however, very few restorative justice programs have developed to address domestic violence.⁶⁶

Restorative justice principles have resulted in a range of justice programs. The programs can be divided into three major models: victim-offender mediation, family group conferences, and sentencing circles. Victim-offender mediation (VOM), the oldest⁶⁷ and most widespread restorative justice model,⁶⁸ features a face-to-face meeting between the victim and the perpetrator accompanied by one or more mediators.⁶⁹ As of 2001, there were approximately 320 VOM programs in the United States and Canada and more than 700 in Europe.⁷⁰ Family group conferencing (FGC), also called restorative conferencing, developed later than VOM but has also spread globally and beyond the scope of its initial application.⁷¹ FGC was first implemented in New Zealand in 1989 to address youth violence and

offender mediation as components of sentencing); 75 PA. CONS. STAT. ANN. § 3804 (West 2006 & Supp. 2009) (incorporating victim impact panels into sentencing for drunk drivers); TENN. CODE ANN. § 16-20-102 (LEXIS through 2010 1st Extraordinary Sess.) (creating a Victim-Offender Mediation Center to provide victim-offender mediation for felony, misdemeanor, and juvenile delinquency cases); TEX. GOV'T CODE ANN. § 508.324 (Vernon, Westlaw through 2009 Reg. & 1st Called Sess. of 81st Leg.) (allowing victim-offender mediation at the request of the victim for offenders on parole or released to mandatory supervision); UTAH CODE ANN. § 62A-15-501 (LEXIS through 2009 1st Spec. Sess.) (recognizing that it is state policy to utilize victim impact panels to assist persons convicted of driving under the influence to gain a full understanding of the severity of their offense); VT. STAT. ANN. tit. 28, § 910 (LEXIS through 2009 Reg. Sess. & 2009 Spec. Sess.) (creating a restorative justice program for offenders required to participate in such a program as a condition of their probation); WASH. REV. CODE ANN. § 13.40.070 (LexisNexis, LEXIS through 2009 Reg. Sess.) (allowing victim-offender mediation for juveniles at the discretion of the prosecutor, juvenile court probation counselor, or diversion unit); WIS. STAT. ANN. § 938.34 (West, Westlaw through 2009 Act 99) (allowing for victim-offender mediation as a part of the disposition of a juvenile offense).

⁶⁶ See *infra* Part IV.

⁶⁷ See LORETTA FREDERICK & KRISTINE C. LIZDAS, *THE ROLE OF RESTORATIVE JUSTICE IN THE BATTERED WOMEN'S MOVEMENT* 1, 8 (2003); Paul McCold, *The Recent History of Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE* 23, 24 (Dennis Sullivan & Larry Tift eds., 2006).

⁶⁸ Mark S. Umbreit et al., *Victim-Offender Dialogue in Violent Cases: A Multi-Site Study in the United States*, 2007 *ACTA JURIDICA* 22, 22; see also Christa Pelikan & Thomas Tenczek, *Victim Offender Mediation and Restorative Justice: The European Landscape*, in *HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE*, *supra* note 67, at 63, 64 (“VOM is just one—but in the European context the most important—model, or practice of restorative justice.”).

⁶⁹ ZEHR, *supra* note 49, at 47.

⁷⁰ Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, *JUV. JUST. BULL.*, Feb. 2001, at 1, 2.

⁷¹ See generally McCold, *supra* note 67, at 30–34.

child welfare, and is based on dispute resolution techniques of Maori origin.⁷² Finally, in sentencing or healing circles, the victim and offender sit in a circle of family and community.⁷³ As the group works through the harm and the resolution, it seeks to reach consensus. Though these three models share some goals and methodology, they differ in the formality of the intervention and in the role and presence of facilitators and community members.⁷⁴

Although rare, programs exemplifying each of these models have been developed to address family violence over the past two decades. Below, this Article summarizes three programs as illustrative of each model.

1. Victim-Offender Mediation

Since 1998, the Mediation and Restorative Justice Centre of Edmonton, Alberta, Canada has administered a VOM program for domestic violence victims and offenders.⁷⁵ Since its inception, its admin-

⁷² FREDERICK & LIZDAS, *supra* note 67, at 9; Bazemore & Umbreit, *supra* note 70, at 2, 5.

⁷³ ZEHR, *supra* note 49, at 51.

⁷⁴ Additionally, Frederick and Lizdas identify victim impact panels as a fourth major type of restorative justice program. FREDERICK & LIZDAS, *supra* note 67, at 11. Because their use has been extremely limited, and they have not been used in the intimate violence arena, they will not be discussed here.

⁷⁵ ALAN EDWARDS & JENNIFER HASLETT, VICTIM OFFENDER MEDIATION ASS'N, DOMESTIC VIOLENCE AND RESTORATIVE JUSTICE: ADVANCING THE DIALOGUE 1 (2003), <http://www.voma.org/docs/DVandRJPaper2003.pdf>. In the United States, VOM appeared in the 1970s. Ilyssa Wellikoff, Note, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO ONLINE J. CONFLICT RESOL. 2, Part IV (2004), <http://cojcr.org/vol5no1/note02.html>. In 1969, the Institute for Mediation and Conflict Resolution (and, in 1972, the Minnesota Restitution Center) began mediating restitution in direct meetings between victims and male perpetrators of property offenses. Inst. for Mediation and Conflict Resolution, History: The Beginning, <http://www.imcr.org/history/beginning.html> (last visited Apr. 9, 2010); LEANNE ALARID ET AL., COMMUNITY-BASED CORRECTIONS 178 (7th ed. 2008). The Night Prosecutor Program in Columbus, Ohio began using mediation to divert criminal cases in 1972. John W. Palmer, *Pre-Arrest Diversion: The Night Prosecutor's Program in Columbus, Ohio*, 21 CRIME & DELINQ. 100, 100 (1975). Also in 1972, the Bristol Association for the Care and Resettlement of Offenders (BACRO) used VOM to improve victim support, including encouraging reparative gestures on the part of offenders. See Christopher Holtom & Peter Raynor, *Origins of Victims Support Philosophy and Practice*, in VICTIMS OF CRIME: A NEW DEAL? 17, 18 (Mike Maguire & John Pointing eds., 1988). In 1973, Rochester, New York opened a Community Mediation Center to mediate primarily small claims civil disputes. The Ctr. for Dispute Settlement, CDS History, <http://www.cdsadr.org/about-history.html> (last visited Apr. 9, 2010). In 1978, the first Victim-Offender Reconciliation Program (VORP) was established in association with the Mennonite Central Committee to allow victims and offenders to mediate a

istrators have found that for many victims, the experience of facing their offenders directly and hearing them take responsibility for their actions can be very meaningful and healing.⁷⁶ Its central principles require the victim to have the desire and strength to represent her needs and talk honestly and the offender to take responsibility for his actions.⁷⁷

The VOM program endeavors to tailor its system to the needs of each case, but it follows an essential template featuring three elements: screening, dialogue sessions, and sessions between the co-mediators and each party.⁷⁸ In the initial screening process, a facilitator has a series of private dialogues with each party to determine if the program is appropriate for the conflict.⁷⁹ Victim safety vitally informs screening decisions.⁸⁰ Dialogue sessions between the parties themselves are the heart of the program. Together with co-mediators, the parties meet face-to-face to brainstorm a resolution of the issue. Finally, the co-mediators meet with each party to verify their assent to the resolution. Most cases involve two to three sessions each, though some require five to eight sessions.⁸¹

The success of this particular VOM program has not been evaluated. However, other VOM programs that have been evaluated have reported mixed results. This Article does not focus on the elements of those programs because their details have been sparsely reported. When one commentator evaluated a similar Austrian domestic violence VOM program, she found it particularly effective in empowering victims but less effective in achieving sincere transformation in perpetrator behavior.⁸² Victim empowerment is derived from the victim's participation in a process in which she has a voice and has the right to terminate the session at any time. The researcher assumed that in cases where a significant power differential existed between the parties, there would not be an effective resolution in medi-

restitution agreement. Susan C. Taylor, *Victim-Offender Reconciliation Program—A New Paradigm Toward Justice*, 26 U. MEM. L. REV. 1187, 1187 (1996).

⁷⁶ *Id.* at 3.

⁷⁷ *Id.*

⁷⁸ *Id.* at 6–7.

⁷⁹ *Id.* at 6.

⁸⁰ *Id.* at 5.

⁸¹ EDWARDS & HASLETT, *supra* note 75, at 6.

⁸² CHRISTA PELIKAN, RESTORATIVE JUSTICE ONLINE, VICTIM-OFFENDER MEDIATION IN DOMESTIC VIOLENCE CASES: A RESEARCH REPORT (2000), available at <http://www.restorativejustice.org/10fulltext/pelikan-christa-victim-offender-mediation-in-domestic-violence-cases-a-research-report>.

ation.⁸³ Her results suggested otherwise; the main predictor of success from mediation was whether the victim had the resources to break free from the relationship or alter it significantly.⁸⁴ Finally, the researcher found that VOM provided a useful tool for helping the parties brainstorm concrete ways to negotiate a separation.⁸⁵

2. Family Group Conferences

Domestic violence cases have been handled through FGC restorative justice programs in New Zealand since 1989 pursuant to national legislation that codified a methodology used for many centuries in Maori culture.⁸⁶ Under this statute, family violence and sexual abuse cases involving youth offenders are referred to conferencing to bolster families' efforts to resolve their conflicts with the help of professionals.⁸⁷ Unlike VOM, conferences engage a broad swath of the community in reaching a resolution. The conference organizer will convene a group of concerned family, community, and friends to participate; for example, the extended family of the offender and victim, the police, and the individuals who are central in the lives of the victim or offender, such as a sports coach or an advisor, would participate.⁸⁸ According to one proponent of FGCs, "[t]hese conferences can be viewed as citizenship ceremonies of reintegrative shaming. The theory of FGC is that discussion of the harm and distress caused to the victim and the offender's family will communicate shame to the offender."⁸⁹ Another supporter generally describes the intent of FGC as follows: "The safety conference, and more broadly a coordinated and inclusive response, is a way to displace assumptions. It is a way to build the individual and collective strength to reshape connec-

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communitarian Control*, in *CRIME CONTROL AND WOMEN: FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY* 151, 155 (Susan Miller ed., 1998).

⁸⁷ See Joan Pennell & Stephanie Francis, *Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard Women and Children*, 11 *VIOLENCE AGAINST WOMEN* 666, 672–73 (2005).

⁸⁸ See Braithwaite & Daly, *supra* note 86, at 155; Joan Pennell & Gale Burford, *Family Group Decision Making and Family Violence*, in *FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE*, *supra* note 62, at 171, 171–75 (describing a particular FGC in a domestic violence case).

⁸⁹ See Braithwaite & Daly, *supra* note 86, at 155 (internal citation omitted).

tions, make sound choices, and promote the safety of women and children from diverse cultures.”⁹⁰

There are four stages that comprise a conference in New Zealand. First, in a group meeting, parties are encouraged to work toward a consensus about what has happened and to explore options for moving forward.⁹¹ Second, the conference leader gives the family members private time to discuss what result they hope to achieve from the meeting.⁹² Next, the group, along with the conference leader, comes together again to reach an agreement about the plan for the future.⁹³ Finally, in any cases that are court-referred, the court must approve the resolutions.⁹⁴

Because conferencing has taken place in New Zealand for several years, the programs have been evaluated on a number of levels and will be discussed in more detail in Part V.⁹⁵ Conferencing is exceedingly successful in securing agreements, with more than ninety percent of conferencing resulting in a resolution.⁹⁶

In an effort to determine the most effective aspects of the conferences, researchers compared the reconviction rates of offenders based on the presence or absence of significant elements of the conferences.⁹⁷ They found that offenders who apologized in their conferences were three times less likely to be reconvicted than those who had not.⁹⁸ Offenders who attended conferences with their victims were four times less likely to be reconvicted than those whose victims failed to participate in the conferences.⁹⁹ Finally, they found that of-

⁹⁰ Pennell & Francis, *supra* note 87, at 688.

⁹¹ Allison Morris, *Children and Family Violence: Restorative Messages from New Zealand*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE*, *supra* note 36, at 91.

⁹² *Id.*

⁹³ See Braithwaite & Daly, *supra* note 86, at 155; Pennell & Francis, *supra* note 87, at 673–74.

⁹⁴ Allison Morris & Gabrielle Maxwell, *The Practice of Family Group Conferences in New Zealand: Assessing the Place, Potential and Pitfalls of Restorative Justice*, in *INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE* 207, 210 (Adam Crawford & Jo Goodley eds., 2000).

⁹⁵ See *infra* Part V.E.4.b. However, none of the evaluations differentiate between domestic violence and general youth violence cases, which are also handled by FGC. Therefore, the evaluations are of somewhat limited direct utility in conceiving a domestic violence conferencing program.

⁹⁶ Morris, *supra* note 91, at 91.

⁹⁷ Morris & Maxwell, *supra* note 94, at 214–15.

⁹⁸ *Id.*

⁹⁹ *Id.* Though researchers failed to hypothesize about the possible alternative explanation for this outcome, see *id.*, one could at least imagine that the underlying

fenders who attended conferences, and who “felt they had made amends to their victim were less likely to be reconvicted six years after the conference” than those who had not.¹⁰⁰

3. Healing Circles

The most extensive account of healing circles addressing domestic violence is reported in Donna Coker’s article, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*.¹⁰¹ Coker studied the practices of the Navajo justice system in Window Rock, Arizona, and Shiprock, New Mexico, in an effort to glean lessons for the traditional American justice system’s treatment of domestic violence.¹⁰²

The Navajo peacemaking circles that Coker analyzed were established in 1982, with their use becoming much more prevalent by 1991.¹⁰³ Cases are referred to circles by victim election and also by the court.¹⁰⁴ Criminal cases often end up in circle programs as a result of diversion or probation.¹⁰⁵ Further, domestic violence cases may be resolved through circles as long as the victim approves and the peacemaker has specific domestic violence training.¹⁰⁶ Coker reports that female victims seek resolution through peacemaking circles in “significant numbers,”¹⁰⁷ signifying some level of interest in, and comfort with, the system.¹⁰⁸

Navajo culture considers peacemaking circles to be a spiritual session aimed at restoring harmony. The goals of the process are not to find fault but rather to reintegrate the offender, nourish relationships, and support the victim.¹⁰⁹ According to Coker, “[p]eacemaking, at its best, is a healing ceremony; it seeks to remake the world—the batterer’s world, creating the possibility of a different

relationships in conferences where the victim chose not to attend the conference may have been inherently more prone to reabuse.

¹⁰⁰ *Id.* at 215.

¹⁰¹ Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999).

¹⁰² *Id.* at 4–5, 13 n.43.

¹⁰³ *Id.* at 32.

¹⁰⁴ *Id.* at 37.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Coker, *supra* note 101, at 73.

¹⁰⁸ The statistics Coker cites to substantiate her claim of “significant numbers,” however, are not overwhelming. *See id.* at 73 n.349 (discussing a sample of twelve self-referred cases involving domestic violence).

¹⁰⁹ *See id.* at 33.

life and a different point of view, and the battered woman's world, marshaling resources and supporting her struggle for greater autonomy."¹¹⁰ The process does not necessarily aim to separate the couple, but rather to heal the parties, which may mean healing the relationship if that is the parties' preference.

First, the peacemaker, who is trained in peacemaking circles, convenes the circle by inviting members of the community and of the parties' families to join.¹¹¹ In addition, those with professional expertise relevant to the conflict also may join the circle. The peacemaking circle then gives the offender and victim an opportunity to present the conflict. Then, the peacemaker leads the group through an opening prayer and explains the rules governing the circle.¹¹² The petitioner explains the complaint from his or her perspective, and the respondent may also provide his or her version of events.¹¹³ Next, the peacemaker characterizes the conflict in need of resolution.¹¹⁴ Finally, a discussion amongst the participants ensues in order to reach resolution.¹¹⁵

Peacemakers emphasize flexibility in their resolutions. Coker, however, reports that a common resolution involves a sixty- to ninety-day separation, during which time the offender, and often the victim, receives counseling.¹¹⁶ Other relief rewarded through peacemaking includes agreements by the parties' families to support them and by the offender to seek alcohol treatment.¹¹⁷

Coker's article does not analyze the effectiveness of peacemaking circles from the perspective of either participant satisfaction or offender recidivism. While circle projects are operating currently in the United States in New York,¹¹⁸ Minnesota,¹¹⁹ and Arizona,¹²⁰ empirical studies of outcomes are lacking.¹²¹

¹¹⁰ *Id.* at 56.

¹¹¹ Linda Mills points out that one of the significant benefits of healing circles for domestic violence is that the circle involves family and community members, thereby diffusing the hostility between the victim and offender and providing a supportive community. LINDA G. MILLS, *VIOLENT PARTNERS: A BREAKTHROUGH PLAN FOR ENDING THE CYCLE OF ABUSE* 221 (2008).

¹¹² *See id.* at 214.

¹¹³ *See id.* at 213–15.

¹¹⁴ *See id.* at 221.

¹¹⁵ Coker, *supra* note 101, at 35.

¹¹⁶ *Id.* at 73.

¹¹⁷ *Id.* at 46–47.

¹¹⁸ *See* LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 101–18 (2003) (providing an overview of the Intimate Abuse Circles at New

Though there are bright spots in the evaluative data regarding restorative justice interventions, much about the effectiveness of restorative justice remains unknown due to the limited number of programs addressing domestic violence and the even more limited number of evaluation efforts. Unless we begin more aggressive experimentation and evaluation of restorative justice, however, we will never know if its theoretical potential could be a reality and if it could offer an alternative for those whom the current justice system fails.

IV. RESISTANCE TO RESTORATIVE JUSTICE AS A DOMESTIC VIOLENCE INTERVENTION

Before considering the potential effectiveness of a particular restorative justice response to domestic violence, one must first address the arguments against using restorative justice in the domestic violence arena. Resistance to restorative justice by advocates involved in domestic violence reform has been so consistent that very few projects currently exist and very few scholars and advocates have promoted its use.¹²² Critiques fall into the following four broad categories: restorative justice theory is inconsistent with domestic violence theory and unworkable given the practical realities of domestic violence; restorative justice is antithetical to domestic violence feminist theory; restorative justice is ineffective given the dynamics of intimate partner violence; and restorative justice poses unique and possibly insurmountable harms to accused perpetrators.

York University); MILLS, *supra* note 111, at 209–39 (providing an overview of the development and operation of the Healing and Peacemaking Circles Program in New York and Arizona in 2004); Mills, *supra* note 14, at 504, 508 (discussing the New York University Center for Violence and Recovery’s Peacemaking Circles).

¹¹⁹ See Lou Kilzer, *Giving Families Options*, ROCKY MOUNTAIN NEWS, Feb. 9, 2005, at 8S (describing domestic violence circles in Minnesota).

¹²⁰ Grauwiler et al., *supra* note 59, at 585 (providing an overview of Construyendo Círculos de Paz (CCP) operating in Nogales, Arizona).

¹²¹ Linda Mills offers anecdotal evidence that the CCP program in Nogales has produced very positive results and cites a local judge who states, “CCP has completely changed how our community thinks about how to address domestic violence. We finally have a way of healing the violence and dealing with the underlying issues. It really is a fantastic solution for all those involved.” MILLS, *supra* note 111, at 225.

¹²² *But see* GOODMAN & EPSTEIN, *supra* note 12, at 124–27 (advocating the exploration of restorative justice responses to domestic violence to supplement or replace aspects of our current system).

A. *Restorative Justice Theory Is Inconsistent with Domestic Violence Theory and Unworkable Given the Practical Realities of Domestic Violence*

Critics have and will continue to argue that restorative justice theory is inconsistent with central beliefs of the modern domestic violence movement and not viable given the realities of intimate partner violence. Central to restorative justice is the theory that cooperation, collaboration, and community involvement can help repair and restore broken relationships.¹²³ Apology and forgiveness are critical to promoting the repair sought by restorative justice.¹²⁴

Collaboration between victim and perpetrator, apology and forgiveness, and reliance on the positive influences of community are concepts foreign to contemporary domestic violence interventions and are largely antithetical to their theoretical underpinnings.

1. Reconciliation and Private Resolution

The movement against domestic violence has successfully navigated *away* from responses that urge private reconciliation between the parties. Prior to the 1970s, justice system actors including police, prosecutors, and judges counseled victims of domestic violence to reconcile with their abusive partners and to maintain family privacy.¹²⁵ Advocates argued that such responses failed to acknowledge the severity of domestic violence and put victims at serious risk. As discussed above, contemporary responses to domestic violence involve active state engagement. Restorative justice, touting the importance of extrajudicial case management and focusing on reconciliation between the parties, contradicts the basic tenets of contemporary do-

¹²³ See ZEHR, *supra* note 49, at 22–24.

¹²⁴ Martha M. Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 969 (1998).

¹²⁵ See Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 938–40 (1999) (stating that in the 1970s public perception of, and criminal justice responses to, domestic violence began to shift from non-intervention polices); see also Brian R. Decker, *Violence and the Private: A Girardian Model of Domestic Violence in Society*, 11 U. PA. J.L. & SOC. CHANGE 105, 109–11 (2007) (stating that because domestic violence was considered a private family matter, police rarely responded except to attempt to reconcile the parties); Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 558–59 (1988) (observing that, at the time the article was published, the response to domestic violence by both district attorneys and judges was often to urge the parties to reconcile or induce delays in an effort to get the parties to “cool off”).

mestic violence interventions and suggests adopting a theory contemporary advocates associate with a much less-effective era.

2. Reliance on Meaningful Victim Participation

Anti-domestic violence advocates argue that restorative justice's reliance on meaningful participation by the victim is an impossibility.¹²⁶ Domestic violence theory posits that often, an abusive partner exerts power and control over his victim and that this dynamic infuses the interactions between the parties with coercion.¹²⁷ This control can be overt or covert but is frequently present and palpable for a victim. A recent study illustrated the inability of domestic violence victims to bargain effectively with abusive partners in any type of legal intervention.¹²⁸ An intervention that relies on the meaningful participation of a victim who can bargain freely and express herself without coercion can be very problematic.¹²⁹ In fact, some critics assert that consensus—so vital to a successful resolution of a restorative justice intervention—will not be reachable, since the “imbalance in power negates [the] victim's ability to negotiate.”¹³⁰

Further, restorative justice relies on voluntary participation by the victim and offender.¹³¹ A basic tenet of restorative justice asserts

¹²⁶ See, e.g., Ruth Lewis et al., *Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence*, 10 SOC. & LEGAL STUD. 105, 119 (2001).

¹²⁷ See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1121–22 (2009) (stating that a battering partner's use of power and control to coerce and deprive the battered partner of her liberty defines the battered partner's experience as much as violence); Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283, 287 (1995) (arguing that a man who systematically terrorizes his female partner may not need to use violence but will use any combination of control techniques necessary to successfully control his partner and satisfy his need to display that control); see also Deborah Tuerkheimer, *Control Killings*, 87 TEX. L. REV. SEE ALSO 117, 119 (2009), <http://www.texasrev.com/sites/default/files/seealso/vol87/pdf/87TexasLRevSeeAlso117.pdf> (arguing that because power and control are so central to a batterer's design, legal conceptions of domestic violence, which are incident-based and conceptually sever violent incidents from the pattern in which they occur, fail to capture the essence of battering).

¹²⁸ Ruth Busch, *Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get It Wrong?*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 36, at 223, 223–24, 230.

¹²⁹ For a discussion of the inability of domestic violence survivors to bargain without coercion, see *id.* at 230.

¹³⁰ Susan S. Russell, *Using Restorative Justice in Family Violence Situations*, 4 CRIME VICTIMS REP. 65, 75 (2000).

¹³¹ See, e.g., ZEHR, *supra* note 49, at 46 (“In each of these models [of restorative justice], victim participation must be entirely voluntary.”); Mary P. Koss, *Blame, Shame,*

that both parties must opt into an intervention. Voluntariness ensures that the parties' participation is meaningful and sincere. Anti-domestic violence advocates, however, doubt the possibility of truly voluntary victim participation. Since coercion is so often present in the dynamics of an abusive relationship, it is likely that that coercion would affect a victim's decision about whether or not to participate in a restorative justice program when given the choice.¹³² The offender, believing that the victim's assent might result in a lighter sentence, may well coerce her to opt into a restorative justice intervention. Once in the group, her participation would similarly be susceptible to coercion. Whether or not the offender himself overtly tried to influence the victim, advocates worry that a domestic violence victim might fail to exercise her free will due to the coercion often present in a violent relationship.¹³³

Not only is meaningful engagement of the victim and perpetrator often an impossibility, it might also be inappropriate from a theoretical perspective.¹³⁴ While negotiation might be a proper legal intervention in some areas of the law, it does not seem to be the appropriate legal tool in domestic violence. Should individuals be required to negotiate for their own safety, or is safety non-negotiable? In addition, creating a forum to resolve domestic violence conflicts that depends on the active negotiation of both parties implies that domestic violence is a binary conflict, the resolution of which re-

and Community: Justice Responses to Violence Against Women, 55 AM. PSYCHOLOGIST 1332, 1337 (2000) (noting that voluntary participation is mandatory to conferencing).

¹³² See, e.g., PROVINCIAL ASS'N AGAINST FAMILY VIOLENCE, NEWFOUNDLAND AND LABRADOR, MAKING IT SAFE: WOMEN, RESTORATIVE JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION 15 (2000), available at <http://www.voma.org/docs/mis2.pdf> (quoting women critiquing VOM in Canada); Mark S. Umbreit & Robert B. Coates, *Impact of Mediating Victim Offender Conflict: An Analysis of Programs in Three States*, JUV. & FAM. CT. J., 1992 No. 1., at 21, 24 (studies showed no statistical differences in offender satisfaction between those offenders processed through restorative justice intervention and those whose cases were handled through the criminal justice system in three U.S. programs); Stephanie Coward, *Restorative Justice in Cases of Domestic and Sexual Violence: Healing Justice?* 18 (Dec. 2000) (unpublished manuscript), available at <http://www.hotpeachpages.net/canada/air/rjStephanie.pdf> (describing poor victim reactions to VOM in sexual and domestic violence cases).

¹³³ See Coker, *supra* note 101, at 79–80 (asserting that safeguarding against coercion in sessions is one of the weakest aspects of the Navajo program); Pennell & Burford, *supra* note 88, at 175 (setting forth coercion of victims as a common fear about FGC).

¹³⁴ See Lewis et al., *supra* note 126, at 120.

quires accommodation by both parties.¹³⁵ Though often both parties create the stressors that lead to violence in an intimate relationship, responsibility for the perpetration of the violent incident rests solely on the perpetrator, unless mutual violence has occurred.

Further, advocates worry that all three models of restorative justice fail to address very real safety concerns. The presence of offender and victim in a conference, mediation, or circle may put the victim's safety in jeopardy.¹³⁶ The meeting provides the offender with an opportunity before, after, or during the meeting to continue to abuse the victim. Further, if the victim has chosen to keep her whereabouts confidential, the meeting gives the offender a greater chance of learning where she has been staying since he might follow her from a meeting or send someone to do so. Indeed, one commentator writes extensively of the serious safety breaches that occurred at a Family Group Conference in New Zealand.¹³⁷ Though victims might infrequently be at serious risk, a model that requires a victim to take this risk might be incompatible with the realities of domestic violence.¹³⁸

3. Apology and Forgiveness

Restorative justice theory's reliance on the power of apology and forgiveness further concerns anti-domestic violence advocates. John Braithwaite, among the most outspoken champions of restorative justice, argues in defense of restorative justice that "[t]he apology can be a much more powerful ceremony than punishment in affirming moral values that have been transgressed."¹³⁹ For many restorative justice programs, the offender's apology is vital to the operation of the program.¹⁴⁰

¹³⁵ See Kilzer, *supra* note 119 (citing a service provider who, in criticizing restorative justice, asserted that engaging the victim in a conference "incorrectly implies that the victim has an impact on what's happening to her").

¹³⁶ See, e.g., Pennell & Burford, *supra* note 88, at 175; Russell, *supra* note 130, at 75.

¹³⁷ See Busch, *supra* note 128, at 236.

¹³⁸ See Kilzer, *supra* note 119 (reporting that one domestic violence advocacy group that considered supporting restorative justice concluded that "the dynamics of domestic violence are so different that using the model 'could make it dangerous'").

¹³⁹ Braithwaite & Daly, *supra* note 86, at 168.

¹⁴⁰ See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 28 ("The opportunity restorative justice allows victims to come face-to-face with an offender clearly enhances the likelihood of an apology being offered: indeed, apology is usually seen as central to the process of restoration."); see also Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 116 (2004) (explaining the power of apology in the criminal context and noting a group of studies in which "74 per-

Apologies and forgiveness in the context of domestic violence are concepts fraught with danger and complexity. First, theories of domestic violence illustrate that apologies frequently serve as the glue that holds together a cycle of violence. Between violent episodes, an offender will often apologize and promise cessation of the violence, preying on the survivor's optimism to maintain the relationship.¹⁴¹ Therefore, an apology offered in the context of restorative justice may simply reaffirm a well-worn tactic the abuser uses to retain the status quo in a violent relationship.

Second, critics such as Donna Coker studying Navajo peacekeeping circles point out that apologies can be merely "cheap-justice."¹⁴² According to Coker, to value words over actions is ineffective, particularly in violent relationships.¹⁴³ Offenders can easily give apologies without sincerity, particularly in a coercive environment where participation in the program may require an apology. The acceptance of apologies is also fraught. A victim of domestic violence might easily accept an apology and grant forgiveness, allowing the intervention to appear effective, when, in fact, her acceptance is insincere. Her willingness to accept an apology might well result from power and control dynamics. One study has shown, for example, that even when domestic violence victims desired to reject an apology, they rarely did so.¹⁴⁴ The complexity of apology and forgiveness in domestic violence leads some critics to reject restorative justice outright for its reliance on forgiveness.¹⁴⁵

4. Community

Finally, the dependence of restorative justice theory on the involvement of community fails to comport with the role community has traditionally played in domestic violence interventions. Restora-

cent of offenders apologized when given the opportunity to do so in restorative-justice conferences").

¹⁴¹ See LENORE E. WALKER, *THE BATTERED WOMAN* 55 (1979).

¹⁴² See Coker, *supra* note 101, at 85.

¹⁴³ *Id.*

¹⁴⁴ See Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 *BEHAV. SCI. & L.* 337, 355-56 (2002) (citing Mark Bennett & Christopher Dewberry, "I've Said I'm Sorry, Haven't I?": A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients, 13 *CURRENT PSYCHOL.: DEVELOPMENTAL, LEARNING, PERSONALITY, SOC.* 10-20 (1994)).

¹⁴⁵ See, e.g., Russell, *supra* note 130, at 65 ("None of these terms [e.g., "reconciliation" and "forgiveness"] are appropriate or safe when dealing with domestic violence issues or victims . . .").

tive justice relies on both the shaming¹⁴⁶ and nurturing influences of community in resolving conflict. In harnessing the reprobation of the relevant community and tapping into its influence over the offender, restorative justice seeks to utilize a powerful and accessible resource to influence positive behavior. In addition, restorative justice programs seek to utilize community resources to provide both parties with support in creating an environment for peace.¹⁴⁷

Critics assert, however, that the community may not be willing or able to fulfill its responsibilities in the context of a domestic violence intervention. First, victims of domestic violence often lack meaningful family and community connections. When an individual suffers violence in a relationship, she can become isolated from friends and family, either because the abusive partner urges her to sever ties with partners or because she seeks to hide the abuse.¹⁴⁸

Second, critics warn that supporters of restorative justice hold an idealized, unrealistic faith in the positive influence of community and assert that family and community might fail to denounce the violence, instead perpetuating the harm in the relationship.¹⁴⁹ Critics warn that in the context of domestic violence, community is unreliable and may actually support any underlying inequalities in the relationship and the violence itself.¹⁵⁰ As one commentator asserts:

¹⁴⁶ See Braithwaite & Daly, *supra* note 86, at 154 (“Shaming is more important to crime control than punishment, and the most important shaming is that which occurs within communities of concern.”).

¹⁴⁷ See *id.* at 169 (pointing out the importance of community members who will help to keep the peace after the conference and support the parties); Coker, *supra* note 101, at 45–46 (discussing the role of community in providing meaningful long-term support); Koss, *supra* note 131, at 1337–38 (advocating the inclusion of community in restorative justice conferences to provide long-term policing of the relationship).

¹⁴⁸ See Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 616–17 (2000) (“The batterer isolates the woman from friends, family, colleagues, and neighbors in an effort to maintain control. The battered woman may also choose to isolate herself from others in order to avoid embarrassment.”); see also WALKER, *supra* note 141, at 29–30 (discussing the inability of battered women to leave their abusers).

¹⁴⁹ See Lewis et al., *supra* note 126, at 119 (“Far from being the all-inclusive, benign haven often implied, communities are more often exclusive, judging and riven with power inequalities.”) (citations omitted).

¹⁵⁰ See, e.g., Coker, *supra* note 101, at 39–41; Liz Kelly, *Tensions and Possibilities: Enhancing Informal Responses to Domestic Violence*, in FUTURE INTERVENTIONS WITH BATTERED WOMEN AND THEIR FAMILIES 67, 77, 80 (Jeffrey Edleson & Zvi Eisikovits eds., 1996); Julie Stubbs, *Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 36, at 42, 52–55

“Folk wisdom” about abuse often predominates on a community level and reinforces myths about the causes of and treatment for domestic violence. The consequence of this “wisdom” has typically been victim blaming and minimization of abuse. Restorative justice practitioners must recognize the complicit role the community can play by its either ignoring or condoning domestic violence.¹⁵¹

Community norms often tolerate or even support a certain level of domestic chastisement.¹⁵² In addition, community members might prefer that domestic violence remain a private matter and refuse to become involved. A central theoretical reliance on positive community influence, therefore, might prove incompatible with the reality of domestic violence.

B. Restorative Justice as a Response to Domestic Violence Is Antithetical to Feminist Principles that Have Informed the Anti-Domestic Violence Movement

Much of the success of the anti-domestic violence movement of the last half century, as discussed above, has rested on lifting the veil of secrecy from interpersonal violence and engaging the power of the state for effective interventions. Instead of allowing system actors to turn a blind eye to domestic violence or diverting intervention from the formal justice system, feminist activists urged the state to treat domestic violence as a public harm.¹⁵³ After initial ambivalence about state intervention in domestic violence,¹⁵⁴ many feminists sought aggressive state intervention for several reasons. Symbolically, the level

(chronicling the ways in which community has traditionally failed battered women, especially women in indigenous cultures).

¹⁵¹ EDWARDS & HASLETT, *supra* note 75, at 7.

¹⁵² See, e.g., Russell, *supra* note 130, at 75.

¹⁵³ See SCHECHTER, *supra* note 15, at 201–02 (analyzing feminists’ perceptions of the role of the state in the domestic violence movement); SCHNEIDER, *supra* note 9, at 87–97 (discussing the feminist struggle to illustrate that battering is a public issue and the ensuing conflicts between private and public in domestic violence discourse); Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 36, at 128, 138–39 (arguing that the success of domestic violence interventions relies on engaging the state, since it implements the boundaries of acceptable behavior); Mills, *supra* note 45, at 563–64 (explaining that many advocates of mandatory prosecution have argued that these policies force state actors to treat intimate abuse crimes in the same way they would if the assailant were a stranger and the victim were male and that the policies present a statement of the state’s “feminist consciousness”).

¹⁵⁴ See SCHNEIDER, *supra* note 9, at 182–84 (providing an overview of feminist resistance to state intervention and its transformation into encouragement).

of state intervention is a significant issue. Previous failure to intervene signified that the state condoned intimate violence; whereas more recent state intervention conveys the state's condemnation of domestic violence.¹⁵⁵ Further, mandatory aggressive state intervention takes the control from the offender, and the onus for pursuing the case from the victim.¹⁵⁶

With the implementation of mandatory arrest laws and no-drop prosecution policies, advocates succeeded in engaging the state in domestic violence interventions. The focus of restorative justice on removing domestic violence cases from the traditional justice system suggests a dismantling of the advances anti-domestic violence advocates have made. The creation of a separate, less-formal system for domestic violence cases seems eerily similar to the diversion of cases from the criminal justice system that preceded the current system.¹⁵⁷ Even if the state were to reinforce restorative justice programs, the symbolism of offering domestic violence perpetrators a "lighter" form of justice than other offenders discomforts feminist advocates by suggesting that domestic violence does not deserve traditional justice intervention.¹⁵⁸

¹⁵⁵ See *id.* at 185 (proponents of state intervention appreciate that it sends "a strong message regarding the 'public' wrong of domestic violence"). See generally Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173 (1997) (making the case for aggressive state intervention).

¹⁵⁶ See Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 874 (1994) ("Some prosecutors and advocates also assert that no-drop policies have affected the batterer's conduct towards the victim. As several of them have observed, some batterers cease harassing their victims after they discover that the victim no longer controls the case."); Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1865-66 (2002) ("[S]upporters argue that . . . no-drop prosecution is the most effective way to eliminate a perpetrator's ability to escape punishment by threatening victims into dropping charges."); Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 217-18 (1999) ("[B]atterers even stop harassing their victims about the process once they realize that the victims are not responsible for the case going forward."); Wills, *supra* note 155, at 180 ("By proceeding with the prosecution with or without victim cooperation, the prosecutor minimizes the victim's value to the batterer as an ally to defeat criminal prosecution.").

¹⁵⁷ See Coker, *supra* note 153, at 128-30 (setting forth the conflict between restorative justice principles and feminist efforts to pierce the veil of privacy surrounding domestic violence).

¹⁵⁸ See Pennell & Burford, *supra* note 88, at 182 (setting forth the concern that "[c]onferencing will decriminalize family violence"). This is not to suggest that there is a unitary feminist view regarding restorative justice as a response to domestic violence. Feminist responses vary widely. See, e.g., Minow, *supra* note 124, at 974-76 (stating that feminists are not generally pro-restorative justice vis-à-vis domestic vi-

Further, restorative justice may render irrelevant the theoretical underpinnings of feminists' conceptions of domestic violence. Feminist theory illustrates that domestic violence is not simply a violent act but often is the symptom of a culture infused with patriarchal inequalities.¹⁵⁹ Donna Coker, for example, argues that "restorative justice theory under-theorizes criminal offending, generally, providing little foundation for a theory of male violence against women."¹⁶⁰ When parties come together to process the offense collaboratively and brainstorm practical solutions, there seems to be little chance to consider the larger theoretical framework of domestic violence. Restorative justice may "domesticate" the dispute rather than characterize it in the larger structure of power, control, and women's subordination.¹⁶¹

An additional feminist concern relates to effectiveness of the general methodology of restorative justice for women. All models of restorative justice rely on the victim's ability to express herself and to bargain freely. Even putting aside the additional complications for a victim of domestic violence to bargain freely in the context of a potentially coercive relationship, studies have suggested women may be at a disadvantage operating in a restorative justice format. For example, research analyzing outcomes of divorce negotiations illustrate that women disproportionately attain worse settlements.¹⁶² Therefore, restorative justice methodology, when applied to male-female relationships, may result in women disproportionately receiving raw bargains.

olence intervention but that they are supportive of the goal and effect of restorative justice in terms of treating victims with respect and compassion and of affirming victims' agency).

¹⁵⁹ See SCHNEIDER, *supra* note 9, at 23 ("The battered women's movement defined battering within the larger framework of gender subordination. Domestic violence was linked to women's inferior position within the family, discrimination within the workplace, wage inequality, lack of educational opportunities, the absence of social supports for mothering, and the lack of child care."); LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 251 (1988) ("The basis of wife-beating is male dominance not superior physical strength or violent temperament . . . but social, economic, political, and psychological power."); Martha M. Minow, *Between Intimates and Between Nations: Can Law Stop the Violence?*, 50 CASE W. RES. L. REV. 851, 863 (2000) ("The gender analysis locates domestic violence as a feature of a patriarchal society.").

¹⁶⁰ Coker, *supra* note 153, at 129.

¹⁶¹ See *id.* at 131, 141-43.

¹⁶² Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 109 & n.2 (2008).

C. *Restorative Justice Is an Ineffective Response to Domestic Violence*

Restorative justice faces criticism that it simply will not work. Those who believe that adversarial justice best achieves effective justice system outcomes will fret that restorative justice simply will not protect victims. A restorative justice model consciously rejects retribution, zero-sum outcomes, and punishment in favor of restoration and healing.¹⁶³ How effective can such a gentle response to criminal behavior be? A restorative justice intervention—either mediation, circles, or conferences—at first blush sounds more like therapy than justice, with insufficient denunciation of the behavior.¹⁶⁴ There is little hierarchy in most restorative justice responses. Instead, all parties have equal right to participation. Decisions are made by consensus. Such concepts are entirely absent from the justice system. Further, one could question the repercussions for failure to either cooperate with the rules of the restorative justice intervention or to comply with the agreements reached in the intervention. If enforcement for non-compliance is weak or nonexistent, critics wonder how the intervention could possibly achieve its goals.

D. *Restorative Justice Is Unjust to Offenders*

Some also fear the implications of such programs for offenders. Proponents tout the voluntariness of restorative justice interventions, pointing out that both victim and offender must opt into any program before it can take place.¹⁶⁵ As discussed previously, victim assent may not be as voluntary as proponents hope, given the dynamics of domestic violence. Offender assent, however, may be equally coerced in a restorative justice setting.¹⁶⁶ An offender who contemplates the choice between facing the courtroom and joining a restorative justice intervention—even one that requires his taking responsibility for his actions—may well opt into the restorative justice setting. He may

¹⁶³ See, e.g., LLEWELLYN & HOWSE, *supra* note 54, at 72 (asserting that the necessary elements of a successful retributive justice program include an absence of punishment); Minow, *supra* note 124, at 970 (arguing that the focus of restorative justice is on the victim's needs and the offender's capacity for accountability and rehabilitation through understanding).

¹⁶⁴ See, e.g., Coward, *supra* note 132, at 11, 13–14.

¹⁶⁵ See Margarita Zernova, *Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences*, 47 BRIT. J. CRIMINOLOGY 491, 500 (2007).

¹⁶⁶ See, e.g., Lois Presser & Emily Gaarder, *Can Restorative Justice Reduce Battering? Some Preliminary Considerations*, 27 SOC. JUST. 175, 187 (2000) (asserting that offender coercion might be a necessary component to a restorative justice intervention in order to protect the victim's well-being).

make that choice because he has committed the offense and wants to take responsibility, or equally likely, he may make the choice because his options are limited and he feels he might get a better outcome by entering the restorative justice intervention.

Further, what happens to the due process rights of an offender who talks freely in a restorative justice conference? If he must take responsibility and apologize as a requisite to participation, can his admissions be used against him in a later criminal or civil hearing? Unless effective steps are taken to protect the offender against self-incrimination, restorative justice interventions appear to be a trap for offenders.

Some of these critiques have appeared overtly in scholarship analyzing restorative justice. Others have been implied in the literature. And still others have not been articulated, but are certain to arise if restorative justice finds a stronghold in the domestic violence intervention system. Ultimately, any restorative justice program must address these criticisms in order to succeed and to be embraced by the local community.

V. SO WHY TRY RESTORATIVE JUSTICE?

In the face of the determined and well-reasoned opposition many have voiced against restorative justice as a response to domestic violence, why even consider restorative justice? Are the methodology, theory, and politics simply too antithetical to the realities of domestic violence and the philosophy that largely informs the anti-domestic violence movement? It is important to consider, with those critiques in mind, the potential for restorative justice. We must consider if restorative justice, adapted to the realities of domestic violence dynamics, might well offer a viable alternative to our current civil justice. This Part explores why we should experiment with restorative justice, beginning by analyzing the substantial consistency between the goals of restorative justice and the domestic violence civil justice system. This Part next addresses the critiques, assessing their validity and illustrating how they might inform the development of effective restorative justice programs. This Part then discusses why modifying the civil and criminal justice systems would not be a sufficiently effective response to the shortcomings of our justice system interventions in domestic violence. Finally, this Part illustrates that a restorative justice approach will render civil justice system goals more attainable for some domestic violence offenders and victims and that though such

programs are expensive, the cost for not adopting a new approach will exceed those costs.

A. *The Theoretical Goals of Restorative Justice and the Civil Justice System Are Symbiotic*

Advocates and legislators supported protection order statutes in order to provide survivors with a civil remedy that offered increased safety; that survivors could pursue, manage, and dismiss; and that offered broader and more flexible relief.¹⁶⁷ Restorative justice principles and programs may enhance the attainment of these same goals. In fact, when considering the legal options for domestic violence victims who wish to or are compelled to maintain a relationship or frequent contact with their abusive partners, restorative justice interventions may well exceed the potential of the civil protection order system in meeting those goals.

Though restorative justice methodology focuses on restoration and healing, architects of restorative justice programs value victim safety during the program itself and also as an ultimate outcome. The philosophical goals of healing damaged relationships, restoring those who have been harmed, and attaining offender accountability would be irrelevant if the process by which those were sought did not result in perceived and actual safety for aggrieved victims. Although the philosophy of restorative justice seems to give short shrift to victim safety, the application of restorative justice suggests that those who implement programs care deeply about the subject. Analysis of program effectiveness uniformly considers reabuse rates rather than simply perceptions of restoration and healing.¹⁶⁸ The flexibility of restorative justice methodology also permits safety to be identified as a central goal in the design of new programs. One program in Canada cites victim safety as its primary value:

The set of values we use . . . are: victim safety, victim choice, offender accountability, and system accountability (by which we

¹⁶⁷ Cf. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 9 (2004) (stating that the key goal of the battered women's movement was to create options for women seeking haven from abuse); Tamara L. Kuennen, "No Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims, 16 UCLA WOMEN'S L.J. 39, 46 (2007) (stating that the dual goals of the public policy underlying protection order statutes are safety and autonomy).

¹⁶⁸ See, e.g., Morris & Maxwell, *supra* note 94, at 211–20; Joan Pennell & Gale Burford, *Family Group Decision Making: Protecting Children and Women*, 79 CHILD WELFARE 131, 145–47 (2000).

mean that legal and support interventions are effective, informed, mutually supportive and mutually accountable). In addition, we recognize two fundamental principles in our domestic violence work: that we must treat each case concretely, not abstractly[,] and recognize that each case holds the potential for grave harm.¹⁶⁹

Just as the civil protection remedy offered victims a new way to exercise their voices in the justice arena, restorative justice programs are intended to offer a forum for victims to express their needs and emotions. As one central restorative justice proponent states in a monograph setting forth the tenets of the philosophy, “[f]or restorative justice, . . . justice begins with a concern for victims and their needs.”¹⁷⁰ For many survivors, the opportunity to speak in an informal environment may well appear less daunting than the courtroom and render a restorative justice option far more meaningful.

Finally, both types of interventions also share a common goal of seeking to offer a forum in which to address complex situations in a deep and meaningful way. Protection order statutes have expanded the scope of relief available to victims from simple stay away orders to include family law¹⁷¹ and social service remedies.¹⁷² Many state statutes explicitly authorize the court to grant any remedy that would address the conflict between the parties.¹⁷³ For example, in the District of Columbia, a judge can grant any relief that is “appropriate to the effec-

¹⁶⁹ EDWARDS & HASLETT, *supra* note 75, at 5 (internal citation omitted).

¹⁷⁰ ZEHR, *supra* note 49, at 22.

¹⁷¹ See, e.g., D.C. CODE § 16-1005(c)(4)–(7) (Westlaw through Jan. 3, 2010) (authorizing the court through a protection order to award use of a home, joint property, and custody and visitation rights); MASS. GEN. LAWS ANN. ch. 209A, § 3(c)–(e) (West, Westlaw through ch. 19 of 2010 2d Ann. Sess.) (authorizing the court through a protection order to award use of a home, joint property, custody and visitation rights, and child support); OHIO REV. CODE ANN. § 3113.31(E)(1)(b)–(e) (West, Westlaw through 2010 File 28 of the 128th Gen. Assem. (2009–2010)) (authorizing the court through a protection order to award use of a home, custody and visitation rights, and child support).

¹⁷² See, e.g., D.C. CODE § 16-1005(c)(3) (authorizing the court through a protection order to require an offender to participate in psychiatric, medical, or counseling programs); MASS. GEN. LAWS ANN. ch. 209A, § 3(i) (authorizing the court through a protection order to require an offender to participate in a batterers’ intervention program); OHIO REV. CODE ANN. § 3113.31(E)(1)(f) (authorizing the court through a protection order to require an offender to attend counseling programs).

¹⁷³ Thirty-nine other jurisdictions offer a broad, catch-all provision under their civil domestic violence laws. See Laurie S. Kohn, *Why Doesn’t She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 1, 9 n.30 (2001).

tive resolution of the matter.”¹⁷⁴ Similarly, restorative justice programs create time and space for parties and supporters to tailor solutions that meet the needs of the parties. The traditional criminal justice system, with its focus on retribution and due process, cannot offer the flexibility of addressing conflict in such a nuanced way.

B. Criticisms May Be Addressed

Though the many critiques of restorative justice domestic violence interventions raise significant issues to be considered, those concerns should not end the discussion of restorative justice principles as a response to domestic violence. In designing and implementing a program to address domestic violence offenses, many valid concerns raised by opponents could be addressed and resolved, as the final Part will propose. In this Part, however, this Article addresses three of the broad theoretical oppositions to restorative justice raised above, illustrating that at a fundamental level, they are not insolvable or even uniformly troublesome.

1. Collaboration and Reconciliation

While some critics have argued that collaboration and reconciliation—the main theories informing restorative justice theory—are antithetical to effective domestic violence interventions,¹⁷⁵ they are in fact, more consistent with successful interventions in certain types of relationships than one would initially believe. Though many violent relationships are marked by power and control that render true collaboration and reconciliation both challenging and fraught with the danger of coercion, not all relationships can be characterized as such.¹⁷⁶ In fact, current intimate partner theory suggests that a portion, possibly even the majority, of violent relationships are just that—violent—and not fraught with coercive control.¹⁷⁷

In addition, while the dangers of encouraging reconciliation and seeking collaboration can be significant in certain relationships,

¹⁷⁴ D.C. CODE § 16-1005(c) (11).

¹⁷⁵ See *supra* Part IV.A.1–2.

¹⁷⁶ See Michael P. Johnson, *Domestic Violence: It's Not About Gender—or Is It?*, 67 J. MARRIAGE & FAM. 1126, 1127 (2005) (characterizing domestic violence as comprised of three separate types of violence: intimate terrorism, marked by control and coercion; violent resistance or violence used in response to intimate terrorism; and situational couple violence related to the escalation of specific conflicts).

¹⁷⁷ See *id.* (asserting that the most common type of intimate partner violence is situational couple violence).

enormous diversity exists in the types of violent relationships in need of intervention. Indeed, because domestic violence protection order statutes have been expanded to cover additional categories of less intimate relationships, such as those who share a common partner,¹⁷⁸ or strangers who stalk or are being stalked,¹⁷⁹ blanket opposition to restorative justice theory of reconciliation and collaboration is particularly misplaced. Since those parties may have very little history and little complexity in their interactions, collaboration and reconciliation would be no more complex than they would be in any restorative justice intervention in the criminal or family law arena. It may be, however, that such cases do not merit restorative justice intervention because of their lack of complexity.

Similarly, even within traditional intimate relationships, one finds significant diversity of victim goals that would affect the dynamics of an intervention. A large proportion of victims choose to remain with their partners after violent incidents for a variety of reasons.¹⁸⁰ Efforts to facilitate collaboration and reconciliation between partners in relationships in which the victim has chosen to remain with or in close contact with the perpetrator may assist in securing the victim's safety. For such victims, a program that facilitates effec-

¹⁷⁸ See, e.g., D.C. CODE § 16-1001(6)(B) (permitting filings against an offender by a person who "is or was married to, in a domestic partnership with, divorced or separated from, or in a romantic, dating, or sexual relationship with another person who is or was married to, in a domestic partnership with, divorced or separated from, or in a romantic, dating, or sexual relationship with the offender"); OKLA. STAT. ANN. tit. 22, § 60.1(3)-(4) (West, Westlaw through 2009 1st Reg. Sess.) (permitting filings against an ex-spouse's new spouse).

¹⁷⁹ See, e.g., D.C. CODE §§ 16-1001(12), 16-1003 (permitting petitioners to file for orders of protection against those who they may not know but who are stalking them); GA. CODE ANN. § 16-5-94(a), (d) (LEXIS through 2009 Reg. Sess.) (permitting those alleging stalking to file under the family violence statute); IND. CODE ANN. § 34-6-2-34.5 (LexisNexis, LEXIS through 2009 1st Reg. Sess. & 2009 Spec. Sess.) ("[D]omestic and family violence also includes stalking . . . or a sex offense . . . whether or not the stalking or sex offense is committed by a family or household member.").

¹⁸⁰ Kilzer, *supra* note 119 (describing domestic violence circles in Minnesota and stating that eighty-five percent of victims surveyed wished to remain in a relationship with the abusive partner); Malecha et al., *supra* note 42, at 496 (stating that over forty percent of women who dropped protection orders said that they did so because they had returned to the relationship); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 512 (2003) (finding that 17.3 percent of women in their study were planning to continue an intimate relationship with their batterer and that 39.3 percent were at least planning to remain in contact with their batterer).

tive communication and collaboration may well serve the interest of the family and to help preserve victim safety.

Collaboration and reconciliation are not uniformly antithetical to the goals of domestic violence interventions given the diversity of intimate partner dynamics, covered domestic violence relationships, and victim aspirations. Therefore, experimentation with an intervention that includes these values should not be dismissed out of hand for all victims, offenders, and cases.

2. Apology

Critics also warn that restorative justice's focus on apology may feed unhealthy cycles in violent relationships and may be dangerous or irrelevant to victims.¹⁸¹ While this critique raises legitimate concerns for many violent relationships, it should not foreclose the option of restorative justice for all domestic violence victims. Research suggests that for some victims, apology might be a powerful step in a domestic violence intervention.¹⁸²

First, offering a forum where a victim can seek and obtain an apology may meet the needs of some victims that the justice system cannot meet. Those who work with domestic violence survivors report that on occasion, their clients have remarked that what they want most is simply an apology from the perpetrator.¹⁸³ Indeed, re-

¹⁸¹ See *supra* Part IV.A.3; see also Coker, *supra* note 101, at 85–87 (criticizing restorative justice's overemphasis on offender apology); Coker, *supra* note 153, at 148 (same).

¹⁸² See C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 291 (2004) (stating that empirical evidence shows that what victims want, beyond stopping the violence itself, is an acknowledgement of wrongdoing or an apology).

¹⁸³ One practitioner states:

I have had several domestic violence clients who seek apologies. Advocates have many tools to redress intimate partner violence, but there are still real limitations to what litigation can provide. Some victims want, more than anything, the abuser to acknowledge the harm done, and make an apology that can serve as a conduit to healing. But, in the absence of a respondent's willingness to do so, a court can only make a finding that will compel a Respondent to make behavioral changes, not express remorse. Nevertheless, the need for an apology can be a stated or unarticulated expectation that leaves many victims unsatisfied when it is not forthcoming.

E-mail from Ann Cammett, Associate Professor of Law, University of Nevada Las Vegas, to Laurie S. Kohn, Co-Director, Domestic Violence Clinic, Georgetown University Law Center (Mar. 16, 2010, 11:53:00 EST) (on file with author); see also E-mail from Mariela Olivares, Teaching Fellow, Domestic Violence Clinic, Georgetown University Law Center, to Laurie S. Kohn, Co-Director, Domestic Violence Clinic, Geor-

search shows that in other areas of civil law, twenty to thirty percent of plaintiffs indicated if they had received an apology, they would not have sued.¹⁸⁴ One commentator asserts that research reveals that what victims generally want most is “an apology and a sincere expression of remorse.”¹⁸⁵

Our justice system is particularly ill-equipped to address apologies. First, our legal system often treats apologies as admissions of liability, permitting their entry in court as statements of party opponents.¹⁸⁶ Such a principle discourages apologies.¹⁸⁷ At the same time, apologies in the courtroom at sentencing are often pro forma, reducing their effectiveness and relevance. During sentencing, when defendants speak on their own behalf, many defendants apologize for their wrongdoing.¹⁸⁸ Such apologies can often be coerced or at least instrumental, intended solely to incur leniency from the judge.¹⁸⁹ Further, the victim may not be present for the apology since complaining witnesses are not required to be at sentencing. Judges occasionally order domestic violence defendants to apologize to their victims;¹⁹⁰ however, because these orders are coerced and of

getown University Law Center (Mar. 11, 2010, 12:37:08 EST) (on file with author) (“I’ve had a number of clients who wanted the perpetrator to admit that his actions were wrong.”); cf. C. Quince Hopkins, *Rescripting Relationships: Towards a Nuanced Theory of Intimate Violence as Sex Discrimination*, 9 VA. J. SOC. POL’Y & L. 411, 436 (2002) (noting that criminal penalties paid by a defendant for domestic violence do not devolve any benefit to the victim who is instead looking for an apology or acknowledgement of wrongdoing).

¹⁸⁴ *Ninth Annual Stein Center Symposium: The Role of Forgiveness in the Law*, 27 FORDHAM URB. L.J. 1347, 1415 n.126 (2000) (panel discussion; statement of Professor Jonathan R. Cohen) [hereinafter *Forgiveness in the Law*].

¹⁸⁵ Heather Strang, *Is Restorative Justice Imposing Its Agenda on Victims?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 95, 98 (Howard Zehr & Barb Toews eds., 2004) (citation omitted).

¹⁸⁶ Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 824–25 (2002) (discussing the admission of apologies as admissions of party opponents under FED. R. EVID. 801(D)(2)).

¹⁸⁷ See *Forgiveness in the Law*, *supra* note 184, at 1417–18 (panel discussion; statement of Professor Jonathan R. Cohen) (stating that apologies are nearly synonymous with liability in the legal system and encouraging mediation as a way to delink the two).

¹⁸⁸ Bibas & Bierschbach, *supra* note 140, at 141.

¹⁸⁹ *Id.* at 89.

¹⁹⁰ See, e.g., *Courts*, LANSING ST. J., Jan. 31, 2009, at 5B (man convicted of domestic violence assault sentenced to jail time as well as to writing a letter of apology to the victim); Kathy Thompson, *Man Enteres [sic] Not Guilty Plea to Robbery Charge*, ZANESVILLE TIMES-RECORDER (Ohio), June 12, 2008, at A3 (man sentenced to three

questionable constitutionality,¹⁹¹ their effectiveness and sustainability is unclear.

Apologies also may be worth offering in a domestic violence intervention because they might promote victim safety and mental health. Apologies can allow victims to absolve themselves of the self-blame that many domestic violence victims carry with them.¹⁹² If the perpetrator takes responsibility for the harm by apologizing and the victim believes his expression of responsibility, the victim does not have to continue to search for her own role in incurring the harm.¹⁹³

If the victim intends to remain in a relationship with the perpetrator, apologies may well facilitate the couple's ability to collaborate and to resolve future conflict. An apology may allow the victim to move forward and see past her rage or pain. As one scholar comments about the healing effect of apology: "If the wrongdoer sincerely repents . . . he now joins me in repudiating the degrading and insulting message—allowing me to relate to him . . . as an equal without fear that a failure to resent him will be read as a failure to resent what he has done."¹⁹⁴

Indeed, it is also possible that apologies might enhance a victim's safety after a violent incident due to the psychological effect of repentance on the batterer. In the criminal arena, research suggests that apologies correlate to future law-abiding behavior. For example, a New Zealand study of a restorative justice program for juvenile offenders revealed that offenders who refused to apologize during a family group conference were found to be three times more likely to reoffend in the subsequent three years than those who did apolog-

years in jail and ordered to apologize to his domestic violence victim for a count of domestic violence and violation of a protection order).

¹⁹¹ See Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1298–1300 (2006).

¹⁹² See Smith, *supra* note 13, at 933 (noting that forgiveness and reconciliation in a domestic violence context may empower a victim to take control of their healing and move beyond a "survivor identity," such that the violence committed against them no longer defines their identities).

¹⁹³ See Mills, *supra* note 14, at 503–04 (arguing that an apology by an offender often restores a victim to a position of power over her experience, allowing her to relinquish the self-blame they carry); White, *supra* note 191, at 1274–76 (stating that apologies can be psychologically valuable to victims because they help victims regain their self worth and dignity, help dissolve self-blame, and make victims feel safer by "correcting the notion that they deserved to be maltreated").

¹⁹⁴ Jeffrie G. Murphy, *Keynote Address, Forgiveness, Reconciliation, and Responding to Evil: A Philosophical Overview*, 27 FORDHAM URB. L.J. 1353, 1362 (2000).

ize.¹⁹⁵ Several commentators identify apology as a critical aspect of the Japanese criminal justice system that explains how Japan has drastically reduced its crime rate.¹⁹⁶ After implementing criminal justice reforms focused on contrition, apology, and confession, Japan succeeded in reducing its crime rate by thirty percent from 1948 to 1988.¹⁹⁷ Presumably, when an individual articulates a genuine apology, he or she may comprehend the implications of the wrongdoing and the humanity of the victim in a way that deters future criminal behavior.¹⁹⁸

Of course, one must not attribute excessive transferable value to such studies. The criminal intent that informs a random act of illegal behavior against a stranger or property or a victimless crime is far from generally analogous to the intent related to a domestic violence incident. A batterer may easily utter an apology—even an authentic apology—to his intimate partner that fails to emanate from a deeper understanding of the injury he inflicted. Instead, his apology may be motivated by love, affection, or contrition. Until research has been conducted to gauge the effect of apology on reabuse in intimate partner cases, it would be unwise to make any assumptions. Considering the complexities of apologies and of assessing their sincerity, if a restorative justice program offered apology as a form of relief to be offered and accepted in an intervention, the key to its effectiveness and safety would lie in the program design,¹⁹⁹ which the final Part of

¹⁹⁵ Petrucci, *supra* note 144, at 357 (citing Allison Morris & Gabrielle Maxwell, *Re-Forming Juvenile Justice: The New Zealand Experiment*, 77 PRISON J. 125 (1997)). These studies failed to assess where the causal link lies, however. It is possible that those who were less likely to reoffend were those more likely to apologize, rather than that those who apologized were less likely to reoffend as a result of having apologized and taken responsibility.

¹⁹⁶ See LLEWELLYN & HOWSE, *supra* note 54, at 12; RUTH MORRIS, PENAL ABOLITION: THE PRACTICAL CHOICE 53 (1995); Petrucci, *supra* note 144, at 339.

¹⁹⁷ MORRIS, *supra* note 196, at 53.

¹⁹⁸ Assessing the sincerity of an apology is a complex issue that is beyond the scope of this Article but is addressed in extensive scholarship. See *generally Forgiveness in the Law*, *supra* note 184 (presenting various speakers hypothesizing about the value of apology); Petrucci, *supra* note 144, at 341–43 (analyzing the components that render an apology authentic).

¹⁹⁹ Any restorative justice program would need to address the research suggesting that women are unlikely to feel comfortable rejecting an apology. As one study noted,

Two reasons for victims not rejecting apology were that victims who rejected an apology had more negative attributions toward themselves than those who did not, and victims were found to be concerned about

this Article will address. However, because of the nuances of domestic violence and interpersonal dynamics, apologies are not necessarily to be avoided in all domestic violence interventions.

3. Feminist Critique

A final critique to be addressed is the feminist critique that restorative justice represents a step back from the progress advocates have made.²⁰⁰ By reducing the formality of domestic violence interventions, the critics say, the system reverts to a program that conveys the attitude that domestic violence fails to rise to the level of a criminal matter and should be treated as less dangerous and reprehensible.²⁰¹

Allowing domestic violence cases to be heard outside of the courtroom, in a less formal setting, does allow the issue to be handled as a more private, informal matter. But because programs can be designed to make agreements developed in a restorative justice setting either enforceable and/or only valid after court involvement, restorative justice will not necessarily result in a reprivatization of domestic violence to the point that any intervention occurs completely without official state involvement. Further, the more formal avenues available currently in the civil and criminal justice systems could coexist with any restorative justice option. The maintenance of existing systems can convey the continuing formal condemnation of domestic violence as a public wrong.

The numerous critiques of restorative justice applied in a domestic violence context, though worthy of consideration, are not dispositive. The additional criticisms raised above are addressed in Part VI, as they can be resolved through program implementation. With careful program design and implementation, many valid concerns can be addressed and dismissed.

damage to the relationship, and accepting an apology, even if it was viewed as insincere, was seen as a means to maintain the relationship.

Petrucci, *supra* note 144, at 355.

²⁰⁰ Ironically, Martha Minow asserts that restorative justice theory and feminist theory are consistent in their analysis and conceptions of power. Minow, *supra* note 124, at 969 (“Some of [restorative justice’s] supporters draw explicitly on feminist work. Feminist conceptions of power with others, rather than power over others, inform some ideas about restorative justice.”).

²⁰¹ See generally Coker, *supra* note 153, at 136–43 (offering an examination of the conflict between restorative justice principles and the anti-domestic violence movement); Curtis-Fawley & Daly, *supra* note 63, at 607–08 (providing a bullet point list of all of the feminist concerns about restorative justice).

C. *Adapting Our Current Justice System Responses Would Not Provide as Effective a Remedy as Offering Restorative Justice as a Separate Civil Option, and It Would Reduce the Substantial Benefits Offered to Some Victims by Our Current System*

A much less radical remedy to the shortcomings of our current domestic violence justice interventions would be to adapt the criminal and civil justice systems. We could continue to modify our current systems to achieve greater victim safety and satisfaction, as well as offender accountability. However, in light of the many efforts that have been made, the systemic resistance to radical change within the justice system, and the substantial benefits conferred to many victims and offenders by the civil and criminal justice system, it is time for experimentation with an alternate track.

First, both the criminal and civil justice systems offer assistance to a limited subset of victims that could be widened by offering restorative justice options. Victims involved in the criminal justice system obtain protection only at the whim of the prosecution. If a prosecutor declines to charge a case, the victim cannot access the system. Similarly, the civil justice system, though officially accessible to all victims who have statutory standing, only truly offers relief to those who feel comfortable entering the formal justice system and remaining within that system. Though changes to the civil system might reduce barriers to entry, such changes take a long time to have an effect. Because of these systemic barriers, many victims who might desire intervention cannot procure protection from the current justice system.

Second, as discussed above, advocates have prevailed in dramatically altering the justice system with the intent of offering more protection to victims over the last four decades.²⁰² In the justice system, no-drop prosecution and mandatory arrest policies have increased the cases entering and remaining within the system.²⁰³ Many prosecutors' offices have engaged victim-witness advocates to support victims throughout the prosecution process.²⁰⁴ Jurisdictions have experi-

²⁰² See *supra* Part II.

²⁰³ See Kohn, *supra* note 12, at 217–18, 224–25 (providing an overview of the data regarding no-drop prosecution and mandatory arrest studies).

²⁰⁴ See, e.g., Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 218 (2008) (explaining that victim-witness advocates work with prosecutors and complaining witnesses); Jane K. Stoeber, *Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS*, 87 N.C. L. REV. 1157, 1222 (2009) (discussing the role of victim-witness advocates).

mented with interagency collaboration to support victims and address offender accountability.²⁰⁵ And yet the statistics suggest that some victims remain reluctant to cooperate with the system and that domestic violence continues to flourish at the same rate as prior to these innovations.²⁰⁶

In the civil system, advocates have similarly experimented with approaches to increasing the effectiveness of the protection order system generally. As discussed above, protection order statutes offer wider remedies and protected classes.²⁰⁷ One-stop shopping centers for intake provide victims increased emotional and social service support.²⁰⁸ Enforcement mechanisms have been enhanced and service of process has been facilitated by the government.²⁰⁹ And yet, again, a significant subset of victims complains about the inhospitality of the system and remains at risk after obtaining an order.²¹⁰

The justice systems can only adapt so much before they transform into different systems altogether—ones that may no longer offer important benefits to certain victims. Though the civil and criminal justice systems cannot meet the needs of all victims and may not provide effective protection to some, they do succeed on both fronts in many cases. Adapting the civil and criminal justice systems so that they can provide the flexible, collaborative, individualized, and long-term remedies offered by a restorative justice intervention would largely eliminate some of the benefits many individuals seek out and get from the formal justice system: formality, authority, expedited

²⁰⁵ See Jonathan Lippman, *Chief Judge Judy S. Kaye: A Visionary Third Branch Leader*, 84 N.Y.U. L. REV. 655, 658 (2009) (discussing “problem-solving” courts based on an interagency collaboration model); see also Jennifer Gentile Long & Viktoria Kristianson, *Taking a Process-Oriented Approach to Domestic Violence Prosecutions*, PROSECUTOR, Sept./Oct. 2007, at 14, 14–15 (2007) (arguing that greater prosecutor collaboration with advocates and agencies and a balancing of victim safety with offender accountability in sentencing reflect a recognition that domestic violence prosecutions uniquely impact the victim).

²⁰⁶ See *supra* Part II.

²⁰⁷ See *supra* notes 21–23 and accompanying text.

²⁰⁸ See Epstein, *supra* note 25, at 30–33 (discussing the role of integrated services for domestic violence victims).

²⁰⁹ See, e.g., GARRINE P. LANEY, CONG. RESEARCH SERV., VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING 1–5 (2010), available at http://assets.opencrs.com/rpts/RL30871_20100226.pdf (describing the Services-Training-Officers-Prosecutors (STOP) Grants, a funding program created by VAWA specifically to strengthen law enforcement, prosecution, and victim services in cases involving violent crimes against women).

²¹⁰ See *supra* notes 34–42 and accompanying text (providing an overview of studies of the effectiveness of protection orders and of studies of victim satisfaction).

resolution, arm's-length transactions, and the unambiguous imprimatur of state condemnation of domestic violence. Reabuse data and victim satisfaction analyses do not suggest that the systems uniformly fail. Instead, as discussed above, they reveal mixed results.²¹¹ Rather than adapting the current systems so radically that they may lose their essential nature, we should instead continue to work on those systems so that they meet the needs of a wider swath of victims and offenders. In addition, however, we should offer an alternative track to meet the needs of victims and offenders that cannot be met by the criminal and civil justice system without more dramatic and difficult change.

D. Although Restorative Justice Interventions Might Involve the Outlay of Substantial Resources, Failing to Provide Effective Remedies for Domestic Violence Victims Also Has Significant Financial Implications

To provide effective restorative justice programs that are most likely to be successful in increasing victim safety while remaining attractive to victims, offenders, and community members, program development and operation costs will most likely be significant.²¹² The cost of failing to adequately address domestic violence, however, is real, omnipresent, and quite staggering.²¹³ Health-related direct costs alone have been estimated to exceed \$5.8 billion each year.²¹⁴ Costs related to employment affect employers and victims alike. Victims lose nearly eight million days of paid work each year, which is “the equivalent of more than 32,000 full-time jobs and 5.6 million days of household productivity.”²¹⁵ Some calculate that the economic cost of domestic violence to employers is \$5–10 billion per year.²¹⁶ Further, society bears the burden of ineffective responses to domestic violence in the outlay of expenses necessary to provide shelter for homeless victims and children, to incarcerate offenders during repeated prison stays, and to place children of victims and offenders alike in foster

²¹¹ See *supra* Part II.

²¹² For a discussion of proposed guidelines for pilot programs, see *infra* Part VI.

²¹³ See Am. Inst. on Domestic Violence, Domestic Violence in the Workplace Statistics, <http://www.aidv-usa.com/statistics.htm> (last visited Mar. 25, 2010).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 33 (2002) (citing Harris Meyer, *The Billion-Dollar Epidemic*, AM. MED. NEWS, Jan. 6, 1992, at 7).

care.²¹⁷ While funding for restorative justice programs must be identified and available, the expense of restorative justice should not preclude our experimentation. Failing to intervene effectively and to supplement our current justice system remedies has staggering direct and indirect costs on society.

E. We Should Try Restorative Justice Because It Is Likely to Be Effective

Despite the challenges restorative justice presents in theory and in program design and implementation, experimenting with restorative justice as an alternative domestic violence intervention is worthwhile for the simple reason that it is likely to be even more effective than the justice system for some domestic violence cases. Its effectiveness is likely to derive from the direct engagement between the perpetrator and victim, the informality of the intervention, and the interagency and community collaboration the conferences involve. Finally, the restorative justice programs that have been developed to address domestic violence have thus far produced favorable results indicating that continued experimentation would be productive and worthwhile.

1. Perpetrator and Victim Engagement May Result in More Successful Agreements

In a restorative justice model such as family group conferencing (FGC), facilitators engage both offender and victim in developing the group, presenting the problem, and developing and ratifying any agreement.²¹⁸ In many FGC programs, victims and offenders share the prerogative of terminating a session at any time.²¹⁹ Such a program design—one in which the parties perceive control over and a voice in the process—is more likely, based on current research, to result in effective agreements.²²⁰

²¹⁷ See Cheryl J. Lee, Note, *Escaping the Lion's Den and Going Back for Your Hat—Why Domestic Violence Should Be Considered in the Distribution of Marital Property Upon Dissolution of Marriage*, 23 PACE L. REV. 273, 296 (2002) (describing sources of “direct costs that domestic violence has on society”).

²¹⁸ See, e.g., Braithwaite & Daly, *supra* note 86, at 155–58 (providing an overview of the critical steps of New Zealand Family Group Conferences); DISSEL, *supra* note 61, at 18–43 (detailing the operation of Victim Offender Conferences).

²¹⁹ See Jennifer Michelle Cunha, Comment, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 304 (1999).

²²⁰ See *infra* note 243 and accompanying text.

The restorative justice setting may well empower the victim and enhance her agency in a way that is impossible in current justice system programs.²²¹ Restorative justice programs allow survivors to step out of their roles as passive victims and into an active role in achieving justice, safety, and closure.²²² The complainant's role in a criminal case, for example, allows her to testify as a witness but otherwise excludes her from the proceedings.²²³ In a civil setting, even though the survivor initiates the case and has authority to proceed or terminate the case herself, she is merely a litigant in a formal court setting—one infused with notions of how she *should* act as a victim and what she *should* seek for her safety.²²⁴

In a restorative justice conference, on the other hand, a victim has the opportunity to speak, be heard, and make decisions for herself in a supported environment. One author analyzing the adversarial justice system and restorative justice responses explains that the traditional system emphasizes individual victimhood, whereas restorative justice focuses on empowerment.²²⁵ “Instead of having to define herself and the harm that has been done to her in terms of a limited repertoire of available legal constructions, [in a restorative justice setting] the victim is at the centre of events, in control and telling her story in her own way.”²²⁶

Empowering victims may not only enhance the effectiveness of an intervention, but might also promote deeper emotional healing.

²²¹ See Presser & Gaarder, *supra* note 166, at 183 (“The restorative justice model ostensibly straddles the divide between agency and blame. The victim is in no way responsible for her abuse. Instead, restorative justice processes involve her in active strategies for changing her situation.”).

²²² *Id.*

²²³ See Curtis-Fawley & Daly, *supra* note 63, at 621 (“Advocates see the potential for restorative justice processes to give victims a chance to speak and to be heard in a way that the criminal court does not allow. Restorative justice also may empower victims to participate in decision making and to propose desired outcomes.”); Mills, *supra* note 14, at 482–83 (arguing that pursuant to the theory of performativity, victim involvement in the criminal justice system enhances their victim status by making them passive actors).

²²⁴ See Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 734 (2003) (analyzing judicial expectations of the perfect victim, her needs, and what she should need); Kohn, *supra* note 12 (discussing generally the treatment of victims in the civil and criminal justice system as infused by perceptions and judgment).

²²⁵ ZEHR, *supra* note 49, at 36.

²²⁶ Hudson, *supra* note 51, at 624; see also ZEHR, *supra* note 49, at 37 (noting the empowering role for victims in a restorative justice intervention); Brookes, *supra* note 58 (same); Grauwiler et al., *supra* note 59, at 584–85 (same).

Research on domestic violence victims and perceived control suggests that when victims perceive themselves to be in control, they display reduced symptoms of trauma.²²⁷ Research additionally suggests that active healing, as facilitated by the perception of control in an effective restorative justice intervention, is far superior to passive healing for a trauma victim.²²⁸

Restorative justice programs may also provide enhanced effectiveness because they can provide what a victim actually needs. The criminal justice system, which is tasked with punishing wrongs done to society, cannot be expected to prioritize victim needs when they diverge from society's interest.²²⁹ The civil justice system, which must provide procedural impartiality and expedited case handling, and has authority over only the parties to the matter, also cannot tailor itself consistently to meet individual victims' needs. But a less formal program, such as restorative justice, may be able to provide many of the objectives victims seek. A restorative justice researcher asserts that

[e]vidence from at least three continents reveals that when victims are asked, they say they want: a less formal process where their views count, participation in their case, more information about both the processing and outcome of their case, respectful and fair treatment, material restoration, and most importantly of all, emotional restoration, including an apology.²³⁰

Though these goals might be met by reforming the civil and criminal justice systems, those reforms may fail and may, in the process, reduce the effectiveness of those systems for other victims.²³¹ Ultimately, whatever her goals, if a victim can choose between the criminal, civil, and/or restorative justice systems, she is more likely to attain her objectives than if her choices were more limited.

²²⁷ Melanie O'Neill & Patricia Kerig, *Attributions of Self-Blame and Perceived Control as Moderators of Adjustment in Battered Women*, 15 J. INTERPERSONAL VIOLENCE 1036, 1046 (2000) (citing a study of 160 women illustrating that "perceived control moderated the relationship between physical violence and adjustment"). In addition, as the next Part will cover, this Article proposes to offer restorative justice as an option to victims filing in the civil system. Giving victims more choices further enhances their perceptions of control.

²²⁸ Mills, *supra* note 14, at 491.

²²⁹ See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

²³⁰ Strang, *supra* note 185, at 96 (citations and line breaks omitted).

²³¹ See *infra* Part V.C.

Further, active victim involvement in the resolution of the conflict may increase its effectiveness since victim risk assessments are often more accurate than those of other system actors.²³² Research has illustrated that victims are well positioned to predict batterers' future behavior.²³³ A recent eighteen-month study of 406 domestic violence victims determined victims' own risk assessments to be accurate for about sixty-six percent of the sample,²³⁴ rendering this research highly consistent with earlier studies finding between sixty-three percent and seventy-four percent.²³⁵ Further, empirical predictive tools for interpersonal violence risk assessment are also flawed and, with some exceptions,²³⁶ are not significantly more accurate than chance.²³⁷ Therefore, victim voices are vital to assessing the implications of any conflict resolution between the parties.

Finally, the integral role that each party can play in a restorative justice intervention may well increase his/her perceptions of procedural justice.²³⁸ Such a perception would increase the likelihood that the parties will respect the resolution.²³⁹ In an FGC, for example, the offender works with the facilitator in choosing participants for the sessions and in setting an agenda.²⁴⁰ He also has the right to speak and to participate freely in determining a resolution.²⁴¹ In a civil or criminal proceeding, on the other hand, which is based on an adversarial model, the defendant must adhere to the strict procedures of

²³² Lauren Bennett Cattaneo et al., *Intimate Partner Violence Victims' Accuracy in Assessing Their Risk of Re-abuse*, 22 J. FAM. VIOLENCE 429, 429–30 (2007).

²³³ *Id.*

²³⁴ *Id.* at 431, 437. It is interesting to note that victims were equally as likely to accurately predict reabuse as to predict no reabuse. *Id.* at 437.

²³⁵ See Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, in *ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS* 96, 106 (Jacquelyn C. Campbell ed., 1995); Lauren Bennett Cattaneo & Lisa A. Goodman, *Victim-Reported Risk Factors for Continued Abusive Behavior: Assessing the Dangerousness of Arrested Batterers*, 31 J. COMMUNITY. PSYCHOL. 349, 365 (2003); D. Alex Heckert & Edward W. Gondolf, *Battered Women's Perceptions of Risk Versus Risk Factors and Instruments Predicted Repeat Reassault*, 19 J. INTERPERSONAL VIOLENCE 778, 778 (2004).

²³⁶ See Lauren Bennett Cattaneo & Lisa Goodman, *Risk Factors for Re-abuse in Intimate Partner Violence: A Cross-Disciplinary Critical Review*, 6 TRAUMA, VIOLENCE, & ABUSE 141, 166 (2005).

²³⁷ Cattaneo et al., *supra* note 232, at 437.

²³⁸ Cf. DISSEL, *supra* note 61, at 8 (discussing different perceptions of "popular justice").

²³⁹ *See id.* at 35–36.

²⁴⁰ *See id.* at 10–11.

²⁴¹ *Id.*

the court and has virtually no control over the resolution, unless he consents to an order or pleads guilty.²⁴² A study of the factors related to perceptions of justice reveals that one of the most important factors to offenders in concluding that justice had been done was the belief that those involved “had an opportunity to take part in the decision-making process.”²⁴³

The outcome measures of several programs illustrate that, if handled well, offenders perceive restorative justice interventions as fair.²⁴⁴ In one program in Australia, a researcher found that “conference offenders were provided with more objective fairness, perceived themselves more fairly treated, [and] had more legitimacy . . . than those who had been assigned to court.”²⁴⁵ Another study that synthesizes outcome measures from seven of the most reliable international restorative justice programs found that compared to offenders whose cases were processed by the court system, offenders in restorative justice programs were twice as likely to perceive the justice system as fair;²⁴⁶ 1.9 times more likely to be satisfied with the way their cases were handled;²⁴⁷ and 4.1 times more likely to feel that they were “able to tell their stories.”²⁴⁸

Procedural justice contributes to the intervention’s effectiveness because it increases the likelihood that the offender will comply.²⁴⁹ The offenders’ perceptions of justice correlate strongly to reabuse in the domestic violence arena. A large scale study in Chicago in 1984

²⁴² Cf. Everett L. Worthington, Jr., *An Empathy-Humility-Commitment Model of Forgiveness Applied Within Family Dyads*, 20 J. FAM. THERAPY 59, 62 (1998).

²⁴³ TOM R. TYLER, WHY PEOPLE OBEY THE LAW 163 (1990); see also GOODMAN & EPSTEIN, *supra* note 12, at 77 (discussing the extensive research linking perceptions of fair treatment and the effectiveness of remedies); Geoffrey Carroll Barnes, *Procedural Justice in Two Contexts: Testing the Fairness of Diversionary Conferencing for Intoxicated Drivers* 100 (1999) (unpublished Ph.D. dissertation, University of Maryland, College Park) (on file with author) (concluding that procedural fairness is more closely correlated with an offender’s reaction to a judicial proceeding than outcome).

²⁴⁴ Barnes, *supra* note 243, at 267.

²⁴⁵ *Id.*

²⁴⁶ Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 178.

²⁴⁷ *Id.* at 180.

²⁴⁸ *Id.* at 182. It is important to note, however, that this statistic is derived from only two studies out of the seven surveyed.

²⁴⁹ See GOODMAN & EPSTEIN, *supra* note 12, at 77 (discussing the powerful effect of procedural justice); Epstein, *supra* note 156, at 1875 (arguing that fair treatment affects compliance regardless of whether the offender perceives the ultimate result as right or wrong).

on procedural fairness and compliance with court orders concluded that when offenders perceive the system as legitimate, they are much more likely to comply with its dictates.²⁵⁰

2. The Informality of a Restorative Justice Intervention May Enhance Its Effectiveness

As opposed to the rigidity inherent in the justice system, restorative justice offers the potential of significant flexibility in both process and remedies. Such flexibility allows the parties to enjoy increased participation and for the intervention to adapt to the complex dynamics often present in violent relationships. Neither the civil nor criminal justice system is well equipped to manage either victims who wish to remain connected to their abusive partners²⁵¹ or the complications inherent in their intertwined lives. While civil protection orders themselves may well address these complications, in certain jurisdictions, most civil court systems lack the resources to devote the time necessary to work through such complexities in the courtroom.²⁵²

A restorative justice session can adapt to the needs of the parties involved. Facilitators can create, together with the parties, a session and resolution that address the specific relationship and family. Restorative justice “offers the possibility of moving beyond the victim-offender ‘zero sum,’ that what is good for victims must be bad for offenders, and vice versa.”²⁵³ A restorative justice intervention may also be tailored to meet the cultural and religious norms or practices of specific populations.²⁵⁴

Restorative justice programs can grant flexible relief—much more so than the traditional legal system—thereby providing a more

²⁵⁰ See TYLER, *supra* note 243, at 8, 172.

²⁵¹ See GOODMAN & EPSTEIN, *supra* note 12, at 80–82 (discussing how ill-tailored the protection order system is to victims who wish to remain with their abusive partners); Goldfarb, *supra* note 11, at 1522–23 (advocating changes in our protection order statutes to better accommodate those victims who want to stay in relationships with the offenders); Kilzer, *supra* note 119 (“When (victims) want to separate from the person who was abusive, we have pretty good services. They were effective . . . [b]ut we were not very effective for the 85 percent who answered it the other way.”).

²⁵² See Goldfarb, *supra* note 11, at 1507 (explaining that although civil protection orders are “intended to be tailored to the needs of each victim,” judges often simply apply the general provision from a standard form).

²⁵³ Hudson, *supra* note 51, at 626 (citation omitted).

²⁵⁴ See Coker, *supra* note 101, at 35 (setting forth the stages of peacemaking circles, one of which includes a prayer); see also Mills, *supra* note 14, at 506–07 (discussing how much more effective batterer intervention programs can be when culturally tailored to specific populations).

effective and appropriate outcome.²⁵⁵ According to one commentator, “[o]ne could impose deserved punishment through any variety of alternative methods without undercutting justice—fine, community service, house arrest, curfew, regular reporting, diary keeping, and so on—as long as the total punitive ‘bite’ . . . of the disposition satisfies the total punishment the offender deserves, no more, no less.”²⁵⁶ In addition to the traditional criminal remedies, of course, a restorative justice intervention could provide parties with any family law relief that is available in a protection order hearing.²⁵⁷ Further, nonlegal remedies, such as commitments from third parties, would also be possible. Parties can agree to whatever the group determines, by consensus, would be effective and reasonable.²⁵⁸

The flexibility of the proceeding also permits the inclusion of members of the community, family, and support service organizations who cannot participate significantly in the justice system due to its binary, adversarial nature. Individuals who are included in the intervention may well feel they have a stake in the effective resolution of the matter, thereby supporting compliance.²⁵⁹

The flexibility of the proceeding also permits the parties to air and resolve some of the complex emotional issues that often accompany a domestic violence assault. Traditional legal systems are not well equipped for addressing the emotional needs of litigants, and the adversarial system does not lend itself to healing. When parties have the chance to express their emotions and to react to the emotions of the other party, they may be able to move toward true resolution more effectively.²⁶⁰

²⁵⁵ See Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice,”* 2003 UTAH L. REV. 375, 382.

²⁵⁶ *Id.* at 386 (citation omitted).

²⁵⁷ See sources cited *supra* note 171.

²⁵⁸ See, e.g., Laverne F. Hill, Comment, *Family Group Conferencing: An Alternative Approach to the Placement of Alaska Native Children Under the Indian Child Welfare Act*, 22 ALASKA L. REV. 89 (2005) (describing the process of family group conferencing in the Alaskan child welfare system and how the end results are able to mirror the needs of the culture and community).

²⁵⁹ See Braithwaite & Daly, *supra* note 86, at 169 (highlighting the importance of community members who will help keep the peace and support the parties after the conference).

²⁶⁰ See LLEWELLYN & HOWSE, *supra* note 54, at 79–80 (stating that emotions are key to the resolution of family disputes and are not appropriately expressed in the courtroom).

Finally, restorative justice's flexible format allows for the creation of less formal interventions that are more accessible and less traumatic and intimidating than the justice system to some litigants.²⁶¹ As discussed above, domestic violence victims often fear the courtroom. A restorative justice intervention can take place in any location and can be as formal or informal as the parties desire. Far from a public forum, a restorative justice intervention can provide the parties increased privacy. According to one commentator familiar with many different restorative justice formats, restorative justice "provides a means of exposing men's violence without revictimizing women. It is a route of crime control that is not dependent solely on the courage or tenacity of victims."²⁶² As such, restorative justice might provide an avenue of recourse that might encourage earlier intervention for some victims who fail to report abuse because they fear the justice system.

3. Restorative Justice Interventions Might Provide Increased Effectiveness Because They Can Incorporate Coordinated Community Responses

The restorative justice format allows for the inclusion of a broad swath of professionals and interested parties. Certain studies have revealed that interventions by one professional without input from pro-

²⁶¹ In addition, research on subordinated populations in particular may find the justice system intimidating to the point that it induces trauma or that they perceive it as inaccessible. See, e.g., Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 8 (2009) (arguing that because the formal justice system does not accommodate the realities of gay and lesbian life, sexual minorities are likely to mistrust it); Jeremy R. Lacks, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 397 (2008) (noting minority populations' tangible mistrust of the police and lack of confidence in the justice system in the context of police policies and judicial oversight); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 517 (2003) (arguing that a study of jury verdicts shows judicial bias within the civil justice system against women and minorities); Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 SOC. PROBS. 305, 305 (2004) (stating that race is one of the most salient predictors of attitudes toward the police and other criminal justice institutions). Despite overall attitudes of fear and mistrust evident in many minority groups, it appears that an individual's perception of the system is strongly linked to his or her particular experiences of procedural justice within that system, and that those experiences, when positive, can influence the perceived legitimacy of the system and its various actors. See *supra* notes 238–48 and accompanying text.

²⁶² Braithwaite & Daly, *supra* note 86, at 163.

professionals of other disciplines are only marginally successful in protecting victims and that such interventions may actually put women at a higher risk of reabuse.²⁶³ On the other hand, studies that measure coordinated intervention approaches have found that coordination of various providers and system actors may lead to lower recidivism rates than solitary interventions.²⁶⁴ A large-scale study by the Urban Institute found that when agencies collaborate on domestic violence cases, victims find their services more useful and are more likely to cooperate with system actors.²⁶⁵

4. The Evaluations of Restorative Justice Programs that Address Domestic Violence Suggest Potential for Success

Over the last three decades, several domestic violence restorative justice programs have been developed. Some of those programs specifically target domestic violence offenses, but more often, the programs handle domestic violence as incident to violent crimes or child abuse. Several programs that focus on domestic violence, however, have reported encouraging results, which suggest that restorative justice might provide effective interventions for intimate partner violence. Two programs in particular have been studied sufficiently to provide suggestive outcomes.

a. Victim Offender Conferences of South Africa

In three sites in South Africa, domestic violence victims and offenders were invited to participate in Victim Offender Conferences (VOC).²⁶⁶ Domestic violence victims and offenders, referred by the court, met separately with mediators, who were trained in both domestic violence and in mediation, to determine if they were both will-

²⁶³ See Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 55 (2000) (arguing that arrest alone does not deter violence and that other professionals should intervene to assist police).

²⁶⁴ *Id.*; Epstein et al., *supra* note 12, at 495–97 (describing coordination approaches). But see Jeffrey L. Edelson, *Coordinated Community Responses*, in WOMAN BATTERING: POLICY RESPONSES 203, 210–12 (Michael Steinman ed., 1991) (arguing that collaborative services have yet to be adequately tested and face many challenges).

²⁶⁵ See JANINE M. ZWEIG ET AL., URBAN INST., THE EFFECTS ON VICTIMS OF VICTIM SERVICE PROGRAMS FUNDED BY THE STOP FORMULA GRANTS PROGRAM 132–33 (2003), available at <http://www.urban.org/url.cfm?ID=410645>.

²⁶⁶ See DISSEL, *supra* note 61, at 3 (“The VOC project was piloted in the three magisterial districts of Alexandra, Newlands/Westbury, and Dobsonville on the West Rand.”).

ing to enter into VOC.²⁶⁷ Both parties were encouraged to invite family and friends to the conference for support.²⁶⁸ During the conferences, the mediator led the parties and their supporters through a discussion of the offense and a resolution.²⁶⁹ If they were able to reach an agreement, both parties would ratify the agreement and send it to the court for approval.²⁷⁰ The court could approve a continuance of the criminal case until the completion of the terms of the agreement. Following the VOC, the mediator worked with the parties to ensure compliance.²⁷¹

To evaluate effectiveness, researchers contacted approximately one-fifth of the victims.²⁷² Most victims reported that they felt safe during the VOC and that the mediation gave them a venue in which to express themselves in a way they would not have been able to do directly with the offender.²⁷³ The researcher reported that

[t]he mediation enabled the women to tell their version of their story for perhaps the first time. But they were also able to talk about how the actions of the abuser affected them personally and emotionally. Not only was this liberating for the women, but it also appeared to be the first time that some men actually listened to what they women were saying.²⁷⁴

Significantly, most of the women who were still involved with their offender reported that their relationships had improved as a result of the VOC.²⁷⁵

b. Youth Justice Care and Protection Family Group Conferences, New Zealand

In New Zealand, the Children, Young Persons, and Their Families Act of 1989 authorized FGCs to address juvenile and domestic violence.²⁷⁶ These FGCs have been closely analyzed for effectiveness.

²⁶⁷ AMANDA DISSEL & KINDIZA NGUBENI, CTR. FOR THE STUDY OF VIOLENCE & RECONCILIATION, *GIVING WOMEN THEIR VOICE: DOMESTIC VIOLENCE AND RESTORATIVE JUSTICE IN SOUTH AFRICA* 4 (2003), available at <http://www.csvr.org.za/docs/crime/givingwomenvoice.pdf>.

²⁶⁸ See *id.* at 8–9.

²⁶⁹ See *id.* at 7–8.

²⁷⁰ See *id.* at 7.

²⁷¹ See *id.*

²⁷² See *id.* at 2–4.

²⁷³ DISSEL & NGUBENI, *supra* note 267, at 6–7.

²⁷⁴ *Id.* at 8.

²⁷⁵ *Id.* at 9.

²⁷⁶ See *supra* Part II.B.2.

In the FGC, the parties and the families meet to achieve a consensus about what has transpired and options for moving forward.²⁷⁷ Then the parties are offered private time to discuss the outcome they desire.²⁷⁸ Together with a facilitator, they reconvene to reach a resolution.²⁷⁹ All cases referred by the court must obtain court ratification of the resolutions.²⁸⁰

Researchers found that more than ninety percent of both juvenile and domestic violence cases resulted in resolutions.²⁸¹ Though research indicated that reoffense rates were similar for offenders processed both through FGC and through the court, it also revealed that if offenders reoffended, their offenses were less serious.²⁸²

Significantly, sixty percent of the victims reported that FGC was “helpful, positive and rewarding” and that they “felt better as a result of participating.”²⁸³ Further, many of the victims perceived that they controlled the resolution.²⁸⁴ It is important to note, however, that twenty-five percent of the victims stated they felt worse as a result of their participation.²⁸⁵ Researchers, however, hypothesize that this statistic derives from inconsistent implementation rather than a programmatic flaw.²⁸⁶

Looking at the experiences of the offenders, researchers reported that the majority felt satisfied that they had been included in a real way in conflict resolution: one-third felt as if they had been involved in the outcome of the conference and one-half felt at least partly involved; the remainder reported that they had not been involved at all.²⁸⁷ Finally, one researcher reported that safety risks at conferences or resulting from conferences are negligible to nonexistent.²⁸⁸

²⁷⁷ Morris, *supra* note 91, at 91.

²⁷⁸ *Id.*

²⁷⁹ Braithwaite & Daly, *supra* note 86, at 155; Pennell & Francis, *supra* note 87, at 673–74.

²⁸⁰ Morris & Maxwell, *supra* note 94, at 210

²⁸¹ Morris, *supra* note 91, at 91.

²⁸² *Id.* at 96 (citing GABRIELLE MAXWELL ET AL., COMMUNITY PANEL ADULT PRE-TRIAL DIVERSION: SUPPLEMENTAL EVALUATION (1999)).

²⁸³ Morris & Maxwell, *supra* note 94, at 211.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 212.

²⁸⁶ Morris, *supra* note 91, at 92.

²⁸⁷ Morris & Maxwell, *supra* note 94, at 213

²⁸⁸ For a survey of various studies of safety at conferences, see Pennell & Francis, *supra* note 87, at 674–75.

Several programs in the United States now offer restorative justice interventions to address domestic violence cases.²⁸⁹ Because most programs have only recently been developed, there are no outcome measures by which to assess their efficacy. But the relative success of the South African and New Zealand programs indicate that for some victims, under some program designs, restorative justice may well offer an effective intervention alternative in domestic violence cases. Coupled with the many other theoretical and practical reasons why restorative justice methodology might be effective in domestic violence cases, this analysis leads to the consideration of how a restorative justice program might complement and best address the shortcomings of our current U.S. justice system response.

VI. PROPOSAL

Based on the success of restorative justice programs that process violent and juvenile crimes, as well as the limited but positive evaluations that domestic violence restorative justice programs have garnered, the promise of restorative justice to offer effective intervention in some domestic violence cases suggests that further experimentation should be conducted. This Part will propose characteristics of a restorative justice program that could complement the current options the U.S. justice system offers.

A. *Format*

Though restorative justice programs have been developed to address domestic violence using each dominant restorative justice format—circles, mediation, and conferences²⁹⁰—this Article advocates the use of conferences. The historical resistance to mediation in domestic violence applies equally to mediations in the restorative justice context. Mediation requires some degree of equality of bargaining power and ability to compromise; it also requires that parties feel

²⁸⁹ See MILLS, *supra* note 111, at 209–10, 222–39 (Peacemaking Circles at New York University Center for Violence and Recovery); Rhea V. Almeida & Ken Dolan-Delvecchio, *Addressing Culture in Batterer's Intervention: The Asian Indian Community as an Illustrative Example*, 5 VIOLENCE AGAINST WOMEN 667–82 (1999) (Cultural Context Model of the Institute of Family Services in Somerset, New Jersey); Coker, *supra* note 101, at 37 (describing a program within the Navajo legal system that is overseen by the judiciary); Grauwiler et al., *supra* note 59, at 585 (Construyendo Circulos de Paz in Nogales, Arizona); Jewish Family Serv. & Riskin Children's Ctr., Project S.A.R.A.H.—Healing Circles, <http://www.jfsclifton.org/node/40> (last visited Jan. 22, 2010) (Project S.A.R.A.H. of New Jersey Family Services).

²⁹⁰ See *supra* Part III.B.

comfortable face-to-face in the presence of one or two mediators.²⁹¹ Because of the power differential often inherent in violent intimate relationships, mediation would not be the best system to adapt to universal domestic violence interventions.

Though the circle format offers the potential for successful and meaningful resolution, it requires extraordinary resources and time investment. In addition, although circles may succeed in environments where the circle format is culturally familiar,²⁹² the concept of a circle, which requires total equality amongst the participants and complete consensus,²⁹³ may prove excessively challenging in many communities.

Conferences may prove to be the most practical, universally effective, and sustainable restorative justice approach to domestic violence cases. Conferences incorporate concerned individuals, the parties, and the facilitators. Community member and family involvement can reduce the coercive effects of having both parties in the room together and can result in the inclusion of community commitments in the resolution. In developing a restorative justice program, however, a group could merge aspects of each restorative justice format to meet their needs. Therefore, though this Article will refer to the proposed restorative justice intervention as a conference, the labeling should not suggest that some aspects of mediation and circle projects would be inappropriate to incorporate in developing a suitable program.

B. Development

An extensive process of program development must take place before any pilot intervention can begin to serve clients. Much has been written about how to develop restorative justice programs, with the bulk of scholarship focusing on the importance of community in-

²⁹¹ See Stephen Hooper & Ruth Busch, *Domestic Violence and Restorative Justice Initiatives: The Risk of a New Panacea*, WAIKATO L. REV., 1996 No. 1, at 101, 105–06 (condemning the use of mediation for domestic violence cases); Coward, *supra* note 132, at 26–27 (quoting Barbara Hart’s statement that “co-operation needed to reach a mediated resolution[] is an oxymoron in the context of domestic assault”).

²⁹² See Coker, *supra* note 101, at 37 (analyzing the peacemaking system within a Native American community where such rituals are common).

²⁹³ See FREDERICK & LIZDAS, *supra* note 67, at 10–11 (providing the general principles of circles).

volvement.²⁹⁴ Participation by the concerned community, including victims, representatives from the court, batterers' intervention programs, domestic violence advocacy organizations, and social service organizations, renders it more likely that the community will support and respect the new system, thus enhancing the development of a successful, appropriate program.²⁹⁵ As Pennell and Francis explain, "Repeated studies have documented the benefits of this partnership-building model in democratizing decision making, respecting family and community cultures, and promoting the safety and well-being of children and women."²⁹⁶

Where the program is based and through what mechanism it is established can significantly affect the breadth and success of the program. Experience with restorative justice suggests that for any restorative justice program to be implemented on a widespread basis and to be truly accessible to victims, the program should be implemented through legislation. While several local non-governmental organizations have developed and implemented restorative justice domestic violence curricula, their relationship with the justice system is tenuous and their constituency extremely limited.²⁹⁷ In the U.S. criminal justice system, many jurisdictions have mandated or encouraged restorative justice interventions through legislation.²⁹⁸ In order to garner legitimacy in the system, a restorative justice program should be acknowledged and possibly even formally linked to the justice system. Otherwise, the program cannot effectively provide a widespread alternative to the current justice system options and cannot prevent the ghettoization of domestic violence intervention.

Until pilot projects have been evaluated and found to be effective enough for continued practice, legislative implementation of restorative justice programs seems premature. Instead, as a preliminary step, court systems could internally establish restorative justice pro-

²⁹⁴ See, e.g., Koss, *supra* note 131, at 1339 (emphasizing the importance of local input in program development); Pennell & Francis, *supra* note 87, at 668–79 (discussing the importance of community involvement in program development).

²⁹⁵ See generally Pennell & Francis, *supra* note 87, at 676 (reporting on the development of an FGC program in North Carolina). In developing an FGC program, organizers gathered "representatives . . . from abused women's programs, batterer services, children's community services, child welfare, police, domestic violence court, women's correctional services, and social work education." *Id.* This advisory group, including a few survivors, developed the program. See *id.* at 676–77.

²⁹⁶ *Id.* at 668.

²⁹⁷ See sources cited *supra* note 289.

²⁹⁸ See sources cited *supra* note 65.

grams using Violence Against Women Act funding²⁹⁹ or internal court funding. Such an establishment would allow experimentation and evaluation but would provide the official imprimatur of the government for legitimacy.

C. Key Principles

Any advisory group developing a restorative justice program must establish the program's key principles. While some restorative justice settings' central principles involve restoration and healing, such principles would be misplaced in many domestic violence interventions due to the complexity and history of the relationships. As many restorative justice critics have stated, encouraging reconciliation, restoration, and forgiveness in a violent relationship is simply too fraught with danger to be an effective general approach.³⁰⁰ Restorative justice, however, is a flexible approach that can be adapted to address the needs of the parties and the context of the offending act. The key principles of a domestic violence restorative justice intervention could be refocused on meeting victims' needs³⁰¹ and on seeking to ensure and enhance safety, autonomy, and communication. Such goals would recognize the victim's enduring fear and the offender's understanding of the effects of his actions. Further, these goals would support the victim's need to assert herself in a relationship that is usually characterized by power imbalances. Finally, such goals could lead the intervention to focus on enhancing the communication between the parties so that both could understand the inappropriate behavior that had taken place.³⁰² As Edwards and Haslett explain, in some relationships, a program goal could be the "creation or recreation of relationships of meaningful social equality."³⁰³

Another important discussion for an advisory group involves determining the relative balance between focusing on the offender and his needs and the victim and her needs. Much criticism has been le-

²⁹⁹ See generally OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, 2004 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT (2004), available at <http://www.ncjrs.gov/pdffiles1/ovw/214641.pdf> (providing an overview of the grant projects funded by VAWA).

³⁰⁰ See Russell, *supra* note 130, at 75–76 (arguing that even the mere language of restorative justice is inappropriate in the domestic violence context).

³⁰¹ See Busch, *supra* note 128, at 224.

³⁰² It is important to note, however, that altering the goals of a restorative justice conference risks negating the relevance of the research suggesting the effectiveness of the intervention.

³⁰³ EDWARDS & HASLETT, *supra* note 75, at 3.

veled against restorative justice programs for directing excessive attention toward the offender at the expense of the victim.³⁰⁴ Undue attention to the offender's needs could focus the intervention inappropriately on the offender's justifications for the violence. The root causes of the violence, however, may be tied to the offender's needs and therefore may need to be addressed. To enhance victim safety, such needs may require examination and resolution. For example, if the offender has substance abuse or psychological issues, a victim may not be able to live safely until he receives treatment.

Considering the offender's needs often facilitates addressing the victim's needs as well. For example, if a victim cannot remain separate from the offender without child support payments, time spent in a restorative justice conference, focusing on the offender's job training needs would directly serve the victim's interests as well as the offender's. With the participation of a variety of service providers and social service agencies, such needs could be addressed in a conference and could lead to more stability for the family and more independence for the victim.

D. Eligibility

In developing a restorative justice program, one must consider how to determine case eligibility. Initially, in this pilot phase, this Article advocates that restorative justice programs be offered as an alternative to the civil justice track. The criminal justice system plays a vital role in clearly conveying society's intolerance for domestic violence and in vindicating community rights. Though restorative justice eventually might also play a role in processing criminal cases, a pilot restorative justice program would fit most comfortably into the justice system as an alternative track in the civil justice system. In order to enhance victim autonomy and meet victims' needs, victims should be offered alternative tracks and permitted to choose the track that best serves their needs.

Initial case eligibility could track the local protection order statute and allow all those who can seek protection under the statute to pursue a restorative justice resolution, pending a case screening. Alternatively, a restorative justice track could be available to a wider constituency. A broader scope of eligibility would permit victims to

³⁰⁴ See, e.g., Susan Herman, *Is Restorative Justice Possible Without a Parallel System for Victims?*, in *CRITICAL ISSUES IN RESTORATIVE JUSTICE*, *supra* note 185, at 75, 77.

seek intervention prior to a violent act. The vast majority of protection order statutes require actual violence or threats as requisite to enter the legal system.³⁰⁵ A restorative justice track might allow victims who feel threatened or who have been emotionally abused to seek intervention before they have actually suffered a criminal act. Allowing such victims to seek intervention would offer important early intervention to victims at risk.

Cases could access the restorative justice track through both victim election and court referral. To facilitate victim election, victims would need information sufficient to make an initial decision to opt into the restorative justice system. Judges might refer a case into a restorative justice program with the consent of the parties once he or she determines that the case is eligible for and would benefit from a more holistic approach.

A vital aspect of developing restorative justice eligibility is determining how cases will be screened. Because restorative justice methodology would not be successful or safe in many types of cases, screening is necessary. A screener or panel of screeners would implement screening protocols to determine if restorative justice would be the proper intervention for each case. Screeners would need to work with the parties to try to provide them with realistic expectations of the program itself and the outcomes—an endeavor, admittedly, that will be difficult before data has been gathered.³⁰⁶ Screening would verify that both parties consented to restorative justice and that that consent was both informed and voluntary. Both victim and offender consent, however, is laden with the potential for coercion. Defense attorneys might encourage offenders to participate by suggesting that the offender's participation would affect the criminal disposition. Alternatively, a victim might offer an offender a quid pro quo that he participate in exchange for her decision to forgo testifying against him. Concerns about coercion of victims and their inability to voluntarily consent abound in restorative justice literature.³⁰⁷

An individual screening meeting with the victim, as well as with the offender, would allow the screener to delve into whether the victim feels intimidated and whether she has been promised anything in

³⁰⁵ Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 58 (2008) ("Every state requires evidence of physical violence or potential violence.").

³⁰⁶ Cf. Presser & Gaarder, *supra* note 166, at 187 (discussing the challenges of effective screening and the need to develop protocols).

³⁰⁷ See, e.g., Coker, *supra* note 101, at 84.

return for consenting to a restorative justice track.³⁰⁸ In this meeting, the screener would also need to examine the victim's reasons for seeking a restorative justice intervention and what she feels might happen to her if she fails to consent. Though the frequent power imbalance between the parties could render any bargaining that might take place in the conference insincere, a screener could try to determine if such an imbalance exists in this relationship and if the victim could be supported in a way to reduce the effects of the imbalance. Despite the parties' consent or referral by a court, the screener must be able to deny admission to particular parties. The relationship between the parties, their unrealistic expectations, or safety issues might play a role in a case being screened out of the program.

Although the screening meeting with the victim would focus on issues of coercion and voluntary consent, the meeting with the offender might focus more so on his admission of responsibility.³⁰⁹ Some restorative justice programs allow offenders to enter the conference prior to admitting responsibility. Making such an admission a prerequisite to participation, however, might be more effective in a domestic violence intervention.³¹⁰ A victim who fears an offender or is subject to coercion might be more willing to enter into a session after the offender has taken responsibility.³¹¹ In addition, because many domestic violence interventions will require extensive work on the creation of remedies, the conference would suffer greatly if forced to focus on encouraging a recalcitrant admission of responsibility. Instead, if an offender denies the allegations, his case might be more effectively and efficiently handled by the traditional justice system.

E. Conference

The conference would consist of several steps and aspects, all to be considered and developed by the advisory committee.

³⁰⁸ LLEWELLYN & HOWSE, *supra* note 54, at 66 (citing to the importance of preconference counseling with the victim).

³⁰⁹ See Hudson, *supra* note 51, at 625 ("Other writers seem to allow for acceptance of responsibility to emerge rather than requiring it to be established at the outset . . .").

³¹⁰ See *id.* (arguing that proceedings should not continue unless the "offender . . . accepts responsibility for the offense").

³¹¹ See *id.*

1. Facilitator Qualifications

After screening, an eligible case would be referred to a facilitator to prepare for conference. Developing selection criteria for appropriate facilitators would be a major undertaking of an advisory development committee. What type of background should facilitators have? What kind of training? What sorts of continuing education and supervision? In order to note and intervene when a conference involves coercion, intimidation, or manipulation—overt or covert—all facilitators should have extensive education and/or background in the dynamics of domestic violence and intimate family power and control. Ideal facilitators would also understand the dynamics of group counseling so that the facilitator can manage the complexities of facilitating the participation and needs of the parties, their supporters, and their advocates.³¹² In order to enhance the creative potential of conference resolutions, ideal facilitators would also be familiar with the range of resources available to victims and perpetrators.³¹³

2. Preconference Meetings

Prior to the conference but after the screening meeting, it would be necessary for the facilitator to meet with the victim and offender separately to counsel them on the procedures of the conference, possible resolutions, and ground rules.³¹⁴ Ideally, capitalizing on the flexible nature of restorative justice,³¹⁵ a facilitator could work with the parties to modify the procedures and ground rules as necessary to meet the specific needs or cultural norms of the group.³¹⁶ In these meetings, facilitators would also work to develop a list of family, service providers, supporters, and community members to participate in

³¹² For an explanation of the central tenets of restorative justice, which includes, inter alia, a discussion of the interests of preserving victim safety and holding the offender accountable in group dialogue sessions, see EDWARDS & HASLETT, *supra* note 75, at 2–8. See also LLEWELLYN & HOWSE, *supra* note 54, at 46–56 (discussing the needs of the victims, wrongdoers, and the community); ZEHR, *supra* note 49, at 52 (discussing concern for the victims' needs); *supra* Part VI.C (discussing victims' and offenders' needs).

³¹³ See EDWARDS & HASLETT, *supra* note 75, at 3 (discussing risks implicit in poor supervision).

³¹⁴ See LLEWELLYN & HOWSE, *supra* note 54, at 61; EDWARDS & HASLETT, *supra* note 75, at 6.

³¹⁵ See *supra* notes 253–55 and accompanying text.

³¹⁶ See LLEWELLYN & HOWSE, *supra* note 54, at 61.

the conference.³¹⁷ Because some victims of domestic violence are isolated from family and friends or have hidden the violence from others, it is likely that a number of victims would lack a concerned community upon whom to call.³¹⁸ In that case, as has occurred in other models, the facilitator would offer to assign a professional advocate to meet with the party prior to the conference and support her during the conference. Such an option should be available to either party if he/she is unable to include supporters in the conference.

3. Community

As critics have appropriately noted, involving the community in a domestic violence conference can be complex.³¹⁹ If the community does not adequately condemn the violence, a conference could reinforce unhealthy norms between the parties.³²⁰ Any domestic violence restorative justice intervention must be developed with this risk in mind and with a protocol for guarding against it. The powerful potential of positive results from community involvement outweighs its risks. Consequently, community inclusion should not be precluded. Particularly for a victim of domestic violence who has been isolated, ashamed, or conflicted about reporting violence, community condemnation can be extremely powerful.³²¹ Further, involving the community in imagining resolutions, feeling invested in enforcing that resolution, and providing support after a conference can greatly enhance the viability of conference resolutions.³²² Braithwaite and Daly, in assessing the risk of involving the community in conferences, noted a further benefit of community inclusion: "Voices in defence of exploitation and brutality will be heard in community conferences. But exploitation and brutality flourish more in secretive settings,

³¹⁷ See, e.g., 1 JOAN PENNELL & GALE BURFORD, FAMILY GROUP DECISION MAKING: NEW ROLES FOR 'OLD' PARTNERS IN RESOLVING FAMILY VIOLENCE: IMPLEMENTATION REPORT § 1.2.4.1, at 6 (1995) ("In preparation for the conference, the coordinator developed an invitation list with the family members and contacted relatives, friends, and involved professionals to secure their participation in the conference.").

³¹⁸ See LLEWELLYN & HOWSE, *supra* note 54, at 49–50 (discussing how victims become isolated from the community); *supra* note 148 and accompanying text.

³¹⁹ See *supra* Part IV.A.4.

³²⁰ See *supra* notes 149–52 and accompanying text.

³²¹ See Coward, *supra* note 132, at 19 (quoting a police officer discussing the power of community condemnation in a domestic violence intervention).

³²² See *supra* Part V.E.3 (discussing increased effectiveness of restorative justice interventions due to community involvement).

when they go unchallenged and unnoticed.”³²³ A conference, at least, may offer the opportunity to address and confront community norms and beliefs that support domestic violence and women’s oppression.³²⁴ To best address this risk, facilitators should screen potential community members and supporters, prepare them for the sessions, and have full authority to intervene to address statements that condone violence and remove from participation those family members who express such approval if their views cannot be moderated.³²⁵

4. Venue

In order to put parties at ease and reduce the anxiety of those who find the court system intimidating, conferences could be held off of court property in culturally appropriate venues.³²⁶ Depending on the backgrounds of the parties, conferences could be scheduled at community centers, social service agencies, or cultural centers.³²⁷ For example, in the Family Group Decision Making Project in Canada, which addressed domestic violence and child welfare cases, all conferences took place in community settings where childcare was provided and food was served.³²⁸

5. Ground Rules

The procedure of the conference itself will vary based on the needs of the parties. In order to foster ownership and comfort, a preliminary step for the conference (once in session) would be to establish goals and rules.³²⁹ Though the group would be empowered to

³²³ Braithwaite & Daly, *supra* note 86, at 170.

³²⁴ See *supra* notes 148–52 and accompanying text (discussing how a community may support domestic violence).

³²⁵ See Jeremy Robertson, *Research on Family Group Conferences in Child Welfare in New Zealand*, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY & PRACTICE 49, 51–54 (Joe Hudson et al. eds., 1996) (discussing how best to address family involvement in a conference).

³²⁶ See, e.g., 1 PENNELL & BURFORD, *supra* note 317, § 4.19, at 100 (“[T]he family members picked a spot at which they would feel comfortable.”).

³²⁷ See, e.g., *id.* (conferences were held at “a parish house or hall, a neighborhood community centre, a nurse’s residence, a women’s organization, and a rented conference room”).

³²⁸ See Pennell & Burford, *supra* note 88, at 171, 177 (describing a particular FGC in a domestic violence case); see also Robertson, *supra* note 325, at 60 (discussing research in New Zealand on restorative justice suggesting that venue selection, such as a family home, was usually based on the wishes of the participating family members).

³²⁹ See LLEWELLYN & HOWSE, *supra* note 54, at 66–67 (suggesting that collective rule development is a component necessary to a successful restorative justice program).

innovate and develop rules and goals that would be personally or culturally appropriate, the facilitator must ensure that the rules and goals are consistent with the general goals of restorative justice intervention and avoid coercion and intimidation. This Article advocates that certain ground rules be non-negotiable. For example, all participating individuals must feel safe at all times. A procedure must be developed to allow individuals and parties to halt the proceedings if they feel unsafe or coerced.³³⁰ Law enforcement should be accessible during conferences; however, their presence in the conference itself might well intimidate the parties.

In order to enhance the potential for effective resolutions and honest discussion, ground rules for confidentiality should also be developed. The proceedings of conferences should be kept confidential. Further, party statements should be considered privileged so that they cannot be used as admissions or to impeach a participant in any subsequent criminal or civil action.

The issue of reconciliation should also be discussed with the victim before the conference begins. Whether reconciliation will be attempted should be completely within the victim's discretion. Other conference members and facilitators must avoid encouraging reconciliation where the victim is unsure or unwilling. Similarly, conference members must avoid aggressively condemning reconciliation if a victim freely expresses willingness to reconcile with the offender. Respecting the agency of the victim to make informed, rational choices about her future requires the facilitator to be open to facilitating reconciliation in some abusive relationships. Such respect should enhance long-term safety because it will capitalize on the potential of a conference to establish ground rules for safety in a relationship.³³¹ Further, if conferences become known as venues where it is acceptable for victims to seek intervention in relationships they hope to continue, victims who currently fail to seek protection or receive ineffective protection from the justice system may choose intervention. One commentator sees this potential effect as one of the central advantages of restorative justice over the justice system:

Unlike the criminal justice system, the medical care system, and some battered women shelters, where women who stay in violent relationships have been pathologized, communitarian approaches avoid cultural and legal focus on separation and can be adapted

³³⁰ See *supra* note 219 and accompanying text.

³³¹ See *supra* Part V.B.1 (discussing how facilitating reconciliation may preserve the victim's safety).

to accommodate either women who wish [to] use the conference to safely end the relationship or women who want to work toward a less violent existence with the abusive partner.³³²

6. Storytelling

Studies of restorative justice programs suggest that storytelling is a vital component of an effective intervention.³³³ A study, for example, of a Canadian restorative justice program for domestic violence victims, found that “[f]or some victims, telling their story directly to the person who harmed them and having the opportunity to ask questions and express emotions can be very meaningful, particularly when combined with hearing an offender take responsibility for his harmful actions.”³³⁴ Thus, a victim should be given the chance to present her story about the wrongdoing. Because some victims find recounting domestic violence to be painful and debilitating,³³⁵ storytelling should not be a required component of an intervention.

7. Dialogue

Of course, a vital aspect of a conference must be a dialogue about resolution. Community members, social workers, mental health providers, probation officers, and family members involved in the conference can be particularly helpful in this stage of the conference because they can offer perspective on the parties, information on resources in the community, and personal involvement in long-term intervention. While many restorative justice programs incorporate “private family time,” in which the parties and their families meet with limited facilitator involvement, the particular dynamics of coercion and power and control that are common in abusive relationships³³⁶ suggests this “private family time” component should rarely be used in domestic violence interventions.³³⁷

³³² Koss, *supra* note 131, at 1339.

³³³ See Coker, *supra* note 101, at 58–66 (discussing the value of storytelling in peacemaking circles); Kay Pranis, *Restorative Justice and Confronting Family Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 36, at 23, 30–31 (discussing the value of storytelling for victims).

³³⁴ EDWARDS & HASLETT, *supra* note 75, at 3.

³³⁵ See *id.* at 2 (indicating that a dialogue about a painful experience can cause further harm).

³³⁶ See, e.g., 1 PENNELL & BURFORD, *supra* note 317, § 1.2.4.1, at 6–7 (Family Group Decision Making Project in Newfoundland and Labrador, Canada “allowed the family group to deliberate in private”); Morris & Maxwell, *supra* note 94, at 209–10 (dis-

8. Number of Conference Sessions

Finally, any group developing a restorative justice program will need to determine guidelines and expectations for how many conferences should be offered in each case. Restorative justice models vary greatly. Some involve one sole meeting,³³⁸ some two to ten meetings,³³⁹ and another requires at least twenty-six sessions.³⁴⁰ Any determination will depend on resources and program goals. Clearly, a program requiring twenty-six sessions for each case will be unable to process a substantial number of cases. Because no outcome data exists for the programs mandating extensive intervention, one cannot gauge the relative effectiveness of a more resource-intensive program. On the other hand, because outcome measures indicate success for programs requiring less extensive intervention, a pilot project might feature a more limited number of meetings. Given the complexity of domestic violence dynamics, family and community interaction, and the thoughtful type of relief this pilot project would seek to provide, it is hard to imagine conferences requiring fewer than three to four sessions.

F. Resolution

At the end of the conference, the group should seek to produce a resolution that can be reduced to writing.³⁴¹ Because the resolution derives from the conference participants themselves, participants can

cussing the stages involved in the Youth Justice Care and Protection Family Group Conferences in New Zealand).

³³⁷ See Braithwaite & Daly, *supra* note 86, at 154–57; Morris, *supra* note 91, at 91, 101–02; Morris & Maxwell, *supra* note 94, at 207 (discussing the stages involved in the Youth Justice Care and Protection Family Group Conferences in New Zealand).

³³⁸ See Morris & Maxwell, *supra* note 94, at 210 (stating that ten percent of cases resolved in more than two hours, and the remainder resolved in less time); Umbreit & Coates, *supra* note 132, at 23 (victim-offender mediation in Albuquerque, Minneapolis, and Oakland in 1990 was usually one session of one hour in duration).

³³⁹ See Almeida & Dolan-Delvecchio, *supra* note 289, at 677 (explaining that the initial socioeducative sessions within “culture circles” for men and women meet for eight to ten weeks); EDWARDS & HASLETT, *supra* note 75, at 6 (stating that some “dialogue sessions” for domestic violence victims and offenders met two to three times and others met between five and eight times before possible resolution).

³⁴⁰ See Grauwiler et al., *supra* note 59, at 585–86, 588–90, 593 (providing an overview of Construyendo Circulos de Paz (Constructing Circles of Peace) in Nogales, Arizona, which requires the offender to attend twenty-six weeks of restorative justice circles with his family, support people, community members, and the victim, if she is willing).

³⁴¹ See DISSEL, *supra* note 61, at 14 (discussing how such agreements are reduced to writing).

have a sense of ownership over the outcome.³⁴² For example, a study reports that in one conference, one victim, who spoke very little, was asked if she was satisfied with the plan; she responded, with a grin, "I wrote it, didn't I?"³⁴³ By capitalizing on the flexibility of the restorative justice format, remedies contained in a resolution can be wide-ranging and creative.

One critic of restorative justice laments that it can address only the harms to be repaired by the offender and not the other needs of the victim that would also serve to keep the victim safe.³⁴⁴ Such a perspective suggests an unduly narrow view of the potential of restorative justice. A resolution could include commitments from the offender; remedies available from the justice system through a protection order, such as family law remedies and stay-away orders; and additional commitments from family and the community. For example, a resolution could include commitments that the victim will seek victim's compensation from her jurisdiction's fund; commitments from the jurisdiction to provide parties with job training; and commitments from family members to provide child care, swiftly intervene in future violence, or attend future counseling sessions. As one commentator noted about one particular restorative justice program,

Both [that program] and formal adjudication have the capability to connect battered women with community resources. However, the breadth of [that program's] reach and its reliance on clan and familial responsibility have the potential to alter the victim's social context in a way that may not be true of formal adjudication.³⁴⁵

Examples from resolutions reached in other restorative justice intervention programs illustrate the broad range of relief that might appear in a resolution if the conference includes individuals with authority to make broad-ranging commitments. Navajo peacemaking circles dealing with domestic violence include agreements by the family to support the victim and offender, commitments by the offender to seek alcohol treatment, and a commitment by both parties to separate for sixty to ninety days.³⁴⁶ Another resolution related to a family

³⁴² See *supra* note 46 and accompanying text (discussing the correlation between one's level of control in the process and one's satisfaction).

³⁴³ Gale Burford et al., *Family Group Decision Making*, in *SOCIAL WORK PROCESSES* 278, 282 (Beulah R. Compton & Burt Galaway eds., 6th ed. 1999).

³⁴⁴ Herman, *supra* note 304, at 78.

³⁴⁵ Coker, *supra* note 101, at 50.

³⁴⁶ *Id.* at 46–47, 73.

abuse case in a Canadian program required that all family outings be alcohol free, that the violent parent live separately until he completed counseling, and that a child protection case worker consistently monitor the family.³⁴⁷

While some may fret that restorative justice resolutions provide soft, ineffective justice, research suggests that restorative justice programs that include the community “build[] on the sanctions abusive men said they fear most. Only a minority of batterers feared criminal punishment or job loss (36% and 27%, respectively). Instead, they believed that the major cost of a domestic violence arrest would be self-stigma, family stigma, and broad social disapproval.”³⁴⁸ If family and community play an integral role in the conference, it is likely that, for some offenders, restorative justice will have a substantial impact.

Prior to formal ratification of the agreement, one further step should be taken to confirm that the parties reached agreement without coercion. Given the dynamics of domestic violence, each party should meet separately with the facilitator to discuss the resolution. If either party expresses an unwillingness to comply or intimates that he or she was coerced into reaching a resolution, the facilitator should reconvene the group for further discussion and possibly for dismissal without resolution. Finally, both parties should formally ratify the agreement by signing the document. Additional conference members could also signify their commitments by signing the resolution.

If resources permit, conference facilitators should make contact with both parties periodically for the first three months following the resolution. Such continued contact could remind the parties of the oversight in place and could ensure some level of compliance. At the request of the victim, a facilitator could reconvene the conference for an additional session.

G. *Enforcement*

After a resolution has been reached, what is the enforcement mechanism is available? The role of the court subsequent to a restorative justice conference provokes significant debate and varies greatly among restorative justice programs. In many restorative justice programs, courts approve and enter agreements reached in confe-

³⁴⁷ Burford et al., *supra* note 343, at 282.

³⁴⁸ Koss, *supra* note 131, at 1338.

rence.³⁴⁹ When restorative justice intervention substitutes for criminal prosecution, some programs require court approval of the agreement and compliance as a condition for suspending the criminal prosecution.³⁵⁰ If the offender violates the agreement, the prosecution can refile the criminal case.³⁵¹ Other community-based restorative justice programs seem to eschew all court involvement, often providing independent resolution, monitoring, and enforcement mechanisms.³⁵²

Complete independence from the court has significant appeal. For those victims and offenders who have negative associations with or who fear the court system, a restorative justice program with no court involvement could be extremely attractive. Once the court becomes involved in an intervention, even if its role is solely to enter and enforce a resolution, there is potential for the parties to act on motivations unrelated to their own free will. An offender may be concerned about agreeing or not agreeing to particular forms of relief (or even to the resolution) entirely based on how he believes the judge will react when entering the order. A victim, similarly, might be motivated in conference by her own concerns about the judicial response to the relief in a resolution or to her withdrawal from or termination of a conference.³⁵³ In addition, a judge is very likely to amend or question the resolution during a hearing on whether to enter the agreement, thereby subverting the will of the conference participants and the agreement of the parties. For example, such a phenomenon occurs regularly when judges enter negotiated settlements

³⁴⁹ See, e.g., DISSEL, *supra* note 61, at 14, 31–32 (discussing the role of the court and prosecutor in withdrawing a case after an agreement is reached between the parties through mediation in South Africa); Umbreit & Coates, *supra* note 132, at 23–24 (discussing a Victim Offender Mediation program in Albuquerque, Minneapolis, and Oakland in the 1990s, which produced restitution contracts between the offender and victim that were entered by the court).

³⁵⁰ See, e.g., DISSEL, *supra* note 61, at 31–32 (describing victim offender conferences in certain sites in South Africa, where the court and prosecutor would suspend the criminal case to allow the parties to comply with the agreement); Morris, *supra* note 91, at 91 (stating that the final stage of a New Zealand youth offender conference involves sending resolutions of court-referred cases to the court for approval).

³⁵¹ See, e.g., DISSEL, *supra* note 61, at 31–32.

³⁵² See, e.g., Almeida & Dolan-Delvecchio, *supra* note 289, at 667–80 (providing an overview of a family intervention program that seems to operate without any court involvement or judicial agreement enforcement).

³⁵³ See *supra* notes 39–42 and accompanying text (discussing victims' negative experiences with judges and the court system in general).

in protection order cases.³⁵⁴ Concerned about the fairness, enforceability, or propriety of the terms of a negotiated protection order, a judge may alter terms of the order before entry.

Despite the risks of court involvement, however, benefits of court enforcement abound. First, though the power of community disapproval is strong, the state's role in condemning criminal acts, particularly domestic violence, can be enormously meaningful.³⁵⁵ If an entire intervention takes place in the privacy of a small conference, and the resolution is a mere agreement between the parties with no legal enforceability, some offenders may well fail to take the intervention seriously. Similarly, a victim may well attain a sense of increased empowerment by appearing before a judge, hearing a judge read aloud in public the offender's admission, and watching a judge ratify the resolution she negotiated for herself. Even some of the most aggressive proponents of restorative justice as an alternative to the justice system agree that court enforcement enhances restorative justice's potential for success.³⁵⁶ One commentator, looking at programs in New Zealand, argues that the state has a significant role as enabler of restorative justice interventions.³⁵⁷ Finally, if the resolution fails to become an order of the court, it cannot be enforced legally through contempt proceedings. Facilitators and conference attendees must, therefore, place pressure on the offender to comply. The victim can threaten to take the matter into the formal justice system. But in the end, without court involvement, the victim has little recourse for enforcement of an agreement that resulted from a significant investment of time and resources.

To address the parties' fears of the court system, resolutions could be entered by the court in ways that minimize intimidation. A magistrate or judge could enter resolutions in a very small hearing room, or in chambers. A judge could even interface with the parties

³⁵⁴ See, e.g., *Maldonado v. Maldonado*, 631 A.2d 40, 42 (D.C. 1993) (reversing a judge's refusal to enter an order to which the parties had consented).

³⁵⁵ See Herman, *supra* note 304, at 78 (arguing that the government's role in stating its disapproval of criminal acts is symbolically very important and that the state should not be totally eliminated from restorative justice interventions).

³⁵⁶ See Braithwaite & Daly, *supra* note 86, at 163 (stating that court enforcement should be part of the enforcement mechanism of restorative justice in some cases); Pranis, *supra* note 333, at 32 (supporting enforcement by the formal justice system of restorative justice interventions).

³⁵⁷ Vernon Jantzi, *What Is the Role of the State in Restorative Justice?*, in *CRITICAL ISSUES IN RESTORATIVE JUSTICE*, *supra* note 185, at 189, 191–93.

and enter the resolution via television satellite hookup.³⁵⁸ Parties should be informed about the informality of the court interaction when considering entering into restorative justice. In this way, the process would be less intimidating, but the imprimatur of the state and the legal enforceability of the resolution would remain intact.

Legislation and rulemaking could address concerns about judicial tampering with resolutions. Judges could be directed to refrain from modifying agreements unless their provisions are against public policy, and the facilitator could appear with the parties to defend the agreement and remind the judge of legislative or regulatory prohibitions on modification. In preconference counseling and during the conference, the facilitator could remind the parties that the judge lacks the authority to modify agreements. Of course, this counsel may not allay the fears of all parties. Similarly, legislative or regulatory prohibitions will probably still fail to deter some judges from expressing their opinions about certain commitments or lack of commitments included in a particular resolution.

One additional practical issue would need to be resolved if a restorative justice agreement were to become enforceable by the court: what would be the effect of court enforcement of commitments from conference attendants other than the offender? Would conference participants remain willing to make commitments to assist the parties if they knew that failure to follow through would result in criminal or civil liability? Most likely, the answer would be, "No." Therefore, agreements presented to the court should be formatted in two delineated sections to cover those commitments made by the offender, which are enforceable through contempt proceedings, and those commitments made by other individuals, which are *not* enforceable by court action.

Such compromises would enhance the potential success of restorative justice agreements but would also accommodate some of the legitimate concerns associated with court involvement.

³⁵⁸ Judges in at least two jurisdictions are hearing or will soon hear temporary protection order cases via webcam. See Beth DeFalco, *NJ Hospital to Offer Care, Restraining Orders*, DAILY RECORD (Morristown, N.J.), Aug. 4, 2009, at 1 (explaining that a hospital in New Jersey is going to start using webcam hookups to the court so that victims can get temporary protection orders without ever leaving the hospital); Superior Court of D.C., Domestic Violence Unit, Intake Centers, <http://www.dccourts.gov/dccourts/superior/dv/intake.jsp> (last visited Jan. 31, 2010) ("The Greater Southeast Center processes Temporary Protection Orders (two week orders) via teleconferencing.").

H. Evaluation

Any group developing a restorative justice program should plan for evaluation. Far too few restorative justice programs have produced useful outcome measures that can inform the development of future programs. Though some general criminal and juvenile programs have been evaluated and analyzed, extremely few domestic violence interventions have been studied. A program's self-analysis can inform the development of future programs and the enhancement of the program itself as it develops. In addition, evaluations are critical to ensure the fairness and justice of restorative justice programs. Because conferences generally will be limited to participants, they will have little oversight. Mandating careful evaluation would require facilitators to be accountable for the just and fair treatment of those involved in the process.

VII. CONCLUSION

We cannot continue to watch domestic violence interventions protect some people but fail so many others. We cannot allow domestic violence homicide rates to remain static despite our increasingly aggressive intervention policies. Instead, it is time to reassess our current programs and enhance options for offenders and victims—options that may better serve the needs of the individuals needing services and the wide variety of violent dynamics present in the justice system.

Rejecting the positive potential of restorative justice interventions because some aspects of the theory appear incompatible with violent intimate relationships betrays a misunderstanding of both the potential benefits of restorative justice and its flexibility. With significant consideration of the complexities of domestic violence and of the needs of offenders and victims, restorative justice programs have the potential to provide effective intervention, particularly for certain victims who will not access the formal justice system or for whom the justice system is simply not effective. Restorative justice programs have the potential to develop community- and family-based resolutions that address the victims' and offenders' individual needs. They have the potential to more broadly affect community norms because conferences gather and engage a broader cross-section of the concerned community into condemning domestic violence. Only through informed development, implementation, and evaluation of restorative justice domestic violence interventions can we begin to as-

2010]

RESTORATIVE JUSTICE

595

sess restorative justice's potential for success in domestic violence cases.