

Drawing the Line

When to Apply Restorative Justice to Cases of Violence against Women

Current trends in international law have influenced the treatment of women's rights in the United States. Advocates and practitioners are increasingly looking to international law for methods to litigate violence against women and attacks on reproductive freedom.¹ Because international experiences are so instrumental in shaping the legal dialogue about women's issues, I propose framing the debate about alternative approaches to domestic violence in the context of transitional justice as understood in post-conflict situations. As defined by the International Center for Transitional Justice, transitional justice "refers to a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights."² These elements of transitional justice, when used more generally in a society not emerging from conflict, are called "restorative justice."³ I will adopt the term "restorative justice" in this paper because of its emphasis on reconstructing relationships after a wide variety of conflicts, not only governmental transitions. Scholars often discuss mediation as a possible resolution to crimes of violence against women, especially

¹ CENTER FOR REPRODUCTIVE RIGHTS, STEP BY STEP GUIDE: USING THE UN TREATY MONITORING BODIES TO PROMOTE REPRODUCTIVE RIGHTS 1 (2004) *available at* http://www.reproductiverights.org/pdf/pub_bp_stepbystep.pdf.

² International Center for Transitional Justice, What is Transitional Justice?, <http://www.ictj.org/en/tj> (last visited Mar. 7, 2008).

³ Transitional justice refers specifically to societies or nations emerging from civil wars or other divisions, and restorative justice deals with a more general use of nontraditional methods in responding to violence. Restorative justice is sometimes encouraged by those who are disillusioned with the current state of the criminal justice system in a given region. Rodrigo Uprimny & Maria Paula Saffon, *Transitional Justice, Restorative Justice, and Reconciliation: Some Insights from the Colombian Case*, 2-4 ("Coming to Terms" with Reconciliation, Working Paper Library), *available at* http://global.wisc.edu/reconciliation/library/papers_open/saffon.pdf (explaining the difference between transitional justice and restorative justice).

domestic violence.⁴ Because the term “mediation” implies a certain business-world model, I propose using the more human-rights based understanding of transitional and restorative justice for this paper.⁵

The various benefits and detriments to restorative justice have led to much debate about its use in cases of violence against women. Using the context of transitional justice, I will draw on the successful example of the South African Truth and Reconciliation Commission (TRC). Much like international observers advocate replicating the South African model of restorative justice in other post-conflict regions, some scholars argue that restorative justice as used in the domestic violence context should be extended to other forms of violence against women, including stranger sexual assault.⁶ Given that alternative dispute resolution may be effective in certain types of cases, it is difficult to resist the urge to encourage its use in other areas of the law. Understanding the success of the TRC as the result of a carefully crafted compromise, women’s rights advocates should note that restorative justice, like transitional justice, is successful when tailored to a specific situation. Those committed to protecting the rights and bodies of women must ask where to draw the line between those situations that will benefit from non-traditional forms of justice and those that are better served by the criminal justice system.

⁴ See generally Trina Grillo, “The Mediation Alternative: Process Dangers for Women” 100 YALE L. J. 1545 (1991); see also Heather Strang & Lawrence W. Sherman, “Repairing the Harm: Victims and Restorative Justice” 2003 UTAH L. REV. 15 (2003); see also Jeffrey Fagan, National Institute of Justice Research Report, *The Criminalization of Domestic Violence: Promises and Limits* (Jan. 1996) available at <http://www.ncjrs.gov/txtfiles/crimdom.txt>; see also Brenda V. Smith, “Symposium: Battering, Forgiveness, and Redemption” 11 AM. U. J. GENDER SOC. POL’Y & L. 921 (2003).

⁵ Mediation is often viewed as a process that gears the victim and offender to a goal predetermined by an outsider. For this reason and others, the mediation model has received harsh criticism from feminists. See Lois Presser & Emily Gaarder, “Can Restorative Justice Reduce Battering? Some Preliminary Considerations,” 27 SOC. JUST. 175, 175 (2000).

⁶ In this paper I refer to victims of domestic violence and sexual abuse with female pronouns and to offenders of these crimes with male pronouns. Although victims and offenders can be of any gender, I do so for the sake of readability and to reflect the fact that the overwhelming majority of domestic violence victims are women. Barnes Jewish Hospital, *Some Facts about Domestic Violence*, <http://www.barnesjewish.org/groups/default.asp?NavID=1640> (stating that 91-95% of domestic violence victims are female who have been abused by male intimate partners).

I propose using the relationship between the parties as the deciding factor in determining which cases are candidates for restorative justice models and which should be reserved for the traditional court system. In this paper I will argue that alternative dispute resolution mechanisms are most appropriate and effective in situations, such as many domestic violence cases, where the parties have a past relationship and are seeking to create a greater peace than that allowed by retribution. Sexual assault cases between strangers that may cause similar pain to the victim but are not based on a prior workable relationship will not make good candidates for restorative justice or other alternative approaches to resolution.⁷ We must look to the nature of the parties, not the nature of the crime, when determining whether restorative justice is an appropriate option. Specifically, I will argue that four criteria need to be met in order for restorative justice to be successful: (1) there must be a workable relationship between the parties, (2) the offender must accept responsibility for his actions, (3) both victim and offender must be dedicated to the process of creating a workable relationship, and (4) the process must involve interested community members that can support the parties as they work toward their goals.

The Context of the South African Truth and Reconciliation Commission

An appropriate case study for a discussion on the place of restorative justice in the context of domestic violence cases is the South African transition to democracy, an example often cited as the hallmark of modern transitional justice. Emerging from apartheid, South Africa initiated its Truth and Reconciliation Commission (TRC) in 1995 to encourage truth-telling about abuses that had happened under the former regime and to foster reconciliation

⁷ Many victims of domestic violence are also victims of sexual assault. The Department of Justice estimates that 50% of family violence victims were raped or sexually assaulted. Matthew R. Durose, et al, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances (June 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>. For this paper, I do not attempt to distinguish between domestic violence and sexual assault in general, rather I seek to distinguish between crimes committed between strangers and those committed between parties with an important preexisting relationship.

between previously adverse groups.⁸ Some analysts claim that the TRC did not uncover a great deal of truth nor bring about reconciliation on a national level.⁹ Its greatest success, some claim, was its ability to provide a smooth transition to a democratic government that could assure a peaceful future.¹⁰ A virtue of the TRC is that it helped people “overcome what has been done to them... and of overcoming what they have done, so that a future might be built.”¹¹ The greater justice of a peaceful future is the cornerstone of the success of the TRC. Politicians and scholars have since tried to apply the TRC model to other areas and conflicts ranging from political violence in Latin America to treating the recent terrorist attacks on September 11, 2001.¹² Although restorative justice has many applications, what worked in one situation may not be an appropriate solution for all societies with divided pasts. Restorative justice is effective when parties use it to forge a peaceful future, but may not be as effective when used for other objectives. It is within this framework that I analyze the debate surrounding restorative justice in cases of violence against women.

Overview of Restorative Justice as a Dispute Resolution Mechanism

⁸ Official Truth and Reconciliation Commission Website, <http://www.doj.gov.za/trc> (last visited Nov. 13, 2007).

⁹ See Colin Bundy, *The Beast of the Past: History and the TRC*, in AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA 9-20 (Wilmot James & Linda van de Vijver, eds., 2001) (arguing that the TRC’s version of the truth was not complete and that by focusing on the individual nature of the crimes the TRC portrayed a distorted version of the truth); see generally LYN GRAYBILL, TRUTH AND RECONCILIATION IN SOUTH AFRICA: MIRACLE OR MODEL? (Lynne Rienner Publishers, Inc. 2002) (investigating whether the TRC was a miracle or a calculated compromise and claiming that the TRC may have brought about individual healing but not reconciliation on a national scale); see also Antjie Krog, *The Truth and Reconciliation Commission – A National Ritual?*, 26 MISSIONALIA 5 (April 1998) (arguing that the TRC brought about reconciliation on an individual but not a national level).

¹⁰ Colleen Scott, “The South African Truth and Reconciliation Commission: Harrowing the Ground so that Others May Build,” European Platform for Conflict Prevention and Transformation 1 http://www.gppac.net/documents/pbp/11/3_safric.htm.

¹¹ *Id.* at 1.

¹² Ellis Cose, *Honoring the Past, Healing the Soul*, in BONE TO PICK: OF FORGIVENESS, RECONCILIATION, REPARATION, AND REVENGE INTRODUCTION 1 (2004) (stating “But though Archbishop Tutu’s TRC was not the first, it was far and away the most popular. And because it was so celebrated, it inspired numerous others in places as disparate as Peru and East Timor.”).

While the South African case is often cited as the main success story of restorative justice work, the elements of restorative justice have been used for centuries.¹³ Restorative justice, now considered to be a modern development in the law, used to be the norm in most societies.¹⁴ More recently, restorative justice has been cited as a proper alternative to the failures of the traditional criminal justice system.¹⁵ Restorative justice views crime as a violation against a community of people and the relationships therein. The traditional legal system, on the other hand, focuses on judges and juries who analyze crimes as external observers.¹⁶ The adversarial nature of the legal system is inherently masculine and replicates an unbalanced power dynamic (state vs. defendant) similar to that in many incidents of violence against women (male vs. female). The patriarchal nature of the traditional legal system is based on linear reasoning that leaves little room to contemplate the emotional states of the parties.¹⁷ Justice in this context is that achieved through rationality and reasonableness. While the traditional justice system leaves victims on the sidelines, serving only to offer evidence to the prosecution, restorative justice “attempts to involve the victim, wrongdoer, and community in the search for solutions which promote repair, reconciliation, and reassurance.”¹⁸ The underlying logic of restorative justice is

¹³ The Babylonian Code of Hammurabi (c. 1700 B.C.) and the Sumerian Code of Ur-Nammi (c. 2060 B.C.) had elements of restorative justice including restitution for particular offenses. The laws included methods of restoring the victim’s property or dignity. Around the end of the 11th century, retribution became the most common form of justice in Great Britain, and this has carried over to the current justice system in the United States. Reginald D. Wilkinson, Editorial, *A Shifting Paradigm: Modern Restorative Justice Principles Have Their Roots in Ancient Cultures*, Corrections Today, December 2007, available at <http://www.drc.state.oh.us/web/Articles/article28.htm>; see also John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIM. & JUST. 1, 1-3 (1999).

¹⁴ Strang & Sherman, *supra* note 4 at 16.

¹⁵ See generally Strang & Sherman, *supra* note 4.

¹⁶ Mary Ellen Reimund, Criminal Justice System Reform Symposium, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 668 (2005).

¹⁷ “The concern for the particular facts of a dispute has been characterized as a feminine search for context, while the pursuit of applicable legal principles has been viewed as a masculine search for certainty and abstract rules” Grillo, *supra* note 4, quoting Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 at 49 (1985).

¹⁸ Heather Block & Chris Lichti, *Restorative Justice with Respect to Domestic Violence and Sexual Abuse* 1, <http://archive.uua.org/cde/csm/restorative.html>.

that punishment is inadequate and inefficient in establishing peace or promoting a functional society.¹⁹ Retribution can fail victims and their families, doing little to provide comfort to victims and providing little opportunity to heal from the crime.²⁰ Victims of crime have reported dissatisfaction with the criminal justice system not because of lenient punishment for the offender, but because “they are unhappy about their lack of a legitimate role in the processing of their cases beyond that of witness for the prosecution, the lack of opportunity to be consulted about the progress of their cases, the lack of recognition of the emotional, as well as material, harm they have experienced, and the lack of fairness and respect they receive at the hands of the justice system as a whole.”²¹ Restorative justice, on the other hand, offers victims more options by which they can facilitate their recovery.²²

The seemingly binary nature of restorative justice and retribution is an attractive option to feminists who wish to counter the failings of the adversarial system and punishment. The very nature of retribution is overtly masculine,²³ and although punishment may be appropriate for some crimes, some women’s rights advocates are seeking alternatives to this system in order to create forms of justice that empower and protect women.²⁴ Restorative justice deviates from the

¹⁹ Uprimny & Saffon, *supra* note 3 at 4. The U.S. Department of Justice notes that many Americans feel alienated from the traditional justice system. Online Restorative Justice Notebook, National Justice Institute, <http://www.ojp.usdoj.gov/nij/publications/rest-just/backgnd.htm> (last visited Mar. 7, 2008).

²⁰ Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 458 (2006) (stating that “Although victims obviously play an integral part in every case prosecuted by the state, both retributive and utilitarian theories of punishment subsume a victim’s individual concerns to the state’s larger interest in the pursuit of public justice”).

²¹ Strang & Sherman, *supra* note 4 at 18.

²² Mills *supra* note 20 at 458.

²³ Larry L. Tiff and Lyn Markham claim, “...patterns which form the foundation of our social and cultural structure – hierarchy, gender superiority, property-possession, and diminution – foster, reinforce, and regularly produce the battering of women.” Larry L. Tiffy & Lyn Markham, *Battering Women and Battering Central Americans: A Peacemaking Synthesis*, in CRIMINOLOGY AS PEACEMAKING 114, 117 (Harold E. Pepinsky & Richard Quinney, eds., 1991).

²⁴ M. Kay Harris, *Moving Into the New Millennium: Toward a Feminist Vision of Justice in CRIMINOLOGY AS PEACEMAKING* 83, 90 (Harold E. Pepinsky & Richard Quinney, eds., 1991) (arguing that feminists must find “a more complete vision of justice and morality, a vision that encompasses concern for process and outcomes, as well as principles and rules, and for feelings and relationships, as well as logic and rationality).

patriarchal linear reasoning of the traditional legal system and instead relies on a more holistic, indeed feminist, approach to justice.²⁵ Advocates have been looking to restorative justice to more effectively treat domestic violence in particular. Such alternatives provide a venue for women victims to exert more control than traditionally allowed in the criminal justice system, thereby empowering them to actively direct the proceedings.

Although restorative justice can facilitate peace between a victim and her abuser, it has some shortcomings which should not be understated. Some victims feel forced into forgiveness or reconciliation when they prefer traditional punishment for the offender.²⁶ Restorative justice techniques, by removing the victim from the traditional legal system, may indicate a general desire to move victims out of public concern and into the personal. This is especially problematic for domestic violence victims, who have fought to have their cases prosecuted in the traditional legal system.²⁷ Nontraditional methods of dealing with domestic violence cases in particular may show a disconnect between the academic discourse and the reality of domestic abuse.²⁸ The power imbalance between victim and offender in these situations may prevent the victim from benefiting from the empowerment restorative justice is supposed to lend.²⁹ Some

²⁵ Grillo *supra* note 4 at 1548.

²⁶ Kathleen Daly, *Restorative Justice and Sexual Assault*, 46 BRIT. J. CRIMINOLOGY 334, 337 (2006); (showing that victims may be pressured to accept certain outcomes, such as offering their forgiveness or accepting an apology against their wishes).

²⁷ Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L. J. 235, 236 (2002) (arguing that "using mediation instead of adversarial adjudication in family law cases serves as a setback to [the trend to publicize domestic violence and create more legislation that punished and deterred batterers and helped victims] because of mediation's inherent private and non-adversarial function").

²⁸ Rose Thelen states, "despite legal advances, unless there is a coordinated community response, batterers will take advantage of the fragmentation, misunderstanding, and bias of the criminal justice system to avoid prosecution and subsequent consequences for their acts of violence, often further isolating, manipulating, and controlling their victims in order to do so." Rose Thelen, *Advocacy in a Coordinated Community Response: Overview and Highlights of Three Programs*, <http://www.mincava.umn.edu/documents/bwjp/communityv/communityv.pdf>.

²⁹ Some offenders and victims communicate during mediation sessions through a personal set of action and language that will reinforce their power dynamic and prevent the victim from expressing her true desires and emotions. Karla Fischer, Neil Vidmar, & Rene Ellis, *Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases* 46 S.M.U. L. REV. 2117 (1993) (arguing that the culture of battering includes inherent power dynamics that may render mediation ineffective in domestic violence cases) available at [http://eprints.law.duke.edu/archive/00001014/01/46_S.M.U._L._Rev._2117_\(1992-1993\).pdf](http://eprints.law.duke.edu/archive/00001014/01/46_S.M.U._L._Rev._2117_(1992-1993).pdf).

offenders may be incorrigible and traditional punishment may be the only method by which to ensure a peaceful future for the victim. Given the heated debate about the merits and failings of restorative justice, we must carefully analyze its application. The following sections will show that domestic violence cases may benefit from restorative justice because it focuses on rebuilding the relationship between the parties, but that we must also use caution in blindly extending restorative justice to all cases of violence against women.

Restorative Justice as Applied to Domestic Violence Cases

Domestic violence is the manifestation of one person exerting control over another person in an intimate or family relationship. The offender may use physical or emotional violence, sexual abuse, intimidation, isolation, economic abuse, or threats of the same to establish control over the victim.³⁰ Although hardly a new crime, only recently has domestic violence occupied such a large part of the debate about how the criminal justice system relates to women.³¹ The law traditionally viewed domestic violence as inherently private and created a legal curtain behind which men could abuse their female partners with impunity.³² A “cultural tolerance” of violence against women fueled the longevity of this hands-off approach to domestic violence cases.³³ Over the past few decades, domestic violence has evolved from a traditionally private issue that does not warrant legal intervention into a general public concern that demands creative solutions.³⁴ With the advent of strict legislation such as mandatory arrest

³⁰ More Information on Domestic Violence: What Is Domestic Violence?
http://www.womenslaw.org/more_info.htm (last visited Nov. 14, 2007).

³¹ Krieger, *supra* note 27 at 235.

³² Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2118 (1996); Interestingly, this idea persists today - some victims and offenders have cited the private nature of the crime, indicating the engrained belief that domestic violence is not a public issue. The most common reason (34% of cases) given for not reporting domestic violence to the police was that the issue was private. Durose, *supra* note 7.

³³ Presser & Gaarder, *supra* note 5 at 176, citing Fagan, *supra* note 4.

³⁴ Deborah M. Weissman, *The Personal Is Political – and Economic: Rethinking Domestic Violence*, 2007 B.Y.U.L. REV. 387, 388 (2007) (arguing that international globalization has so altered the economic fabric of our communities

and no-drop policies came greater public debate about the effectiveness of concentrating on these prosecutorial aspects of the crime and the ways in which these laws and others may harm as well as help women.

The traditional criminal justice system may seem like the appropriate venue for addressing violence against women. A closer look, however, reveals that the system's inadequacies may do little to address the needs of victimized women and decrease the incidence of domestic violence. There are four main characteristics of the traditional justice system that make it ineffective at delivering justice to all victims of domestic violence. First, policies aimed at bolstering the power of the police and prosecution mirror biases pervasive in the legal system.³⁵ Mandatory arrest and no-drop policies are more likely to be applied in poor neighborhoods and communities of color, creating a general distrust of the police and lessening the availability of alternative forms of dispute resolution.³⁶ Second, victims of domestic violence may not want to resort to traditional measures of retribution because of the unique relationship she has with her abuser.³⁷ Statutory mandatory arrest requirements, for example, are likely to dissuade the victim from seeking help at all.³⁸ The adversarial system pits the parties against each other, and not all victims will want to act in complete opposition to their intimate partners or family members. Third, the crime of domestic violence itself is based on power differentials within an intimate or family relationship, and the hierarchical structure of the legal system

that it has increased the occurrence of domestic violence and simultaneously has erased the line between private and public).

³⁵ Presser & Gaarder, *supra* note 5 at 177; see also Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281 (1997).

³⁶ Weissman, *supra* note 34.

³⁷ Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 561 (1999) (stating that mandatory policies "visit upon these victims...an interaction...that contains many of the emotionally abusive elements of the victim's relationship with the batterer").

³⁸ Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 241-244 (2005).

replicates this very power structure.³⁹ The victim has the same diminished power and opportunity for control in the legal system as she does within the context of domestic violence. The naturally adversarial structure of the traditional legal system may not be the best recourse for victims of domestic violence.⁴⁰ Finally, the traditional criminal justice system is ineffective for many cases of violence against women.⁴¹ The odds of an individual charged with sexual assault receiving a conviction of the same is less than 4 in 100.⁴² The legal system does not respect the needs of the victim and supplants her desires with the more general state's interest.⁴³

Given the inadequacies in the traditional justice system, scholars and practitioners have been looking for alternative forums for domestic violence cases. The literature about nontraditional approaches to treating domestic violence cases centers around mediation.⁴⁴ I propose a broader interpretation of nontraditional dispute resolution mechanisms: following the international example of transitional justice, we should look to forms of restorative justice that are more appropriate to domestic violence cases than only mediation. Carrying overtones from the business world, mediation entails a non-adversarial encounter of the parties with the help of a neutral third-party who helps the parties reach a reasonable solution. Although the concept of mediation is important for parties of domestic violence cases, the idea of restorative justice focuses more on the offender's acceptance of responsibility, the victim's ability to choose the outcome, and the community's interest in supporting a peaceful resolution of the dispute.

³⁹ Presser & Gaarder, *supra* note 5 at 177, quoting SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 176 (Boston: South End Press 1982) (stating that "the criminal justice system began to appear as complicit in the maintenance of unequal power relations based on class, gender, and race).

⁴⁰ Grillo, *supra* note 4 at 1547 (stating that "[t]he family court system, aspiring to the ideal of objectivity and operating as an adversary system, can be relied on neither to produce just results nor to treat those subject to it respectfully and humanely).

⁴¹ Fay Honey Knopp, *Community Solutions to Sexual Violence: Feminist/Abolitionist Perspectives in CRIMINOLOGY AS PEACEMAKING* 181, 183 (Harold E. Pepinsky & Richard Quinney, eds., 1991) (discussing how violence against women is not reduced by a society that deals with symptoms instead of causes of crime).

⁴² HUBERT FIELD & LEIGH BIENEN, *JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW* 95 (1980).

⁴³ Mills, *supra* note 20 at 459.

⁴⁴ See generally Krieger, *supra* note 27; Fischer, *supra* note 29.

Even though the traditional legal system may not provide the best solution for domestic violence victims, many scholars are hesitant to embrace alternative techniques.⁴⁵ There is much disagreement about whether to diverge from the traditional justice system at all, and if so, in which situations. To clarify this debate, I propose choosing cases that will be successful candidates for restorative justice by analyzing the nature of the parties, not the nature of the crime. By focusing on the situation of the parties instead of the type of crime, restorative justice can do more to bring about an improved relationship between the parties.

Balancing Rights under Restorative Justice

The traditional legal system balances the rights of the victim and rights of defendant using rules and procedural requirements that clearly define these rights. Although there are protections for the defendant before and during criminal trials, the very nature of prosecution places a greater weight on the rights of the victim than the rights of the defendant. Restorative justice also strikes a balance between the rights of victim and defendant. Focusing more on rehabilitation instead of retribution allows restorative justice to respect the rights of offenders. Instead of ostracizing the offender from the rest of society, restorative justice increases his connections with community members to help him accept responsibility for his actions and seek ways to change. The correction of the offender should not lead to the conclusion that restorative justice techniques should be used to overhaul the traditional justice system and make it fairer to defendants.⁴⁶ The benefit of the balancing of rights in restorative justice is that it facilitates a nonviolent future relationship between the parties, not only that it is more respectful to the offender.

⁴⁵ Fischer et al., *supra* note 29 (arguing that mediation is incompatible with the culture of battering); *see generally* Krieger, *supra* note 27.

⁴⁶ The inequities in the criminal justice system call for massive reforms that are outside the scope of this paper. Although restorative justice takes the rights of the offender into consideration, it is not a panacea for all the problems of the justice system.

Using Restorative Justice: Drawing the Line

Because restorative justice may be helpful in dealing with some offenses, it does not follow that restorative justice should be implemented throughout the criminal justice system.⁴⁷ There needs to be a general understanding of which offenses are candidates for restorative justice and which are not. Those who have written about applying restorative justice to domestic violence usually include sexual assault as a similar category of crime.⁴⁸ I argue that these two categories, although similar in many ways, should be separated in the discussion on restorative justice. Domestic violence is one person exerting control over another person in an intimate or family relationship.⁴⁹ Sexual assault can often be a manifestation of this physical control, thus blurring lines between sexual assault and domestic violence. For the purposes of restorative justice, however, I claim that sexual assault between strangers is a different situation than between intimate partners. I disagree with authors who place domestic violence and sexual assault in the same category and instead argue that the preexisting relationship between the parties should dictate the opportunities for seeking justice. Instead of asking whether a crime involves violence against women, we should ask about the unique situation of the parties themselves. Not all cases of violence against women will be appropriate for restorative justice, and we should be careful about extending restorative justice to broad categories of offenders and victims.⁵⁰ In this section I will draw the line between cases that are appropriate for restorative justice and those that are not by defining the requirements for success in a restorative justice setting. Generally, the defining characteristics of cases appropriate for restorative justice techniques are those based not on the crime, but the parties themselves. Restorative justice

⁴⁷ Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986) (arguing that ADR is sometimes appropriate, but we should be concerned that it is on a runaway course).

⁴⁸ Daly, *supra* note 26; Block & Lichti, *supra* note 18.

⁴⁹ Womenslaw.org, *supra* note 30.

⁵⁰ Edwards, *supra* note 46.

places great obligations on both offender and victim, and therefore only parties with certain relationships and with certain attitudes toward justice will be successful.

First, there must be a workable relationship between the parties. This is the most important foundation upon which to build restorative justice. Justice is not defined as putting the parties in the situation they were in before the violence occurred, because this was the very situation that gave rise to violence. Successful restorative justice, using the South African example, is creating a sustainable peaceful future between the victim and the offender. Parties with no previous relationship to each other have no basis on which to build a peaceful future. Restorative justice seeks to achieve the improvement of this relationship; among strangers there is no prior relationship upon which to create a peaceful future.

Secondly, the offender must take responsibility for his actions.⁵¹ Although the victim is an important member of the restorative justice process, without the will of the offender those involved in the process will not be able to create a stable relationship between the parties. The traditional legal system alienates the offender, doing little to reduce the likelihood of recidivism.⁵² Restorative justice, by including the offender as a necessary part of the process, can reduce an offender's future violent acts.

Third, both the offender and victim must be committed to building a peaceful future relationship. The success of restorative justice depends on each party's attitude toward the process.⁵³ Mediation as traditionally understood has come under criticism when it is applied

⁵¹ Scholars claim that accepting responsibility is necessary in order to reform behavior. Fay Honey Knopp, *supra* note 41.

⁵² Daly, *supra* note 26 (admitting that restorative justice may do little to change an offender's behavior if there are no additional violence management programs or the threat of legal intervention).

⁵³ *Id.* at 337 (showing that offenders who use the process to trivialize the violence or shift blame to the victim are not appropriate participants and will not lead to a successful result, and that victims who are not invested in the process will not benefit from it).

forcibly to the parties.⁵⁴ Mandatory mediation ignores one of the foundational elements of restorative justice: that the parties actively choose this method and are committed to using it to find the best workable solution. Some female participants in mandatory mediation describe the experience as one akin to rape.⁵⁵ Successful restorative justice cases will not follow the model of mandatory mediation, but instead should exist only with both parties' interest and commitment. Forgiveness or reconciliation may be desired by some people, but is not required. Forced forgiveness would not empower women but instead hold them to a certain ideal with which they do not identify.

Finally, the restorative justice process must be conducted by those experienced in working with cases of violence against women and must involve interested community members who are in a position to encourage the parties to forge a peaceful future.⁵⁶ A mediator or counselor can diminish the power differences between the victim and offender, and a community of interested individuals can keep the offender from being ostracized from healthy relationships as well as provide a support network for the victim. To ensure that a mediator is neutral and sensitive to the special circumstances of domestic violence victims, community members who represent the parties as well as concerned organizations should be present.⁵⁷ These individuals can work to ensure that the offender creates and sustains a constructive relationship with support services, thereby preventing the detrimental effects of isolation common in the traditional justice system.⁵⁸ The presence of these individuals will also create an enforcement mechanism, ensuring that the offender takes the responsibility to change his actions. Mediation as it has been

⁵⁴ Grillo, *supra* note 4 at 1549-50.

⁵⁵ *Id.* at 1605.

⁵⁶ Harris, *supra* note 24 at 93.

⁵⁷ Andre Rene Imbrogno & Salvatore Imbrogno, *Mediation in Court Cases of Domestic Violence, Families in Society*, 81 J. CONTEMP. HUM. SERVICES 392, 397 (2000) (showing that mediators can sometimes place the blame on the victim for prompting the violence or otherwise deserving the violent acts).

⁵⁸ Jennifer L. Llewellyn and Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L. J. 355, 377-9 (1999).

conducted in other settings has been criticized for its lack of an enforcement mechanism, but the inclusion of more community members who have ties to the parties will provide such a mechanism in restorative justice proceedings.⁵⁹

Mechanisms for Implementation

The four requirements for successful restorative justice cases should inform the structure of any implementation measure. An essential element of implementation would be the training of all individuals who engage with victims of domestic violence – social workers, the police, counselors, court officers, lawyers, judges, and other community members. These individuals should be aware of the basic requirements for successful restorative justice cases and should be able to judge which victims and offenders are most likely to benefit from restorative justice techniques.

There are many published analyses of alternative approaches to criminality in general,⁶⁰ but there is a lack of significant research about domestic violence programs and their use of restorative justice. One successful example is the Duluth Domestic Abuse Intervention Project (DAIP) – a program that has implemented restorative justice mechanisms by coordinating a community response to domestic violence.⁶¹ DAIP intervenes in the early stages of domestic violence cases, sending counselors to separately inform abusers and victims of restorative justice options. The program also includes a 29-week educational program for offenders and encourages the assistance of victims and other individuals to encourage the offender to take

⁵⁹ Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L. J. 57, 61 (1984) (arguing that mediation does not end the victimization of women because it lacks an enforcement mechanism).

⁶⁰ See generally Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513 (2003); see also Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1 (2002).

⁶¹ Domestic Abuse Intervention Project: An Overview, <http://www.duluth-model.org/documents/daipccr3.htm> (last visited Mar. 7, 2008).

responsibility for his actions and make the decision to reform.⁶² This system encompasses the fourth requirement of successful application of restorative justice to domestic violence: the involvement of the general community.

DAIP offers a strong model for the implementation of restorative justice, but I argue that, similarly to the South African TRC, its application should not be universal. The aforementioned requirements for successful restorative justice cases should serve as the guideposts by which counselors determine whether individual offenders and victims are appropriate restorative justice candidates. In addition to trained counselors, other people who may be involved with domestic violence cases should recommend the option of restorative justice while remembering the four qualifications mentioned above. Professionals in the fields of social work, medicine, and the law should all be aware of the beneficial qualities of restorative justice while resisting the impulse to apply it to all cases of violence against women.

Counterarguments about the Fallibility of Restorative Justice

There are many valid counterarguments to my stance on advocating for the use of restorative justice techniques in the context of domestic violence and likewise for limiting its use in situations where there is no preexisting relationship between the parties. Some argue that using alternate forms of justice will move domestic violence back into the realm of the private.⁶³ Since the traditional legal system was used to bring domestic violence into the forefront of public discourse on violence against women, it may follow that diverging from this system would equal retracting domestic violence from the public sphere. Although I recognize the validity of this point, I argue that women's rights advocates should not be bound to the traditional justice system given the historical bias against women in the adversarial legal structure. It is with creative

⁶² *Id.*

⁶³ Krieger, *supra* note 27 at 236.

alternatives that women can choose a resolution mechanism better suited to their own empowerment and healing. Seeking nontraditional routes to justice is a step forward, not backward, for the feminist movement.

Another argument against employing restorative justice in domestic violence cases concerns the fear of carving an exception for crimes against women. By urging nontraditional resolution mechanisms for domestic violence cases, some may claim this makes a broader statement about the inapplicability of the traditional legal system to women's issues.⁶⁴ I am not urging the use of restorative justice mechanisms for "women's issues," but rather for crimes for which a peaceful future would be a greater goal than traditional punishment and retribution. For this reason, the aforementioned requirements for restorative justice to be applied successfully are essential to include in our discourse.

Critics also claim that restorative justice works when there is an equal power relationship between the parties, and that the power imbalance in domestic violence cases make them appropriate candidates for the traditional legal system.⁶⁵ I agree that domestic violence crimes are based on the offender seeking power over the victim, but I also argue that alternative dispute resolution mechanisms can properly address this power imbalance. First, the courts themselves do not actively empower the victim, and alternative solutions may do more to lessen the power imbalance between the parties by giving the victim a greater role in structuring the process. As mentioned above, criteria for success include a motivation on the part of the offender to accept responsibility and create a stable relationship. Second, the fatalistic view of power imbalances is based on a definition of offenders as incorrigible criminals. Restorative justice requires us to

⁶⁴ *Id.*

⁶⁵ Krieger, *supra* note 27 at 245; Imbrogno, *supra* note 56 at 397.

shift our views of how people can change their behavior.⁶⁶ Offenders who are committed to responsibly working with the victim have the possibility of changing for the better. Previous power imbalances do not eliminate the possibility of creating a workable future relationship.

Counterarguments about the Limited Use of Restorative Justice

There are also counterarguments from those who argue that restorative justice can be applied to stranger assault offenses much like it is to domestic violence cases. If restorative justice does indeed lend domestic violence victims a voice in the pursuit of justice, why not extend this to other cases of violence against women? I argue that lending legitimacy to the victim, although important, is not the only basis for pursuing restorative justice. The relationship between the parties is an essential ingredient of successful restorative justice. A reasonable counterargument would state that even though there is no prior relationship between the parties, there is a connection between the offender and the community at large as well as between the victim and the community. I assert that the relationship between the perpetrator and the community can be strengthened through education and reintegration initiatives such as anger management programs that do not include the specific victims. Alternatively, the relationship between the victim and the community can be strengthened through support groups, education about violence against women, and more general community support for victimized women. The prior relationships between the general community and the victim or offender do not supplant the requirement of a prior existing relationship between the parties themselves. Within the scope of this paper, the traditional legal system is appropriate for crimes that do not involve

⁶⁶ Block & Litchi, *supra* note 18 at 1 (stating that “How we respond [to domestic violence and sexual abuse] depends on our underlying philosophies regarding the root of abuse, our understanding of justice, and our beliefs regarding how people change.”).

intimate partners or family members.⁶⁷ Expanding restorative justice to deal with all female victims of crime could result in a second-tier legal system that does not serve the needs of women in general.

Conclusion

Understanding the appropriateness of restorative justice in the context of domestic violence requires scholars and advocates to suspend stereotypes about the characteristics of abusers and victims. In order to more effectively respond to the needs of victims of violence, we should remember that not all offenders are incorrigible, that women victims may be better served in a non-adversarial setting, and that retribution may not serve the needs of either party. We should also keep in mind the limits of nontraditional dispute resolution. While some laud restorative justice as a panacea for the inequities in our criminal justice system,⁶⁸ we must be cautious about extending its use to all forms of criminality.⁶⁹ Although restorative justice can give victims of domestic violence a greater voice in the judicial system, it has serious drawbacks. Restorative justice is an appropriate alternative dispute resolution mechanism only for willing offenders and victims who have a prior workable relationship and who are committed to finding an effective solution. Drawing on the South African experience, we should remember that the TRC was a calculated compromise specifically tailored to the South African political situation. In the United States, restorative justice should be used for specific cases of domestic violence where the parties have an interest in forging a future peaceful relationship with each other. By focusing on the nature of the parties instead of the nature of the crime, we can make sure that victims and offenders benefit from the healthy relationships created by restorative justice. When

⁶⁷ There are many faults with the criminal justice system regarding crimes other than domestic violence, but for the scope of this paper I chose to focus only on how the traditional legal system deals with domestic violence cases.

⁶⁸ Block & Lichti, *supra* note 18 (advocating for a more thorough integration of restorative justice philosophies).

⁶⁹ Edwards, *supra* note 46.

women's rights advocates analyze domestic violence through this prism, they can do more to ensure that victims are offered a more desirable form of justice: that of a peaceful future.