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Restorative Justice and Gendered Violence? From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law

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Restorative Justice and Gendered Violence? From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law

Legal remedies for crimes of gendered violence that are more effective, expansive, creative, victim-centred, and victim-sensitive are urgently needed. The author argues that restorative justice is one promising approach which warrants critical engagement and, more importantly, requires input from feminists in their efforts to end violence against women. The paper concludes with some key principles and recommended directions for further engagement between feminists and proponets of restorative justice in the development of approaches to the harms of gendered violence.

Il est grand temps que soient mis en place des recours juridiques plus efficaces, plus larges, plus créatifs, plus axés sur les victimes et plus sensibles à leurs besoins dans les affaires de violence fondée sur le sexe. L'auteure allègue que la justice réparatrice est une approche prometteuse qui justifie un engagement critique et, point plus important, qui exige l'implication de féministes dans leurs efforts de mettre fin à la violence faite aux femmes. En conclusion, l'article énonce des principes clés et recommande des orientations concernant une plus grande collaboration entre féministes et promoteurs de la justice réparatrice pour la recherche de moyens d'aborder les préjudices résultant de la violence fondée sur le sexe.

* Associate Professor, Faculty of Law, Western University. These ideas have been developed in the context of my work as an academic team member on The Nova Scotia Restorative Justice Community University Research Alliance (NSRJ–CURA), a project on which I collaborated closely with Lori Haskell, whose work and ideas have always been a source of inspiration. I thank Jennifer Llewellyn for inviting me to participate in the NSRJ–CURA despite my lack of knowledge about restorative justice, and for our many stimulating and challenging ongoing conversations and debates on these issues. I also thank Terrah Smith, JD, Western University, Faculty of Law, for her excellent research assistance.

Introduction: why engage?

Developing better and more humane ways of understanding and responding to the social problem of violence against women and children has animated several decades of feminist scholarship and activism. Indeed, directly flowing from feminist legal and social advocacy, significant victories have been achieved in establishing improved criminal justice system responses to gendered violence. To name just a few, these include: reform to sexual assault law, evidentiary protections to guard against the excesses of traditional victim blaming techniques and rape myths, mandatory charging and prosecution in domestic violence cases, the development of specialized domestic violence courts, and enhanced civil remedies such as restraining orders for domestic violence.[1] Yet these victories, important as they are, can arguably be characterized as tinkering around the edges of a legal system that remains profoundly unresponsive to the needs of women who are harmed by sexual and physical violence.

Given the extensive and thoroughly researched critiques, as well as the documented dissatisfaction with the criminal justice system's handling of crimes of violence against women and children, why have so many feminist scholars and activists been slow to engage with, or even overtly resistant to restorative justice and other alternative approaches for responding to crimes of gendered violence? Certainly there are competing feminist perspectives on the topic of restorative justice for cases of violence against women, and further diversity within the various critical perspectives staked out either in favour or in opposition to restorative justice for crimes

1. For selected analyses of sexual assault law reform, see, for example, Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994); Kwong-Leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42 Int'l J Offend Therapy & Comp Criminology 258; Sheila McIntyre, "Feminist Movement in Law: Beyond Privileged and Privileging Theory" in Radha Jhappan, ed, *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 42; Lise Gotell, "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist Inspired Law Reform" in Clare McGlynn & Vanessa Munro, eds, *Rethinking Rape Law* (London: Routledge, 2010) 209. For domestic violence legal reforms see: Leigh Goodmark, *A Troubled Marriage* (New York: NYU Press, 2011); J Ursel & C Hagyard, "The Winnipeg Family Violence Court" in J Ursel, L Tutty & J LeMaistre, eds, *What's Law Got to Do With It* (Toronto: Cormorant Press, 2008); J Ursel & L Tutty, "The Justice System Response to Domestic Violence: Debates, discussions and dialogues" in J Ursel, L Tutty & J LeMaistre, eds, *ibid*; J Ursel & L Tutty, "Specialized Domestic Violence Courts: A Comparison of Models" in J Ursel, L Tutty & J LeMaistre, eds, *ibid*. See also, E Comack, *Locating Law: Race/Class/Gender/Sexuality Connections*, 2d ed (Halifax: Fernwood Publishing, 2006).

of gendered violence.[2] There has been, however, a strong and vocal line of argument both within feminist scholarship and the feminist violence against women service sector opposed to the use of restorative justice in cases of gendered violence.[3]

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2. For a range of perspectives analyzing the use of restorative justice for genered violence, see for example: James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2009); A Cameron, "Stopping the violence: Canadian feminist debates on restorative justice and intimate violence" (2006) 10:1 Theoretical Criminology 49; Kathleen Daly & Julie Stubbs, "Feminist engagement with restorative justice" (2006) 10:1 Theoretical Criminology 9.

Also, Heather Strang & John Braithwaite, eds, *Restorative Justice and Family Violence* (Melbourne: Cambridge University Press, 2002); Clare McGlynn, Nicole Westmarland & Nikki Godden, "'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice" (2012) 39:2 Law & Soc'y 213; Kathleen Daly, "Restorative Justice and Sexual Assault: An Archival Study Of Court and Conference Cases" (2006) 46:2 Brit J Criminal 334; Kathleen Daly & Sarah Curtis-Fawley, "Gendered Violence and Restorative Justice: The Views of Victim Advocates" (2005) 11:5 Violence Against Women 603; Julie Stubbs, "Apology? Domestic Violence and Critical Questions for Restorative Justice" (2007) 7:2 Criminal & Crim Just 169 [Stubbs, "Beyond Apology"].

Also, Mary Koss & Quince Hopkins, "Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses" (2005) 11:5 Violence Against Women 693 [Koss & Hopkins, "Incorporating"]; Quince Hopkins, Mary Koss & Karen Bachar, "Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities" (2004) 23 St Louis U Pub L Rev 289 [Hopkins, Koss & Bachar, "Applying Restorative Justice"]; Quince Hopkins, Mary Koss & Karen Bachar, "Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable" (2003) 989 Ann NY Acad Sci 364 [Hopkins, Koss & Bachar, "Restorative Justice for Sexual Violence"]; Quince Hopkins, Mary Koss & Karen Bachar, "An Innovative Application of Restorative Justice to the Adjudication of Selected Sexual Offenses" in Helmut Kury & Joachim Obergfell-Fuchs, eds, *Crime Prevention: New Approaches* (Germany: Weisser Ring, 2003) 321.

And see, Julie Stubbs, "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice" in Strang & Braithwait, *ibid* at 42; Julie Stubbs, "Relations of Domination and Subordination: Challenges for Restoratice Justice in Responding to Domestic Violence" (Sydney Law School Research Paper, No 10/61, 2011); Anne Hayden, "The Promises and Pitfalls of Restorative Justice for Intimate Partner Violence" (2013) Internet Journal of Restorative Justice, online: RJ4all <http://www.rj4all.info/library/promises-and-pitfalls-restorative-justice-intimate-partner-violence>; Shagufta Aziz, "Should Restorative Justice be Used for Cases of Domestic Violence" (2010) 6:1 Int'l J Restorative Just 1; Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women" (2008) 3:2 Fem Crim 101; Shirley Jülich et al, "Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence" (2010), online: <http://www.restorativejustice.org/RJOB/project-restore-an-exploratory-study-of-restorative-justice-and-sexual-violence>; Shirley Jülich et al, "Yes, there is another way" (2011) 17 Canterbury L Rev 222.

3. For examples of concerns about and criticisms of restorative justice for violence against women, see for example: Stubbs, "Beyond Apology," *ibid*; Donna Coker, "Restorative Justice, Navajo Peacemaking and Domestic Violence" (2006) 10:1 Theo Crim 67 [Coker, "Restorative Justice, Navajo Peacemaking"; and BC Association of Specialized Victim Assistance and Counselling Programs, "Restorative Justice, Domestic Violence and Sexual Assault in Canada: A Summary of Critical Perspectives from British Columbia" (2002), online: <http://www.endingviolence.org/files/uploads/RestorativeJusticeDVSA_0.pdf>; Pamela Rubin, *Restorative Justice in Nova Scotia: Women's Experience and Recommendations for Positive Policy Development and Implementation* (Ottawa National Association of Women and the Law), online: <http://www.restorativejustice.org/articlesdb/articles/5571>.

In a social context still characterized by under acknowledgment and minimization of the extent and nature of gendered violence, pervasive victim blaming, and systemic and individual failures of accountability, caution and skepticism about the capacity of restorative justice approaches are understandable and even warranted. But this alone is not sufficient reason to refuse to engage in conceiving, developing, and implementing restorative, reparative, and more expansive remedies and solutions to the harms of gendered violence—harms which are experienced both individually by victims and, more broadly, by society at large. Clearly we can and should do better than settle for the overburdened and profoundly victim-insensitive criminal justice system which we inherited.

In this paper I argue that more effective, expansive, creative, victim-centred, and victim-sensitive legal remedies for crimes of gendered violence are urgently needed. This does not mean that we should abandon efforts within the traditional criminal justice system, but it does mean that surely we can also seek more radical innovations both within and without. Restorative justice is one such promising approach which warrants critical engagement and input.

Restorative justice is a tradition around which a sophisticated scholarship has developed, and which has an international network of theorists, practitioners, organizations, and practices that feminist scholars and advocates can both usefully inform as well as learn from.[4] This could represent dynamic and productive intellectual and practical projects in a range of contexts. Indeed, it must be acknowledged that some feminists are already highly engaged in restorative justice work, though this work appears to occur at the margins of the feminist project in both advocacy and scholarship. Still, the reception of restorative justice within the broader feminist project(s) has been, at best, ambivalent. Indeed I would go further and say that for most of the extensive and impressive feminist legal scholarship addressing the law, the criminal justice system, and gendered violence, restorative justice is entirely off the radar.

My own intellectual relationship to restorative justice and similar alternative forms of justice has transitioned, as the title of the paper reflects. The shift has been away from an initial assumption (and not a particularly well informed one) that these approaches were necessarily and by definition inappropriate for victims, not attuned to gender dynamics, "soft on crime," and easy on offenders, towards a sense that philosophically,

4. Obviously there are feminists working within restorative justice networks. My point, however, is that the restorative justice movement and the significant majority of the work within the feminist movement to end gendered violence remains disconnected, rather than critically engaged.

politically, and (in theory at least) procedurally, a robust and well thought through restorative justice model shares a commitment to a great many foundational feminist principles.

These principles include a recognition that the harms of interpersonal violence extend beyond the individual victim, an insistence on community involvement to end crime and related social issues, an insistence on offender accountability and community response, a view that offenders can often—if not always—change, and a vision of peace, equality of opportunity, and social justice. Feminist scholars and advocates also foreground the foundational significance of gender inequality and call for a gender analysis of the nature of social relations and institutions. Although the project of achieving gender equality has not been central to restorative justice, its commitment to equality in social relationships is certainly consonant with this goal.[5] Clearly, then, this set of shared commitments means that the foundation exists for a deeper engagement between those seeking an end to gendered violence and those working within the restorative justice paradigm. Such a collaboration could prove fruitful and open a range of possibilities for those seeking a world with less violence, without gender (or other) inequalities, and with more responsive social and legal remedies and systems.

In this paper I make a number of interconnected arguments. The first is that, in view of the severe and entrenched deficiencies in the traditional criminal justice system processing of crimes of gendered violence, and because so many of these crimes are filtered out of the criminal justice system, *in some cases* it may be appropriate and even preferable for victims to pursue a restorative justice remedy, or at least, for them to have the option available.[6] Put differently, it is arguably paradoxical to be deeply, even scathingly critical of the criminal justice system, while simultaneously being closed to considering a potentially viable, and in some cases more suitable, alternative.

The second line of argument is that the many important criticisms raised in the scholarly literature on restorative justice regarding cases of

5. See for example, Jennifer J Llewellyn & Robert Howse, *Restorative Justice—A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998) at 1-107 for an articulation of this perspective.

6. A crucial challenge for the development of appropriate restorative justice approaches to gendered violence will be screening cases. Obviously cases where a woman faces ongoing or possibly an escalated threat (which is associated with post-separation relationships) will not be amenable to a restorative justice intervention. Development of a sophisticated set of criteria, which would need to be regularly evaluated, assessed, and revisited, will be an important and *essential* contribution to the project of developing restorative justice approaches to gendered violence, and these criteria will need to be in place prior to the commencement of any restorative justice models.

gendered violence are legitimate and must be satisfactorily addressed in any development or adaptation of a restorative justice model suitable for responding to gendered violence, and any such model must begin with the expertise of scholars and service providers working on issues of violence against women.

The third is that any restorative justice model for crimes of gendered violence must begin from a position of being victim-centred, while still incorporating a focus on victims, offenders, and the community. This starting point is essential to counteract the offender-focused orientation of the traditional criminal justice system (which is understandable given the purpose of this system). And, in order to take seriously the restorative justice commitment to repairing harms, we must begin with the victim's experience of those harms.[7]

The analysis developed in this paper is pitched at a broad conceptual level, so while I am advocating that we consider developing alternative and restorative approaches to provide remedies for crimes of gendered violence *in some cases*, there are many elements which are beyond the scope of this paper, such as the procedural specifics of what such a model might look like, which cases might qualify, why, and how. Determining these aspects is an important but separate project, which has both conceptual and empirical dimensions. With this in mind, I do, however, outline in broad strokes some of the key principles and elements that must be incorporated in a gender sensitive restorative justice model for crimes of violence against women.

To develop these arguments, I first outline key features of restorative justice in order to map the continuities and points of entry for thinking about feminist-inspired restorative justice responses and, in particular, perspectives on remedies for gendered violence. Next, I critically engage with fundamental concerns about restorative justice, and then turn to a brief summary of the small but steadily growing body of feminist literature specifically addressing restorative justice. I conclude the paper with some recommended directions for further engagement aimed at developing more sophisticated and gender sensitive remedies for the harms of

7. The recognition and analysis of the harms suffered by the victim is a starting point, not an end point.

gendered violence.[8] Finally, I emphasize that while exploring feminist-led restorative justice models for some cases of gendered violence is an important project for expanding options for assaulted women, undertaking such a project does not and should not entail abandoning the related task of continuing work to improve traditional criminal justice system responses and building on law reform successes that have already been achieved.[9]

I. *Criminal and restorative justice systems*

1. *The criminal justice system as a failed or failing model*

There are a number of fundamental problems with the criminal justice system's processing of crimes of gendered violence, starting with the fact that a huge filtering process exists. Statistically few cases of violence against women get reported to police[10] and prosecutorial discretion (notwithstanding mandatory arrest and procedural policies) means that many cases are dropped before they even reach trial. In addition to this filtering, the system is tilted towards protecting the rights of the accused and victim-witnesses have few formal rights, as evidenced by discriminatory evidentiary requirements. Due to these issues, the conviction rates for sexual assault and domestic violence are extremely low. In cases where a conviction occurs, sentences are often very lenient. Crimes of gendered violence seem discounted in relation to property crimes or other matters, largely because of the undervaluing of women and the social minimization of the harms of gendered violence.

Finally, many, perhaps most crimes of gendered violence, do not ever get reported or processed criminally. This means that the majority of crimes of gendered violence are never legally acknowledged or remedied.

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8. A forthcoming companion paper fleshes out in greater detail what and how a feminist informed restorative justice model might offer by way of remedies for gendered violence in appropriate cases. This paper more specifically addresses the "why" question, pertaining to establishing a rationale for taking feminist work more deeply into the area of alternative and restorative justice approaches. For a more general analysis of why a trauma-informed approach to restorative justice in general is necessary, see in this issue Melanie Randall & Lori Haskell, "Taking a Trauma Informed Approach to Law: Why Restorative Justice Must Understand Trauma and Psychological Development."

9. Clearly we want to retain and build on legal successes in relation to gendered violence to date, the recognition of gendered violence as violating human rights norms, international law's recognition of gender persecution, and evidentiary reforms in criminal trials such as the rape shield law.

10. See Linda Light & Gisela Ruebsaat, *Police Classification of Sexual Assault Cases as Unfounded: An Exploratory Study* (Ottawa: Department of Justice Canada, 2007). For a media report on this study see Dean Beeby, "Stereotypes affect rape cases," *Canadian Press* (4 September 2006), online: <http://media.ssid.net/media/20060905-Metro_Vancouver.pdf>; Blair Crew, "Striking Back: The Viability of a Civil Action Against the Police for the 'Wrongful Unfounding' of Reported Rapes," and Teresa DuBois, "Police Investigation of Sexual Assault Complaints: How Far Have We Come Since Jane Doe?" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012).

In some of the cases that do come to the attention of the criminal justice system, many assaulted women, particularly but not only with regard to domestic violence, opt out of the system altogether, in part because they assess that the result is not worth the effort.[11] The adversarial process of a criminal trial coupled with attacks on the victims' credibility is inherently retraumatizing for women who have already been harmed by an experience of rape, sexual assault, or domestic violence. Most fundamentally, then, the needs of victims are not only discordant to the needs of the traditional criminal justice system, they are often antithetical. The occasional successful responses from the criminal justice system, as important as they are to acknowledge, remain the exception and not the rule.

The problems and deficiencies in the traditional criminal justice system's response to crimes of gendered violence are thoroughly documented and analysed in feminist research literature.[12] To some extent it is not an overstatement to speak of the criminal justice system as largely a failed model in relation to the vast majority of these crimes. At the very least, despite occasional successes in processing crimes of gendered violence, the criminal justice system is profoundly deficient in terms of providing adequate remedies to victims, and instead, often retraumatizes them.

It is arguable, therefore, that an outright rejection of restorative justice and an insistence on its inapplicability to any and all crimes of gendered violence fails to take seriously the feminist critique of the profound limits of the criminal justice system. It does not apprehend how nuanced and thoughtful research has moved debates and information about restorative justice theory and practices forward in some important ways. The Restore Project in Arizona (Responsibility and Equity for Sexual Transgressions

11. Kathleen Daly & Brigitte Bouhours, "Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries" in Michael Tonry, ed, *Crime and Justice: A Review of Research*, vol 39 (Chicago: University of Chicago Press, 2010) 565.

12. See, for example, Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22 CJWL 397; Melanie Randall, "Sexual Assault in Spousal Relationships, 'Continuous Consent', and the Law: Honest but Mistaken Judicial Beliefs" (2009) 32:2 U Manitoba LJ 144; Melanie Randall, "Domestic Violence and the Construction of 'Ideal Victims': Assaulted Women's 'Image Problems' in Law" (2004) 23 St Louis U Pub L Rev 107; and L Gotell, "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-Liberal Sexual Citizenship" in D Chunn, S Boyd & H Lessard, eds, *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007) 127. See also the contributions to Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012).

Offering a Restorative Experience), led by Dr. Mary Koss and colleagues, has been an exemplar in this regard.[13]

Furthermore, an outright feminist rejection of restorative justice and other innovative approaches does not participate in the construction of new knowledge about what alternative models of justice might look like, and new practices and interventions. It does not help expand community capacity to end violence against women nor does it meaningfully engage the community in justice system responses. At present there is no place or role for the community in the criminal justice system. Instead, criminal cases are radically individualized. They are offender focused and seek to impose criminal culpability on a legal standard described as beyond a reasonable doubt.

If we are serious about more widely implemented progressive social change in relation to violence against women, and if the justice system and legal remedies are to be part of that, we must expand and improve the options currently available to those harmed by gendered violence. Taking this position, is most emphatically, *not* to discredit or refute the many thoughtful criticisms of restorative justice theory and practice advanced by a number of commentators, including women's organizations and victim advocates. Indeed, responding to and respectfully engaging with these concerns should be the very starting point of the consultative and collaborative process which must precede the development, let alone the rolling out of any restorative justice model to deal with crimes of gendered violence.

13. The Restore Project in the USA began as a collaboration in Pima County, AZ between three local police and sheriffs' offices, the county attorney's offices of Tucson and of Pima County, two victim services centers, and The University of Arizona College of Public Health. The project was formed to develop an alternative option for sex crimes (excluding marital rape) in cases where victims elected to pursue this option and offenders had pled guilty. The project, its successes and challenges, have been critically analysed in a series of publications and evaluations by Mary Koss and colleagues. See, for example, Mary Koss, "Shame, Blame, and Community: Justice Responses to Violence Against Women" (2000) 55 Am Psych 1332; Koss & Hopkins, "Incorporating," *supra* note 2; Mary Koss et al, "Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration: Introducing the RESTORE Program" (2004) 19 J Interpersonal Violence 1936 [Koss et al, "Introducing the RESTORE Program"]; Koss, Hopkins & Bachar, "Restorative Justice for Sexual Violence," *supra* note 2; Koss, Hopkins & Bachar, "Innovative Application," *supra* note 2. In New Zealand, Project Restore, inspired by the work of Dr. Mary Koss and colleagues on restorative justice and sexual violence in Arizona, has been developed to pilot restorative justice responses to crimes of sexual violence. See "Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence," online: <http://www.academia.edu/274691/Project_Restore_An_Exploratory_Study_of_Restorative_Justice_and_Sexual_Violence>; see also, Shirley Jülich & John Buttle, "Beyond Conflict Resolution: Towards a Restorative Process for Sexual Violence" (2010) 8 J Te Awatea Violence Research Centre 21. For other feminist engagements see: Kathleen Daly, "Sexual Assault and Restorative Justice" in Strang & Braithwaite, *supra* note 2 at 62.

While there is great debate and controversy in feminist scholarly and social service circles about the utility of restorative justice for gendered violence, there is near unanimity about the failures and inadequacy of the criminal justice system. A full-blown repudiation of the development of more innovative legal and extra-legal approaches, including restorative justice, leaves us where we already are. It limits us to working within an overwhelmed criminal justice system that is deeply flawed on multiple levels, most significantly because it fails to deliver satisfactory outcomes for victims. Furthermore, it leaves us with a criminal justice system that—in too many cases—retraumatizes and revictimizes the women who are already harmed by violence and violation, thus adding insult to injury.

2. *Defining terms: what is meant by "restorative justice"?*

Despite the fact that restorative justice principles have had a discernible impact on various legal systems, there is still no clear cut or comprehensive definition of what restorative justice means in theory, or what a model looks like in practice. This is because, to put it mildly, restorative justice has an elastic meaning. Compounding this conceptual vagueness, a diverse multiplicity of practices exist, which in some cases are misidentified as representing restorative justice. It is not uncommon for mediation, alternative dispute resolution, Aboriginal circles, or alternative sentencing measures to be incorrectly labeled as restorative justice. Restorative justice does not describe just any kind of alternative approach to settling a legal problem or dispute, and it is not a catch-all phrase for every alternative legal approach.

Despite the conceptual confusion surrounding restorative justice, and an undeniable variability in how it is practiced on the ground, there is an emerging consensus in academic literature about restorative justice's defining attributes. Put most broadly, restorative justice is organized around the normative values of respect, peacefulness, and responsibility, and at the procedural or operational level it involves some kind of encounter developed to repair and transform. While the practices associated with restorative justice are relatively diverse, a greater degree of cohesion is found in the scholarly restorative justice literature which defines it in terms of foundational principles, goals, and values.

Although contemporary restorative justice movements are relatively new and span only about the last four decades, the historical roots of restorative justice predate the contemporary era and can be traced to before the inception of the modern criminal justice system. Restorative justice has been most often defined in opposition to the "retributive" legal

paradigm which has been the dominant philosophical underpinning of criminal law in North America and Western Europe.

Whereas retributive models of justice focus narrowly on individual punishment as the most appropriate response to criminal conduct, restorative approaches to justice take a broader view of possible solutions to crime, focusing not only on holding the criminal offender responsible, but also requiring the offender's active participation in constructing a remedy to address the harms caused. As Van Ness and Strong express it:

Restorative justice theory emphasizes that every crime involves specific victims and offenders, and that a goal of the criminal justice process should be to help them come to resolution.... Resolution requires that the rights of victims be vindicated by exoneration from responsibility for the injuries they have sustained as well as receiving reparation for those injuries. That is not all that is required. The offender must make recompense for there to be full resolution.... "Recompense".... is something given or done to make up for an injury. This underscores that the offender who caused the injury should be the active party.[14]

Howard Zehr, a prominent restorative justice proponent, describes it as both a philosophy and theory of justice, as well as a set of practices aimed at righting wrongs and providing healing for those affected. Restorative justice, then, is most often defined by reference to its overarching goals and principles. As Cormier observes, restorative justice should be conceptualized as an approach to justice "that includes the underlying principles of responsibility, inclusiveness and trust."[15] According to Tony Marshall, restorative justice describes "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[16] Of particular note and significance is the fact that in a restorative justice model, the involved parties include not only the victim and offender, but also the broader community.

Perhaps the most fundamental and defining feature of restorative justice is its emphasis, both theoretically and in practice, on repairing the wrongs and harms caused by criminal conduct (or other wrongdoing). This notion of repair is a broad one which necessarily and by definition includes the accountability of the offender. The philosophical and practical approach of a restorative justice approach stands in stark contrast to the aims of the

14. Daniel Van Ness & Karen Heetderks Strong, *Restoring Justice*, 2d ed (Cincinnati: Anderson Pub, 2002) at 46-47.

15. *Ibid.*

16. Tony Marshall, "Restorative Justice: An Overview" (London: Home Office, 1999), online: <http://www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf>.

traditional criminal justice system, which is founded on retributive justice and aims to punish offenders found criminally culpable.

The central role assigned to community involvement in restorative justice has a dual importance. First, recognizing the community as a key participant is significant in terms of a broadened understanding of the extent of the harms inflicted by individual crimes. These harms are seen as extending beyond the immediate victim, to "secondary" victims such as people in the victim's life, and even farther, to include people (unknown to the victim) in the community at large. Second, community inclusion in restorative justice approaches to crime is premised on the idea of crime as a product, as well as an impact, on the collectivity, not just on the individual.[17]

Restorative justice's insistence on the centrality of community engagement is distinctly different from the radically individualized model of the criminal justice system which frames crimes as wrongs perpetrated by citizens against the state. The community focused feature of restorative justice is very consonant with feminist analyses of violence against women as being a social and public problem, rather than just an individual and privatized one.

3. *Restorative justice, values, processes, and practices*

In addition to being predicated on a theory of justice, the restorative justice approach to crime (or conflict) consists of the following key elements: the involvement of all parties affected, an encounter, an amends, and the reintegration of victims and offenders. A key feature of restorative justice is a formal meeting, often called a "conference," at which the parties or their representatives, or both including victim(s), offender(s), and community, are present in order to discuss and process what happened, identify the nature of the harms caused, and determine what needs to occur to rectify the wrongs and repair harms. Skilled restorative justice facilitators are essential participants in the conference as they guide and structure the process. Where restorative justice processes directly engage with the criminal justice system, various legal players such as lawyers and judges may also be present although their roles are distinctly different than in the criminal justice system.

While some practitioners working within restorative justice emphasize the role of victim "forgiveness," this is not, and emphatically should not, be required. Offender acknowledgment of responsibility, apology, and

17. This aspect of restorative justice is well analysed in Llewellyn & Howse, *supra* note 5.

amends need not elicit forgiveness from victim(s), nor should this ever be an expected element of a restorative justice process.[18]

In addition to an overarching theoretical approach to justice, restorative justice is now also an increasingly organized movement, with organizations dedicated to implementing restorative models in legal as well as other contexts, such as workplaces and education. In Canada, the province of Nova Scotia has one of the more organized restorative justice programs,[19] as well as a community academic collaboration established to study it.[20] In terms of the procedural elements, Zehr writes that restorative justice is "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."[21]

In a report to the *Law Commission of Canada*, Jennifer Llewellyn and Robert Howse refer to Tony Marshall's explanation of restorative justice as a type of working model and practical description, though they argue that more analytical attention is required for understanding restorative justice definitionally.[22] Marshall describes restorative justice as "a process

18. While "forgiveness" is explicitly articulated as an expectation in some iterations of restorative justice, can be a part of the process of restorative justice, and certainly has been in practice in some versions, my point is that it should not be. This does not preclude the possibility of some victims electing to "forgive" offenders, either privately or publically as part of the restorative justice (or other) process, but the process of forgiving must be freely chosen and is not necessary to a resolution. Moreover, more critical analysis is needed in terms of explicating what forgiveness means and requires, particularly in relation to accountability and responsibility. These issues are especially acute for crimes of gendered violence and assaults and transgressions which take place in contexts of intimate relationships.

19. See Nova Scotia Restorative Justice Program, a program of the Correctional Services Division of the Nova Scotia Department of Justice, which was established in 1997 and currently focuses on youth, online: <http://www.gov.ns.ca/just/rj/>. Restorative justice initiatives are also underway in the province in education, human rights processes, and other institutional contexts. See also, Don Clairmont, *Penetrating The Walls: Implementing a System-Wide Restorative Justice Approach in the Justice System* (Oregon: Willan, 2005); Bruce Archibald & Jennifer J Llewellyn, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2006) 29 Dalhousie LJ 297. Restorative justice programs are in use in some other parts of Canada, and are in active use in other parts of the world. See Daniel W Van Ness, "An Overview of Restorative Justice Around the World" (Paper delivered at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Restorative Justice around the World, Bangkok, Thailand, 18–25 April 2005) online: <http://www.restorativejustice.org/university-classroom/02world>.

20. The Nova Scotia Restorative Justice Community University Research Alliance (NSRJ–CURA) is a collaborative research partnership between university and community partners. The project was conceived, initiated, and led by Professor Jennifer Llewellyn, Viscount Bennett Professor of Law, Schulich School of Law, Dalhousie University. It is focused on research related to the institutionalization of restorative justice practice with particular attention to the example of the Nova Scotia Restorative Justice Program (NSRJP). My work on restorative justice was developed in my capacity as a university collaborator on this project. For information on NSRJ–CURA see online: <http://www.nsrj-cura.ca/home>.

21. Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, Penn: Good Books, 2002) at 37.

22. Llewellyn & Howse, *supra* note 5.

whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[23] Similarly, Robert Cormier, offered the following "working definition" of restorative justice in his report to the Solicitor-General:

> Restorative justice is an approach to justice that focuses on repairing the harm caused by the crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime—victim(s), offender, and community—to identify and address their needs in the aftermath of a crime and seek a resolution that affords healing, reparation and reintegration, and that prevents future crime.[24]

Those working within a restorative justice paradigm, while not necessarily rejecting the use of incarceration in all cases, typically urge the use of alternative measures to deal with offenders and to better address the causes of crime. While much more research and analysis on this issue is required, it is not particularly controversial to acknowledge that the current prison system in North America is not known for its sophistication or efficacy in terms of rehabilitation.[25]

The retributive model of justice underpinning the criminal justice system views crimes as violations against the state.[26] Despite lofty rhetoric that suggests rehabilitation and deterrence are elements of sentencing in Canadian criminal law, these are both subordinated to the primary goal of punishment. It is not a stretch to say that the overwhelming majority of convicted persons receive no meaningful rehabilitation or treatment as part of their sentence. At the same time, in the overwhelming majority of cases victims of crime do not receive restitution.[27]

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23. *Ibid.*

24. Robert S Cormier, "Restorative Justice: Direction and Principles—Developments in Canada" (Department of the Solicitor General Canada, 2002), online: <http://publications.gc.ca/collections/Collection/JS42-107.2002E.pdf>.

25. Indeed it is arguable that prison conditions, in particular in terms of the hyper masculinization of the institution, may reinforce rather than reduce the kind of ideological and behavioural orientations which contribute to gendered violence.

26. See Bruce Archibald, "Coordinating Canada's Restorative and Inclusionary Models of Criminal Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law" (2004) 9 Can Crim L Rev 215.

27. Although criminal injuries compensation funds exist throughout Canada, there are relatively stringent requirements, compensation amounts are fairly low, and the compensation comes from public funds and not the offender. For an analysis of criminal injuries compensation in relation to crimes of gendered violence in Canada, see Craig Brown & Melanie Randall, "Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance and the Role of the State" (2004) 30 Queen's LJ 311.

In a restorative justice model the view of crime is predicated not so much on transgressions against the state, but on a violation of other people, specifically of relationships between those people on an individual and communal level. As a result, the offender's obligation is both to acknowledge responsibility for the harms caused to the victim and to the community, and to right the wrong by meeting the requirements for amends and accountability as determined in the restorative justice process. As Zehr explains, the participants in a restorative justice process, that is the victim, offender, and community, are engaged "in a search for solutions which promote repair, reconciliation, and reassurance."[28] As Llewellyn and Howse also observe, "as a conception of justice, restorative justice challenges the very idea of justice prevalent in the current justice system. It is this challenge that holds the promise for effective reform."[29]

II. *Identifying possibilities, expanding options: why consider restorative justice for (some) crimes of gendered violence?*

Ambiguity about what restorative justice is and the inaccurate use of the term to describe a range of (sometimes badly implemented) alternative practices—such as sentencing circles, and victim/offender mediations—which are not consonant with the values, principles, or key processes of restorative justice, has led to significant confusion and less receptivity to restorative justice in the feminist community than might otherwise exist.[30] The terminological imprecision and its application to a wide range of alternative practices which are not specifically or appropriately tailored to the complexity of gendered violence, has understandably made many resistant to its use.

It may be premature to consider and, possibly, may never be appropriate to apply restorative justice approaches to cases of significant and ongoing violence in intimate relationships, and cases which pose threat and danger to victims and the broader community. The field of risk and lethality assessment in domestic violence situations, for example, is both complex

28. Zehr, *supra* note 21 at 181.

29. Llewellyn & Howse, *supra* note 5 at 19. Jennifer Llewellyn has elaborated upon the idea of relational theory and restorative justice in a number of articles and presentations. For a feminist articulation of relational theory, see: Jennifer J Llewellyn, "Restorative Justice: Thinking Relationally about Justice" in Jennifer J Llewellyn & Jocelyn Downie, eds, *Being Relational: Reflections on Relational Theory and Health Law and Policy* (Vancouver: UBC Press, 2012) 89.

30. A related issue is the adoption of restorative justice within various faith based movements. While there may be overlap between the values of some religious organizations and the theory of restorative justice, in my view restorative justice theory and practice should not be conceived of or practiced as a religion based (or even influenced) intervention and should, in fact, be secular in order to be as inclusive as possible. For an important and influential secular account of restorative justice see, for example, Llewellyn & Howse, *supra* note 5.

and relatively nascent. Even in cases where the risk of further harm to a woman is discernible, a more activated community may offer protections which supplement or extend significantly beyond the largely reactive powers of the police.

Research has shown, however, that many cases and incidents on the spectrum of what constitutes violence against women are not at the extreme end of the continuum, and instead are one-time occurrences or relatively isolated events. As such, the perpetrator does not pose an ongoing threat to the victim. These cases may be ideally suited to restorative justice approaches, providing they are carefully and specifically designed to address the gendered dynamics of crimes of sexual and other kinds of violence against women. This is in no way to trivialize the crimes or minimize their impact. Instead, it is to say that there are some classes of cases which, by their characteristics, may be amenable to an alternative and innovative legal response organized around restorative justice principles and practices.

In terms of those cases that might be amenable to a restorative justice approach—a determination to be made when developing an effective model—I outline in this section some of the potential benefits of a restorative justice approach over that offered by the traditional criminal justice system.

1. *What can restorative justice offer women harmed by gendered violence? A victim-centred theory and practice*

An adequate restorative justice approach to crimes of gendered violence must be victim centred. In an ideal world, a model of restorative justice or other alternative approaches to the crimes of sexual assault, violence in intimate relationships, and other interpersonal violations might be more equally balanced in terms of a concern for the needs and rights of the victim and the offender. We are nowhere near an ideal world, particularly in terms of gender equality. Indeed we are very far from it. In fact, it is arguably the case that the gendered relations of domination and subordination are nowhere more acutely expressed than in crimes of gendered violence. Indeed, this is importantly recognized even by some leading restorative justice scholars and advocates. As John Braithwaite and Kathleen Daly observe, "violence is gendered: it is in considerable measure a problem and consequence of masculinity."[31]

31. John Braithwaite & Kathleen Daly, "Masculinities, Violence and Communitarian Control" in Tim Newburn & Elizabeth Stanko, eds, *Just Boys Doing Business* (London: Routledge, 1994) 189.

It is not only to correct the offender-focused criminal justice system that restorative approaches dealing with gendered violence must be victim centred, but also because taking seriously the harms caused by the violations which inhere in gendered violence can only begin with the victims. The victim-centred starting point should not be controversial if restorative justice takes its own values seriously.

An alternative approach to the traditional processes of the criminal justice system, such as that of restorative justice, is significant for victim survivors of violence, perhaps most profoundly because it situates women as subjects and not objects in relation to their experiences of gendered violence. Instead of being victim witnesses to crimes not against them but against the state—as is the case in the traditional criminal justice system—in a victim-centred restorative justice approach the victims are the drivers of a process designed to repair the harm they have suffered. This approach is certainly more respectful and potentially quite empowering for victims, whose consent and participation is essential and central and whose injury is a critical focus of the process.

2. *Moving past offenders' denial: the acknowledgment of responsibility as the starting point for a restorative approach*

For a restorative justice approach, the starting point for planning an encounter, restitution, and amends, is the offender's acknowledgment of responsibility for the criminal act and its impact. While the offender may only initially take partial responsibility, the preparation for, experience of, and follow up required for a restorative justice model necessarily facilitates a deepened awareness and sense of responsibility, and the offender's response will likely become more robust as the process continues.

The offender's acceptance of responsibility—the starting point in a restorative approach to crimes of gendered violence—profoundly differs from that of the criminal justice system. This difference and its significance cannot be overstated. In a criminal trial, where admissions of guilt are extraordinarily rare in cases of gendered violence, the very "what happened" is contested and denied from the beginning and the trial is typically a spectacle of attacks on victim credibility and veracity.

Even in civil trials pertaining to gendered violence, such as historical child sexual abuse, victim-survivors are pathologized as "already damaged" in a defence tactic to minimize legal acknowledgment of the harms and the compensation owed. In contrast to traditional adversarial legal adjudications of gendered violence crimes, a restorative approach beginning from an acknowledgement of responsibility represents a profound shift for the victim's position within the process.

3. *Restorative justice, community participation, and the link to prevention*

> *Restorative justice represents a paradigm change from thinking about justice as a mechanism for social control to thinking about justice as a mechanism for social engagement.*[32]

Restorative justice approaches to gendered violence are highly relevant for prevention, perhaps most importantly because they centrally engage bystanders in the process by involving the community. Prevention is arguably the most important element of any strategy to end gendered violence and its harms. Yet prevention is woefully under resourced when it comes to services geared to violence against women, government funding, and even in the research literature on gendered violence (though violence prevention literature has developed in recent years and continues to grow).

We need to think of legal responses to crimes of gendered violence, including crimes of violence more generally (beyond sexual assault, and domestic violence), as part of larger social efforts aimed at violence prevention and creating the social conditions of equality and peace. Legal and other responses to violence against women which directly and fully engage communities necessarily play a role in violence prevention. By centrally including community members in restorative approaches to gendered violence, a much more robust connection between violence responses and violence prevention can be made.

Understanding human behaviour and attitudes means understanding the social norms that influence them. Social norms which valorize aggressive masculinity while sexualizing and undervaluing women are part of the social context of violence against women, as is the representation of gendered violence and coercion as entertainment in mass media, video games, and music videos. It is well recognized that effective sexual violence prevention must move beyond simply providing educational or

32. Dr. Brenda Morrison, the director of Simon Fraser University's Centre for Restorative Justice, cited online: SFU <http://www.sfu.ca/crj/about.html>.

informational messages to the targeted audience.[33] Instead, in order to bring about positive social change, effective violence prevention efforts need to challenge and change social norms, in addition to providing information and education to the public. Challenging the social norms which minimize, rationalize, or legitimize the pervasiveness of gendered violence can and should be part of the community's role in a restorative justice approach to crimes such as sexual assault, as is working towards the creation of new and egalitarian social norms.

4. *Restorative justice in practice: case studies and their limitations*

A restorative justice approach to a tragic case of intimate femicide (though not described as such), received significant coverage in the Sunday *New York Times* magazine in 2012, in an article titled "Can Forgiveness Play a Role in Criminal Justice?"[34] The article title somewhat miscasts the focus of the innovation undertaken in a case in which the family of a young woman murdered by her boyfriend in a "domestic dispute," sought an alternative to life in prison for the offender. After a protracted series of arguments spanning thirty-eight hours, Conor McBride, then nineteen years old, shot Ann Margaret Grosmaire and killed her. He then went to the police department, disclosed what he had done, and asked to be arrested.

In their despair and grief at the loss of their daughter and the very different loss of her boyfriend—someone they had loved as a member of the family—the parents of the deceased young woman discovered that prosecutorial discretion made possible a restorative justice intervention to allow the families (both of the victim and the offender) to participate in the process of determining what should happen to the young man who had killed his girlfriend. While the issue of forgiveness is one that the bereaved parents struggled with, the larger story revolves around the purpose and impact of seeking a restorative process to deal with the crime and the tragedy of it. It was an innovation in which those deeply affected by the

33. There is massive scholarly and popular literature on violence prevention. While some of this material is rather simplistic in focus and analysis, there is an increasing emphasis on more sophisticated ways to engage people, in particular through the use of social norms and the "bystander approach." See the work of Dr. Lori Haskell, for the Ontario Women's Directorate, in "Key Best Practices for Effective Sexual Violence Prevention Campaigns: A Summary" and "Preventing Sexual Violence: Social Marketing for Social Change" (2011), online: <http://www.sexualviolenceforum.ca/sites/default/files/pdf/Dr._Lori_Haskell_Preventing_Sexual_Violence.pdf>; see also Jackson Katz on *The Mentors in Violence Prevention (MVP) Model*, which is a gender violence, bullying, and school violence prevention approach that encourages young men and women from all socioeconomic, racial, and ethnic backgrounds to assume leadership roles in their schools and communities, online: <http://www.jacksonkatz.com/mvp.html>.

34. Paul Tullis, "Can Forgiveness Play a Role in Criminal Justice?" *New York Times Magazine* (4 January 2013), online: <http://www.nytimes.com/2013/01/06/magazine/ can-forgiveness-play-a-role-in-criminal-justice.html?pagewanted=all&_r=0>.

crime were able to participate meaningfully in the criminal process, by expressing their sorrow, articulating the harms done to them, requiring the offender to explain himself, giving input into the way in which the offender was punished and held accountable, and ultimately, of seeing justice done.

The Grosmaires contacted Sujatha Baliga, who directs the restorative justice project at the National Council on Crime and Delinquency in Oakland, California. Interestingly, Baliga had a history of working on behalf of assaulted women, and then trained as a lawyer in order to "lock up child molestors" because of her own experience of protracted sexual abuse perpetrated by her father.[35] She had worked as a public defender and later moved into the field of restorative justice. Also of interest is that Baliga initially suggested to the Grosmaires that a restorative justice intervention was not appropriate for a case of homicide, but was better suited for less serious crimes such as robberies. At the insistence of the bereaved parents, a restorative justice conference was planned as part of the pre-plea conference in which the prosecution and defence meet to bring a deal before the judge.

After the planning period, the conference took place in the jail where the offender was being held, and a photograph of the deceased young woman was prominently displayed throughout. After a structured conversation in which the parties spoke, including the parents of the offender and of the victim, the amends and sentencing part of the conference took place. The range of the recommended prison sentence was five to fifteen years, though the assistant State Attorney (responsible for many of the state's high profile murder cases) refused to agree to a sentence at the conference without further consultation. Instead, after the conference was concluded, the assistant State Attorney consulted with community leaders, the head of a local domestic-violence shelter, and others before he offered McBride a sentence of twenty years plus ten years of probation. The assistant State Attorney reported to the *New York Times* journalist who wrote about the case that he had to be certain that "a year or 20 years down the road, I could tell somebody why I did it. Because if Conor gets out in 20 years and goes and kills his next girlfriend, I've screwed up terrible. So I hope I'm right."

This case is interesting on many levels, beyond what can be assessed here. From the perspective of this analysis, it is remarkable that it represents a restorative justice innovation in relation to the most serious of crimes of gendered violence: intimate femicide. It also involved the offender's immediate and continuing admission of responsibility, and

35. *Ibid.*

was incorporated into (and not a radical departure from or parallel to) the traditional criminal justice system processing of the case. The offender was held accountable, and while it could be argued that he benefited from a lighter sentence than life in prison, two decades of incarceration is hardly insignificant. One term of his probation is that he will have to speak to community groups about teen dating violence. He is also voluntarily participating in the anger management programs offered in his prison, but the extent to which he will receive adequate rehabilitation and treatment is surely questionable in the punitive, increasingly privatized, and dehumanizing structure of the US prison system. Nevertheless, this particular offender remains connected to and visited by his family and the family of his victim, all of whom are invested in him rebuilding his life after his incarceration. This connection enhances his chances of rehabilitation and reduces the likelihood of recidivism. It also makes him feel, more deeply (one hopes), the impact of his crime.

From the reported perspective of the victims of the crime as well as the other participants, the restorative justice approach was effective and superior to what would have happened in a conventional criminal justice system process. The offender was required to speak at length and in detail about what happened. While this was particularly harrowing for the parents to hear, they all reported relief at knowing the details of what transpired.

Baliga, the restorative justice expert, reports that at the conference the victim's mother spoke powerfully and directly to the offender. "She did not spare [Conor] in any way the cost of what he did....There were no kid gloves, none. It was really, really tough. Way tougher than anything a judge could say." The public prosecutor recalls that "it was excruciating to listen to [the parents] talk....To look at the photo there [of the deceased victim]. I still see her. It was as traumatic as anything I've ever listened to in my life." Before the criminal sentencing was discussed at the conference, Baliga asked Ann Grosmaire's parents what they considered restitution. Kate Grosmaire addressed Conor directly and "with great emotion told him that he would need 'to do the good works of two people because Ann is not here to do hers.'"[36] It would seem as if the intensely personal and direct nature of the engagement required of an offender in a process such as this is both more demanding and difficult than the more ritualized and distancing procedures of a criminal trial where offenders are entirely insulated from the proceedings by their defence counsel. All of these elements might bode well for connecting offenders to a greater appreciation of the harms they have inflicted, initiate a self-critical examination as to the question of why,

36. *Ibid.*

and keep them connected within a community which not only holds them accountable for what they have done, but also cares about the possibility of their rehabilitation.

Some people within the restorative justice community may not think that the process described in the above case study departs sufficiently from the criminal justice system, whereas others might find that it leads to an "overly soft" punishment of a criminal. My own view is that this case seems to represent an important, if somewhat limited (in the legal sense), innovation—one which made a meaningful difference to the parties directly involved. At the very least it significantly realigned their roles, which would have been extraordinarily minimal and marginalized in a traditional criminal trial or proceeding. Furthermore, it is their assessment of the efficacy and impact of the restorative justice intervention which counts the most.

Restorative justice models differ and some which have (infrequently) been tried in cases of gendered violence (no doubt as well as in relation to other crimes) have been done badly, sometimes very badly. A colleague who is an expert in violence against women and who has worked on this issue for many years sent me this discouraging and recent story about a sexual assault case mishandled in a restorative justice process in a Canadian province:

> The community-based victim support worker was brought in by the community forum facilitator and supported the victim through the community forum process. The feedback from the community-based victim support worker was exactly what we always hear—the victim was not central, the referral made her feel the police didn't take the offence seriously, the offender was babied and cajoled into "taking responsibility," including by the victim, the offender's supporters were singing his praises, the volunteers were doing this in their spare time without any training on the dynamics and realities of violence against women....And, on and on.[37]

Part of the reason this case was even referred by police to a restorative justice process was because the Crown in the jurisdiction was known rarely to pursue prosecution in gendered violence cases, so there was a good chance that for this sexual assault case, the charges would have been dropped and nothing would have been done at all. In fact the police in the jurisdiction, who work well and closely with the community based anti-violence workers, were trying to get a remedy for the sexual assault victim.

37. Personal correspondence, on file with author.

But the restorative justice intervention undertaken was, unfortunately, sorely deficient.

Bleak as this account is, it does not necessarily condemn restorative justice per se, though it certainly raises many concerns. It highlights the ineffectiveness and even harmfulness of inappropriate practices, insufficient preparation and training, failures of Crowns and other criminal justice system players to take gendered violence cases seriously, and failures on the part of community supporters and unskilled facilitators to understand gendered violence and to challenge its minimization and normalization. Furthermore, as already discussed, a variety of alternative practices which have been described as restorative justice are not, in fact, in any way true to the defining elements and principles of restorative justice.

Having referenced these examples, there is, in fact, a larger problem with citing case studies of restorative justice interventions, whether they are deemed successful or dismal failures—it is that they can be taken to stand in for arguments either in favour of or opposed to restorative justice. There is a risk of oversimplifying by citing these cases or examples as if they are definitive and end the debate. There is a danger, therefore, in over generalizing from particular examples as they carry too much weight and stand in for too much.

While it is tempting for the sake of concreteness and specificity to expound upon particular examples, they ultimately do not necessarily assist or defeat the arguments I am making here, which are conceptual and political. I am not arguing that restorative justice has already been shown to be successful or appropriate for the complexities of cases of gendered violence, only that it is possible that it could be, and that is a possibility we should pursue. And I aim to contribute to the conversation about how a victim-centred, feminist-inspired version of restorative justice for violence against women might begin to be developed, implemented, and evaluated for its efficacy. Given the paucity of viable options for women harmed by gendered violence, we can only benefit by expanding the available remedies.

III. *Concerns and considerations for a feminist-inspired restorative justice approach to some crimes of gendered violence*

A significant amount of thoughtful consideration and critique of restorative justice approaches to crimes of gendered violence has been generated by scholars and advocates concerned to devise better legal processes to remedy these crimes. Drawing on this body of work, I outline some of the key concerns about and considerations for how to address these concerns in moving towards restorative justice approaches specifically designed

for responding to some cases of gendered violence. The issue of which cases might be suitable, and which excluded, is one that is beyond the scope of this analysis, but warrants sustained attention at a more concrete than conceptual level. Some work on precisely this question has already begun.[38]

1. *Feminist criticisms of restorative justice*

A significant proportion of feminist scholarship on restorative justice, perhaps the dominant voice in the feminist conversation about it, has been at the level of critique and resistance. There are very good reasons for concern about the fit between restorative justice and crimes of gendered violence, and not only because approaches described (often inaccurately) in practice as restorative justice have been botched or are inappropriate.

Many criticisms of some restorative justice approaches are entirely valid, though this does not mean that a feminist-inspired restorative justice model could not satisfactorily address them. The concerns raised in the literature and by advocates and practitioners require sustained and central attention in any further attempts to conceptualize and deliver restorative justice responses to these crimes and their particular and complex dynamics. Indeed, addressing these concerns might be the most productive starting point for any development of restorative justice approaches to crimes of gendered violence.

Donna Coker has aptly categorized feminist concerns about informal adjudication for assaulted women into four types: "the coercion problem, the cheap-justice problem, the normative problem, and the communitarian/social-change problem."[39] With particular reference to some restorative justice practices the main lines of critique are that they pay insufficient regard to women's safety, are soft on offenders and lack adequate accountability, insist on forgiveness, coerce victims to participate and

38. See, for example, the work of Mary Koss on using restorative justice for some cases of sexual assault. Mary P Koss, "Empirically Enhanced Reflections on 20 Years of Rape Research" (2005) 20:1 J Interpersonal Violence 100; Koss & Hopkins, "Incorporating," *supra* note 2; (2005) 11:5 Violence Against Women; Koss, et al, "Introducing the RESTORE Program," *supra* note 13, Hopkins, Koss & Bachar, "Applying Restorative Justice," *supra* note 2.

39. Donna Coker, "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking" (1999) 47 UCLA L Rev 1. See also, Coker, "Restorative Justice, Navajo Peacemaking" *supra* note 3.

thereby compromise women's integrity, and do not deliver justice for victims.[40]

Some of the criticism of what is taken to be restorative justice is predicated on inaccurate characterizations of the theory or practice or both, and many of the alternative approaches taken to processing crimes of gendered violence have been erroneously described as restorative justice when they actually bear little if any relationship to it. And this problem aside, it seems reasonable to suggest that a great deal of the criticism of restorative justice from feminist scholars involves cases where some version of restorative justice has been applied without adequate training or understanding of gender inequality and the dynamics of violence against women.

In fact, to date there have been extremely few models of restorative justice specifically designed for responding to crimes of gendered violence.[41] Apart from a very few exceptions,[42] there are virtually no restorative justice models which have been conceptualized, implemented, and overseen by those with expertise and experience working on issues related to gendered violence. Indeed, as Daly and Stubbs point out, while sexual violence and violence against women in intimate relationships are common contexts for women to come into contact with the criminal justice system, these are also areas "in which RJ advocates are poorly informed."[43] The failings of restorative justice in relation to gendered violence to date, therefore, are largely failings because the restorative approach has not been done properly (or has not been tried at all). These

40. See, for example, Cameron, *supra* note 2; J Stubbs, "'Communitarian' Conferencing and Violence Against Women: A Cautionary Note" in Mariana Valverde, Linda MacLeod & Kirsten Johnson, eds, *Wife Assault and The Canadian Criminal Justice System: Issues and Policies* (Toronto: University of Toronto, 2002); Stubbs, "Domestic Violence and Women's Safety," *supra* note 2; Julie Stubbs, *Restorative Justice, Domestic Violence and Family Violence* (Australia: Australian Domestic and Family Violence Clearinghouse, 2004).

41. Most jurisdictions prohibit restorative justice alternatives associated with legal systems, out of an abundance of caution and because violence against women advocates have forcefully argued for limitations on approaches which might further endanger or harm women who are victims. In some jurisdictions, restorative justice models have been implemented for crimes committed by young offenders, including some Canadian provinces, New Zealand, and Australia among others.

42. Joan Pennell & Mary Koss, "Feminist Perspectives on Family Rights: Social Work and Restorative Justice Processes to Stop Women Abuse" in Elizabeth Beck, Nancy P Kropf & Pamela Blume Leonard, eds, *Social Work and Restorative Justice: Skills For Dialogue, Peacemaking, and Reconciliation* (New York: Oxford University Press, 2011) 195; Joan Pennell, "Family Group Conferencing" in CM Renzetti & JL Edleson, eds, *Encyclopedia of Interpersonal Violence* (California: Sage Publications, 2008) 238; Joan Pennell, "Stopping Domestic Violence or Protecting Children? Contributions from Restorative Justice" in D Sullivan & L Tifft, eds, *The Handbook of Restorative Justice: A Global Perspective* (New York: Routledge, 2006) 286; Barbara Hudson, "Restorative Justice and Gendered Violence Diversion or Effective Justice" (2002) 42 Brit J Crim 616.

43. Daly & Stubbs, *supra* note 2.

failings can potentially be addressed by thinking about how restorative justice models could respond to gendered violence and starting to develop these models with, and drawing on the expertise of people working within, the violence against women sector. Insider knowledge of the complex gendered dynamics of sexual violence and violence against women in intimate relationships is the critical starting point and touchstone for the development of any appropriate restorative justice approaches to crimes of gendered violence.

2. *Shifting the frame: asking different questions*

Understandably, most of the intellectual, organizational and advocacy efforts undertaken by feminist activists and scholars have focused on the criminal justice system we already have and how to improve it. But in the search for better legal responses and in terms of the broader social change project of feminism, we need a shift in focus away from only documenting defects in the criminal justice system (important as that is to the law reform project) towards a more expansive conversation about what alternative visions of and approaches to justice might offer for the development of better responses to crimes of gendered violence.

Speaking of the possibilities for restorative justice and gendered violence, Daly and Stubbs point out that "more attention needs to be given to ideal justice principles and to whether RJ measures up to those principles."[44] Put differently, the feminist project for ending violence against women and devising better and new justice options for this problem could benefit from more constructive and visioning conversations about what justice from the perspective of victims might look like and how we might move closer towards it. As Judith Herman asks in her superb analysis, what are the meanings of justice from the victims' perspectives?[45]

Some research has been done to document the perspective of service providers in the violence against women sector on the suitability of restorative justice. The researchers found that (anti-)violence against women advocates often tended to think of restorative justice and the criminal justice system in dualistic and even opposing terms. As Curtis-Fawley and Daly explain:

> As long as advocates and other feminist critics view restorative justice in opposition to established criminal justice, it will be perceived as a soft

44. *Ibid* at 22. Jennifer Llewellyn has assessed the relational theory underpinnings of the theory of justice which inheres in restorative justice from a feminist perspective in her article, "Restorative Justice: Thinking Relationally about Justice" in Llewellyn & Downie, *supra* note 29.

45. Judith Lewis Herman, "Justice From the Victim's Perspective" (2005) 11:5 Violence Against Women 571.

> option that is incapable of dealing with serious crimes such as gendered violence. The task ahead is to create a dialogue that moves beyond this dualistic debate and seeks to imagine how the future of restorative justice may be shaped by feminist engagement.[46]

As Curtis-Fawley and Davis point out, restorative justice models may be connected or parallel to criminal justice system proceedings, and when and under what circumstances is to be determined as part of the project of thinking through what restorative justice approaches might offer. They elaborate on this view point, stating that:

> The debate must move beyond either/or analyses that unequivocally promote or denigrate restorative justice approaches to gendered violence. We require a more flexible, pragmatic approach that permits consideration of when restorative justice may (or may not) be appropriate, for which kinds of offenses and victim-offender relations, and when it should be used as diversion from court or as a parallel court process.[47]

In seeking to devise more adequate, effective, and respectful remedies for those harmed by crimes of gendered violence, "we cannot afford to put anything off the agenda."[48]

3. *Considerations for a robust restorative justice approach to (selected) cases of gendered violence: key principles articulated by the violence against women sector*

A number of organizations and individual researchers and scholars have begun to think through what a restorative justice approach to cases of violence against women might require in order to be effective and to satisfy concerns about women's safety. Publications pertaining to the Restore Project coordinated by Dr. Mary Koss detail the kinds of procedures and safety measures put in place in one of the extremely rare programs applying restorative justice to adult sexual assault cases at the more "minor" end of the spectrum.[49] The Ending Violence Association of British Columbia (EVA BC) has produced a useful report synthesizing findings from evaluations, and outlining concerns about the application of restorative justice to cases

46. Curtis-Fawley & Daly, *supra* note 2 at 632.
47. *Ibid* at 633.
48. *Ibid.*
49. Hopkins, Koss & Bachar, "Applying Restorative Justice," *supra* note 2; Koss et al, "Introducing the RESTORE Program," *supra* note 13; Hopkins & Koss, "Incorporating," *supra* note 2; Keith V Bletzer & Mary P Koss, "From Parallel to Intersecting Narratives in Cases of Sexual Assault" (2012) 22:3 Qualitative Health Research 291.

of violence against women. It has also developed a highly useful checklist of considerations for any future restorative justice programs.[50]

While the set of issues surrounding a restorative justice model for crimes of gendered violence warrants its own fuller analysis and requires considerable detail, I sketch out some preliminary principles to guide further work in this area (drawing on the work of other scholars and organizations such as EVA BC).

A restorative justice approach to gendered violence must:

- Be meaningfully victim centred and focused;
- Prioritize safety, autonomy, and respect for victims;
- Be based on a well thought out screening criteria to determine which cases might be suitable and which are not, and be based on criteria which are regularly reviewed;
- Include risk assessment and safety planning (though the need for this is typically understood in cases of domestic violence, risk and safety assessments must be required for any and all cases of gendered violence using restorative justice);
- Require extensive preparation for all participants—this part of the process may be the most critical and, indeed, the most transformative;
- Have program standards in place before cases are processed, standards which are regularly reviewed;
- Centrally involve community members and facilitators who have specialized and in-depth expertise in the dynamics, nature and effects of gendered violence, including the range of victim responses and coping styles, research on offenders, nature of social minimization, misinformation and myths;
- Abandon the idea of neutrality—take an anti-violence and gender equality perspective, as Coker points out: engage normative judgments that oppose gendered domination as well as violence. As a theory of justice this would require an orientation towards

50. See: *Restorative Justice, Domestic Violence and Sexual Assault in Canada: A Summary of Critical Perspectives from British Columbia* (British Columbia: BC Association of Specialized Victim Assistance and Counselling Programs, 2002), online: <http://www.endingviolence.org/node/354>. Tracy Porteous, executive director of EVA BC, has played a critical and leadership role in developing innovative responses to violence against women, and as part of this work has analysed the possibilities for and concerns about restorative justice for crimes of gendered violence. See, "Checklist for Restorative Justice Programs Contemplating Violence against Women" (2002) developed by Tracy Porteous, Executive Director, Ending Violence Association of BC & Willie Blonde, John Howard Society of BC (on file with author).

equality and justice in relationships, both structural and individual (which obviously also requires a context specific analysis);
- Challenge victim blaming;
- Challenge the social denial and minimization of the nature and harms of gendered violence;
- Require specialized training and education about the nature and dynamics of gender inequality;
- Be cognizant of the context of racism and other forms of social inequalities and discrimination, and be sensitive to cultural contexts and differences;
- Require ongoing monitoring and follow up; and,
- Be trauma informed and include specialized trauma training.

4. *Essential restorative justice procedural components: planning, monitoring, transparency, and ongoing evaluation*

The focus of this analysis on the potential for using restorative justice for some cases of gendered violence is conceptual, so the details and mechanisms of any such model warrant a separate analysis and, most importantly, must be worked out on the ground, in local contexts, and in consultation and collaboration with experts on the topic of violence against women.

That said, any appropriate and successful restorative justice approach to crimes of gendered violence must include the following elements:
- Careful planning and preparation (which includes screening of appropriate cases);
- The development of standards of practice for restorative justice and gendered violence models in advance of any programs being undertaken for these crimes;
- Ongoing monitoring of the program and its challenges, deficiencies, and successes;
- Rigorous follow up and monitoring as an essential component of accountability mechanisms;
- Transparency so that records of restorative justice proceedings (rendered anonymous for confidentiality) are kept and available to evaluators/researchers and regular public reporting is undertaken; and
- Ongoing evaluation using both qualitative and quantitative measures, the results of which are publicly available.

The legitimacy and efficacy of restorative justice models for crimes of gendered violence, both in initial conceptualization and in practice over

the long run, depend upon transparent, self-critical, self-evaluating, and public reporting.

Another key feature of an adequate restorative justice model attuned to the particular dynamics and harms of gendered violence must be an approach which is fundamentally trauma informed. This is particularly important because much of the feminist critique of the criminal justice system and its failings with regard to gendered violence has demonstrated the retraumatizing nature of the adversarial trial process in which victims, by virtue of their status as witnesses to crimes against the state, are vulnerable to a range of indignities, including vicious and discriminatory credibility attacks. A victim-centred restorative justice approach, however, potentially has the capacity to overcome these difficulties by starting from a nuanced appreciation of the nature of the harms of sexualized violence, the complexities and range of responses to victimization, and the wide ranging effects of trauma.

5. *Trauma-informed legal responses and trauma-informed restorative justice*[51]

A great deal (though certainly not all) of the conflict, difficulties, and violence in human interactions is rooted in some way in untreated abuse-related trauma. This also applies to crime. For women in particular, vulnerability to, knowledge of, and direct experiences of pervasive forms of gendered violence can be understood as a form of broader trauma. Yet most lawyers, judges, court personnel, police, and even the majority of service providers within the social services, are unaware of the effects of trauma on human development and human behaviour. Instead, the legal system is premised on fairly simplistic and highly rationalist assumptions about human psychology and behaviour.

Adequate and more effective legal responses, in particular, but not only in relation to crime, must be trauma informed. Trauma informed refers to an understanding of the way in which traumatic experiences affect human development, behavior, and responses.

An event is defined as traumatic when it is experienced as so overwhelming that it diminishes a person's capacity to cope, and elicits intense feelings of fear, terror, helplessness, hopelessness, or despair. While the traumatic event need not be violent, it entails the violation of a person's sense of self and security.[52]

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51. See Randall & Haskell, *supra* note 8, for a fuller elaboration of these ideas.

52. Nina Kammerer & Ruta Mazelis, *After the Crisis Initiative: Healing from Trauma after Disasters* (Resource Paper: Trauma and Retraumatization, 2006), online: <http://gainscenter.samhsa.gov/atc/text/papers/trauma_paper.htm>.

Research in the exploding fields of trauma and neuroscience shows that trauma physiologically alters the way that the brain responds to danger. People who have experienced trauma often have abnormal levels of stress hormones, which can sometimes cause impairments in logic and reasoning capacities when the traumatized person feels under threat.[53] Due to these complex neurological trauma responses, the effects of trauma will go beyond those readily connected with the traumatic experience itself.[54]

The degree to which trauma affects a person depends on a range of factors. These can include (but are not limited to) her temperament, how she interprets what happened, her basic coping skills, the level of traumatic exposure, home and community environments, and the degree to which she has access to strong and healthy support systems.[55] Recent studies support the conclusion that the impact of trauma is not only cumulative—the more times a traumatic event is experienced the greater the impact—but also additive: exposure to additional different types of trauma is correlated with greater impact.[56]

Post-traumatic stress disorder (PTSD) is the most widely known psychological impact of a traumatic event, as the survivor often re-experiences the event through dissociation, flashbacks, and nightmares.[57] Far too often, trauma is equated solely with PTSD.[58] While a likely result, there are many other known consequences. To list some other negative outcomes associated with trauma:

- Mental and emotional health disorders like depression, excessive hostility, and generalized anxiety;
- Engagement in high-risk behaviors;
- Low academic performance and delinquency;
- Substance use disorders;
- Criminal activity;
- Physical health problems, including those associated with eating disorders;

53. Justice Policy Institute, *Healing Invisible Wounds: Why Investing in Trauma-Informed Care for Children Makes Sense* (Justice Policy Institute, July 2010), online: <http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf>.

54. Stephen Wiland, "What Happened to You?" Assessing Trauma with Community Mental Health Populations: A Toolkit for Providers" (National Clearing House for Trauma Informed Care, 2010), online: <http://integratedrecovery.org/wp-content/uploads/2010/08/What_Happened_to_You_-_Addressing_Trauma_with_Community_Mental_Health_Populations-A_Toolkit_for_Providers5.pdf>.

55. Kris Buffington, "Trauma-Focused Cognitive Behavioral Therapy," online: <http://www.ja.cuyahogacounty.us/pdf_ja/en_US/DefendingChildhood/KrisBuffington-TF-CBT-Prt1.pdf>.

56. Kammerer & Mazelis, *supra* note 52.

57. *Ibid.*

58. *Ibid.*

- Struggles with peer and family relationships; and
- Self-harmful urges such as suicidal tendencies.[59]

At the core of these reactions, or coping strategies, is "disempowerment and disconnection from others."[60] Trauma can make it difficult to create meaningful relationships with the people who could help the most. After experiencing a traumatic event or events, it is not uncommon to experience difficulties with trust and intimacy, anxiety, and rage, all the while grappling with chronic feelings of intense shame, fear and poor self-worth.[61]

The core principles of trauma-informed services include: choice, empowerment, safety, collaboration, trustworthiness.[62] The goal of a trauma-informed approach to delivering services is to minimize further trauma. This is achieved by a conscious attempt to reduce and eliminate triggers for victims, assist in healing and recovery, and prevent future traumatization and violence.[63] These goals can be accomplished by taking the trauma into account in developing an institutional response or policy, avoiding triggering trauma reactions, adjusting behaviour to support the individuals, and allowing survivors to manage their trauma symptoms.[64]

Trauma-informed systems understand traumatic impacts and the ways these shape human development, responses and coping, view recovery as possible, recognize that healing and recovery takes place within the context of relationships. As the National Council for Community Behavioral Healthcare explains it, in a trauma-informed system "services are... strength-based, recovery-oriented, culturally relevant, gender-specific... engaging, collaborative, sensitive, respectful, empowering."[65]

Trauma-informed approaches also stress the promotion of safety, recognize the need for cultural competence, offer support for client control and autonomy, and recognize the importance of integrated care and responses of social systems to avoid revictimizing and retraumatizing the people who come into contact with them. While the principles of trauma informed care were developed in the context of social services, including

59. *Ibid.*
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*
63. Barbara Bloom, *Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders* (Ohio State University, Excellence in Justice Symposium, November 2006), online: <http://www.drc.state.oh.us/web/iej_files/200702_KeynotePresentation_BarbaraBloom.pdf>.
64. *Ibid.*
65. See National Council for Community Behavioral Healthcare, online: <http://www.thenationalcouncil.org/cs/business_practice_areas/traumainformed_care/what_is_traumainformed_care>.

mental health services, some of the key insights are applicable to the legal system; indeed, they are already being adopted in terms of responses to child and family services and policing.

Clearly restorative justice models, with their emphasis on repairing relationships, must also adopt a trauma-informed organization and system approach to effectively deliver on this value in practice.[66] Indeed, a psycho-educational component of a restorative justice response to gendered violence would be to increase the knowledge of all parties about the impacts of trauma on human development and coping. Related to this, organizers and facilitators of restorative justice approaches to crimes of gendered violence, and indeed of other crimes, would require specialized and in-depth trauma training.

6. *Expanding and redefining what counts as a successful outcome for processing crimes of gendered violence: restorative justice and the criminal justice system*

Offering another viable choice and option for a remedy to women who have suffered domestic or sexual assault is a welcome development in the face of a traditional legal system radically disempowers, marginalizes, and too often pathologizes victims of gendered violence. It is important to point out that restorative justice approaches should be undertaken as processes and not thought of as single or discrete events focusing only on the restorative justice "conference" or meeting. Important as that component is, so is the extensive preparatory work involved, as well as the accountability measures decided upon, imposed and monitored for implementation and follow up.

The restorative process itself, including perhaps most importantly, the foundational preparation work, is already potentially transformative for victims, because unlike the criminal justice system where the victim is a witness to the crime against the state, in a restorative justice approach the harm to the victim is the starting point for recognition of the wrong and the search for a way to remedy it. These empowerment elements include: psycho-education, provision of support, resources, options, opportunities to form a narrative of "what happened," and a view to how it affected the person in the various elements of their life.

Even interruption of the process or a failure to get to the "conference" or "encounter" stage is not equivalent to failure. Instead it is an indication that, for a variety of reasons, which will always warrant analysis and evaluation, the process was not appropriate or the parties were not ready.

66. This important set of issues is developed in Haskell & Randall, *supra* note 8.

This will be inevitable in any ongoing restorative justice approach, either in general or in specific relation to crimes of gendered violence, and should be part of the evaluated process, which should be continuously monitored, analysed, and refined as needed.

Restorative justice approaches to crimes of gendered violence can also be undertaken in a range of ways in relation to, and distinct from, the criminal justice system. Advocating for the development and implementation of victim-centred restorative justice approaches to cases of gendered violence (where victims consent of course) does not require or lead to an abandonment of successful law reform efforts or of the resources and procedures of the criminal justice system. Indeed, there are many points of entry for restorative justice approaches within the traditional criminal justice system, including diversion pre-trial, after a trial (or plea bargain), and post-conviction, or even post imprisonment.[67] In fact, it might be a mistake, at least initially, to undertake restorative justice initiatives for crimes of gendered violence without direct connection to the criminal justice system, at the very least as a backup in the event that the restorative justice process does not yield the results agreed upon by the parties.

7. *Engaging the state: cautions about government enthusiasm to divert from the criminal justice system*

An acknowledged, if relatively under theorized subject in restorative justice is the role of the state. Daniel Van Ness centrally identifies the significance of the state to the project of restorative justice. In fact, Van Ness identifies the state as one of the four crucial elements of restorative justice, in addition to the three other and more well-known constituents: victim, offender, and community.[68] Van Ness has also recently proposed that the term "restorative living" be adopted by those committed to the foundational restorative justice principles in a wide range of spheres,

67. For a schematic discussion of the entry point analysis see Bruce P Archibald, "Let My People Go: Human Capital Investment and Community Capacity Building via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice" (2008) 16 Cardozo J of Int & Comp L 1. Some feminist writers who argue that restorative justice should be considered for gendered violence suggest that feminists should not support prisons at all, though this is a controversial position on which there are diverse perspectives. See, for example, Constance B Backhouse, "A Feminist Remedy for Sexual Assault: A Quest for Answers" in Elizabeth Sheehy, ed, *Sexual Assault Law, Practice, and Activism in a Post Jane Doe Era* (Ottawa: University of Ottawa Press, 2012) 725.

68. Daniel W Van Ness & Karen Heetderks Strong, *Restoring Justice*, 2d ed (Cincinatti: Anderson Publishing, 2002). See also Archibald & Llewellyn, *supra* note 19.

extending beyond the sphere of the legal, into education, workplaces, and other domains of everyday life.[69]

Restorative justice approaches to crime in general, and to crimes of gendered violence in particular, entail a different relationship to the state for victims, offenders, and the community than exists within the traditional criminal justice system. Engaging the state is both necessary and perilous for those working to end violence against women, and has always been a fraught relationship.[70] No doubt the tensions between the state and social movements, such as those working to end violence against women, will affect the construction of the project to bring restorative approaches to crimes of gendered violence, but that is part of the terrain to be navigated.[71]

Many government actors and those working in government institutions are sincerely committed to finding community and legal solutions to end gendered violence. But all too often the broader government agenda, particularly in a time of fiscal constraints, is to cut costs and find the most efficient, simple, and inexpensive solutions, regardless of their ultimate suitability. It is not unreasonable, therefore, to worry that the enthusiasm for restorative justice at some government levels, in Canada and elsewhere, is motivated more by a concern to offload cases from the overburdened and under-resourced criminal justice system than it is by a genuine commitment to develop well planned and resourced alternative legal avenues. It may well be the case, in fact, that a carefully planned restorative justice model would be as or more resource intensive than the criminal justice system, given the number of players involved, the training required, and the follow up necessary.

While Llewellyn and Howse identify communities as the central drivers of restorative justice in their "Conceptual Framework" for restorative justice initiatives, they acknowledge the importance of the role of the state as an agent of restorative justice. As they point out, "the government is in a prime position to play a role in ensuring rights are protected...[and] could also be key in ensuring that some standards are met with respect to restorative processes."[72] State resources will be essential to the development of adequate restorative justice programs for violence

69. Daniel Van Ness, "Restorative terminology: A modest proposal" (2 May 2011), online: <http://www.restorativejustice.org/RJOB/restorative-terminology-a-modest-proposal>.

70. See, for example, Emily J Sack, "Battered Women and the State: The Struggle for the Future of Domestic Violence Policy" (2004) Wisconsin L Rev 1658; Jane Murphy, "Engaging With The State: The Growing Reliance on Lawyers and Judges to Protect Battered Women" (2003) 11 Am UJ Gender Soc Pol'y & L 101.

71. For an analysis of some of these issues in the context of Nova Scotia, see Archibald & Llewellyn, *supra* note 19.

72. Llewellyn & Howse, *supra* note 5 at 107.

against women and this will entail collaboration between those academics, advocates, service providers, and policy makers with expertise in gendered violence and those working within a variety of government institutions and organizations. Engaging the state, therefore, must necessarily be an ongoing part of the work of developing, monitoring, and evaluating restorative justice approaches to crimes of gendered violence.

Conclusion

Increasingly, restorative justice approaches are being advocated or explored around the world and in a number of contexts.[73] In Canada, various levels of government have already adopted restorative justice approaches in some categories of crimes, typically involving youth; however, these approaches are actively under consideration for adult offences, including crimes of violence against women. Given this emerging reality, it would be a grave mistake for feminist legal scholars and advocacy and service providers to fail to participate fully and critically with these developments, by exploring if, when, and under what circumstances restorative justice models might be appropriate and beneficial. Indeed, it would be better still to fully engage with the project in order to devise and play a leadership role in any movements towards the application of restorative justice to gendered violence.

But beyond the call to join in and shape the debates on this issue, there are substantive reasons that a restorative justice approach to gendered violence warrants consideration, exploration and testing. Of profound significance in restorative justice is its beginning from a point of offender admission of responsibility. This would allow, in cases of gendered violence, for bypassing the entire spectacle of contested responsibility in a criminal trial that damages victim-witnesses in the process. In this way, one of the most pernicious forms of revictimization of assaulted women in the criminal justice system is eliminated, that is the credibility testing for the purposes of challenging the veracity of a woman's account of "what happened" to defend the accused against criminal culpability.

A starting point of offender admission of responsibility and a process by which a convicted offender does not simply passively endure a sentence imposed but must actively participate in its construction and completion process, marks an important and potentially transformative,

73. See, for example, Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks Consultation Paper* (2010) 545, online: <http://austlii.edu.au>; *Victorian Law Reform Commission Review of Family Violence Laws: Report* (2006) 84; *Victorian Law Reform Commission Sexual Offences: Final Report* (2004) 478, online: <http://www.lawreform.vic.gov.au/all-projects/family-violence>.

even rehabilitative shift. Further, active community involvement in a restorative justice approach to gendered violence makes it more real and tangible that violence against women is a social problem requiring a broader social solution. An approach which focuses on victims' needs and experiences could not be more different than the criminal justice system which sidelines and often further harms victim-witnesses.

The overlap of concerns and shared principles between feminist and restorative justice approaches to crime means that there exists the potential to develop more radical, nuanced and transformative remedies than we currently have. A thoughtful exploration of what kinds of cases might be suitable for a restorative justice process can only expand the far too limited options for women harmed by crimes of gendered violence.

Many cases of gendered violence will be screened out as unsuitable for restorative justice, particularly in the early phases of the development and refinement of the model and processes. Restorative justice itself has a built-in set of filters. In addition, the restorative justice approach is predicated upon the consent of the parties, so victims and offenders must agree to participate, and offenders must accept and not deny responsibility for the harmful conduct. These requirements will necessarily filter out many cases.

A failure to consider the circumstances in which restorative justice might offer something better, and could offer another option in a legal landscape which resembles a desert, is a failure to take seriously the feminist critique of the criminal justice system, and commits us to being limited to tinkering around the edges of a largely failed and certainly deficient model. If we want meaningful and progressive social change at both macro and micro levels, and if law and justice remedies are to be part of that, then we must expand and improve the options currently available to those harmed by gendered violence.

Mary Koss, a highly regarded feminist expert on sexual assault and violence against women, has issued what she describes as "a call to action to those working to end sexual assault that is holistic, involves efforts to change community norms, enlarge survivor services, improve survivor satisfaction of justice needs, and increase offender accountability."[74] As Koss points out, moving forward on these fronts by engaging restorative justice approaches strengthens and does not diminish already existing legal avenues for processing crimes of gendered violence. Instead, it expands

74. Mary Koss, "Restoring Rape Survivors. Justice, Advocacy, and a Call to Action" (2006) 1087 Ann NY Acad Sci 206.

them "through promotion of thoughtfully designed nonadversarial, restorative justice-based options."[75]

The argument in this paper does not amount to a recommendation that we move forward from a position of blind faith into adopting restorative justice models as they currently exist or as they have been practiced for processing crimes of gendered violence. Indeed, in Canada appropriate models have yet to be developed, let alone tested, evaluated, and refined. Nor does considering the applicability of restorative justice in some cases require an abandonment of the criminal justice system as it currently stands. Nor is it a retreat from any (albeit limited) successes, or an abandonment of several decades of feminist-inspired law reform. Rather it is a call to engage fully and critically with restorative justice theory and practice, and to draw on the best elements of this approach in pursuit of better and expanded options for women harmed by crimes of gendered violence who may benefit from a process and remedy other than that offered by the traditional criminal justice system.

75. *Ibid* at 208.