

Mediating Sexual Assault:

Justice for Victims Within and Beyond the Criminal Justice System

By Ainslie Schroeder

I. INTRODUCTION

Restorative justice measures, such as victim-offender mediation and family group conferencing, have been touted as bringing a richer and more lasting justice to all parties involved—victims, offenders, family members and the community alike. Significant concerns exist, however, regarding the appropriateness of applying restorative justice to gendered violence, both because of doubts that restorative methods can benefit victims in this context and because of the perceived incompatibility of restorative justice with the women’s movement goal of establishing violence against women as a serious public criminal law issue. This paper will focus on both the appropriateness and efficacy of restorative justice measures in addressing sexual assault and on the proper forum in which it should occur. I conclude that restorative justice for victims of sexual assault has demonstrable benefits for victims and offenders, benefits that could reach more parties if offered completely apart from the criminal justice system. While restorative justice measures will have some negative impact on efforts to keep violence against women in the public eye, its demonstrated benefits would likely exceed any detrimental effect. Generating options for women who are ill-served by the current system and in need of help is the best feminist response to this very difficult issue.

This paper’s conceptual focus is upon the use of restorative justice measures to address sexual assaults between acquaintances rather than sexual assaults between strangers or long-term domestic violence, although commentary addressing those criminal activities

will be drawn from in addressing the broader questions engaged.¹ The analysis herein considers sexual assaults perpetrated upon women by men and attempts to address the gendered nature of this crime as well as the responses to it. Restorative justice, which is explained briefly later, will be compared to what I loosely call the “criminal justice system,” meaning the state’s current method of dealing with crime through police officers, courts, and court sentencing of criminals.

II. THE EXPERIENCE OF SEXUAL ASSAULT VICTIMS IN THE CRIMINAL JUSTICE SYSTEM

The practice is formally illegal but is seldom found to be against the law.²

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The criminal justice system has failed to establish itself as the place for victims of sexual assault, who are primarily women,³ to turn. Canada’s 1999 General Social Survey found that 78% of sexual assaults are not reported to police,⁴ although other studies have estimated that the percentage of unreported sexual assaults is much higher.⁵ Further,

¹ Many commentators’ support or rejection of the use of restorative justice in cases of sexual violence, or any type of gendered violence against women, is largely contingent upon the nature of the violence; others reject drawing what may be artificial lines between different types of gendered violence: see pp. 13–16, *infra*.

² Catharine A. MacKinnon, “Reflections on Sex Equality Under Law” (1990-91) 100 Yale L.J. 1281 at 1303 [hereinafter MacKinnon, “Reflections on Sex Equality Under Law”].

³ In Canada, in 1998, 82.6% of victims in reported cases of sexual assault were women; 98 per cent of the accused were men: Canada, *Juristat: Canadian Crime Statistics*, vol. 19, no. 9 (Ottawa: Statistics Canada, 1998).

⁴ Canada, *A Profile of Criminal Victimization: Results of the 1999 General Social Survey* (Ottawa: Statistics Canada, 2001) at ch. 4, p. 78 [hereinafter Canada, *A Profile of Criminal Victimization*].

⁵ For example, the Ontario Women’s Justice network claims, in a 2000 article, that one in ten sexual assaults are reported to the police: Pamela Cross, “The Uniqueness of Sexual Assault Cases” (2000) online: The Ontario Women’s Justice Network <<http://www.owjn.org/issues/assault/unique.htm>> (date accessed: March 11, 2005). Another survey done by Statistics Canada found that only 6% of sexual assaults were

when sexual assaults are reported, prosecution and conviction rates are comparatively low and victims often feel re-victimized by the proceedings, both in terms of how they are treated by actors in the system and in terms of the rules by which the court proceeds.⁶ Some studies have shown that charges are far less likely to be laid when the complainant knew the accused, possibly showing a bias against acquaintance rape victims.⁷ Despite attempts to make reporting sexual assault easier on victims—including training for police officers, specialized units and even special suites at which to report and in which to stay at police stations—under-reporting and difficulty in obtaining convictions subsist.⁸

While women's groups have successfully lobbied for legal reform, including the criminalization of spousal rape and changes in evidentiary rules regarding complainants' past sexual conduct and medical records, these changes have failed to result in significantly higher rates of reporting, charging, prosecution or conviction.⁹

Women's reasons for underreporting vary. One author cites fear of the criminal justice system as the most frequent reason for non-reporting.¹⁰ Women of colour and Indigenous

reported to police, although that survey was 6 years earlier: Canada, *The Violence Against Women Survey* (Ottawa: Statistics Canada, The Daily, November 18, 1993).

⁶ Barbara Hudson, "Restorative Justice and Gendered Violence: Diversion or Effective Justice?" (2002) 42 *Brit. J. Criminology* 616 at 622 [hereinafter Hudson, "Restorative Justice and Gendered Violence"]; see also A. Parriag & K.E. Renner, "Do Current Criminal Justice Practices Lead to Unjust Outcomes for Adult Victims of Sexual Assault?" Working Manuscript, 1998 (under review) online: National Action Plan Against Sexual Assault <<http://www.napasa.org/PUB13.HTM>> (accessed March 11, 2005) [hereinafter Parriag & Renner, "Do Current Criminal Justice Practices Lead to Unjust Outcomes for Adult Victims of Sexual Assault?"].

⁷ D. P. Bryden & S. Lengnick, "Rape in the Criminal Justice System" (1997) 87 *J. Crim. L. & Criminology* 1194 at 1214.

⁸ Hudson, "Restorative Justice and Gendered Violence", *supra* note 6 at 623.

⁹ M. Koss, K. Bachar & C. Q. Hopkins, "Restorative Justice for Sexual Violence: Repairing Victims, building Community, and Holding Offenders Accountable" (2003) 989 *Ann. N.Y. Acad. Sci.* 384 at 387 [hereinafter Koss *et al.*, "Restorative Justice for Sexual Violence"].

¹⁰ MacKinnon, "Reflections on Sex Equality Under Law", *supra* note 2 at 1303.

women are often especially reluctant to report because of police treatment of minorities (as victims and/or as offenders).¹¹ Fear of publicity or media coverage was found in one study to be a factor in the decision not to report almost 5 times as often in sexual assaults than in other unreported crimes.¹² Victims of violent crimes who know their offenders, as victims of sexual assault most often do,¹³ are less likely to report crimes than when the perpetrator is a stranger.¹⁴

Some reasons, then, why women do not report sexual assaults are related to problems with the criminal justice system itself. Other problems are related to victims' privacy interests or to their feelings of loyalty toward, or fear of, the offender. Whether the problems victims have with reporting the assaults to the police are within the control of the criminal justice system or beyond its reach, that system has simply not established itself as a venue to which victims are willing to turn.

It is clear that a new response is needed. While programs exist to offer counseling and support to victims, they lack an element that may be essential to justice for many victims: the involvement of the offender. The disturbing combination of the severity of the crime, its gendered nature, and the lack of viable options within the criminal justice system demands an innovative response, perhaps one outside the criminal justice system.

¹¹ D.L. Martin & J.E. Mosher, "Unkept Promises: Experiences of Immigrant Women With the Neo-Criminalization of Wife Abuse" (1995) 8 C.J.W.L. 3; A. McGillivray & B. Comaskey, *Black eyes all of the time: intimate violence, Aboriginal women and the justice system* (Toronto: University of Toronto Press, 1999) at 156; E. Zellerer, "Community-Based Justice and Violence Against Women: Issues of Gender and Race" (1996) vol. 20 no. 2 Int'l. J. Comparative & Applied Crim. Justice 233 at 235 [hereinafter Zellerer, "Community-Based Justice and Violence Against Women"].

¹² Canada, *A Profile of Criminal Victimization*, *supra* note 4 at ch. 4, p. 41.

¹³ D. Gartzke Goolsby, "Using Mediation in Cases of Simple Rape" (1990) 47 Wash. & Lee L. Rev. 1183 at 1213 [hereinafter Gartzke Goolsby, "Using Mediation in Cases of Simple Rape"].

¹⁴ Canada, *A Profile of Criminal Victimization*, *supra* note 4 at ch. 4, p. 43.

III. WHAT IS RESTORATIVE JUSTICE?

Restorative justice is a philosophy that places emphasis on repairing harm by empowering a victim-driven process. It emphasizes offender accountability through reparations and rehabilitation rather than punishment and aims to transform the community's role in addressing crime.¹⁵

Koss *et al.*

Restorative justice is a concept too diverse and broad to canvass fully here.¹⁶ A brief introduction must suffice to make sense of how it is understood and employed for the purpose of this paper.

The quotation from Koss *et al.* above sets out what restorative justice means in a general sense. In the context of sexual assault, there are primarily two methods of restorative justice that have been used or recommended: Victim-Offender Mediation (VOM) and community conferencing.

VOM is usually initiated through programs that divert those who are seen as suitable offenders from criminal prosecution. Victim and offender, if they both consent, are brought together in a face-to-face meeting with a mediator to discuss the crime. Ideally, the offender will express remorse, the victim may forgive, and both parties will reach a new understanding and agree upon a restitution plan.

¹⁵ Koss *et al.*, "Restorative Justice for Sexual Violence", *supra* note 9 at 388.

¹⁶ For a broader look at restorative justice, one classic text on the topic is Howard Zehr's *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA: Herald Press, 1995) [hereinafter Zehr, *Changing Lenses*].

VOM's success may be reflected in the fact that numerous countries have adopted such programs.¹⁷ Its proponents emphasize benefits for the victim and the offender as demonstrated in their high satisfaction levels with the process, potentially lower recidivism rates, higher rates of compliance with restitution agreements, and a process that humanizes both parties while maintaining an emphasis on offender accountability.¹⁸

Those opposing VOM celebrate the public nature of criminal law that has, over the centuries, developed away from understanding crime as private disputes between the parties and towards recognition of crime as being an offence against the public.¹⁹ VOM models re-privatize justice, placing criminal justice, once again, in the less visible private sphere.²⁰ VOM has also been criticized as a regressive method rooted in religious ideology with links to the far-right victims' rights movement.²¹

Community conferencing brings not only the victim and the offender, but also family members and friends, into a meeting with a facilitator, where they "are encouraged to discuss the effects of the incident on them and to make a plan to repair the damage done and minimize the likelihood of future harm."²² The inclusion of a larger group gives

¹⁷ P. Hughes & M.J. Mossman. "Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses" (2002) 13 Windsor Rev. Leg. Soc. Iss. 1 at 85 [hereinafter Hughes & Mossman, "Re-Thinking Access"].

¹⁸ M. Umbreit, "Victim Sensitive Offender Dialogue in Crimes of Severe Violence: Differing Needs, Approaches, and Implications" (U.S. Department of Justice: Office for Victims of Crime, 2001) at 2-3 [hereinafter Umbreit, "Victim Sensitive Offender Dialogue in Crimes of Severe Violence"].

¹⁹ J. Gerarda Brown, "The Use of Mediation to Solve Criminal Cases: A Procedural Critique" (1994) 43 Emory L. J. 1247 at 1254 [hereinafter Gerarda Brown, "The Use of Mediation to Solve Criminal Cases"].

²⁰ See part V, *infra*.

²¹ Gerarda Brown, "The Use of Mediation to Solve Criminal Cases", *supra* note 19 at 1255 & 1259.

²² Koss *et al.*, "Restorative Justice for Sexual Violence", *supra* note 9 at 388.

support to both parties and reflects the impact of the crime on those other than the immediate victim and offender.

Community conferencing is based on Maori traditions and its use has expanded from New Zealand and Australia to North America as well.²³ It has sometimes been criticized for paying closer attention to the needs of offenders than of victims.²⁴ Concern has also been raised that characterizing mainstream use of Maori conferencing traditions as a victory for restorative justice may render invisible the struggle for decolonization that led to conferencing's increased use.²⁵

These brief explanations, justifications, and criticisms aspire only to provide an idea of the possible mechanisms at hand when discussing restorative justice and sexual assault. It should be noted that because of the large variety of restorative justice programs in operation, criticism directed towards a certain method may not be applicable to some programs of that vein where they have addressed identified weaknesses through modifications to their structure or approach. This paper broadly examines what restorative measures, at their best, are capable of accomplishing, rather than addressing the strengths and weaknesses of the specific approaches.

In focusing on relationships and repairing harm done, the *restoration* aspect of restorative justice is a feature largely unknown to the criminal justice system, which (formally, at

²³ Hughes & Mossman, "Re-Thinking Access", *supra* note 17 at 104.

²⁴ M. Umbreit & H. Zehr, "Restorative Family Group Conferences: Differing Models and Guidelines for Practices" (1996) 60 Federal Probation 24 at 25.

²⁵ J. Braithwaite, "Restorative Justice and Social Justice" (2000) 63 Sask. L. Rev. 185 at 187 [hereinafter Braithwaite, "Restorative Justice and Social Justice"].

least) emphasizes the presumption of innocence and the rights of offenders while denying any meaningful role to victims.²⁶

The *justice* aspect of the movement goes directly to the heart of the issues that arise when proposing restorative measures to ‘do justice’ in cases of sexual assault. All of those making arguments regarding the application of restorative justice measures—whether for or against their use—tend to justify their positions by purporting to support the response that is most just: for the victim, for the offender, for women and/or for the community at large.

The question of what is justice is complex on its own; the question of what justice is in relation to the best response to the scourge of sexual assault is far too complex to result in a single explanation or answer. However, as Kathleen Daly points out, the search must be not simply for the “right punishment” but for the “right response,” which looks more broadly at the social justice impact of the response.²⁷ The inquiry necessarily consists of “different logics, competing loyalties and competing justice claims,”²⁸ and these must be considered to be sources to draw from and not simply stumbling blocks to ascertaining the just response.

²⁶ The existence of restitution agreements as part of the outcome of an offender’s criminal trial, which provide restitution to the victim without their having to go through a lengthy and costly civil trial, should be noted as a possible exception. There are also statutory provisions for victims of crime, such as part 5 of Manitoba’s *Victims’ Bill of Rights*, C.C.S.M. c. V55, which may provide some compensation to victims.

²⁷ K. Daly, “Sexual Assault and Restorative Justice” in H. Strang & J. Braithwaite, eds., *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) at 64 [hereinafter Daly, “Sexual Assault and Restorative Justice”].

²⁸ *Ibid.*

This paper will take a feminist approach to the application of restorative justice measures to sexual assault and will primarily concern itself with the impact of sexual assault on victims, who are most often women. While it should be acknowledged that restorative justice aims to, and has been shown to,²⁹ benefit offenders as well as victims, the focus in this paper remains on women, and how, as individuals and as a group, they are affected by measures directed towards addressing sexual assault.³⁰

IV. CAN RESTORATIVE JUSTICE MEASURES BE APPLIED TO SEXUAL ASSAULT?

Can restorative justice help those sexual assault victims who would choose to access it? Does it offer benefits that are not available under the criminal justice system in a measure sufficient to justify developing such programs?

The seriousness of the crime is often advanced as a reason against employing restorative justice measures for sexual assault. The seriousness issue can be divided into two prongs: first, whether restorative justice is too lenient a measure when dealing with sexual assault and is therefore fundamentally incompatible with what can be considered just in Canadian society, and second, whether the mechanics of restorative justice can function between victim and offender where the violation involved is extremely grave.

²⁹ See K. L. Joseph, "Victim-Offender Mediation: What Social and Political Factors Will Affect its Development?" (1996) 11 Ohio St. J. on Disp. Resol. 207 at 212.

³⁰ It is to be noted that criticism has been levied against feminist scholarship on violence against women for failing to pay attention to the experiences of men in the criminal justice system, and what that means for women. See R. Lewis *et al.*, "Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence" (2001) 10:1 Soc. & Leg. Stud. 105 at 108-109 [hereinafter Lewis *et al.*, "Law's Progressive Potential"].

Accusations of leniency likely dismiss too quickly the immense difficulty of facing one's victim, of taking responsibility for one's acts, and then making restitution for them. Yet it cannot be denied that restorative justice does not have the capacity to punish offenders as harshly as the criminal justice system can. For some, this will be a fatal criticism of restorative justice in any context.

However, emphasis on the punitive capacity of the criminal justice system leads to a far too symbolic approach, irrelevant to the needs of victims, if it is not reconciled with the criminal justice system's failure to effect punishment on the vast majority of sexual offenders. Participating in a restorative justice process is far more taxing on an offender than the treatment currently received by the vast majority of offenders in the criminal justice system, in which most never have to answer to anyone for their actions.

Any argument that the criminal justice system alone must be called upon to deal with sexual offenders because of its capacity for punishment must rely upon a presumption that this system will one day be successful in effecting the punishment of a significant proportion of such offenders. But how long can we cling to the idea that punishment of sexual offenders will one day be realized in the criminal justice system? It is not simply a matter of doubting that the police or the courts will treat victims with respect and refrain from subjecting them to stereotypes of women who lie out of regret or revenge. All accused are presumed innocent until proven guilty; the Crown bears the heavy onus of proving an accused guilty beyond a reasonable doubt. No matter how much the criminal justice system is successful in being more respectful of victims, it will always, as it

should, demand a high standard of proof before meting out any punishment. This standard is especially difficult to meet in the circumstances of a sexual assault. There are most often no independent witnesses to sexual assault, and if consent, and not the act itself, is the issue, there will often be no physical evidence to support a victim's claim. It is not cynicism about the system but rather a reasoned assessment of it that leads to the conclusion that another response is required—even if that response means forgoing some of the punitive aspects of the criminal law.

If restorative justice's application to sexual assault can be rationalized from the punitive angle, could it also work from the individual's perspective? Is sexual assault still too serious a crime for restorative justice to work for the individuals involved? Initially, even restorative justice practitioners doubted that victim-offender mediation would be effective for serious crimes, seeing it as more appropriate for property crimes and less significant assaults.³¹ Since then, however, its use has expanded and the value of restorative justice measures—for victims, victims' families, offenders and communities—in dealing with serious crimes, such as sexual assault and murder, has become evident.³² Indeed, while the increased complexity and seriousness of the issues involved necessitate that close attention be paid to the standards and methods employed, “[t]he benefits attributed to mediating less violent and less serious crimes only further validate the importance of handling violent and serious crimes in victim-offender

³¹ M. Umbreit, “Restorative Justice Through Victim Offender Mediation: A Multi-Site Assessment” (1998) *Western Criminology Review* 1(1), online: [Western Criminology Review](http://wcr.sonoma.edu/v1n1/umbreit.html) <http://wcr.sonoma.edu/v1n1/umbreit.html> (date accessed: 12 March 2005) [hereinafter Umbreit, “Multi-Site Assessment”].

³² M. Umbreit, “Victim Offender Dialogue in Crimes of Severe Violence: A Multi-Site Study of Programs in Texas and Ohio” (Draft) (2002), online: Center for Restorative Justice and Peacemaking <<http://2ssw.che.umn.edu/rjp/Resources/Resource.htm>> (date accessed: 12 March 2005) at 3.

mediation.”³³

If we reject the argument that sexual assault is just too serious for restorative justice to be effective, we are still faced with criticism regarding the nature of the crime. Violence against women, it is alleged, should not and cannot, be mediated. This is said to be the position of the majority of feminist writers and advocates for women who have been victimized by violence.³⁴ Mediation is criticized as having “multiple and inconsistent goals” which “may themselves create problems of inequality of power and the potential for abuse.”³⁵ Advocates tell stories of women who are severely beaten at home after not behaving as an abusive partner wished they would have during a mediation session.³⁶ Victims have complained of being pressured into participating in mediation sessions.³⁷ Attendance at mediation sessions with an accused has even been used against a woman to negate a claim of criminal harassment.³⁸

There is another camp, however: a growing number of feminist writers are calling for, and actually establishing, restorative justice programs to deal with violence against women.³⁹ What is the reason for this divide? It appears to be at least partially rooted in

³³ I. Wellikoff, “Victim-Offender Mediation and Violent Crimes: On the Way to Justice” (2004) 5 *Cardozo J. Conflict Resol.* 2.

³⁴ Zellerer, “Community-Based Justice and Violence Against Women”, *supra* note 11 at 236.

³⁵ Hughes & Mossman, “Re-Thinking Access”, *supra* note 17 at 25.

³⁶ Zellerer, “Community-Based Justice and Violence Against Women”, *supra* note 11 at 238.

³⁷ Hughes & Mossman, “Re-Thinking Access”, *supra* note 17 at 47.

³⁸ I. Grant, N. Bone & K. Grant, “Canada’s Criminal Harassment Provisions: A Review of the First Ten Years” (2003) 29 *Queen’s L.J.* 175 at 202.

³⁹ See, for example, Koss *et al.*, “Restorative Justice for Sexual Violence”, *supra* note 9; Daly, “Sexual Assault and Restorative Justice”, *supra* note 27; D. Coker, “Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking” (1999) 47 *U.C.L.A. L. Rev.* 1; B. Hudson, “Restorative Justice: The Challenge of Sexual and Racial Violence” (1998) vol. 25 no. 2 *J. Law & Society* 237 [hereinafter Hudson, “Restorative Justice: The Challenge of Sexual and Racial Violence”]; and E. Peled *et al.*, “Choice and Empowerment for Battered Women Who Stay: Towards a Constructivist Model” (2000) 45 *Social Work* 9.

the fact that gendered violence occurs in many contexts, some of which are generally considered to be far less conducive to a restorative response than others.

The use of mediation to settle divorces where there has been domestic violence is widely criticized, with the most passionate criticism coming from advocates who have seen the devastating effects of mandatory divorce mediation on women in abusive relationships.⁴⁰

A study of family mediation in Canada found that mediation was being promoted to, and even forced upon, women as a government cost-saving measure without considering that many mediators lacked the ability to identify and address abusive situations.⁴¹ Some commentators see mediation as a generally positive process as long as there are sufficient measures in place to identify abuse and to stop the mediation when abuse is identified,⁴² while others see it as being inherently disadvantageous for women regardless of the existence of abuse.⁴³

There is a difference, however, between the mediation of a divorce (*i.e.* proceedings regarding custody, property and support) where there is unidentified and/or unaddressed abuse, and the mediation of domestic violence itself. The former, amounting to a disastrous misuse of mediation that is now universally rejected, seems to be what most writers are referring to when they denounce using mediation where there is domestic

⁴⁰ See, for example, Zellerer, "Community-Based Justice and Violence Against Women", *supra* note 11; C. L. Chewter, "Violence Against Women and Children: Some Legal Issues" (2003) 20 Can. J. Fam. L. 99; Marie L. Gordon, "What, Me Biased?" Women and Gender Bias in Family Law" (2001) 19 C.F.L.Q. 53 [hereinafter Gordon, "What, Me Biased?"].

⁴¹ Sandra A. Goundry *et al.*, *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998) online: Status of Women Canada <http://www.swc-cfc.gc.ca/pubs/familymediation/index_e.html> (date accessed: 28 January 2005).

⁴² S. Grace Kerr & Peter G. Jaffe, "Legal and Clinical Issues in Child Custody Disputes Involving Domestic Violence" (1999) 17 C.F.L.Q. 1.

⁴³ Gordon, "What, Me Biased?", *supra* note 40.

violence. Some critics also reject the appropriateness of the latter, which is basically a form of victim-offender mediation, arguing that, “the violence itself can never be mediated.”⁴⁴ The long-term and intimate nature of the abuse, it is argued, makes mediation inappropriate.⁴⁵

At the same time, however, mediation has been argued by some to be an appropriate and helpful response in situations of long-term domestic violence because of the process’ capacity to address the impact of abuse on women as a public health concern.⁴⁶ While reservations about mediating in contexts of abuse have likely kept programs from arising which could be used to assess its efficacy, there are some existing programs that have shown success in this regard.⁴⁷

Many of the criticisms regarding the inappropriateness of mediation in cases of crimes of violence against women are rooted in negative experiences with divorce mediations that ignored or were not equipped to address the actual abuse. These are important criticisms, and hopefully family lawyers and mediators are learning from them. They are not compelling, however, as the basis upon which to dismiss the mediation of sexual assault between acquaintances, where the violence would be the central issue and where the complicating factor of long-term intimate violence is not present.

⁴⁴ J.D. Payne & M.A. Payne, *Dealing with Family Law* (Toronto: McGraw-Hill, 1993) at 70.

⁴⁵ Lewis *et al.*, “Law’s Progressive Potential”, *supra* note 30 at 119-120.

⁴⁶ C. Q. Hopkins, M. P. Koss & K. J. Bachar, “Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities” (2004) 23 St. Louis U. Pub. L. Rev. 289 [hereinafter Hopkins *et al.*, “Applying Restorative Justice to Ongoing Intimate Violence”].

⁴⁷ *Ibid.* at part V.

Once concerns regarding the seriousness of the crime are satisfied and arguments against mediation for sexual assaults based on the misplaced application of the experience of abused women in family law are set aside, the analysis gains focus: is restorative justice appropriate in cases of sexual assault between acquaintances? In other words, does it actually help?

There are many facets of restorative justice that seem immediately beneficial in sexual assault cases. The process is private, and privacy concerns are one of the most important reasons why women do not report sexual assault. Further, low reporting and conviction rates combined with the fact that most victims of sexual assault know the person who assaulted them indicate that many victims are dealing, unaided, with the offender in their communities. And if the lower recidivism rates claimed to be associated with other victim-offender programs could be realized in this context, other women, in addition to the victim herself, could benefit from the VOM process.

Commentators have made the theoretical case for mediation of sexual assault,⁴⁸ and some have endorsed and/or demonstrated its beneficial potential by creating programs.⁴⁹ Some endorsements may be overstated: no matter how effective VOM is, the description “quick, responsive, and humanistic”⁵⁰ underestimates the enormity of the conflict to be mediated. Mark Umbreit, a pioneer in mediation of serious offences like sexual assault

⁴⁸ See Gartzke Goolsby, “Using Mediation in Cases of Simple Rape” *supra* note 13.

⁴⁹ See Koss *et al.*, “Restorative Justice for Sexual Violence”, *supra* note 9 and R. Chandra, “Mediating University Sexual Assault Cases” (2001) 6 Harv. Negot. L. Rev. 26. One national American directory shows that many VOM programs are now taking on mediations of sexual assault: United States, *A Directory of Victim Offender Mediation & Conferencing Programs in the United States* (Washington: U.S. Department of Justice, Office for Victims of Crime, 2000).

⁵⁰ Gartzke Goolsby, “Using Mediation in Cases of Simple Rape” *supra* note 13 at 1185.

and murder, describes the process as “intense and lengthy.”⁵¹ To some extent, the specific restorative measure at hand may influence whether one expresses support for it.⁵²

One program, based in Arizona, has been set up specifically to use restorative justice in relation to sexual assaults.⁵³ RESTORE (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience) identifies cases in which the perpetrator of a sexual assault has no record of arrest or domestic violence calls and where minimal physical force was employed. Separate meetings are arranged with the victim and the perpetrator to explain the process before offering them the option of going through the RESTORE program, which is entirely voluntary for both parties. If they agree to participate, there are preparatory meetings with each party, including a safety assessment and the setting out of expectations for the process. Victims may seek reparations including answers to questions, financial compensation for counseling and for lost wages, and ‘stay-away’ agreements.

The actual conferencing session is held in a secure location with weapons screening and an armed guard is present. Participants sign confidentiality agreements; no written record

⁵¹ Umbreit, “Multi-Site Assessment”, *supra* note 31.

⁵² Koss *et al.*, in “Restorative Justice for Sexual Violence”, *supra* note 9, endorse community conferencing, a method that includes friends and family members of both victim and offender, and explicitly reject mediation as appropriate, stating at page 388 that “[m]ediation’s conceptual foundation is *inappropriate* for application to crimes against women because it fails to acknowledge the structural inequities between victim and offender.” The articles cited in support for this assertion (Gerarda Brown, “The Use of Mediation to Solve Criminal Cases”, *supra* note 19 and Zellerer, “Community-Based Justice and Violence Against Women”, *supra* note 11), however, are basically wholesale rejections of restorative justice measures that make no differentiation between various methods employed and give no support to community conferencing. It is beyond this article to go into preferred specific restorative justice measures for gendered violence, but it seems that although the benefits of having family and friends involved is clear, the nature of sexual assault might mean that some complainants would prefer not to have others attend and so traditional VOM between the immediate parties should still be available.

⁵³ This program is described in detail in Koss *et al.*, “Restorative Justice for Sexual Violence”, *supra* note 9 at 389-392.

is kept except for the redress plan. The conference begins with the offender telling the group what he has done. The participants include: a pair of facilitators, the offender, the victim, and her invited supporters. The victim tells of the impact of the crime on her and then the other participants have a chance to speak.

There is a program in place after the conference to monitor compliance with any agreement reached. In the RESTORE program, if the offenders comply with the redress agreement, a criminal record is avoided.

Part of the aim of RESTORE is to give a practical dimension to the largely theoretical debate about the appropriateness of using restorative justice to deal with sexual assault.⁵⁴ Every aspect of the RESTORE program is being scrutinized in order to assess the efficacy of the program.⁵⁵ Those running the program note the positive results of similar programs dealing with other crimes and they hope for, and expect, similar results from RESTORE.⁵⁶

The theoretical case for the efficacy of restorative justice measures as a response to sexual assault is strongly grounded in the positive results of other programs, combined with an awareness of the need to ensure that the specific needs of victims of sexual assault are identified and addressed by the process. The practical case has yet to be conclusively made, although the work of the RESTORE program will be available to this

⁵⁴ M.P. Koss *et al.*, "Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration" (2004) vol. 19 no. 12 *J. Interpersonal Violence* 1435 at 1456.

⁵⁵ *Ibid.* at 1453-4.

⁵⁶ *Ibid.* at 1445-8

end in the near future. Criticisms of the application of restorative justice to gendered crimes are important and must be considered in shaping programs. But no criticism raised thus far, whether with regard to the seriousness of the crime or its gendered nature, is conclusively fatal for a restorative justice program dealing with sexual assault. Therefore, the conclusion that applying restorative justice measures to sexual assault will benefit the parties involved is not inevitable, but is solidly grounded in the available research. It is this conclusion that this paper adopts.

Accepting that there are very likely substantial benefits to victims of sexual assault to be gained from establishing restorative justice programs tailored to victims' specific needs, a balancing of the costs and benefits involved is in order. If there are benefits to restorative justice in the sexual assault context, is a restorative justice approach beneficial enough to warrant setting up structures other than those contained in the criminal justice system? Should energy be spent instituting such structures or programs instead of working on identifiable problems in the current system?

This is necessarily a comparative inquiry. The potential benefits of a parallel restorative justice system must be measured against what the current criminal justice system has to offer. As noted earlier, the current state of affairs is that the majority of sexual assault victims do not report attacks to police, and those that do report find their cases subjected to low prosecution and conviction rates.

But is it fair or useful to pit the potential of restorative justice against the current state of

the criminal justice system? Some say it is:

Empirical comparisons being so far unavailable, both advocates of restorative justice and those who oppose its use for domestic and sexual violence are arguing about the potential rather than the actuality of the approach they prefer. What cannot be denied is that formal criminal justice has had its chance; it has been the dominant form of justice for a very long time and has not proved effective for these sorts of crimes.⁵⁷

But others point out that it is dangerous to use the current criminal justice system as the barometer for new programs. Restorative justice, it is argued, has an unfair comparative advantage because of the criminal justice system's abysmal failure to meet women's needs.⁵⁸ Such an advantage must not be used to lower the bar for what is expected of new systems to be put in place.

Mindful of these concerns, the conclusion remains that offering restorative justice options for victims of sexual assault is, in the narrow context of what can help victims, a positive advancement. Simply adding it to the current system provides another option, one that, despite the current lack of empirical data, can realistically be predicted to offer a different and more complete justice to victims of sexual assault.

Having come to this conclusion, a large question looms: what might victims of sexual assault, and all women, stand to lose by moving their pursuit of justice into the largely private realm of mediation? Will the benefits of mediation be worth the price to be paid?

⁵⁷ Hudson, "Restorative Justice and Gendered Violence", *supra* note 6 at 623.

⁵⁸ Zellerer, "Community-Based Justice and Violence Against Women", *supra* note 11 at 236.

V. RESTORATIVE JUSTICE, PRIVATIZATION AND CRIMES OF VIOLENCE AGAINST WOMEN

Whether a response to intimate violence might nonetheless be able to address both the individual preferences of women and the larger systemic issues is no small matter, but this is an unavoidable tension once we insist that women's voices and preferences matter.⁵⁹

Hopkins *et al.*

There are strong competing rationales for and against implementing restorative justice measures to deal with gendered violence. The traditional criminal system has failed to establish itself as a safe place for most sexual assault victims to turn. Restorative justice programs, which typically act as diversionary measures once crimes have been reported to police, show great promise in offering another option within that system for victims of sexual assault. Yet one must be mindful of the women's movement's struggle to bring violence against women outside the private sphere and within the bright light of the criminal justice system. Restorative justice measures, even when backed by, and part of, the criminal justice system, remove disputes from the public forum of the courtroom and into private conferencing, often with guarantees of confidentiality.

A helpful starting point is to address the issue of the privatization of justice in broader scope. The privatization of justice arises as a general concern when alternative dispute resolution (ADR) processes, a banner term for extra-judicial resolution processes within which restorative justice falls, take the resolution of disputes out of the public eye of the court and into private dispute resolution chambers. This issue takes on increased

⁵⁹ Hopkins *et al.*, "Applying Restorative Justice to Ongoing Intimate Violence", *supra* note 46 at 300.

importance in the context of restorative justice for sexual assault and the struggle of the women's movement to have it recognized as a serious—and public—crime.

Jack Weinstein has canvassed the issue of privatization as it relates to ADR on a general basis.⁶⁰ He identifies primary concerns such as the possibility that the development of the common law will be stunted and that important information may be kept from the public (such as on the safety of certain products).⁶¹ The role of the courts in establishing norms of behaviour, the importance of transparency of laws in a participatory democracy, the public security interest in the denunciation of criminals, and the therapeutic effect of airing disputes in a public forum are also reasons asserted for keeping disputes within the public system.⁶² Weinstein's treatment of criminal issues and ADR is extremely brief. Nevertheless, he does conclude that processes such as mediation should play a larger role in the criminal justice system, which, he argues, has displayed increasing rigidity and requires an infusion of creativity and flexibility to deal with the complex interests involved.⁶³

Many of the justifications advanced for ADR methods, such as economic efficiency and the breadth of the interests it can address, are not related to privacy. Privacy itself is, however, one reason that it may be *more* appropriate in a circumstance such as sexual assault. In the context of sexual assault, complainants' privacy interests in the events surrounding the allegations are augmented by legitimate concerns that by engaging the

⁶⁰ J. Weinstein, "Some Benefits and Risks of Privatization of Justice Through ADR" (1996) 11 Ohio St. J. on Disp. Resol. 241 [hereinafter Weinstein, "Some Benefits and Risks of Privatization"].

⁶¹ *Ibid.* at 246.

⁶² *Ibid.* at 248-251.

⁶³ *Ibid.* at 292-294.

courts they open themselves to scrutiny going beyond the assault. And no matter how well the criminal justice system addresses the crime, a victim's wish for privacy may be the decisive factor in not pursuing public charges.

On a broader basis, however, women have fought for decades to have violence against women recognized and penalized as the serious criminal activity that it is. A large part of this struggle has been to dispel the notion that violence within the family or intimate relationships is of a private nature and that state interference is therefore not appropriate. This is a part of the greater fight of the women's movement against the general ordering of society in a way that relegates women and their interests to the private, *i.e.* home and familial sphere, while reserving public life, from paid employment to participation as governmental actors, exclusively for men.⁶⁴

As a policy concern, the victim's privacy interest in sexual assault cases where the victim wishes to pursue restorative justice must be weighed against the public interest in having sexual assault publicly recognized, denounced and punished in a court of law. Simply establishing the option of programs where the assault can be dealt with through private restorative justice measures opens the door toward resolving some sexual assaults out of the public eye, with no record of facts found or of convictions. Despite legitimate criticisms of it, the criminal justice system is "still the recognized way of demonstrating that society takes something seriously."⁶⁵ This is especially important when dealing with

⁶⁴ See generally Susan Boyd, ed., *Challenging the public/private divide: feminism, law and public policy* (Toronto: University of Toronto Press, 1997) and Katharine T. Bartlett, "Essay: Gender Law" (1994) 1 *Duke J. Gender L. & Pol'y* 1.

⁶⁵ Hudson, "Restorative Justice and Gendered Violence", *supra* note 6 at 629.

sexual assault as a gendered crime that has traditionally not been taken as seriously as others:

[When restorative measures are pursued, t]he symbolic value of the state's condemnation of certain kinds of activities becomes simply a dispute between the victim and the offender, particularly of concern in domestic, sexual and racial crime. ... There is a difference between recognizing that the victim of a crime has a particular interest in it and identifying that interest as the whole interest, as if society does not have a claim or concern.⁶⁶

The value in addressing sexual assault in the criminal justice system is more than just symbolic, however. Private mechanisms may distort public perceptions of occurrences of violence. The fragmentation of knowledge of incidents may keep the public from knowing, understanding and attempting to address trends in violence:

Privatization of justice, whether in the civil or criminal context, often fails to address the societal interest in ensuring that widespread wrongdoing is known and addressed or that societal values are reaffirmed. ... More significantly, they are significant enough that it is not unreasonable to conclude that they risk perpetuating the inequities of the current criminal legal system rather than transforming it.⁶⁷

Assuming that public recognition of the crime through traditional mechanisms is the optimal situation, what is the proper feminist response to the fact that most women who are sexually assaulted do not choose to use the criminal justice system?

One the one hand, given the previously-discussed failings of the criminal justice system, to what extent can critics rationally oppose programs that can help individual women and instead favour forcing them to either deal with the current system or be left on their own?

If we accept that mediation for sexual assault can lead to positive results for victims,

⁶⁶ Hughes & Mossman, "Re-Thinking Access", *supra* note 17 at 119.

⁶⁷ *Ibid.* at 120 & 131.

should the majority of sexual assault victims (who do not report to the police) be denied this option in favour of the perceived greater good of having sexual assaults prosecuted?

On the other hand, advancement of mediation as an option for sexual assault is an endorsement for addressing complaints privately, directly in opposition to the women's movement's goal of having violence against women recognized as a serious public crime.

Some parts of restorative justice's privatizing effect can be remedied somewhat. For example, the RESTORE program, which mediates incidents of sexual assault, issues regular press releases with general statistics to keep the work they are doing in the public eye without compromising the benefits of the private nature of the process.⁶⁸

Other concerns may be addressed by looking at whether feminist interests are, as it often seems to be presumed, served by insisting upon the harshest form of (retributive) justice for sex offenders. Dianne Martin argues that the credibility and strength of the women's movement has basically been hijacked by the far-right victims' rights movement,⁶⁹ resulting in "get-tough" governmental responses to crime that provide, at best, only symbolic relief in denouncing certain offenders and do nothing to enhance women's safety.⁷⁰ She sees the advancement of restorative justice as a way for feminists to get out

⁶⁸ Hopkins *et al.*, "Applying Restorative Justice to Ongoing Intimate Violence", *supra* note 46 at 311.

⁶⁹ D. Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall L.J. 151 at 159.

⁷⁰ *Ibid.* at 160.

of what she calls the “retribution trap” and into meaningful action to address and prevent crime.⁷¹

In a similar vein, Martha Minow emphasizes the similarities between the goals of restorative justice and of feminist values embracing the idea of power *with* others rather than power *over* them.⁷² She notes that feminists often call for restorative justice solutions for female offenders but then, inconsistently, insist upon retributive action against males.⁷³

Retributive justice through the criminal justice system is not, then, the only natural feminist response to addressing sexual assault. But whether or not one is convinced that mediation is an appropriate response to sexual assault may depend in part on whether one believes that it can form the basis for meaningful social change as an essentially private mechanism. The public nature of the criminal justice process lends itself more easily to the idea that it is capable of creating change that reaches beyond those directly involved. Yet we note once more the criminal justice system’s failure to establish itself as a legitimate venue for most victims of sexual assault:

The combined effect of sexual assault trials built around a set of themes that bear little resemblance with the nature of women's actual experiences, and of outcome dictated by known distortions of communication, is a failure to achieve social justice.⁷⁴

⁷¹ *Ibid.* at 188.

⁷² M. Minow, “Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice” (1998) 32 *New Eng. L. Rev.* 967 at 969 [hereinafter Minow, “Between Vengeance and Forgiveness”].

⁷³ *Ibid.* at 976.

⁷⁴ Parriag & Renner, “Do Current Criminal Justice Practices Lead to Unjust Outcomes for Adult Victims of Sexual Assault?”, *supra* note 6.

The trouble with envisioning restorative justice as having social justice potential is rooted in its private nature as well as in the fact that it generally limits itself to dealing on a case-by-case basis with those already engaged in the criminal system:

Restorative justice responds to the mainstream's designation of acts as criminal and while it may affect the outlook of individuals or their relationship with each other, it is rarely directed at systemic transformation.⁷⁵

But if systemic transformation is the goal, and the case-by-case approach is simply a way of attaining that goal, restorative justice can work as a tool for social justice. The Hollow Water program,⁷⁶ where members of an isolated Manitoba community in which the vast majority of residents had been victims of sexual abuse took part in group healing circles, is often cited as an example of a transformative result that goes beyond the direct parties involved. John Braithwaite states that the Hollow Water project “shows that restorative justice has potential as a tool for advancing social justice for women and children who suffer at the hands of violent men.”⁷⁷ He acknowledges that some manifestations of restorative justice may lack some of the protections for victims that are found in the criminal justice system, but calls it “a policy design challenge we can rise to.”⁷⁸

The tensions involved with the question of balancing the benefits of restorative justice for individual victims against what women in general might lose by privatizing how we deal with sexual assault are complex. However, denying options to victims for the perceived but elusive greater good seems in the end to be too much to ask in return for too little. As

⁷⁵ Hughes & Mossman, “Re-Thinking Access”, *supra* note 17 at 70.

⁷⁶ See R. Ross, *Returning to the Teachings: Exploring Aboriginal Justice*, (Toronto: Penguin Books, 1996) at 29-48.

⁷⁷ Braithwaite, “Restorative Justice and Social Justice”, *supra* note 25 at 190.

⁷⁸ *Ibid.* at 194.

one author put it, “[t]he opportunity to mediate does not prevent women from bringing rape charges; it provides them options to move forward and seek justice in a manner most appropriate for recovery.”⁷⁹ While there will inevitably be some loss of visibility, hopefully the wealth of criticism that has identified problems with restorative justice measures in sexual assault cases can be drawn upon to construct programs that avoid many of the pitfalls that will hamper the push to recognize and eliminate violence against women.

VI. THE MEDIATION OF SEXUAL ASSAULT OUTSIDE THE CRIMINAL JUSTICE SYSTEM

“There is still no firm consensus on what the proper range of restorative justice is, or could be. . . . Furthermore, although they may start with detailing the failures of conventional justice to convict and punish frequently and adequately, the core argument is not just that restorative justice would be better than the lack of justice that is the usual case at present, but that it can be effective justice. That is to say, it can be effective in the instrumental sense of reducing the likelihood of reoffending, and effective in the symbolic sense of occasioning strong censure in the individual case and in demonstrating that the behaviour of which the case is an example is beyond the bounds of social tolerance.”⁸⁰

Barbara Hudson

If one accepts that restorative justice is an appropriate and effective response to sexual assault, the barriers to accessing it become of vital importance. One particularly pervasive and deeply rooted barrier is the involvement of the police and other components of the criminal justice system.⁸¹ Most restorative justice programs get their casework by referrals from the police, meaning that these programs are not available to, or at least are

⁷⁹ K. M. Hordak, “Court Sanctioned Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution” (2004) 19 Ohio St. J. on Disp. Resol. 1089 at fn 120.

⁸⁰ Hudson, “Restorative Justice and Gendered Violence”, *supra* note 6 at 621 & 626.

⁸¹ MacKinnon, “Reflections on Sex Equality Under Law”, *supra* note 2 at 1303; see also footnotes 6, 7 and 11, *supra*.

not explicitly directed to, those who would like to go through mediation but who have decided not to report the crime to the police.

What if, then, a program were structured to make itself known and available to victims of sexual assault who would like to benefit from restorative justice measures but who do not wish to deal with the police or courts?

The case supporting such a program is simple and persuasive. Restorative justice measures can, as established earlier in this paper, help victims of sexual assault. Because most sexual assault victims choose to not deal with the police and courts, such a program would make relief available to a large group of sexual assault victims whose needs are not being met by the current system.⁸²

The case against such a program is more complex and also compelling. First, concerns about the privatization of violence against women are amplified by such a proposal, given that its exclusion of the police renders the process even more out of the public realm than traditional restorative justice programs which rely on referrals from the police. It might also divert attention and energy away from reforms to the current system to make it friendlier towards victims of sexual assault.⁸³

⁸² It should be noted, however, that victims of more serious crimes have been found to be less likely to want to participate in victim-offender mediation than those of less serious crimes: Canada, *A Profile of Criminal Victimization*, *supra* note 4 at ch. 4 p. 46.

⁸³ Weinstein, "Some Benefits and Risks of Privatization", *supra* note 60 at 247.

A number of practical difficulties also exist. Mediation of sexual assault, or any victim-offender mediation, will quite likely be hampered by the absence of the “heavy hammer” of the criminal law, waiting to step in if the mediation goes badly or if redress agreements are not adhered to. Many commentators emphasize that a punitive scheme as a back up plan is a pre-requisite to successful restorative justice.⁸⁴ Although restorative justice programs like to call themselves voluntary for both parties and emphasize that offenders must be able to choose freely whether to participate,⁸⁵ the fact that the penalties are often different, and some would say less harsh, through restorative justice cannot help but influence the decision of an offender to participate. Offender participation would have to depend on either his own interest in meeting with the victim and attempting to resolve their difficulties—not an entirely fanciful idea, especially given the high number of sexual assaults that happen between people who know each other and thus may have a greater interest in the relationship than with other crimes—or perhaps on the offender’s fear that reporting to the police may follow his refusal to participate.

Though scathing in her indictment of the current use of victim-offender mediation, Jennifer Gerarda Brown recommends that it be separated entirely from the criminal justice system. She does not suggest, as put forward herein, that mediation should replace the traditional system; rather, she argues that it should be reserved for after convictions have been entered.⁸⁶ While her general thesis is suspicious of victim-offender mediation, recognition of its possibilities is found in her suggestion that value may be had from the

⁸⁴ Hughes & Mossman, “Re-Thinking Access”, *supra* note 17 at 80.

⁸⁵ Umbreit, “Victim Sensitive Offender Dialogue in Crimes of Severe Violence”, *supra* note 18 at 27.

⁸⁶ Gerarda Brown, “The Use of Mediation to Solve Criminal Cases”, *supra* note 19 at part VI.

experience. The submission that some offenders may be willing to participate even in the absence of state coercion is sound.

Funding may be a major obstacle for such an endeavour. Highly skilled mediators would need to design and implement the program and security and overhead costs would be significant. The most obvious potential funder is the government, yet it is likely it would be reluctant. This proposal indirectly rejects and thus threatens the authority and competence of the police to handle sexual assault complaints; when challenged, the criminal justice system's impulse is towards self-preservation.⁸⁷

Further, part of the appeal to government of alternative dispute resolution programs seems to stem from a belief that money is being saved through diverting people from the more expensive governmental structure of the criminal law.⁸⁸ Why fund what is essentially, from an economics-only standpoint, a make-work project? Will the state interest in having sexual assault victims report the crime be compelling enough to override budgetary constraints and the political implications of their decision? Although restorative justice can be appropriate and effective when dealing with serious crimes, it is still true that "the political stakes and political risks of restorative justice are raised as one moves up the scale of offence seriousness."⁸⁹

⁸⁷ Zehr, *Changing Lenses*, *supra* note 16 at 233-5.

⁸⁸ Hughes & Mossman, "Re-Thinking Access", *supra* note 17 at 18.

⁸⁹ B. Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions Between Punitive and Restorative paradigms of Justice" (1998) 3 *Can. Crim. L. Rev.* 69 at 91.

Even the authors that write in support of restorative justice measures for sexual assault tend to either assume or explicitly support such programs existing as an arm of the criminal justice system.⁹⁰ One exception is Martha Minow, who states that “victim-witness programs should be strengthened and made available even to victims who do not want to participate in prosecutions.”⁹¹

One author, Barbara Hudson, has written about the potential for restorative justice measures relating to sexual and racial violence from a prison abolitionist perspective. She ultimately concludes that crimes of sexual and racial violence pose the biggest dilemma, and possibly a fatal one, to prison abolitionists. This is due to concerns about the community’s capacity to identify itself, to deal with the volume of crimes and to create meaningful change in the relationships between the victims and offenders.⁹² This criticism is not directly on point, because what is proposed herein is not the dismantling of the criminal justice system but rather another option to exist outside of it. Nevertheless, it is of some significance that this type of violence is identified as offering the greatest challenge to those who believe that the prison system should be abolished.

The case against setting up restorative justice options for sexual assault victims outside the criminal justice system is compelling and multi-faceted. This paper cannot conclusively overcome all the criticisms levied against setting up a separate system, yet rejects them based on the simple fact that, despite decades of women fighting for change

⁹⁰ For example, Hudson states that “[t]he answer here is for expressive and instrumental functions, retribution and restorativeness, to be integrated throughout the stages of the criminal justice system”: Hudson, “Restorative Justice and Gendered Violence”, *supra* note 6 at 629.

⁹¹ Minow, “Between Vengeance and Forgiveness”, *supra* note 72 at 980.

⁹² Hudson, “Restorative Justice: The Challenge of Sexual and Racial Violence”, *supra* note 39.

within that system, most sexual assault victims choose not to access the criminal justice system. If the criticisms of having a separate system are taken into consideration in the design and implementation of new programs, many of the potential failings could be overcome. Restorative justice measures must be given a chance given the criminal justice system's demonstrated failure to offer any form of justice to women who have been victims of sexual assault.

VII. CONCLUSION

[P]riority should be given to restoring respect and self-respect to victims, regardless of the response that is chosen. ... [T]he entire range of potential responses should be included in this norm. ... This means that a range of responses, sponsored by the government or other collectivities, must be developed even when prosecution of the offender or apology by the perpetrator is impossible.⁹³

Martha Minow

The criminal justice system has never met the needs of women who have been victims of sexual assault. This is perhaps inherently a part of the system: the combination of the presumption of an accused's innocence, a vitally important part of our justice system, and the private nature of sexual assault between acquaintances does not lend itself to being proven beyond a reasonable doubt by witnesses or physical evidence when the act is agreed to have occurred but consent is disputed.

In restorative justice, the victim is central to the process; in the criminal justice system she is merely a source of evidence to be drawn from as far as the rules of the court will

⁹³ Minow, "Between Vengeance and Forgiveness", *supra* note 72 at 980.

allow.⁹⁴ A meeting with an offender may result in some closure—simply having the chance to confront an offender in a safe environment may provide immense relief. In some cases, there may be healing in relationships between the parties; others may simply devise a non-contact plan.

While research on the actual application of restorative justice measures to sexual assault has not yet been concluded, the theoretical case for it, combined with the successful results of programs dealing with other serious crimes, is strong. There is a price to be paid: taking sexual assaults entirely out of the criminal justice system, or diverting them to private processes within it, is in opposition to the fight women have waged to have crimes of gendered violence considered to be important public crimes in the criminal justice system. Yet to deny victims a measure of relief on this ground is to adhere too blindly to a goal that has seen much progress but that may have reached its ultimate distance within the rules of the criminal justice system, where offenders' rights are paramount.

⁹⁴ Hudson, "Restorative Justice: The Challenge of Sexual and Racial Violence", *supra* note 39 at 248.