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STALLED AT 20: VAWA, THE CRIMINAL JUSTICE SYSTEM, AND THE POSSIBILITIES OF RESTORATIVE JUSTICE

*Leigh Goodmark**

Since its passage in 1994, the Violence Against Women Act (VAWA) has promoted a criminal justice approach to addressing intimate partner abuse. But VAWA has done little to provide people subjected to abuse with alternative avenues for seeking justice. VAWA could and should do more. Restorative justice is one option that future versions of VAWA might explore.

Since its inception, VAWA has required states receiving funding through its grant programs to adopt either mandatory or pro-arrest policies, sending the clear message that criminal justice intervention was the preferred method of addressing intimate partner abuse.¹ VAWA has also funded the implementation of no-drop prosecution policies, which encourage prosecution regardless of the victim's willingness to participate.² As a result of these policies, in some jurisdictions women subjected to abuse are forced to testify against their partners, an outcome achieved through pressure, subpoenas, and in extreme cases, arrest and incarceration of the women who the system was meant to protect until their cooperation is secured.³

Given the historic under-enforcement of crimes involving intimate

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¹ Barbara Fedders, *Lobbying for Mandatory Arrest Policies: Race, Class and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L & SOC. CHANGE 281, 300 n.73 (1997).

² BARBARA E. SMITH & ROBERT C. DAVIS, AN EVALUATION OF EFFORTS TO IMPLEMENT NO-DROP POLICIES: TWO CENTRAL VALUES IN CONFLICT III-4-3 (2004).

³ LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 125-28 (2012).

partner abuse, VAWA's focus on developing a robust criminal justice response was unsurprising. Advocates believed, and some continue to believe, that requiring the criminal justice system to intervene in cases of intimate partner abuse would keep women safe and hold their partners accountable.⁴ What VAWA failed to acknowledge, however, was that the state and the women it purported to serve did not always share the same goals. Some women subjected to abuse were not interested in having their partners arrested or participating in prosecution. Some were unable to leave their relationships for a variety of reasons, including immigration status, economic hardship, community sanction, religious beliefs, and children. Others wanted to continue their relationships with their partners, albeit without the violence.⁵ For those women, VAWA's criminal justice reforms offered little help.

VAWA could promote other choices for these women. Restorative justice is one option. Restorative justice emphasizes repairing harms rather than punishing crimes, giving victims and offenders the opportunity to engage in dialogue around the harm, assessing the impact on the victim, and outlining the steps necessary to ensure offender accountability and meet the victim's needs.⁶

Anti-violence advocates have been skeptical about using restorative justice. They fear that restorative processes could endanger women and that restorative justice practitioners do not understand the dynamics of intimate partner abuse well enough to make those processes safe.⁷ Critics cite the lack of offender accountability in restorative justice, claiming that restorative justice is insufficiently punitive and fails to send the strong anti-abuse message necessary to create community accountability norms.⁸ Some are concerned about the gender and race implications, believing that restorative justice pushes the problems of women, particularly women of color, back into the private sphere from whence it emerged forty years ago.⁹ In addition, advocates worry about whether restorative justice focuses more on reintegrating the offender than on supporting the person subjected

⁴ Barbara J. Hart, *Arrest: What's the Big Deal?* 3 WM. & MARY J. WOMEN & L. 207 (1997).

⁵ Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1499 (2008).

⁶ Loretta Frederick & Kristine C. Lizdas, *The Role of Restorative Justice in the Battered Women's Movement*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 41-45 (James Ptacek ed. 2010).

⁷ James Ptacek, *Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 7, at 19.

⁸ *Id.* at 20.

⁹ *Id.*

to abuse¹⁰ and whether restorative justice forces forgiveness on women who are not ready to forgive or creates sufficient space for their anger.¹¹

But restorative justice holds promise for addressing intimate partner abuse. Restorative justice provides an alternative to the criminal justice system without jettisoning that system altogether. Restorative justice could help us to change community norms around intimate partner abuse. The early battered women's movement believed that enacting laws declaring intimate partner abuse a crime would begin to create that change, because the laws would assert the community's disapproval of abuse.¹² But laws against intimate partner abuse have existed in most states for at least the last thirty years, and, as has been made clear in the coverage of the incident involving NFL player Ray Rice and his wife, those community norms have not decisively changed; only the release of a videotape showing Rice knocking his wife unconscious was sufficient to significantly sway public opinion about the incident.¹³

Restorative justice could also expand communities' understanding of abuse. The law's definition of abuse is narrow, generally providing redress for physical harm and threats of physical harm and little else.¹⁴ But people subjected to abuse experience multiple forms of abuse that the law does not reach—verbal, emotional and psychological, economic, reproductive and spiritual.¹⁵ Restorative justice could enable communities to respond not only to illegal activity, but also to cases involving abuse that is legal, but nonetheless extremely harmful.

Restorative justice honors the humanity of both the person subjected to abuse and her partner and prioritizes change over punishment as the goal of intervention. Restorative justice refuses to damn those who abuse, expressing disapproval of the act but hope for and trust in the person who commits it and is willing to try to change, unless and until that person proves unworthy of hope and trust.¹⁶ Without such an approach, people who abuse may curtail some of their violence to avoid further criminal involvement, but they are unlikely to fundamentally change their behavior

¹⁰ Julie Stubbs, *Restorative Justice, Gendered Violence, and Indigenous Women*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 7, at 106.

¹¹ Susan L. Miller & LeeAnn Iovanni, *Using Restorative Justice for Gendered Violence: Success with a Postconviction Model*, 8 FEMINIST CRIMINOLOGY 247, 250 (2013).

¹² Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1666 (2004).

¹³ David Von Drehle, *Seeing Is Believing*, TIME, Sept. 22, 2014, at 20.

¹⁴ GOODMARK, *supra* note 4, at 40-45.

¹⁵ *Id.*

¹⁶ JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 35 (2002).

toward their partners.

Restorative processes, which include victim-offender mediation¹⁷ and conferences bringing together victims, offenders, and members of their communities,¹⁸ put a great deal of power into the hands of victims: the power to determine whether restorative processes are appropriate, to confront their partners, to have their partners admit responsibility for their actions, and to seek reparations. Restorative processes can be victim-centered, deployed only at victims' requests and only in ways that are acceptable to them. Restorative processes engage the community in condemning the harms inflicted and provide community support for victims who may previously have been isolated. In a study of one feminist-informed, intimate partner abuse sensitive restorative program, victims reported that abuse decreased significantly post-conference.¹⁹

VAWA provides only minimal support for these kinds of programs. VAWA funds federally recognized Indian tribes interested in implementing restorative practices, including sentencing circles and other alternative justice courts,²⁰ but such funding is not available to non-tribal courts or to community-based agencies interested in providing restorative justice processes outside of the criminal justice system. Instead, VAWA continues to commit the vast majority of its appropriated funds to police, prosecutors, and courts implementing criminal justice "reforms," as it has for the past twenty years. VAWA's continued emphasis on the criminal justice response leaves little room for innovative work on restorative justice and provides no financial incentive to explore different ways to reach people subjected to abuse who are unable to interact with or uninterested in criminal justice intervention. VAWA could create demonstration projects, testing whether, when restorative justice programs are designed with intimate partner abuse at the forefront, such programs can be useful not only in addressing immediate incidents of abuse, but in changing the behaviors and attitudes of abusive partners and the way that communities view abuse. By expanding its focus beyond criminal justice, the next iteration of VAWA could substantially increase the potential for people subjected to abuse to find justice.

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¹⁷ Miller & Iovanni, *supra* note 12, at 248.

¹⁸ Ptacek, *supra* note 7, at 9.

¹⁹ C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 307-09 (2004).

²⁰ U.S. DEP'T OF JUSTICE, *Coordinated Tribal Assistance Solicitation: FY 2014 Competitive Grant Announcement 20* (2014), available at http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/11/19/ctas_fy-2015_solicitation.pdf.