

**TEMPERING IDEALISM WITH REALISM: USING
RESTORATIVE JUSTICE PROCESSES TO PROMOTE
ACCEPTANCE OF RESPONSIBILITY IN CASES OF
INTIMATE PARTNER VIOLENCE**

C. QUINCE HOPKINS*

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* Professor of Law, Florida Coastal School of Law. J.D. University of Maryland, J.S.M. and S.J.D. (ABD) Stanford Law School. The author thanks Brian Foley, Gertrude B. Hopkins, Mary P. Koss, David Millon, Greg Pingree, Christopher Roederer, Rebecca Razavi, Joan Shaughnessy for their helpful comments on earlier drafts of this article. My early thinking about the underlying ideas in this article was enriched by many conversations with Lyman Johnson and Andrew McThenia on spiritual and theological aspects of apology and forgiveness. A special thank you to the members of the *Harvard Journal of Law & Gender* Editorial Board, particularly Emily Wales and Lindsay Reimschuessel, for their exceedingly careful and tireless editorial work and thoughtful substantive suggestions. Drawing on the central thesis of this Article, the author presented a work in progress, *Violence and Power Along the Gender Axis: Restorative Justice for Violence within the LGBT Community*, at the *Harvard Journal of Law & Gender* Symposium, TRANSCENDING BARRIERS: STRATEGIES FOR CHANGE IN TRANSGENDER RIGHTS, in March 2012. The author thanks *Journal* Co-Editor-in-Chief, Ryan Blodgett, Managing Editor Hilary D’Angelo, and the Symposium organizers, Joanne Cáceres, Samantha Cochran, and Caitlin Pratt, for their work in organizing the symposium.

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INTRODUCTION

This Article evaluates the potential use of “responsibility initiatives” in gender-based violence, with a specific focus on adult intimate partner violence. This Article analyzes the law’s role in furthering victims’ recovery from the trauma caused by gender-based violence through promoting acceptance of responsibility by offenders.¹ Perpetrators of abuse often minimize or

¹ This Article falls within the author’s larger project examining justice responses to sexual and physical violence against women, particularly the use of restorative justice in these cases. The author is the legal advisor for a pilot research demonstration project in Pima County, Arizona, funded by the Centers for Disease Control and Prevention, implementing such a response in acquaintance rape cases. See generally Mary P. Koss, Karen Bachar & C. Quince Hopkins, *Disposition and Treatment of Juvenile Sex Offenders from the Perspective of Restorative Justice*, in *THE JUVENILE SEX OFFENDER* 336, 346–52 (Howard E. Barbaree & William L. Marshall eds., 2006) (exploring the potential of using restorative justice as a response to juvenile sex offenses); Mary P. Koss, Karen J. Bachar & C. Quince Hopkins, *An Innovative Application of Restorative Justice to the Adjudication of Selected Sexual Offenses*, in *CRIME PREVENTION: NEW APPROACHES* 321, 325–29 (Helmut Kury & Joachim Obergfell-Fuchs eds., 2003) (introducing the *RESTORE* concept and rationale for the first time); Mary P. Koss, Karen J. Bachar, C. Quince Hopkins & Carolyn Carlson, *Justice Responses to Sexual Assault: Lessons Learned and New Directions*, in *UNDOING HARM: INTERNATIONAL PERSPECTIVES ON INTERVENTIONS FOR MEN WHO USE VIOLENCE AGAINST WOMEN* 37, 47–55 (Mona Eliasson ed., 2004) (describing the *RESTORE Program*); C. Quince Hopkins, Mary P. Koss & Karen J. Bachar, *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 *ST. LOUIS U. PUB. L. REV.* 289, 296–304 (2004) [hereinafter Hopkins et al., *Applying Restorative Justice*] (raising concerns with the use of restorative justice for ongoing domestic violence as opposed to a one-time acquaintance sexual assault); C. Quince Hopkins & Mary P. Koss, *Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses*, 11 *VIOLENCE AGAINST WOMEN* 693, 708–15 (2005) [hereinafter Hopkins & Koss, *Incorporating Feminist Theory*] (analyzing feminist critiques and support for the use of restorative justice methods in responding to sex offenses); Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 *AM. PSYCHOLOGIST* 1332 (2000) [hereinafter Koss, *Blame, Shame*] (describing problems with current criminal justice system interventions and proposing the need for change to

outright deny their abuse when asked about it by family, friends, and even their victims. In cases of acquaintance sexual assault, this denial is often firmly rooted in offenders' cognitive distortion, which leads them to believe their victim in fact consented. The denial of the victim's experience of the assault as clearly unwanted causes unique and devastating trauma to victims, and yet the core of our criminal justice response to sex offenses facilitates this denial rather than acceptance of responsibility by offenders.

In cases of partner violence, the underlying psychology is more simple and yet also more complex than in cases of acquaintance sexual assault. Nonetheless, this process of unmaking the past is central to the dynamics of many violent intimate relationships: it insulates the batterer's conduct from outside criticism and intervention, creates a liar out of the victim, and ultimately can work its magic on the victim's own memory of past abuse.

This comprehensive un-telling of the past by perpetrators of gender-based violence not only causes psychological harm to victims and ostracizes them from family and friends, but it also presents significant challenges to prosecutors. At the same time, it suggests an important potential benefit to victims should the criminal justice system enhance, rather than undercut, mechanisms that promote acceptance of responsibility.

Professors Stephanos Bibas and Richard Bierschbach make a compelling case for using existing aspects of the federal criminal justice process as venues for increasing acceptance of responsibility by offenders in the federal criminal system.² Their argument and proposals, however, do not adequately map on to the issues and dynamics at play in most gender-based crimes for three reasons. First, the vast majority of gender-based violence cases are prosecuted in state, rather than in federal courts.³ Thus, Bibas's

promote more positive outcomes for victims of intimate partner violence); Mary P. Koss, Karen J. Bachar, C. Quince Hopkins & Carolyn Carlson, *Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration: Introducing the RESTORE Program*, 19 J. INTERPERSONAL VIOLENCE 1435, 1436, 1448–56 (2004) (describing the collaborations underlying the RESTORE Program); Mary P. Koss, Karen J. Bachar & C. Quince Hopkins, *Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable*, 989 ANNALS N.Y. ACAD. SCI. 384, 388–92 (2003) (introducing the RESTORE approach to sexual violence to sexual offender research community).

² Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology Into Criminal Procedure*, 114 YALE L.J. 85 (2004). See generally Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/1/LRColl2011n1Cassell&Joffe.pdf> (addressing criticisms of the federal Crime Victims' Rights Act ("CVRA")), and arguing that including victims' rights improves the adjudication of criminal cases); Mary Margaret Giannini, *Equal Rights for Equal Rites? Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431 (2008) (discussing the importance of allocation in federal cases under the CVRA)).

³ One notable exception to this might be federal prosecutions under the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103–322, tit IV, 108 Stat. 1902 (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.). For instance, VAWA makes possession of a firearm by someone subject to an order of protection a federal crime. 18 U.S.C. § 922(g)(8) (2000). Whether actual prosecutions are

and Bierschbach's federally-based recommendations simply are not applicable to most gender-based violence.⁴ Second, and more importantly, the fact that offender denial is inherent in the fundamental dynamics underlying both intimate partner violence and in acquaintance sexual assault suggests that Bibas's and Bierschbach's proposals will gain little headway in the context of these particular crimes. Finally, secondary consequences to sexual assault offenders hint at another way that the Bibas and Bierschbach proposals will prove ineffective in these cases: accepting responsibility and admission of a sexual offense will subject many if not all of these offenders to lifetime sex offender registration requirements.⁵ That alone is sufficient to keep most acquaintance rapists from ever acknowledging their sex offending in a court

taking place in federal courts, however, is a different matter, and whether the Supreme Court would uphold prosecutions under that statute as within Congress's power to enact is also an open question following the Supreme Court's decision in two important cases. In *United States v. Lopez*, the Supreme Court struck down the Gun-Free School Zones Act, which criminalized possession of a weapon on school property, as beyond the scope of Congress's Commerce Clause power. 514 U.S. 549, 551 (1995). In *United States v. Morrison*, the Supreme Court held that the civil rights remedy of the Violence Against Women Act was outside the scope of Congress's Commerce Clause power because the underlying conduct, interpersonal violence against women, did not sufficiently impact interstate commerce. 529 U.S. 598, 616–19 (2000). Although the latter did not involve the criminal sanctions in VAWA, when *Morrison* is read in conjunction with *Lopez*, one might wonder if the Supreme Court would follow the same reasoning and find the provisions of VAWA criminalizing firearms unconstitutional. Following the *Lopez* decision, however, the Gun-Free School Zones Act was amended by the Lautenberg Act, which included relevant provisions for violence against women. See, e.g., 18 U.S.C. § 922(g)(8) (criminalizing possession of a firearm for defendant under an order of protection), and 18 U.S.C. § 922(g)(9) (criminalizing possession of a firearm for defendant convicted of a domestic violence misdemeanor). Even if those revised provisions are ultimately found to be constitutionally sound, it remains the case that almost all gender-based crimes occur in state courts under state criminal laws. For an illustration of the contrast between the number of non-interpersonal violence criminal cases, violent crime cases, and sexual violence against adults cases filed in federal courts, see Bureau of Justice Statistics, *Criminal Defendants Disposed of in U.S. District Courts Fiscal Year 2010*, SOURCEBOOK ON CRIMINAL JUSTICE STATISTICS ONLINE, <http://www.albany.edu/sourcebook/pdf/t5242010.pdf> (last visited Mar. 5, 2012).

⁴ The reasons for this are constitutional: federal criminal courts are courts of limited jurisdiction and only hear criminal cases involving a federal criminal statute or a crime on federal land. See, e.g., ELLEN S. PODGOR, PETER J. HENNING, & NEIL P. COHEN, *MASTERING CRIMINAL LAW* 17 (2008). Additionally, most federal criminal statutes derive their authority from Congress's Commerce Clause power. See, e.g., *id.*; see also J. KELLY STRADER, *UNDERSTANDING WHITE COLLAR CRIME* 4–6 (3rd ed. 2011) (discussing federal versus state jurisdiction generally, and specifically in the context of white collar crime). Most gender-based crimes—in particular family violence and sexual violence—do not have the requisite impact on interstate commerce to merit federal statutory sanction. See, e.g., *Morrison*, 529 U.S. at 616–19 (holding that the civil rights remedy of the Violence Against Women Act was outside the scope of Congress's Commerce Clause power because the underlying conduct, interpersonal violence against women, did not sufficiently impact interstate commerce). See also *supra* note 3 (discussing *Morrison* and *Lopez*). Therefore they are prosecuted in state courts that fall within the states' police power. PODGOR ET AL., *supra*, at 4.

⁵ See CHRISTOPHER REINHART, *FEDERAL LAW ON CLASSIFYING SEX OFFENDERS* (2006), available at <http://www.cga.ct.gov/2006/rpt/2006-r-0765.htm> (stating all offenders found guilty of “a crime involving a sexual act or sexual contact with another” are considered Tier I offenders under federal law and required to register as sex offenders).

of law, even if they internally have come to realize their culpability. Thus, in the case of sexual assault in particular, traditional criminal justice processes are unlikely to provide an avenue for promoting acceptance of responsibility by offenders. By contrast, restorative justice initiatives may provide a more effective avenue for offender admission of wrongdoing and consequently enhanced victim recovery.

Restorative justice, broadly defined, 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.”⁶ Restorative justice emphasizes the “needs and roles” of key stakeholders—victims offenders, and communities—⁷ acknowledges “offender responsibility for repairing harm,”⁸ and promotes victim, offender, and community engagement in the process.⁹ Restorative justice processes are inclusive and collaborative, with “consensual outcomes.”¹⁰ The aim is to identify and address the actual harms caused by the offense, and additionally address underlying causes of behavior.¹¹

In cases of intimate partner violence in state courts—where these cases are most often prosecuted—Bibas’s and Bierschbach’s proposals might bear more fruit, albeit with several caveats discussed in this Article. More specifically, the avenue for enhancing offender acceptance of responsibility might be present in certain criminal law provisions that domestic violence advocates otherwise rightly target as wrong-headed, namely criminal law domestic violence diversion provisions¹². Diversion programs allow first-time¹³ domestic violence offenders to have their criminal case (or imposition of traditional sanction) held in abeyance, typically in exchange for an agreement to enter a counseling program, and sometimes also in exchange for an

⁶ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 37 (2002). Zehr also explains that “restorative justice is *not*”: “primarily about forgiveness or reconciliation,” “mediation,” “primarily designed to reduce recidivism,” “necessarily an alternative to prison,” or “the opposite of retribution.” *Id.* at 8–13.

⁷ *Id.* Victims need information, truth-telling, empowerment, and restitution or vindication. *Id.* at 14–15. Offenders, on the other hand, need accountability, “encouragement to experience personal transformation,” reintegration into the community, and at times, “temporary restraint.” *Id.* at 17. Members of the community where the crime occurred need recognition that they are also victims, the “opportunit[y] to build a sense of community and mutual accountability,” and “encouragement to take on their obligations for the welfare of their members . . . and to foster the conditions that promote healthy communities.” *Id.* at 18.

⁸ *Id.* at 21.

⁹ *Id.* at 24.

¹⁰ *Id.* at 26.

¹¹ *Id.* at 28–30.

¹² Diversion typically consists of some form of counseling for the offender, quite often a combination of individual and group counseling about the violence, and additional substance abuse counseling if the offender was using drugs or alcohol during or prior to the incident. See *infra* Part IV.A (discussing diversion).

¹³ Rarely is the criminally charged domestic abuser a true first-time offender. Based on my experience, victims rarely seek police intervention for a first incident; several incidents of abuse typically occur before a victim’s first call to the police.

in-court admission of wrongdoing.¹⁴ While the effectiveness of the counseling programs themselves is not demonstrably robust,¹⁵ this does not mean that other potential benefits of diversion necessarily should be ignored or eliminated.

These diversion provisions are convincingly criticized by advocates who argue that diversion treats domestic violence as a less serious matter than stranger assaults and that it treats family violence as a therapeutic matter rather than as a crime,¹⁶ but the programs nonetheless provide a unique opportunity for victims that should not be ignored. This Article analyzes requirements of public admission by batterers of wrongdoing in domestic violence diversion laws and companion provisions that allow victims to make in-court statements about past harm. The claim in this Article is that this process of public truth-telling is a means of restoring history that previously was unwritten through batterers' typical denial of past wrongdoing. The restoration of history effectuated by these laws provides a unique benefit to victims that should not be abandoned, despite other possibly valid feminist critiques of diversion.

Because non-admission of guilt is the norm in our criminal justice system,¹⁷ diversion's provision for batterer public confession may be the only method of restoring the history that he (and occasionally she)¹⁸ previously

¹⁴ In some states, such as Virginia, there is no need for a confession, just a finding by the judge that there is sufficient evidence to convict. *See infra* Part IV.B.3 (discussing Virginia's diversion statute).

¹⁵ *See, e.g.,* Johnna Rizza, Comment, *Beyond Duluth: A Broad Spectrum of Treatment for a Broad Spectrum of Domestic Violence*, 70 MONT. L. REV. 125, 131–32 (2009) (discussing the limited effectiveness of batterer intervention programs in Broward County, Florida).

¹⁶ Although the criticisms are meritorious, they ignore the actual wishes of victims who often say they do not want typical criminal punishment, but rather for the batterer to publicly admit what he did and to make good on promises to change, which they hope will happen through counseling; these are the precise things diversion programs attempt to deliver. *See, e.g.,* Hopkins et al., *Applying Restorative Justice*, *supra* note 1, at 291. For further discussion of criticisms of diversion, *see infra* Part III.B.1.

¹⁷ *But see* Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337, 353 (2002) (discussing the use of acceptance of responsibility under the Federal Sentencing Guidelines in obtaining a more lenient sentence).

¹⁸ *See, e.g.,* RONET BACHMAN & LINDA E. SALTZMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 3 (1995), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/FEMVIED.PDF> ("Compared to men, women were about 6 times more likely to experience violence committed by an intimate [partner]."); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 17 (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>. ("[W]omen were significantly more likely than men to report being victimized by an intimate partner."). There has been much debate about the gendered nature of domestic violence, and claims made that women are abusive at the same rates as are men. *See, e.g.,* LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 38 (2012). As a result, some scholars have recently argued for disaggregating domestic violence into different types of violence, which would help explain the ongoing debate

unmade.¹⁹ Quite possibly, it may also be the case that, since batterers often resort to apologies as part of their pattern of power and control, their tendency to apologize may well be leveraged in a process that promotes public acceptance of responsibility. This is in contrast with acquaintance sexual assault offenders who are faced with the potential of lifetime sex offender registry, which makes it significantly less likely that they will admit responsibility even once they internally acknowledge their wrongful acts. If that is the case, it should not be lightly tossed aside, but rather should be emphasized and expanded.²⁰

For many of the same reasons enumerated here, Professor Laurie Kohn has eloquently argued for a radical and visionary creation of a new restorative justice response to intimate partner violence that would stand separate and apart from existing criminal justice responses.²¹ While the approach she advocates is arguably a more “pure” restorative justice response,²² its radical nature makes it less likely to be accepted by key stakeholders (prosecutors, judges dealing with family violence cases, and domestic violence advocates in particular) than the approach argued for in this Article. A non-receptive

about the gendered nature of domestic violence. *Id.* at 38–39 (discussing sociologist Michael Johnson’s “typology of domestic violence” consisting of four different types of domestic violence). While the vast majority of domestic violence offenders are male partners in heterosexual relationships, domestic violence does occur in same-sex relationships, and very occasionally involves female perpetrators in heterosexual relationships. This Article does not wish to silence or hide victims in these cases, who suffer equally and differently from what is otherwise the overwhelming majority of female victims in heterosexual intimate violence cases. For a further discussion of intimate partner violence in same-sex relationships, see GOODMARK *supra*, at 71; Satoka Harada, Comment, *Additional Barriers to Breaking the Silence: Issues to Consider when Representing a Victim of Same-Sex Domestic Violence*, 41 U. BALT. L.F. 150, 155–61 (2011).

¹⁹ See *infra* Part I.A.2 (highlighting the importance of these confessions taking place in a public rather than private forum). *But see* Petrucci, *supra* note 17, at 246 (pointing out potential negative consequences to making confessions in public). One could cogently argue that a public approach over-privileges and over-emphasizes the offender’s authority, power, and role in first unwriting (i.e., misstating) and then re-writing (i.e., correcting) history, to the detriment of the survivor’s power and role in the endeavor. A more fundamental shift in our constitutional framework and criminal justice system than that argued for in this Article would be required to implement a presumption that endorses the victim’s reclaiming of the historical truth—herstory if you will. More importantly, the use of victim impact statements already accomplishes much of this goal of focusing on victim truth-claiming and truth-telling. The value in promoting offender acceptance of responsibility stands separate and apart from that goal, yields benefits to victims and to society more generally, and only enhances deference to victim narrations of the truth of the events.

²⁰ See Petrucci, *supra* note 17, at 354–58 (presenting empirical evidence that apology should be incorporated in criminal justice proceedings, where apology includes the concepts of acceptance of responsibility for wrongdoing).

²¹ Laurie S. Kohn, *What’s So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 576–94 (2010) (proposing a restorative justice-based intervention program as an alternative to the criminal and civil process).

²² See Christa Obold-Eshleman, *Victims’ Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 571, 602 (2004) (claiming that working within “the traditional adversary system” might “distort” a restorative justice model without “changing the traditional adversarial system”).

audience alone is not necessarily a sufficient reason to refuse to attempt Professor Kohn's project. However, because her proposed reform moves away from long-fought-for reforms in the criminal justice system, her approach—in contrast to the one argued for here—is more vulnerable to a charge from advocates that it is “justice light” for victims, and that it undercuts advocates' hard-won gains.²³ As a purely logistical and fiscal matter, using the existing criminal justice response infrastructure makes the approach argued for here much more feasible than the visionary program argued for by Kohn. In addition, the approach suggested here will allow for the continued development and study of the outcomes of “coordinated community response” models coupled with “safety and accountability audits,” which are deemed best practices in current responses to intimate partner violence and which key stakeholders fear might be side-stepped.²⁴ This Article thus analyzes the public confession aspect of existing diversion programs as a means of restoring history and achieving some of the other ends Kohn and I agree are so critical for victims. I argue that restoring history, in particular, is a critical companion to victims' own recounting of the past harm either through traditional trial testimony or victim impact statements made at sentencing.²⁵ After a diversion-based approach has been implemented and studied over a period of time and key stakeholders and victims have positive experiences with it, the Kohn approach is much more likely to be accepted and thus possible to implement.

Part I addresses the need for and benefits from promoting public truth-telling within the legal system. The argument draws on psychological research on recovery from trauma. This section first evaluates the counterpart to offender confession, namely victim impact statements, and how they too contribute to victim healing. This section then focuses on the benefits of offender confession and acceptance of responsibility: (1) to individual vic-

²³ Kohn, *supra* note 21, at 549 (citing Joan Pennell & Gale Burford, *Family Group Decision Making and Family Violence*, in *FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE* 171, 182 (Gale Burford & Joe Hudson eds., 2000)).

²⁴ See, e.g., Loretta Frederick & Kristine C. Lizdas, *The Role of Restorative Justice in the Battered Women's Movement*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN* 39, 42–44 (discussing coordinated community responses); James Ptacek, *Resisting Co-optation: Three Feminist Challenges to Antiviolence Work*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN* 5, 12–15 (J. Ptacek, ed., 2010) (describing coordinated community response and safety and accountability audits); John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 *CRIM. L. BULL.* 244, 245 (2002) (“Neither chronic cynicism nor conversion and commitment to reform that does not look back can [systematically reveal both the positives and negatives of new and old justice responses.]”).

²⁵ See generally Richard A. Bierschbach, *Allocation and the Purposes of Victim Participation under the CVRA*, 19 *FED. SENT'G REP.* 44 (2006) (discussing differing interpretations of § 3771(a)(4) of the Crime Victims' Rights Act and the role of victim participation in criminal proceedings); Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 *OHIO ST. J. CRIM. L.* 611 (2009) (highlighting several benefits from allowing victim impact statements); Giannini, *supra* note 2 (discussing the importance of allocation to victims).

tims of gender-based violence as a therapeutic moment; (2) to victims of gender-based violence as a group in terms of increased societal understanding of the phenomena; and finally, (3) potentially to the general public from reductions in gender-based violence which in turn can trigger reductions in other social problems.

Part II addresses theoretical bases for incorporating perpetrators' public acceptance of responsibility into the criminal justice processing of gender-based violence cases. This section first analyzes the theory of therapeutic justice before ultimately proposing that restorative justice theory and its practices may prove promising for promoting the goals suggested in this Article. This Part argues that there may be a larger societal benefit from the continued (and perhaps expanded) use of public truth-telling in acquaintance sexual assault and family violence cases.

Part III evaluates feminist theoretical foundations for a criminal justice response that promotes domestic violence offender confession. This section argues that in many ways, a diversion model that incorporates a public truth-telling component sits squarely within not just one, but several central branches of feminist legal theory: (1). Robin West and Carol Gilligan's cultural or difference feminism (as modulated by Martha Chamallas's more recent recasting of this theory) emphasizing the importance of relationships; (2). Catharine MacKinnon's dominance feminism and its emphasis on gender-based power disparities; and (3). Kathy Abrams's and other authors' feminist jurisprudence on women's agency and its potential emphasis on the importance of empowering victims of intimate violence.

This Part then confronts concerns about diversion programs expressed by feminist advocates, highlighting several benefits to incorporating offender apology into the widespread use of diversion. Next, this Part addresses concerns regarding restorative justice's use in domestic violence cases, including real concerns about the perverse role apology plays in the dynamics of intimate violence when used by offenders as a tool to maintain domination over victims and restorative justice's emphasis on reconciliation, which are ignored by many contemporary scholars who argue for the increased use of apology in criminal and civil law. The argument concludes that although use of offender apology to victims in ongoing violent relationships is problematic the system could minimize the harmful effects of apology while still achieving the potential benefits of public acceptance of responsibility.

Finally, Part IV discusses one instance where offender confessions might be encouraged in domestic violence cases: as precursors to offender referral to diversion programs in the United States.²⁶ This section first

²⁶ See *supra* note 1 (concerning the larger cross-national project of which this Article is a piece); see also *infra* Part IV (discussing diversion analysis). Diversion is perhaps the most mainstream of the various alternative or creative sentencing approaches undertaken by courts in the United States. Some of these alternative sentencing approaches

briefly overviews black-letter law on diversion in the United States, concluding that even now, close to two decades after the National Council of Juvenile and Family Court Judges recommended that diversion be used in only the narrowest class of domestic violence cases,²⁷ many states continue to provide for diversion in their criminal law statutes, rules, or local prosecution protocols.²⁸

Not only do state statutory and other regulatory schemes continue to provide for diversion, this Part reviews anecdotal accounts that suggest that prosecutors in a number of states utilize diversion as the *primary* means of resolving most family violence cases.²⁹ An evaluation of two such state provisions, Arizona and Virginia, constitutes the focus of the final section of this Part to demonstrate the ways in which use of diversion can differ from jurisdiction to jurisdiction. This discussion concludes, however, that despite the great potential to promote offenders taking responsibility for their violence, the promise remains unfulfilled. In practice, domestic violence offenders rarely, if ever, acknowledge their wrongdoing in the legal forum prior to receiving the benefit of diversion. As this study demonstrates, close attention to the actual implementation of criminal justice initiatives is required to ensure that their promise of promoting public acceptance of responsibility comes to fruition.

I. THE IMPORTANCE OF PUBLIC TRUTH-TELLING AND ACCEPTANCE OF RESPONSIBILITY TO VICTIM HEALING AND COMMUNITY NORM CHANGE: SOCIAL AND PSYCHOLOGICAL PERSPECTIVES

In all but the narrowest of contexts, the criminal justice system in the United States disincentivizes the admission of wrong-doing and the acceptance of responsibility for criminal behavior.³⁰ Public truth-telling within the legal system, however, can serve a number of important functions that are beneficial to both individuals and society. After briefly addressing the therapeutic benefits of victim testimony, this Part focuses on the benefits of offender confession and acceptance of responsibility including therapeutic benefits for individual victims, the group benefit to victims from increased societal understanding of intimate partner violence, and finally, to society as a whole from reductions in violence generally. Given the demonstrated cor-

include the use of identifying license plates, requiring offenders to wear placards that state their crimes, and so on.

²⁷ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: A MODEL STATE CODE 15–16 (1994) [hereinafter NCJFCJ RECOMMENDATIONS].

²⁸ See *infra* Part IV.B (discussing the current status of US diversion laws).

²⁹ See *infra* Part IV.B.3 (using anecdotes to suggest that prosecutors routinely use diversion as the primary method of resolving domestic violence cases).

³⁰ See, e.g., Bibas & Bierschbach, *supra* note 2, 141–42 (discussing the limited use of offender expressions of remorse in sentencing); Petrucci, *supra* note 17, at 352–53 (discussing the Federal Sentencing Guidelines' use of acceptance of responsibility as a factor for downward deviation in sentences).

relation between domestic violence and a number of other social ills, a reduction in domestic violence may in turn possibly help reduce problems such as homelessness and juvenile delinquency.³¹

A. *Benefits to Individual Victims*

Public testimony as to wrongs done, both in the form of victim testimony and offender confession, may serve positive functions in victim healing and social norm change. This section focuses on the first of these two benefits—victim healing—since both victim testimony and offender confession map directly on to the second stage in victim recovery: remembrance and mourning.³²

1. *Victim Allocation: Public Truth-Telling as a Component in Victim Recovery*

Psychological studies of trauma and recovery from trauma tell us that human beings need to talk about harms we have suffered in order to heal.³³ Truth-telling about the traumatic events is central to any process of recovery.³⁴ Although emphasizing that there is no magic bullet for recovery,³⁵ Harvard psychologist Judith Herman lays out three typical stages necessary to victim recovery from trauma, namely: (1) ensuring victim safety, (2) remembrance and mourning, and (3) reconnecting with others.³⁶

The first stage of recovery from trauma—reestablishing control and a sense of safety—focuses both on insuring self-reliant physical safety and emotional security.³⁷ This stage emphasizes victims regaining power and control over themselves and their environment, including such basic processes as sleeping.³⁸ In the context of criminal prosecution, the demands

³¹ See discussion and sources cited *infra* Part I.C.

³² See JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 175 (1992).

³³ See *id.* at 181 (discussing the power of storytelling in the process of healing); CHARLES L. WHITFIELD, M.D., *MEMORY AND ABUSE: REMEMBERING AND HEALING THE EFFECTS OF TRAUMA* 250–51 (1995) (summarizing several studies on stages of PTSD recovery and noting that all involve some form of remembering and naming the experience). This is not to say that there are not some who prefer instead to turn their back on the traumatic event, and stoically go forward with their lives rather than reliving their trauma through testimony. Some of those who choose that path, however, may not be taking this path because they see it as the healthy option. Some may want to avoid dwelling on the past, while others may not want to reveal the traumatic experience because they feel shame about it. See Herman, *supra* note 32, at 158–59 (describing reasons patients avoid psychotherapy after traumatic events).

³⁴ HERMAN, *supra* note 32, at 148.

³⁵ *Id.* at 156.

³⁶ *Id.* at 155. See also WHITFIELD, *supra* note 33, at 254 (1995) (describing an additional stage of recovery by including a stage “zero” as the stage that exists prior to Herman’s stage one).

³⁷ HERMAN, *supra* note 32, at 159–62.

³⁸ *Id.*

of the criminal process often fail to address the victims' physical and emotional safety needs.³⁹ This is particularly true where the violence subject to legal action is part of an ongoing relationship between victim and offender.⁴⁰ Criminal processes, with their own constitutionally and institutionally driven time-table, may force victims to move more quickly at this stage than is psychologically advisable.⁴¹

The second stage of recovery from trauma identified by Herman involves a process of remembrance of the traumatic act, coupled with mourning losses that the trauma entailed.⁴² This stage emphasizes victim testimony and remembrance, but also suggests the possibility that offender confession might facilitate victim recovery.⁴³ It is this second stage that most directly calls for justice system responses that facilitate testimony and confession.⁴⁴

³⁹ See *id.* at 165 (describing the legal system as "hostile" or "indifferent" to a survivor).

⁴⁰ *Id.* at 168. Herman emphasizes the difficulty of establishing safety in relationships with ongoing violence. *Id.* For example, she explains that offenders in these cases will make promises to reform and victims will sometimes be particularly willing to accept these promises even to the extent of denying or minimizing the ongoing danger. *Id.*

⁴¹ *Id.* at 165.

⁴² *Id.* at 175, 188.

⁴³ Cf. *id.* at 175–81 (enumerating several difficulties in the process of remembering and retelling trauma as part of the recovery process, many of which come from uncertainty about the facts of the traumatic episode). But see *id.* at 189–90 (suggesting offender confession is not a prerequisite to victim recovery).

⁴⁴ What is the impact of divergent memories (and thus, divergent testimonies) on any endeavor to use public confessions and testimony as a therapeutic and restorative event, i.e., when victim and defendant's public statements speak different "truths?" This Article does not address situations where parties present divergent accounts of the same event because either the perpetrator or the victim affirmatively and intentionally misrepresents what he or she knows to be true—what might be characterized as the "easy" scenario where one or the other is simply lying. Although I leave this scenario for analysis in other venues, I use scare quotes around the term "easy" because part of what may underlie our anxiety with divergent stories is the very real prospect that one or the other party is in fact affirmatively and intentionally speaking untruthfully.

For purposes of this Article, I focus not on situations where the perpetrator denies *anything* happened, but rather on those situations in the grey interstices where both parties agree generally that something happened but disagree on the specifics of the event(s). The more complex scenario between victims and offenders involves those situations where the parties tell diverging stories, both honestly believing their version is the accurate one. Studies of memory function in general, and autobiographic memory in particular, reveal that this can and does happen regularly simply by virtue of the neural processes that occur when we encode and store memories in our brains. See WHITFIELD, *supra* note 33, at 13–14 (describing the process of memory experience and encoding).

I also assume a unitary phenomenology and that divergent human accounts of that reality reflect something that occurs on an individual level, whether this be individualistic experiences of reality, individualistic expressions of that experience, or something in between. Post-modern theorists, like Teresa de Lauretis and Joan W. Scott, challenge the common-sense notion that experiences are "direct, unmediated, subjectively lived accounts of reality . . . [t]hey are not traces of reality, but rather part of life itself." Ernst Van Alphen, *Symptoms of Discursivity: Experience, Memory, and Trauma*, in ACTS OF MEMORY: CULTURAL RECALL IN THE PRESENT 24, 24 (Mieke Bal, Jonathan Crewe & Leo Spitzer eds., 1999). As post-modern theorists would have it, experience is something that subjects *do*, rather than merely something a subject *has*. Experience "is not so direct and unmediated as is usually assumed, but is fundamentally discursive." *Id.* "Experience

For victims, an experience of trauma triggers a loss of both language and the realization that language itself can be a critical tool for addressing trauma.⁴⁵ Because trauma can, at least temporarily, rob the victim of language,⁴⁶ overcoming trauma requires regaining language. Overcoming trauma *requires* speech.⁴⁷ In this sense, trauma ultimately can end up multi-

depends on discourse to come about; forms of experience do not just depend on the event or history that is being experienced, but also on the discourse in which the event is expressed/thought/conceptualized.” *Id.*

It is also important to note, before moving on to the more difficult analysis of sincere but diverging stories, that diversion itself may trigger incidents of false or insincere confessions. Since diversion offers a way to make the whole matter virtually disappear, there is a great incentive for false or insincere confessions where a guilty plea is a prerequisite to getting diversion. The wish to make a bad situation just go away is perhaps even part of the human condition. The protagonist in J. M. Coetzee’s compelling novel, *Disgrace*, states the problem succinctly: “I plead guilty to both charges. Pass sentence, and let us get on with our lives.” J.M. COETZEE, *DISGRACE* 48 (1999). See also PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW & LITERATURE* 21–22 (2000) (explaining motivations for false confessions). Some research suggests, however, that the mere act of accepting responsibility, even if insincere, might nonetheless prove beneficial to both victim and offender. See, e.g., Petrucci, *supra* note 17, at 355–56 (discussing motivations to accept apologies, even if that apology is insincere). Note, of course, that “insincere” acceptance of responsibility or expressions of remorse are not the same as “untrue” confessions. It is arguable that an “untrue” confession may not provide the same kind of benefit to a victim that an insincere apology would.

⁴⁵ HERMAN, *supra* note 32, at 175 (“Traumatic memory . . . is wordless and static.”). As Herman notes, the process of recovery incorporates a process of identifying and naming the trauma itself, which in the therapist’s office equates with diagnosis. *Id.* at 156–59.

⁴⁶ ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 54–55 (1985). Paul Celan, poet and Holocaust survivor, described his traumatic experience thus:

Within reach, close and not lost, there remained, in the midst of the losses, this one thing: language.

This, the language, was not lost but remained, yes, in spite of everything. But it had to pass through its own answerlessness, pass through a frightful falling mute, pass through the thousand darkneses of death-bringing speech.

Shoshana Felman, *Education and Crisis, or the Vicissitudes of Teaching*, in *TESTIMONY: CRISES OF WITNESSING IN LITERATURE, PSYCHOANALYSIS AND HISTORY* 1, 28 (Shoshana Felman & Dori Laub eds., 1992) (quoting John Felstiner, *Translating Celan’s Last Poem*, *AM. POETRY REV.*, July/August 1982, at 21, 23). Felman noticed a similar reaction in her students, after showing them traumatic images of the Holocaust: “[The students’ experience] was, not unlike Celan’s own Holocaust experience, something akin to a *loss of language*; and even though [they] came out of it with a deep need to talk about it and to talk it out, [they] also felt that language was somehow incommensurate with it.” *Id.* at 50.

⁴⁷ HERMAN, *supra* note 32, at 175. Felman describes this phenomenon in relation to the trauma of the Holocaust:

To seek reality through language “with one’s very being,” to seek in language what the language had precisely to *pass through*, is thus to make of one’s own “shelterlessness”—of the openness and the accessibility of one’s own wounds—an unexpected and unprecedented means of *accessing reality*, the radical condition for a wrenching exploration of the testimonial function, and the testimonial power, of the language

Felman, *supra* note 46, at 28–29. Later in the chapter, when Felman describes the secondary trauma the class undergoes after watching the testimony of Holocaust survivors, she states: “The [students] looked subdued and kept their silence even as they left

plying speech, if language is used as a tool in recovering from that trauma.⁴⁸ This may come in the form of regaining voice in the first instance—the ability to speak or write about the events—to put words to the experience. Or it may be that entirely new language needs to be learned to describe the traumatic event—the new reality, as it were, of the victim’s post-trauma world. Testimonial accounts enable “psychological survival—the very ability to sustain and to continue life after catastrophes.”⁴⁹ The public act of testifying about the harm done to a victim—whether through testimony at trial, a victim impact statement, or another public or quasi-public forum—can play a role in that persons’s recovery from trauma.⁵⁰

With victim testimony, this reclaiming of language and movement towards overcoming trauma must in the first instance be the responsibility and prerogative of the victim.⁵¹ In other words, prosecutors’ accounts of the incidents of violence serve little therapeutic function. It is theft, a pre-emption of the right to witness, when prosecutors recount the traumatic events on victims’ behalf. “[T]estimony cannot be simply relayed, repeated or reported by another without thereby losing its function as a testimony . . . [it] is a radically unique, non-interchangeable and solitary burden.”⁵² However, if witnessed (in the both strict and loose senses of that word), the act of testifying overcomes the witness’s sense of isolation.⁵³

What was unusual was that the experience did not *end* in silence, but instead, fermented into endless and relentless talking in the days and weeks to come . . .” *Id.* at 47.

⁴⁸ Thank you to Professor Chris Roederer for this insight.

⁴⁹ Shoshana Felman & Dori Laub, *Introduction*, in *TESTIMONY*, *supra* note 46, at xvii.

⁵⁰ Testimony is not, however, unproblematic. Although it may be beneficial to the primary victims to be able to recount the harm done, one of the dangers of testimony, of re-telling trauma, is that hearing the testimony will create further trauma in those who hear it. *See, e.g.*, Dori Laub, *Bearing Witness or the Vicissitudes of Listening*, in *TESTIMONY*, *supra* note 46, at 57–58. Secondary post-traumatic stress is not unusual for those working with victims of trauma. *See, e.g.*, HERMAN, *supra* note 32, at 140–47 (discussing what is in essence secondary post-traumatic stress disorder). “By extension, the listener to the trauma comes to be a participant and a co-owner of the traumatic event: through his very listening, he comes to partially experience trauma in himself.” Laub, *supra*, at 57. The initial trauma continues to ripple outward, potentially causing a tertiary level of trauma. Secondary-trauma victims experience the same initial loss of language and then the compelling need to use language to deal with their emotions. *See* Felman, *supra* note 46, at 47–52. In Felman’s case, hearing the original testimony gave the students who heard it a further need to talk about the experience extensively to family and friends, who might in turn experience trauma in the retelling. *Id.*

⁵¹ Felman, *supra* note 46, at 3 (“‘If someone else could have written my stories,’ says Elie Wiesel, ‘I would not have written them. I have written them in order to testify.’”).

⁵² *Id.*

⁵³ *See id.* Presenting a cultural studies account of memory, Mieke Bal makes a similar point. Mieke Bal, *Introduction to ACTS OF MEMORY*, *supra* note 44, at vii–viii. Bal describes three types of memory: 1) “unreflective, habitual” (what keeps you from stepping into a puddle); 2) “narrative memor[y]” (“affectively colored, surrounded by an emotional aura that, precisely, makes them memorable”); and 3) “traumatic recall” or “traumatic memory” (“the painful resurfacing of events of a traumatic nature”). *Id.* at viii. Bal agrees with Felman and Laub that traumatic memories need to be “legitimized and narratively integrated in order to lose their hold over the subject who suffered the traumatizing event in the past.” *Id.* This need to integrate past trauma into present narrative confirms the importance of cultural memory in the process for several reasons

Having the opportunity to speak is particularly important when the acts done to us are enveloped in a norm of silence, such as in the case of incest,⁵⁴ domestic violence,⁵⁵ or rape.⁵⁶ As renowned trauma expert Judith Lewis Herman states: “In refusing to hide or be silenced, in insisting that rape is a public matter, and in demanding social change, survivors create their own living monument.”⁵⁷ Giving victims the opportunity to tell their story in some capacity is critical to their healing from that trauma. Some victims prefer to tell their stories somewhere other than in court, such as in a therapist’s office, but for others, the legal system provides several opportunities for such therapeutic events.⁵⁸ In the context of a criminal trial for domestic violence or sexual assault, not only may victims testify at trial, but they are often allowed to provide a victim impact statement—another opportunity for victim allocution—at sentencing.⁵⁹

2. *Offender Allocution: Acknowledgment of the Wrongful Act as a Component of Victim Recovery*

In addition to having the opportunity to publicly recount his or her traumatic experience, hearing a public acknowledgment of wrongdoing by the offender can also aid victim recovery.⁶⁰ For victims of domestic violence, public admission of wrongdoing by the offender can serve to undo the denial of violence in which many perpetrators engage. That is, as part of the dynamics of violent intimate relationships, many batterers verbally minimize

including: 1) because need to integrate is current, “in this sense, trauma can paradoxically stand for the importance of cultural memory;” and 2) having a “confirming witness to a painfully elusive past confirms a notion of memory that is not confined to the individual psyche, but is constituted in the culture in which the traumatized subject lives,” making memory into “an exchange between first and second person that sets in motion the emergence of narrative.” *Id.* at x. Bal’s collection contends, as do Felman’s and Laub’s to a certain extent, “that the incapacitation of the subject—whose trauma or wound precludes memory as a healing integration—can be overcome only in an interaction with others” who, though “often a therapist,” can be “whoever functions as the ‘second person’ before or to whom the traumatized subject can bear witness, and thus integrate narratively what was until then an assailing specter.” *Id.* at x–xi.

⁵⁴ See, e.g., MOIRA JOHNSTON, SPECTRAL EVIDENCE: THE RAMONA CASE: INCEST, MEMORY AND TRUTH ON TRIAL IN NAPA VALLEY 115–18 (1997) (quoting sections of Holly Ramona’s letter detailing her memories of incest and detailing how the process of writing helped her cope with her newfound memories).

⁵⁵ HERMAN, *supra* note 32, at 2 (discussing the increase in victims coming forward to help recover from domestic violence as part of the women’s liberation movement).

⁵⁶ See, e.g., SUSAN ESTRICH, REAL RAPE 2 (1987) (“[B]eing raped is something you simply don’t talk about. . . . If it isn’t my fault, why am I supposed to be ashamed? If I’m not ashamed, if it wasn’t ‘personal,’ why look askance when I mention it?”).

⁵⁷ HERMAN, *supra* note 32, at 73.

⁵⁸ See Cassell, *supra* note 25, at 621–23 (describing therapeutic benefits to victims who deliver impact statements).

⁵⁹ See *id.*

⁶⁰ See Petrucci, *supra* note 17, at 351–52 (noting that apologies promote healing by increasing victims’ self-esteem and reducing anger towards the offender).

the violence they perpetrate, blame the violence on the victim herself, and at times even outright deny it ever took place.⁶¹ They engage in this denial, minimization, and transferral of blame not only in their interactions with the victim, friends, and family, but also at times they even deny to themselves the seriousness of the violence or their responsibility for it.⁶² Since domestic violence rarely occurs in front of witnesses, a batterer's outward denial typically stands in direct opposition to the victim's assertion that the violence occurred. Family and friends typically must choose whom to believe. Not witnessing the violence themselves, those around the victim often disbelieve her.⁶³ Believing the offender's version of events is characteristically consistent with many of the outward signs and behaviors of the batterer who may present as charming and non-violent to all but his partner.⁶⁴ Additionally, believing the offender tends to be the easier route for family and friends than accepting that someone close to them has harmed another person close to them.⁶⁵ Acknowledging the violence in a public forum thus undercuts, although not entirely disrupts, the offender's ability to deny the prior violence and to get away with future violence so easily. It is also the case that this offender allocution may aid the victim in the final stage of recovery, which entails reconnection between the victim/survivor and those around her.⁶⁶ As discussed in the following section, notions of restorative justice emphasize the importance of relationships and connections, as well as the manner in which legal processes can assist in this final stage of recovery from this type of trauma.

Further, on both a therapeutic and a symbolic level, a public admission can serve as a vindication for the victim that the violence she suffered was real, which can aid in her recovery.⁶⁷ Acknowledgment of wrongdoing in a criminal justice forum also sends the message that what the offender did to her is seen as wrong by the legal system; what greater statement of public

⁶¹ Leonore M. J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & L. 43, 52 (1995). See also LENORE E. WALKER, *THE BATTERED WOMAN* 14–15 (1979) (discussing how and why batterers blame victims for abuse). Cf. C. Quince Hopkins, *Rescripting Relationships: Towards a Nuanced Theory of Intimate Violence as Sex Discrimination*, 9 VA. J. SOC. POL'Y & L. 411, 431–32 (2001) (recounting the story of an abuser who repeatedly denied any abuse occurred).

⁶² Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 288–89 (1985).

⁶³ *Id.* at 284 & n. 87.

⁶⁴ *Id.* at 287–88.

⁶⁵ *Id.* at 284 n.87.

⁶⁶ See HERMAN, *supra* 32, at 209–11 (discussing how taking offenders to court helped trauma survivors with the reconnecting process).

⁶⁷ Hopkins & Koss, *Incorporating Feminist Theory*, *supra* note 1, at 695–96 (describing negative outcomes for victims where offenders deny responsibility for wrongdoing). Similar notions of a courtroom victory as “symbolic justice” for victims are often discussed in the context of war crimes and genocide. See, e.g., Mark Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 63–64 (2002) (stating that economic awards in terrorism cases are “not a trivial exercise” but “prompt symbolic justice”).

condemnation do we have in the United States than that which is exemplified by our criminal justice system? While a conviction alone may send this message, and a statement from the bench acknowledging the wrongfulness of the offender's conduct may as well, the offender's public admission has symbolic value and can further aid a victim in her healing process—particularly in the final stage of recovery mentioned above and the reconnection of relationships disrupted by the crime(s).⁶⁸ Those within the victim's community who may have begun to doubt the violence or to blame the victim for the violence may be less likely—after offender allocution—to think she either lied about, exaggerated, or at worst, somehow caused the violence. In turn, as a consequence of offender allocution, those in the community may see the victim in a more positive light. This in turn may lead to a reconnection of disrupted relationships between the victim and her community.

Finally, in some violent intimate relationships, a pattern of denial by the offender is interrupted by a period of remorse and acknowledgment of the violence; this is sometimes coupled with an apology from the offender for his violent acts.⁶⁹ Often, however, as is true with the violence itself, this contrition takes place only in front of the victim, and not when others are present. That way, the offender retains his ability to deny the violence to others. By contrast, a public admission leaves him in a position where denying past violence becomes almost impossible.

B. Benefits to Victims as a Group

Victims as a group may also benefit when offenders publicly admit to violence against their intimate partners. Until recently the general public (including actors within the criminal justice system) engaged in a form of denial as well.⁷⁰ Until domestic violence advocates spearheaded research initiatives, public education campaigns, and the reformation of criminal laws

⁶⁸ HERMAN, *supra* note 32, at 196–97. I do not mean to suggest that a victim's recovery is dependent upon an offender's acceptance of responsibility or apology, and certainly Herman is not suggesting this either. However, in some cases, it might be of some benefit to a victim to hear her abuser's public acceptance of responsibility as part of her healing process, especially if it fully confirms her own account of the harm she suffered. It might possibly also awaken compassion in her friends and family for the experience she has endured.

⁶⁹ See, e.g., Waits, *supra* note 62, at 291–95 (describing Lenore Walker's theory of the cycle of violence in battering relationships); see also GOODMARK, *supra* note 18, at 31–40 (describing the cycle of violence, the power and control wheel, and development of the theory of coercive control at the core of intimate partner abuse rather than a definitive cycle of violence).

⁷⁰ Hopkins, *supra* note 61, at 422 (noting an “increasingly widespread and concerted effort over the past two decades to combat the problem of family violence on a level perhaps not present in these prior reform movements”). *But see id.* at 419–21 (pointing out that awareness of and legal responses to domestic violence are not merely recent phenomena, but have recurred at various points during past centuries).

and procedures for intimate violence, the problem of domestic violence was virtually invisible.⁷¹

Although much has changed in this regard over the past few decades, regular public admissions of violence can continue to undercut ongoing denial by police, prosecutors, judges, and society at large. This practice of denial is further exacerbated by film and other media coverage that focuses on the most outrageous forms of family violence (e.g., the trial of O.J. Simpson for the murder of his wife, Nicole Brown Simpson, and that of Susan Smith for the murder of her children),⁷² rather than the more common types of family violence that comprise the bulk of intimate abuse. For victims as a group, then, increased societal awareness of the reality of “ordinary” domestic violence might help other individual victims. First responders—primarily law enforcement—might take victims seriously, and ultimately jurors might believe their stories. Further, this increased awareness may serve to reduce the marginalization and stigmatization of victims of intimate violence as weak, masochistic, similarly violent, or mentally ill.⁷³

C. *Benefits to Society in General*

Finally, society in general can benefit from the implementation of a system that encourages rather than discourages public acceptance of responsibility for intimate violence.⁷⁴ First, simultaneous but separate efforts that expose the reality of abuse by undercutting denial of the problem can strengthen educational efforts aimed at reducing the prevalence of domestic abuse.

Second, and more importantly (although more attenuated and as yet untested), public acceptance of responsibility by offenders can support and enhance other processes that aim to interrupt offending patterns, such as domestic violence counseling and batterer intervention programs. Requiring batterers to admit to their behavior can help initiate the steps towards permanent behavioral change. In other words, public truth-telling may ultimately prevent future reoffending by the confessing individual, thus reducing overall prevalence rates of intimate violence. In addition, others who witness the public admission are both on notice and better equipped to confront future offending behavior and hold the offender accountable. Further, if an individual offender who lives in a home with male children (whether his own or others’) does not reoffend, this may interrupt the documented inter-genera-

⁷¹ See *id.* at 419–23 (describing the evolution of the domestic violence advocacy movement over time).

⁷² See GOODMARK, *supra* note 18, at 54–55 (describing the evolution of the “stereotypical” image of domestic violence). In my opinion, race played a role in the high profile nature of the O.J. Simpson trial, while gender—a murdering *mother?!—*likely played a role in the coverage of the Susan Smith murder trial.

⁷³ GOODMARK, *supra* note 18, at 55–56; Waits, *supra* note 62, at 279–80.

⁷⁴ Discussing the benefits of public truth-telling in contexts other than intimate violence is beyond the scope of this Article.

tional transmission of acts of violence against intimates and norms supporting that behavior.⁷⁵ This potentially reduces prevalence rates over time exponentially rather than just on a case-by-case basis.

An important caveat is in order. Batterer intervention programs have not yet proven themselves consistently and robustly effective.⁷⁶ To the extent they have been shown to change an individual batterer's use of physical violence, batterers often simply resort to other methods of abuse, such as increased verbal abuse or increased control of their partners' activities.⁷⁷ As many victims acknowledge, these emotional and psychological tactics are often also harmful and difficult to recover from.⁷⁸

Despite the lack of proven effectiveness for batterer intervention and despite the fact that these programs might be effective even if batterers do not admit at the outset of the program that they have a problem, the intervention process in general is consistent with other similar forms of intervention for behavioral problems. Twelve-step programs like Alcoholics Anonymous or Gamblers Anonymous are not effective unless the person with the problem first acknowledges he or she has the problem.⁷⁹ Certainly denial of the problem, typical of perpetrators of intimate partner violence, does not help with offender reform. But even in the case of a subsequent retraction or minimization of the prior offending behavior, the previous admission puts everyone else on notice that there is indeed a problem. Even if the offender does not internally reform, others can help increase surveillance and impose secondary social sanctions for abusers who fall back into offending behaviors, be it physical or emotional violence.

Finally, if public truth-telling can in fact reduce the prevalence of intimate violence for the reasons just discussed, society will benefit by the reduction of a host of other social and public health problems proven to be associated with intimate violence.⁸⁰ Victims of intimate violence and their children tend to have a higher prevalence of psychological and physical

⁷⁵ See Waits, *supra* note 62, at 288 (stating that battering behavior often is a learned behavior transmitted inter-generationally).

⁷⁶ GOODMARK, *supra* note 18, at 148–50. This is not to say that they might not yet prove to be effective. Maryland, for instance, has only recently implemented quality control over batterer intervention programs when it transferred authority to oversee these programs to Governor's Office of Crime Control and Prevention. H.R. 739, 427th Leg., 2010 Reg. Sess. (Md. 2010) (amending MD. ANN. CODE CRIM. PRO. SECTION 11-923, and FAM. LAW SECTIONS 40-501, 4-503, 4-515, and 4-516). Thus, we cannot at this point conclusively say that well-designed and well-monitored batterer intervention programs are useless.

⁷⁷ GOODMARK, *supra* note 18, at 149.

⁷⁸ See Hopkins et al., *Applying Restorative Justice*, *supra* note 1, at 292–93.

⁷⁹ See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1395 (2003) (“In twelve step programs . . . admitting that one has a problem is an essential step to recovery.”).

⁸⁰ See, e.g., Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1849–50 (2002).

health problems than those who are not battered.⁸¹ Battered women miss more work days as a result of the violence than do their non-battered counterparts.⁸² Domestic violence is one of the leading causes of homelessness among women and children.⁸³ Juvenile delinquency is correlated with exposure to violence within the home.⁸⁴ Thus reduction of family violence may have ripple effects that benefit society at large.

II. THEORETICAL SUPPORT FOR PUBLIC ACCEPTANCE OF RESPONSIBILITY: THE BENEFITS, CONCEPTS, PRACTICES, AND CAVEATS OF THERAPEUTIC JURISPRUDENCE, RESTORATIVE JUSTICE, AND FEMINIST THEORY

Two recent justice movements, therapeutic justice and restorative justice, incorporate concepts that map onto the notion of law as a process that can promote healing rather than exacerbate harm.

Therapeutic jurisprudence (“TJ”), an interdisciplinary movement originally spearheaded in the United States by David Wexler and Bruce Winick among others,⁸⁵ encompasses the idea that law can, in some circumstances,

⁸¹ EVAN STARK & ANNE FLITCRAFT, *WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN’S HEALTH* xviii (1996) (finding links between domestic violence and a range of women’s health problems including suicide attempts, alcohol and drug abuse, and poor pregnancy outcomes); Epstein, *supra* note 80, at 1849–50 (citing correlations between domestic violence and mental illness).

⁸² See Julie Goldscheid & Risa E. Kaufman, *Seeking Redress for Gender-Based Bias Crimes—Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265, 275 n.52 (2001); Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence* 56 J. SOC. ISSUES 655, 664–68 (2000) (discussing how domestic violence can interfere with women’s ability to work).

⁸³ Beverly Balos, *A Man’s Home is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 ST. LOUIS. U. PUB. L. REV. 77, 99–100 (2004) and sources cited therein; Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 731 (1999); Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL’Y 237, 244 (1994) (discussing domestic violence as a leading cause of homelessness; stating that approximately one-half of homeless women and children are homeless because of domestic violence).

⁸⁴ Buel, *supra* note 83, at 734–35 (explaining the link between domestic violence and juvenile delinquency, including a study that “children growing up in violent homes were six times more likely to attempt or complete suicide, had a 24 percent greater chance of committing sexual assault crimes, a 74 percent increased incidence of committing crimes against the person, and a 50 percent higher likelihood of abusing drugs and/or alcohol”); Terence P. Thornberry, David Huizinga & Rolf Loeber, *The Causes and Correlates Studies: Findings and Policy Implications*, JUV. JUST. 3, 8–9 (2004) <https://www.ncjrs.gov/pdffiles1/ojdp/203555.pdf> (analyzing studies that demonstrate increased delinquency by juveniles from broken homes or exposed to violence in the home).

⁸⁵ See, e.g., LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in ESSAYS IN THERAPEUTIC JURISPRUDENCE 17 (David B. Wexler & Bruce J. Winick eds., 1991) [hereinafter Wexler, *An Introduction*]; BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (1997); David B. Wexler, *Therapeutic Jurisprudence*, 57 MINN. L. REV. 289 (1972).

act as a therapeutic or an anti-therapeutic agent.⁸⁶ Restorative justice (“RJ”) is a similar movement with more ancient roots that has reemerged in contemporary criminal justice practice and scholarship. In contemporary scholarship, RJ is defined and practiced in a number of ways, but is perhaps best summarized by Kathleen Daly and R. Immarigeon as follows: “The concept may refer to an alternative process for resolving disputes, to alternative sanctioning options, or to a distinctly different, ‘new’ mode of criminal justice organized around principles of restoration to victims, offenders, and the communities in which they live.”⁸⁷

RJ is similar to TJ in some aspects, and in fact, one scholar has intentionally merged the two strains of thought into what he terms Restorative Therapeutic Jurisprudence (“RTJ”). RJ differs from TJ, however, in some ways relevant to this discussion.

A. *Therapeutic Jurisprudence*

Mental health law served as the primary focus of early incarnations of TJ.⁸⁸ The movement has now spread well beyond mental commitments and dealing with mentally ill or addicted persons, and touches on tort, criminal, contract, and property law.⁸⁹ In general, TJ covers “four overlapping areas of inquiry:”⁹⁰ “(1) the role of the law in producing psychological dysfunction, (2) therapeutic aspects of legal rules, (3) therapeutic aspects of legal procedures, and (4) therapeutic aspects of judicial and legal roles.”⁹¹

Regardless of which area of inquiry one surveys, TJ’s analysis of these four areas maintains a primary, if not exclusive, focus on therapeutic benefits of the legal system for offenders rather than for victims, a distinction of central importance to this discussion.⁹²

A simple example of a TJ analysis is that the failure of law enforcement or courts to take appropriate action after an incident of domestic violence could be anti-therapeutic if it encourages the belief that abusive behavior is acceptable, thus exacerbating the offender’s cognitive distortion of socially acceptable behavior. By contrast, a judge’s statement to an offender at sen-

⁸⁶ Wexler, *An Introduction*, *supra* note 85, at 18.

⁸⁷ Kathleen Daly & Russ Immarigeon, *The Past, Present, and Future of Restorative Justice: Some Critical Reflections*, 1 CONTEMP. JUST. REV. 21, 2 (1998), http://www.griffith.edu.au/__data/assets/pdf_file/0006/50694/daly_part1_paper4_past_present_future_of_rj.pdf.

⁸⁸ See, e.g., Wexler, *An Introduction*, *supra* note 85, at 18; see generally David B. Wexler, *Inducing Therapeutic Compliance through the Criminal Law*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 85, at 187 (discussing “disordered” defendants).

⁸⁹ See generally *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (BRUCE J. WINICK & DAVID B. WEXLER eds., 2003) (describing new approaches and techniques involving therapeutic justice).

⁹⁰ Wexler, *An Introduction*, *supra* note 85, at 19.

⁹¹ *Id.*; see also Petrucci, *supra* note 17, at 347.

⁹² Petrucci, *supra* note 17, at 347.

tencing about the wrongfulness of the crime in theory might serve to disrupt that psychological dysfunction in a way that might help the offender reassess his distorted views of interpersonal relationships, and ultimately change his behavior and reduce the likelihood of future offending and arrest. Similarly, and perhaps more obviously, the provision of counseling services as a result of a conviction for domestic violence could in theory allow the legal system to play a therapeutic role for the offender.

Therapeutic jurisprudence is not without its critics. A number of psychologists believe that the aims of law are antithetical to the aims of psychotherapy.⁹³ Tom Gutheil, co-founder of the Program in Psychiatry and Law at Harvard, believes that rather than being a source of healing, litigation can cause what he calls “developmental arrest.”⁹⁴ “When you start bringing suit . . . [i]t arrests people at the victim stage, and you get stuck there. . . . You sit and wallow in it, and cannot go on with your life”⁹⁵

Lenore Terr, a psychologist who works with victims of trauma, represents the view that “[an] intimate [therapist’s] office [is] a better place for fixing lives than a court of law”⁹⁶ On the other hand, courtrooms can serve as educational fora: “A court of law is the best place our system has for educating the public. . . . It gets people to think. After courtroom battles, laws are passed. Books are written.”⁹⁷ The public being educated includes not only family and friends, but also the judge, prosecutor, defense attorney, court personnel, and any other observers. As with the advantages of public confession discussed in the preceding section, an educated audience is more likely to hold offenders accountable for future offending.

B. Restorative Justice

Related to and yet different from this therapeutic jurisprudence approach is the concept of restorative justice, which has gained increased attention in the United States and elsewhere in recent years.⁹⁸ There are a number of restorative justice models, but they can roughly be broken into three categories: victim-offender mediation, (family group or community) conferencing, and sentencing circles.⁹⁹ Some of these programs are agree-

⁹³ See, e.g., JOHNSTON, *supra* note 54, at 211–31.

⁹⁴ *Id.* at 319.

⁹⁵ *Id.*

⁹⁶ *Id.* at 208. Several jurors in the Ramona case firmly believed that the family should have stayed in therapy rather than go to court: “[You] can’t repair your family in a court of law.” *Id.* at 306; see also *id.* at 318.

⁹⁷ *Id.* at 208 (quoting Lenore Terr).

⁹⁸ Restorative justice is not a new concept, but the victim’s rights movement of the 1970s and 1980s triggered its resuscitation. See, e.g., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, BALANCED AND RESTORATIVE JUSTICE: PROGRAM SUMMARY 5 (1994) [hereinafter OJJDP].

⁹⁹ See, e.g., CAROLINE G. NICHOLL, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP’T OF JUSTICE, COMMUNITY POLICING, COMMUNITY JUSTICE, AND RESTORATIVE JUSTICE: EXPLORING THE LINKS FOR THE DELIVERY OF A BALANCED APPROACH TO

ment-driven and some are dialogue-driven.¹⁰⁰ With respect to conferencing, it is notable that in one study of community conferencing, victims received apologies from offenders in seventy-four percent of the conferencing cases, in contrast with only fourteen percent in traditional court cases.¹⁰¹ By contrast, with respect to financial restitution, the outcomes in conferencing and traditional litigation are comparable.¹⁰²

Restorative justice builds, in part, “on traditional peacemaking practiced by many indigenous peoples.”¹⁰³ Currently, there exist nearly “1,000 victim-offender mediation or reconciliation programs spread across North America, Europe, and in the Southern Hemisphere.”¹⁰⁴ In the last thirty years, “family group conferencing has emerged from the Maori approach to justice in New Zealand.”¹⁰⁵ Programs for community and group conferencing now operate in “Australia, the United Kingdom, Ireland, South Africa, Canada, and the United States.”¹⁰⁶ Healing or sentencing circles have been developed based on practices in the Canadian Aborigines and Navajo communities.¹⁰⁷

While there are overlaps with TJ theory, RJ embodies a particular set of principles and goals. The following are generally accepted principles of restorative justice:

1. Crime harms people . . . ;
2. Response to crime should be about repairing the harm . . . ;
3. Harm is identified in many ways, not only by legal definition . . . ;
4. Responses must be victim centered . . . ;
5. The behavior is condemned, but not the offender . . . ;
6. The offender is supported in his or her efforts to repair the harm and become law abiding . . . ;
7. Communities are victims too, but also have responsibilities . . . ;
8. Dialogue between those affected brings conflict resolution into justice . . . ;

PUBLIC SAFETY 5, 113–67 (1999), http://www.cops.usdoj.gov/files/ric/Publications/e09990014_web.pdf.

¹⁰⁰ See, e.g., NICHOLL, *supra* note 99, at 119; Paul McCold, *Restorative Justice Practice: The State of the Field 1999*, REALJUSTICE.ORG, [HTTP://WWW.REALJUSTICE.ORG/ARTICLES.HTML?ARTICLEID=504](http://www.REALJUSTICE.ORG/ARTICLES.HTML?ARTICLEID=504) (LAST VISITED MAR. 5, 2012).

¹⁰¹ NICHOLL, *supra* note 99, at 137.

¹⁰² *Id.* (eighty percent in traditional litigation, eighty-three percent in conferencing cases).

¹⁰³ *Id.* at 95 (emphasis in original); see also Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (2000) (describing the use of peacemaking practices in cases of domestic violence in tribal courts on the Navajo Reservation).

¹⁰⁴ NICHOLL, *supra* note 99, at 95.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

9. Justice is about building peace, not revenge . . .; [and]
10. The state has a role, but the primary role rests with the community.¹⁰⁸

Restorative justice is typically contrasted with retributive justice, which focuses on “public vengeance, deterrence, and punishment through an adversarial process”¹⁰⁹ Under a retributive justice model, offender accountability is characterized as “taking punishment,” while restorative justice defines accountability as “assuming responsibility and taking action to repair harm.”¹¹⁰

Unlike TJ, RJ focuses not just on offenders, but is equally—if not more so—concerned with victims. As can be seen from the principles of RJ outlined above, victim recovery and offender accountability are, in fact, two linchpins of restorative justice.¹¹¹ In this way, restorative justice is more in line with the proposal being made here, that offenders’ public statements of responsibility are an important aid to victim recovery.

In addition, restorative justice emphasizes the impact of crime on a community, and the need for a justice response to repair those community-related harms. There are two ways a system that encourages a batterer to publicly accept responsibility can work to repair community-related harms. First, as discussed at the beginning of this Article, part of the direct harm to the victim from an offender’s denial of the violence is that she is thereby often cut off from her immediate community—family and friends—who might believe his story rather than hers. His public statements of accountability may serve to restore her connections with those closest to her. This restoration of connections to support networks is particularly important for battered women, since quite often batterers directly isolate their victims as a strategy for maintaining control.¹¹² The second way that this approach can repair community harm is that it can inform the community about the realities of domestic violence, with the ultimate benefits discussed at the beginning of this Article, including reducing crime and increasing public health.¹¹³

Similarly, and again in contrast with therapeutic jurisprudence, which typically emphasizes individual treatment, the foregoing principles demonstrate that “restorative justice is concerned with the broader relationships among offenders, victims, and the community.”¹¹⁴ Restorative justice em-

¹⁰⁸ *Id.* at 93–95.

¹⁰⁹ OJJDP, *supra* note 98, at 6; *see also* NICHOLL, *supra* note 99, at 5. Restorative justice is also sometimes contrasted with community justice, which stands for the proposition that responses to crime must not ignore the needs or expectations of the community. *See, e.g.*, NICHOLL, *supra* note 99, at 5, 89.

¹¹⁰ OJJDP, *supra* note 98, at 7.

¹¹¹ NICHOLL, *supra* note 99, at 91 (citing HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 177–214 (1990)).

¹¹² GOODMARK, *supra* note 18, at 35.

¹¹³ *See* discussion *supra* Part I.

¹¹⁴ OJJDP, *supra* note 98, at 6; *see generally* NICHOLL, *supra* note 99 (describing the community-based approach of restorative justice).

phasizes victim, offender, and community involvement in the judicial process of dealing with wrongdoing.¹¹⁵ Increased victim involvement in this process enhances victim satisfaction.¹¹⁶ Restorative justice further aims to promote offender accountability, which enhances victim satisfaction and helps promote victims' recovery from the crimes committed against them.¹¹⁷

Two of the central yardsticks of restorative justice models outlined above mirror the twin truth-telling devices discussed in this Article: victim impact statements and diversion's (occasional) requirement of public acceptance of responsibility. These yardsticks are: (1) "victims have sufficient opportunities to tell their truth to relevant listeners"; and (2) "offenders [are] encouraged to understand and take responsibility for what they have done."¹¹⁸ Where an offender is required to allocute or at least acknowledge guilt in order to get the benefit of diversion, the legal system acts in accordance with restorative justice principles.

Additionally, the impact of crime is understood broadly in the restorative justice model. The impact on victims is understood to be not just physical and/or financial, but also implicates victims' psychologically.¹¹⁹ Traditional retributive justice ignores much of the impact on the victim, and particularly the intangible emotional impact. Encouraging offenders to publicly acknowledge wrongdoing can get at the emotional and psychological needs of victims in a way that mere incarceration cannot. It is possible that the public admission of responsibility including an apology from the offender might further lead to a victim's psychological and spiritual healing (if relevant or important to her), in that apologies may inspire victims to forgive offenders. As discussed in the next section, however, the role of apologies and forgiveness in violent intimate relationships is problematic in a way different from other victim-based crimes, thus compromising the possible benefit of apologies for domestic violence victims.

III. FEMINIST THEORY AND ACCEPTANCE OF RESPONSIBILITY FOR INTIMATE VIOLENCE

In this section, I explore the relationship between promoting a public truth-telling approach to domestic violence and feminist jurisprudence generally. I then address the specific feminist concerns about applying restorative justice to violence against women.

¹¹⁵ See, e.g., OJJDP, *supra* note 98, at 1.

¹¹⁶ *Id.* at 6.

¹¹⁷ *Id.* at 1, 3, 6.

¹¹⁸ *Id.* at 13. Additional related yardsticks include whether "the injustice [is] adequately acknowledged" and whether "offenders [are] given encouragement and opportunities to make things right[.]" *Id.*

¹¹⁹ See, e.g., Braithwaite, *supra* note 24, at 244.

A. *Dovetailing Feminist Jurisprudence and a Public Truth-Telling Approach to Domestic Violence*

Three strands of feminist theory support a legal system response that accords merit to the approach proposed here. These three strands—cultural feminism, dominance feminism, and what I will refer to as “agency feminism”—are discussed below. Each of these feminisms supports the approach in a similar way.¹²⁰

First, and perhaps most controversially, cultural feminism (sometimes called difference feminism) aligns with a legal response that promotes public truth-telling. Cultural feminists emphasize the importance of listening to women’s voices and giving heed to their specific calls for action. Robin West, for instance, argues in her central article on cultural feminism that women tell different stories than men do and that historically the legal system has neither responded to them nor been structured to accommodate their telling.¹²¹ Others argue that although West’s characterization of women as essentially different from men—whether one believes this difference is the result of cultural or natural forces—may be problematic and questionable, the central thrust of West’s argument holds merit. That is, those values stereotypically associated with women, such as nurturing or relationship-building or narrative story-telling and so on, are typically under-valued in society and in the legal system.¹²²

Regardless of which view of cultural feminism one considers, it is clear that each argues for listening to and responding to the specific requests of those who suffer the injury. In other words, in the context of legal response to intimate violence, the criminal justice system should be structured so as to best heed the voices of the victims of the harmful activity, rather than to some other abstract demands of criminal justice theory. In addition, public confessions by perpetrators that corroborate the victims’ statements of harm will give added reinforcement to women’s voices. This is not to say that this latter addition is necessary to comport with cultural feminism’s call, but it does not hurt.

In a different way, dominance feminism supports the approach advocated here. Catharine MacKinnon and others have eloquently argued that our legal system is patriarchal, and built on constructs of male power and domination over women.¹²³ MacKinnon herself may be skeptical of listen-

¹²⁰ For an extended discussion of feminist theory’s role in restorative justice responses to acquaintance sexual assault, see Hopkins & Koss, *Incorporating Feminist Theory*, *supra* note 1.

¹²¹ Robin West, *Love, Rage and Legal Theory*, 1 *YALE J.L. & FEMINISM* 101, 108 (1989).

¹²² See, e.g., MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 56 (2d ed., 2003).

¹²³ See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 114, 163 (1989) [hereinafter *MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE*]; see also Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for*

ing uncritically to women's voices, as they can be already distorted or tainted by these underlying sexist structures.¹²⁴ She may even be skeptical of a call for offender public truth-telling as taking power from women and placing it squarely back in the hands of the offender.¹²⁵ However—and pointedly, drawing on MacKinnon's work—scholars and advocates working in the area of intimate violence have made cogent arguments that the reason intimate violence continues is that it is bolstered by (and bolsters) a legal system designed to protect men's power. That is, the legal system's failure to hold batterers accountable for their violence simply reflects men's power-preservation efforts, and intimate violence itself is a specific tool to help maintain both individual and general control over women and women's autonomy.¹²⁶

As a result of the ubiquity and power of MacKinnon's central thesis, domestic violence advocates in the United States quickly allied themselves with law and order advocates, and began pushing for harsher penalties, consistent arrests, and prosecution of all incidents of domestic violence.¹²⁷ However, one result of this emphasis has been to ignore the actual voices of the women allegedly being oppressed by the violence. This is not to say that mandatory arrest and pro-prosecution or mandatory-prosecution policies are completely wrong-headed. It is to say, however, that to enact these pro-criminal punishment policies without also enacting companion policies that respond to victims' pleas for action that encourage offenders' acceptance of wrongdoing is wrong-headed and counter-feminist.

Elizabeth Schneider and Kathy Abrams have written on agency feminism, which further supports an approach that gives power to the voices of victims by enacting reforms that incorporate messages from those voices.¹²⁸

Theory, 7(3) SIGNS 515, 529 (her original theoretical piece on dominance feminism). For a more extended discussion of MacKinnon's dominance feminism in the context of gender-based violence, see Hopkins & Koss, *Incorporating Feminist Theory*, *supra* note 1; see also GOODMARK, *supra* note 18, at 10–15 (discussing MacKinnon's dominance feminism and critiques thereof).

¹²⁴ See MacKinnon, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 123, at 114.

¹²⁵ See, e.g., Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 72 (1985) (describing MacKinnon's position that women are able to seek empowerment, and may use the state to do so).

¹²⁶ MacKinnon made the argument in the context of sexual harassment and rape, and has been interpreted as viewing domestic violence "as a subset of sexual victimization of women" GOODMARK, *supra* note 18, at 14 (discussing and citing MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 123, at 178).

¹²⁷ Interview with Professor Kathleen Daly, criminologist (Feb. 28, 2006). Professor Daly is a criminologist in Australia who has been a long-time researcher on the use of restorative justice and gender. She observed that advocates in the United States were much more aligned with prosecution than in Australia, where advocates chose to ally with social service providers first and foremost. For another discussion of the "strange bedfellows" U.S. advocates have made, see GOODMARK, *supra* note 18, at 15–16. Professor Goodmark also discusses "governance feminism," an emerging conceptual branch of feminism not discussed here. *Id.*

¹²⁸ Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387 (1993).

Schneider's original thesis on battered women's agency, although focused primarily on ways in which battered women act to survive in the context of a violent relationship rather than their demands of the legal system, nonetheless provides a classic example of how agency theory dovetails with a public truth-telling approach to intimate violence.¹²⁹

Is it possible that a feminist response to violence against women could be and look different from a response designed by victims of that violence?¹³⁰ I think not. MacKinnon's views aside, for it to be so is to fly in the face of the central goal of each of the aforementioned feminist lines of thought: that legal harms that ignore women's demands are harmful to women and therefore should be excoriated. Promoting public truth-telling by domestic violence offenders responds to survivors' explicit requests for such an act.¹³¹ From the perspective of victims generally, studies indicate that primarily, what they want is not punishment in the form of a fine or incarceration, but rather for the offender to acknowledge what he or she did and to accept responsibility for that act.¹³² While victims of intimate violence preliminarily want the violence itself to stop,¹³³ they also often want an opportunity to speak about what has happened to them and for the batterer to acknowledge the wrongful acts and accept responsibility for those acts.¹³⁴ Feminist theory suggests that a feminist response to sexual violence against

¹²⁹ See generally Elizabeth Schneider, *Battered Women and Feminist Lawmaking*, 23 WOMEN'S RTS. L. REP. 243, 245 (2002) (describing the "public-private divide" surrounding violence against women).

¹³⁰ This question was posed by James Ptacek at the 2002 International Law and Society Association Annual Conference, Vancouver, British Columbia (June 2002).

¹³¹ See Hopkins & Koss, *supra* note 1, at 695.

¹³² MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 72(1994) (noting that seventy-eight percent of victims participating in a mediation program want an apology); Nathalie Des Rosiers, Bruce Feldhusen, & Oleana Hankivsky, *Legal Compensation for Sexual Violence: Therapeutic Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y. & L. 443, 442 (1998); see also Amy B. Witman, Deric M. Park, & Steven B. Hardin, *How Do Patients Want Physicians to Handle Mistakes?*, 156 ARCHIVES OF INTERNAL MED. 2565, 2566 (1996) (citing that ninety-eight percent of patient respondents expect or desire acknowledgement of physician error).

¹³³ WALKER, THE BATTERED WOMAN, *supra* note 61, at 20; Des Rosiers, *supra* note 132, at 437. My own experience with victims also revealed this phenomenon. See generally sources cited *supra* note 1 (referencing sources that document victims' wish that the violence stop and for batterers to admit wrongdoing).

¹³⁴ Hopkins et al., *Applying Restorative Justice*, *supra* note 1, at 291; Hopkins, *supra* note 61, at 436; see also Frederick & Lizdas, *supra* note 24, at 33-34 (noting that most women do not want the men who batter them to be penalized, and critiquing some battered women's programs for insisting on an approach that emphasizes separation from the abuser, which merely replaces one view of what she should do—that of the batterer—with another, that of the program); cf. Coker, *supra* note 103, at 67-73 (discussing Navajo Peacemaking as a justice approach that avoids forcing women to choose between competing loyalties and identities); see generally Koss, *Blame, Shame*, *supra* note 1 (discussing the victim's ability to ask for and likely receive an apology from her abuser in communitarian models).

women must consider and, where possible, map onto survivors' expressed preferences for redress.¹³⁵

B. Specific Feminist Concerns About Diversion and Restorative Justice

It is important to note that there are feminist concerns about the use of "diversion" as a response to domestic violence. As discussed further in Part III, diversion refers to the criminal justice system's practice of shifting criminally-charged defendants from a track headed towards trial to other programs, often focusing on treatment or monitoring.¹³⁶ Diversion is typically used for those without long criminal histories, or those offenders believed to have offended due to some underlying mental health or addiction problem.¹³⁷ Either of these categories of offenders is thought to be both less deserving of traditional criminal punishment such as jail time, and also to be more amenable to treatment to avoid recidivism. As is true with diversion, applying restorative justice to domestic violence cases also triggers feminist concerns, albeit somewhat different ones.¹³⁸ The central concerns as to both diversion and restorative justice are addressed below.

1. Concerns about Diversion

The primary criticism of diversion in cases of domestic violence is that diversion is a soft response to intimate violence as compared with stranger violence; further, unlike other instances where diversion is used—notably drug and alcohol offenses and juvenile offenses—the central component of most diversion programs, counseling, has not proven effective in preventing recidivism of individual batterers.¹³⁹ I addressed this latter, narrower criticism earlier,¹⁴⁰ but the central three-pronged point is worth emphasizing here.

First, while it is true that diversion is an option typically used for those who are violent towards individuals they know, the fact is that there *is* a difference between stranger violence and intimate violence, and the legal system's response should be cognizant of that fact. This is not to say that the

¹³⁵ Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 20 (1991).

¹³⁶ See *infra* Part III.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Anthony Thomson, *Formal Restorative Justice in Nova Scotia: A Pre-Implementation Overview* (presented at the Annual Conference of the Atlantic Association of Sociologists and Anthropologists, Fredericton, NB., Oct. 22, 1999), available at <http://www.acadiau.ca/~thomson/RJ-NS/RepAASAOct99.pdf>. Thomson also addresses other concerns which are less specific to diversion and relate to the criminal justice system generally, including victim's lack of control of the criminal justice process, fear of coming face to face with her abuser, and the offender-centeredness of the process. Some of these more general concerns similarly arise in, or are satisfied by, a restorative justice response, and thus are dealt with in the next section.

¹⁴⁰ See *id.* at 21 (discussing the limitations of batterers' counseling programs).

law should be more lenient towards batterers who know their victims; in our retributive system, one could argue just the opposite—that hitting someone you are supposed to take care of and love is more morally culpable than hitting a stranger, and thus deserving of greater punishment. In fact, specific enhanced statutory penalties for repeat acts of family violence have been enacted in some jurisdictions.¹⁴¹ However, one can support the potential benefits of diversion for first-time offenders and still support those enhanced penalties for repeat offenders.

The central thrust of the criticism as to lenient treatment of first-time batterers still remains. Arguably, a primary aim of the advocacy community in spearheading efforts that increased penalties for domestic violence was not just to prevent recidivism of an individual batterer, but more importantly, to change society's view of domestic violence from something to brush under the rug to something that is serious. If general attitudes change in this manner, the argument goes, a larger societal environment that does not tolerate intimate violence will in time result in a reduction in the overall prevalence rate. If diversion is seen as a soft legal response to domestic violence, then the already slow process of social norm change will be even further hampered.

Second, however, there is currently no evidence that incarceration is more effective than counseling at preventing recidivism of an individual offender beyond short-term incapacitation. There is also no evidence that incarceration operates as a general deterrent to other batterers, or leads to the norm changes discussed above. If it did, then we would expect to see recidivism rates that are lower for defendants who were incarcerated than those who were not. But that is not the case.¹⁴² Third, even if the theory behind enhancing penalties for domestic violence were valid and the results of studies of batterer's counseling programs remained inconclusive, so long as diversion remains our legal system's primary response to domestic violence, we should press it to better serve individual victims' and the larger community's needs. Requiring acceptance of responsibility more frequently for entry into diversion represents a primary example of this.

2. Concerns about Restorative Justice Responses Applied to Domestic Violence Cases

There are a number of practical concerns expressed about the application of restorative justice to cases of domestic violence. First, victims of ongoing domestic abuse may fear confronting or speaking in front of their

¹⁴¹ See, e.g., ARIZ. REV. STAT. ANN. § 13-3601 (West, Westlaw through 2011 First Reg. Sess.); VA. CODE ANN. § 18.2-57.2 (2003) (expressly excluding from diversion programs repeat domestic violence offenders).

¹⁴² Raymond Paternoster, Ronet Bachman, Robert Brame, & Lawrence W. Sherman, 31 LAW & SOC'Y REV. 163, 164 (1997) (noting "equivocal at best" results from mandatory arrest studies).

abusers; due to the overarching power and control dynamic present in many violent intimate relationships, victims may be silenced and unable to speak the truth about what happened to them. Second, restorative justice could create the opportunity for additional violence by the abuser against the battered woman. Third, advocates question the use of coerced apology as an appropriate legal response to intimate violence. Finally, feminists express concern that there is an overemphasis on reconciliation in restorative justice. The first two concerns are dealt with briefly, while the final two are treated more in depth.

As to a victim's fears of confronting or speaking in front of an abuser, any restorative justice response to domestic violence must lay this option squarely in the hands of the victim. One of the central tenets of the relevant type of restorative justice discussed herein is that it is a victim-centered process. If the victim is not given the right to veto the process (i.e., to instead pursue traditional prosecution), then the process is not truly a restorative justice approach.¹⁴³ With respect to victim impact statements in particular (which can be viewed as a quasi-restorative justice option), victims are not required to make them. Further, most victim impact statements can be submitted in writing, rather than in person, thus minimizing some of the fear many victims have about face-to-face confrontations.¹⁴⁴ Finally, victims should be given the option, but not be required to attend an offender's allocution and public acceptance of responsibility.

As to secondary victimization, any criminal justice method of responding to crime potentially entails secondary victimization.¹⁴⁵ However, restorative justice as a victim-driven process is arguably less likely to cause secondary victimization than traditional retributive justice. With respect to witnessing the offender's allocution, again, the victim should be allowed to attend at her option, but not be required to do so. Proper preparation of the victim for hearing the batterer's acceptance of responsibility, including the possibilities of diverging stories, may further preempt secondary victimization.

Restorative justice proponents often talk about the role that apology can play in a RJ model.¹⁴⁶ Within the context of domestic violence, this raises two concerns. First, apologies by batterers are not uncommon. In fact, apologies, whether sincere or not, are now understood to be one of the "tactics"

¹⁴³ There are indeed some forms of justice responses, termed restorative justice, that are more community-centered rather than victim-centered. The Gacaca courts of Rwanda, and the South African Truth & Reconciliation process come to mind. See, e.g., Toran Hansen, *The Gacaca Tribunals in Post-Genocide Rwanda*, Center for Restorative Justice and Peacemaking (Nov. 27, 2005), http://www.cehd.umn.edu/ssw/trjp/resources/rj_dialogue_resources/RJ_Dialogue%20Approaches/Gacaca_Tribunals.pdf.

¹⁴⁴ Ptacek, *supra* note 24, at 20 (discussing the importance of victim support in restorative justice).

¹⁴⁵ See Koss, *Blame, Shame*, *supra* note 1, at 1337.

¹⁴⁶ See, e.g., Ptacek, *supra* note 24, at 22.

used by intimate abusers to keep victims in relationships.¹⁴⁷ Expressions of contrition, coupled with promises not to repeat such behavior, are powerful tools to draw back in a victim who may, in all other respects, love the offender.¹⁴⁸ The expression of an apology, however, does not mean the violence ends. Thus, the role of apology in cases of interpersonal violence is already compromised. Nonetheless, the standard batterer's apologies take place in private, between just the victim and offender. A public apology may yet have some benefit in that it reduces the batterer's credibility should he offend again in the future. Further, as C.J. Petrucci has noted, even an insincere apology may nonetheless be instrumental in behavior change.¹⁴⁹ Whether this will be borne out in practice with domestically violent offenders remains to be seen. Given that denial and minimization are typical of domestic violence offenders, the public admission could serve to rebut any subsequent denial; as a practical matter, it also could be used in a subsequent probation violation hearing should a batterer reoffend during the period of probation.

Second, some who advocate the use of apologies tout the potential for an apology to create space for forgiveness, and thus further healing for both the victim and offender.¹⁵⁰ As is true with apologies in the context of intimate violence, however, forgiveness often has already been offered by the victim on other occasions following post-violence contrition. Part of the problem here is that in an ongoing relationship, apologies, forgiveness, and letting go of old wrongs is in fact necessary to a continued (healthy) relationship. Even in the context of a discontinued violent relationship, there is often continued interaction between the parties, whether it is because they remain in the same community of friends, or because they have children together.¹⁵¹ The more central issue for our purposes here, though, is that a public statement of wrongdoing, coupled with an apology to the victim, can result in the victim feeling coerced into offering forgiveness, even if she is not required to do so. Thus, although a court of law may be an appropriate place for confessions,¹⁵² making them a place for apologies by domestic

¹⁴⁷ GOODMARK, *supra* note 18, at 31.

¹⁴⁸ *Id.*

¹⁴⁹ Petrucci, *supra* note 17, at 357.

¹⁵⁰ Desmond Tutu, *Without Forgiveness There is no Future*, in *EXPLORING FORGIVENESS* xiii, xiii–xiv (Robert D. Enright & Joanna North eds., 1998).

¹⁵¹ GOODMARK, *supra* note 18, at 113–14.

¹⁵² Confession carries with it potential religious overtones. This may be reassuring to some and concerning to others. Within the Christian tradition, confession stands center stage and is inextricably linked to the possibility of divine forgiveness of sin. Some criticize (and even reject) the South African Truth and Reconciliation process exactly for these religious overtones, arguing that reliance on Christian faith and theology doomed the process to failure in a country rich with non-Christian faiths. Lynn Graybill, *Assessing Africa's Truth and Reconciliation Commission*, 36 *CAN. J. AFR. STUDIES* 356, 358 (2002). Archbishop Desmond Tutu, one of the chief architects of that process, is often charged with injecting Christian values into what others viewed as necessarily standing separate and apart from religion. See MOELLENDORF & ROEDERER, *JURISPRUDENCE* 279 (2004). While Tutu is an Anglican Archbishop and therefore squarely within the Chris-

abusers is more problematic. Thus, in advocating here for an expanded use of public acceptance of responsibility, I do not mean to also advocate for public apologies by batterers to their victims.

A problem similar to that posed by the idea of apology and forgiveness is the potential for reconciliation of the parties.¹⁵³ Two aspects of reconciliation are problematic in the context of domestic violence. If reconciliation (which in this context would mean the victim and the batterer getting back into a relationship) is the objective, then first, perhaps a courtroom is not the proper place for that to take place, and second, reuniting a batterer and his victim should be discouraged, not encouraged by the court system. It seems reasonable that once a relationship has become violent, the relationship is less likely to become healthy again. If there is no actual reuniting anticipated, then the landscape is different. Under a restorative justice approach, the reconciliation at issue is about reconciling the offender with the community at large and the victim reconciling with the past and moving forward. Courtrooms seem more appropriate for encouraging that kind of reconciliation.

As discussed in this section, a restorative justice response to domestic violence is consistent with a number of strands of feminist jurisprudence, as is the public truth-telling proposal argued for in this Article. Further, although there are some valid feminist concerns with these efforts, many of these concerns already exist within our traditional criminal justice response, or can be accommodated in a system that would incorporate (or expand) the use of public acceptance of responsibility by intimate abusers.

IV. DOMESTIC VIOLENCE PERPETRATORS AND PUBLIC TRUTH-TELLING: AN OPPORTUNITY UNDER DIVERSION STATUTES AND PRACTICES IN THE UNITED STATES

As discussed above, there may be a unique benefit to domestic violence survivors from the offender's public admission of guilt. This benefit comes only with a justice response that emphasizes confession rather than denial.¹⁵⁴ Although not the central focus of the criminal justice system in the United

tian tradition, the concept of forgiveness can also be found in Ubuntu theology. *Id.* at 442–44.

¹⁵³ GOODMARK, *supra* note 18, at 182.

¹⁵⁴ See discussion *infra* Part I.A (discussing benefits to victims of hearing public admissions of guilt). It may also be the case that offenders can benefit from publicly accepting of responsibility. It not only might serve as the necessary prerequisite to cognitive and behavioral change in the batterer, but it also could serve a healing and reintegrative function for the offender. For other examples of the benefit of public confession for offenders, see Shoshana Felman's work that analyzes the role of confession in the O.J. Simpson trial (his post-acquittal denial in England) and in Tolstoy's *The Kreutzer Sonata* (a literary confession to spousal murder). Shoshana Felman, *Forms of Judicial Blindness, or the Evidence of What Cannot Be Seen: Traumatic Narratives and Legal Repetitions in the O.J. Simpson Case and in Tolstoy's The Kreutzer Sonata*, 23 *CRITICAL INQUIRY* 738 (1997). Felman asks what speech means in relation to an act of violence and whether

States, unlike in other countries such as Japan,¹⁵⁵ there are two main instances in the U.S. criminal process when a defendant might publicly accept responsibility for his wrongdoing: when entering a plea or at sentencing.¹⁵⁶ Whether pre- or post-conviction, diversion is one model where admission of responsibility by batterers can—or as argued herein—*should* take place.

A. Overview: What is Diversion?

What is diversion? Also known as deferred prosecution,¹⁵⁷ probation before judgment,¹⁵⁸ or delayed prosecution,¹⁵⁹ diversion refers collectively to programs where certain categories of offenders are diverted (hence the name) from the traditional criminal justice process into an alternative quasi-criminal track.¹⁶⁰ Some diversion programs operate pre-conviction or pre-plea, while the increasing majority of programs are predicated on a plea or conviction. Diversion typically differs from ordinary probation in that the offender has a record at the end of probation while someone going through diversion typically does not.¹⁶¹

“speech [can] *make visible* a violence whose very nature is to blind[.]” *Id.* at 781 (emphasis in original). Felman’s view is that:

The confession wishes to confer on speech the highest moral value and the highest epistemological responsibility: that of *accessing the truth*; that of truly *looking* at what has been accessed, no matter how unbearable or how incriminating; that of sacrificing alibis and of *acknowledging reality*, for whatever price.

Id. (emphasis in original).

¹⁵⁵ See Petrucci, *supra* note 17, at 353–54 (discussing the use of apologies and acceptance of responsibility in Japan).

¹⁵⁶ See, e.g., *id.* at 353 (discussing federal sentencing and other processes during which apologies might be offered); see generally Bibas & Bierschbach, *supra* note 2 (discussing various points in the criminal justice process where apologies could be incorporated).

¹⁵⁷ ARIZ. REV. STAT. ANN. § 11-365 (West, Westlaw through 2011 First Reg. Sess.).

¹⁵⁸ MD. CODE ANN., CRIM. PROC. § 6-220 (West, Westlaw through 2011 Reg. Sess.).

¹⁵⁹ NEV. REV. STAT. § 453.3363 (West, Westlaw through 2011 Reg. Sess.) (allowing suspension of proceedings and probation); N.D. CENT. CODE § 29-01-17 (West, Westlaw through 2011 Reg. Sess.) (allowing stay of proceedings upon compromise). In this Article I refer to all of these practices collectively as “diversion,” despite real differences between them, because these differences are not significant to the substance of this Article. The exception to this is the final discussion of the Arizona pilot project on community conferencing in sex offense cases. See *infra* at Part III.B.3.

¹⁶⁰ N.H. REV. STAT. ANN. § 169-B:2 (West, Westlaw through 2011 Reg. Sess.) (defining diversion); KAN. STAT. ANN. § 22-2908 (West, Westlaw through 2011 Reg. Sess.) (discussing diversion); MD. CODE ANN., CRIM. PROC. § 6-220 (West, Westlaw through 2011 Reg. Sess.) (discussing probation before judgment).

¹⁶¹ See, e.g., GOVERNMENT OF MONROE COUNTY, IND., *Pre-Trial Diversion Program*, <http://www.co.monroe.in.us/tsd/Justice/Prosecutor/PreTrialDiversionProgramPDP.aspx> (describing the effects of the county’s diversion program, which include preventing a criminal conviction from appearing on an individual’s record) (last visited Feb. 25, 2012).

Note that typically a record is kept of the arrest and charge and, in many cases, of the diversion. According to the National Association of Pretrial Services Agencies (NAPSA), some programs allow a participant to have his record expunged in compliance with state law. Other programs refuse to expunge a participant’s record because future access to such records is more important. NAPSA, *Performance Standards and Goals*

Petty drug offenses, juvenile offenses, and family violence offenses typically form the meat and potatoes of most diversion programs.¹⁶² A number of states also use diversion in criminal cases where the defendant is a juvenile.¹⁶³ The arguments for and against diversion in each of these three categories of cases differ, as do the eligibility requirements, and although a full discussion of drug and juvenile diversion is beyond the scope of this paper, these two categories are briefly discussed here to provide the larger context in which family violence diversion sits. The alternative diversion track typically consists of some form of counseling for the offender, which is quite often a combination of individual or group counseling about violence and substance abuse counseling if the offender was using drugs or alcohol during or prior to the incident.¹⁶⁴

for *Pretrial Release and Diversion* 19 (Aug. 1995), available at <http://www.projectre- mand.org/pdf/diversion1995.pdf>.

¹⁶² See, e.g., OHIO REV. CODE ANN. § 2951.041 (West, Westlaw through 2011 Legis- lation) (allowing diversion of limited drug offenses). Some states do not have specific drug diversion statutes but also do not expressly prohibit the use of diversion for drug offenses. See, e.g., FLA. STAT. § 948.08 (West, Westlaw through 2012 Second Reg. Sess.) (establishing a pretrial intervention program that can be utilized to divert a variety of crimes). A number of states have specific family violence diversion statutes. See, e.g., DEL. CODE ANN. tit. 11, § 4218 (West, Westlaw through 2011 First Reg. Sess.) (setting forth the minimum requirements for the “Probation Before Judgment” program which can be utilized for domestic violence cases). Other states do not have specific family violence diversion statutes, but still offer diversion for family violence offenses. See, e.g., KAN. STAT. ANN. § 21-3412a (West, Westlaw through 2011 Reg. Sess.) (describing domestic battery and defining “conviction” as including entering into a diversion program or having a judgment deferred on a domestic battery charge). Some states offer diversion for the issuance of worthless checks. See, e.g., WYO. STAT. ANN. § 6-3-704 (West, Westlaw through 2011 Gen. Sess.) (involving deferred prosecution for issuing a check with insufficient funds).

¹⁶³ See, e.g., D.C. CODE § 16-2305.01 (West, Westlaw through Jan. 11, 2012) (al- lowing diversion for juveniles arrested for non-violent offenses); FLA. STAT. § 985.155 (West, Westlaw through 2012 Second Reg. Sess.) (describing “neighborhood restorative justice”); HAW. REV. STAT. § 571-2 (West, Westlaw through 2011 Reg. Sess.) (defining “informal adjustment” for juvenile offenders). Some states do not have specific juvenile diversion statutes, but diversion is still available for juvenile offenders. See, e.g., ARIZ. REV. STAT. ANN. § 9-500.22 (West, Westlaw through 2011 First Reg. Sess.) (granting chief prosecuting officer authority to establish diversion programs for offenses that do not involve the “discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument”).

¹⁶⁴ One of the few scholars to address domestic violence diversion, Lenore Simon, very briefly discusses the use of diversion in domestic violence cases in her contribution to David Wexler and Bruce Winick’s book. Lenore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 85, at 243, 274–75. Simon advocates the recommendation of the National Council of Juvenile and Family Court Judges (“NCJFCJ”) that diversion only be used in the narrowest of cases, and only if the defendant in fact confesses to the act or acts of domestic violence. As the NCJFCJ recommendation suggests, allowing an offender to obtain counseling in lieu of other punishment must, at a minimum, be predicated upon admission of a problem in the first place—a basic tenet of any 12-step program. *Id.* at 259 (citing NCJFCJ and stating that a plea of guilty is the most important element of diversion). (The author notes that an offender’s failure to admit that he battered his partner is not necessarily an indicator that an offender will not realize belief and behavior change through a well-designed bat-

B. State of the Law on Diversion

This section summarizes the current state of the law on diversion in the United States. As this section demonstrates, most states have some form of a diversion program outlined in their state statutes addressing some form of criminal activity. The typical diversion program addresses juvenile offenses, petty drug offenses, or domestic violence, and these are discussed in turn.

1. *Juvenile Cases*

The most common use of diversion is for juvenile offenses.¹⁶⁵ The theory behind diversion in juvenile cases is that a diversion court “could do good by simply doing less harm than the traditional criminal processes.”¹⁶⁶ To advocates of diversion, the main “characteristic of a diversionary argument for juvenile justice is its attention to the harmful nature of criminal punishment for the young.”¹⁶⁷ By contrast, traditional criminal processes are thought by some to educate youth in the ways of crime.¹⁶⁸ That is, the policy choice embodied in diversion for juveniles is based on the premise that youth are, in some ways, still malleable, amenable to reform but also to further corruption.

Policy-makers’ belief in the possibility of juvenile reform can be contrasted with the unclear reformability of the intimate violence offender. It is this distinction that in part drives domestic violence advocates to challenge the use of diversion for domestic violence perpetrators.¹⁶⁹

Research conducted since Lenore Simon’s article, discussed above,¹⁷⁰ suggests that there are different kinds of family violence offenders. Because of this, a one-size-fits-all model, such as mandatory incarceration for batterers, is no longer scientifically justifiable. Further, although many will not, some offenders will respond well to domestic violence counseling.¹⁷¹ For those who fall into the category that could respond well to treatment, diver-

terer’s counseling program. These programs sometimes do lead to a previously denying offender finally admitting the wrongful acts he committed.)

¹⁶⁵ See generally Franklin Zimring, *The Common Thread: Diversion in Juvenile Justice* 88 CALIF. L. REV. 2477 (2000). Zimring expresses concern that conservative pressures towards accountability of juveniles jeopardizes decades of work in juvenile justice. *Id.*

¹⁶⁶ *Id.* at 2481.

¹⁶⁷ *Id.* at 2482.

¹⁶⁸ *Id.*

¹⁶⁹ Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1558–59 (1998) (criticizing the “paradox of hope” in diversion programs). *But cf.* Bruce J. Winick, *Special Theme: Preventive Outpatient Commitment for Persons with Serious Mental Illness: Outpatient Commitment: A Therapeutic Justice Analysis*, 9 PSYCH. PUB. POL’Y & L. 107, 118–19 (criticizing court-imposed therapy as excessive punishment of the offender).

¹⁷⁰ See *supra* note 164 (discussing Lenore Simon’s article in LAW IN A THERAPEUTIC KEY).

¹⁷¹ GOODMARK, *supra* note 14, at 192.

sion should still be a viable option, although confession should be a mandatory prerequisite.

So why pursue this avenue even when there is no evidence to date that incarceration results in any greater reduction in future offending by the majority of batterers?¹⁷² The reason to move forward is the unique benefit to victims that comes with diversion predicated on confession, which does not arise from ordinary criminal prosecution. That is, the therapeutic effect *for the victim* of hearing an offender's admission of what he has done to her is an important benefit for victims, and one that should not be ignored.¹⁷³ A public confession of wrongdoing may go a long way to restoring a victim's place within her community of family and friends as an honest person, but also her sense of the world as a place where truth again is respected.

That there occasionally may be a victim harmed by the youthful offender's conduct is accounted for by a provision requiring, at the request of the victim, victim consultation prior to diversion of juveniles.¹⁷⁴ However, in further contrast with domestic violence cases where victims are frequently consulted, victim consultation in juvenile cases is the exception rather than the norm, as there are identifiable victims less frequently in juvenile cases than in domestic violence cases.¹⁷⁵

2. Drug Offenses

Many state statutes also provide for diversion for minor drug offenses.¹⁷⁶ The rationale for diversion in these cases is similar to, and yet different from, that for juvenile cases. The typical diversion-appropriate drug offense is simple possession of a small amount of a given drug.¹⁷⁷ If a drug offender is charged in this way, prosecutors presume that the drug was for personal consumption rather than distribution. The offense charged is therefore, in two different senses, personal to the offender: first, there is no

¹⁷² See discussion *infra* at Part III.B.2.

¹⁷³ See *infra* at Part II.B (discussing benefits to victims of hearing public admissions of guilt).

¹⁷⁴ See, e.g., ARIZ. REV. STAT. ANN. § 8-399 (West, Westlaw through First Reg. Sess.).

¹⁷⁵ Recent programs in the United States, Canada, and some other countries increasingly are incorporating community conferencing or sentencing circle models that involve not just the victim, but also other community members when addressing juvenile offenses. See *infra* Part I.B (discussing restorative justice initiatives).

¹⁷⁶ See *supra* note 162 (for drug diversion statutes).

¹⁷⁷ Ohio law, which provides for "intervention in lieu of conviction," is representative of such statutes, requiring that the amount of drugs found in the possession of a defendant not qualify as a first-, second-, or third-degree felony. OHIO REV. CODE ANN. § 2951.041 (West, Westlaw through 2011 Legislation). Drug possession felonies that would not qualify for diversion involve "bulk" amounts of drugs likely possessed by a defendant for resale. OHIO REV. CODE ANN. § 2925.11 (West, Westlaw through 2011 Legislation).

victim other than the offender;¹⁷⁸ and second, possession of the prohibited substance may indicate that the defendant suffers from an addiction. Since we now understand that addiction is a treatable (if not curable) illness given the right collection of circumstances,¹⁷⁹ a justice system response that emphasizes treatment of this underlying problem makes sense.¹⁸⁰

In contrast with drug offenses—first and foremost—intimate abuse is not a victimless crime. Where there is a victim, the cry for justice rather than treatment is often louder, although the call may not necessarily come from the victim but from a prosecutor or domestic violence advocate. Second, related to the distinction with juvenile offenders, there is little evidence in the research to date that domestic abusers suffer from an illness that causes the criminal activity comparable to drug abusers who are diverted. Both of these distinctions may support not using diversion for intimate violence.

3. *Domestic Violence Offenses*

Diversion for domestic violence offenses, in contrast with both juvenile and drug diversion, is not addressed in all state statutory schemes.¹⁸¹ Some states, like Ohio, specifically exclude family violence cases from diversion.¹⁸² This approach complies with the NCJFCJ recommendations on the

¹⁷⁸ Although true in theory, certainly family and friends often experience collateral harm from a loved one's drug use.

¹⁷⁹ See Winick, *supra* note 170, at 130–31.

¹⁸⁰ The use of treatment for offenders is not without critics on both sides of the equation. “Tough on crime” advocates say treatment is too little punishment, while at least one offender-focused scholar argues the opposite. See generally Bruce J. Winick, *When Treatment is Punishment*, in THERAPEUTIC JURISPRUDENCE APPLIED, *supra* note 85, at 319.

¹⁸¹ These states include Arizona, Connecticut, Delaware, Florida, Maine, New Mexico, Virginia, Wisconsin, West Virginia, and Wyoming. See ARIZ. REV. STAT. ANN. § 13-3601 (West, Westlaw through 2011 First Reg. Sess.); CONN. GEN. STAT. ANN. § 54-56m (West, Westlaw through 2011 Oct. Sp. Sess.); DEL. CODE ANN. tit. 10, § 1024 (West, Westlaw through 2011 First Reg. Sess.) (providing for a diversion program); DEL. CODE ANN. tit. 11, § 4218 (2002) (setting forth the minimum requirements for the “Probation Before Judgment” program which can be utilized for domestic violence cases); FLA. STAT. § 741.281 (1997 & 2003) (requiring a batterer who has had adjudication withheld to attend a batterer's intervention program); FLA. STAT. § 741.2901 (1997); ME. REV. STAT. ANN. tit. 19-A, § 251 (1998) (requiring mediation in domestic matters unless extraordinary cause can be shown as to why mediation is inappropriate); N.M. STAT. ANN. § 31-16A-4 (Michie 2003); VA. CODE ANN. § 18.2-57.3 (Michie 2003); W. VA. CODE § 61-11-22 (2003) (allowing diversion for limited domestic violence offenses); WIS. STAT. ANN. § 971.37 (West, Westlaw through 2011 Reg. Sess.); WYO. STAT. ANN. § 7-20-103 (Michie 2003) (specifically allowing diversion for domestic violence offenses).

¹⁸² 730 ILL. COMP. STAT. 5/5-6-1 (1997 & Supp. 2003) (discussing conditional discharge and disposition of supervision for crimes other than felony or Class A misdemeanors); 720 ILL. COMP. STAT. 5/12-3.2 (1997 & Supp. 2003) (classifying domestic battery as a class A misdemeanor); N.D. CENT. CODE § 29-01-16 (West, Westlaw through 2011 Reg. Sess.) (allowing for the discharge of certain crimes other than domestic violence offenses); OHIO REV. CODE ANN. § 2935.36 (West, Westlaw through 2011) (excluding domestic violence offenses from diversion); OHIO REV. CODE ANN. § 2901.01 (West,

use of diversion in family violence cases discussed previously.¹⁸³ By contrast, other state statutes provide for mediation in contravention of the NCJFCJ's recommendation that mediation never be an option in family violence cases.¹⁸⁴ Some statutes specifically list counseling as a component of diversion.¹⁸⁵

Some states, even those without diversion programs, allow for victim input in prosecution decisions such as plea bargains.¹⁸⁶ Where victims have a meaningful say in these decisions, confessing and/or apologizing to the victim may certainly help the offender get the victim's blessing for non-prison sentences or solutions.¹⁸⁷ Even without provisions for victim input, prosecutors can be diligent in pursuing such a term in plea bargain negotiations.

Out of the handful of states that provide for diversion in their family law statutes, few specifically and explicitly require a finding of guilt (in some fashion) prior to allowing a defendant to take advantage of diver-

Westlaw through 2011 Reg. Sess.) (defining crimes of violence to include domestic violence).

¹⁸³ NCJFCJ RECOMMENDATIONS, *supra* note 27, at 15.

¹⁸⁴ See, e.g., CONN. GEN. STAT. § 54-56m (West, Westlaw through 2011 Oct. Sp. Sess.) (establishing mediation programs for various offenses, including cases referred to mediation by the Superior Court); IOWA CODE § 679.5 (West, Westlaw through 2011 Reg. Sess.) (allowing dispute resolution for criminal complaints); ME. REV. STAT. ANN. tit. 19-A, § 251 (1998) (requiring mediation in domestic matters unless extraordinary cause can be shown as to why mediation is inappropriate). Mediation may be even more concerning in domestic violence cases than is diversion. Mediation does not necessarily require or presuppose complete equal bargaining power; most mediators must—as a matter of course—negotiate differentials in bargaining power between parties to the mediation. However, it is inappropriate in cases where bargaining power between the parties is grossly unequal. In many, if not all, cases of intimate partner violence, one of the central dynamics of those relationships is the excessive exercise of power and control by the batterer over the victim. These bargaining power inequalities in IPV relationships can lead to unfair settlements, despite the mediator's skill. In addition, one could understand mediation as a process in which both parties are expected to give up something in order to resolve a dispute. Clearly victims should not have to give up anything in order to stop the other person's violence against them. Non-violence should not come at a cost to the victim. The more recent notion of transformative mediation does not presuppose a settlement must be reached, but rather that the mediation process—even absent a settlement—can play a transformative role for the parties. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOGLER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 217 (2005). However, again in cases of intimate partner violence, the concern is that bargaining power inequalities in IPV relationships can lead to *unfair* settlements (as opposed to no settlement)—*precisely because of* the unequal bargaining power. Because of this, even transformative mediation—lovely a notion as it is—could still be inappropriate in cases of IPV. See also *infra* Part II.B (dealing with feminist criticisms of diversion).

¹⁸⁵ See, e.g., ARIZ. REV. STAT. § 13-3601 (West, Westlaw through 2011 First Reg. Sess.).

¹⁸⁶ ALA. CODE § 15-23-64 (West, Westlaw through 2012 Reg. Sess.); GA. CODE ANN. § 17-17-11 (West, Westlaw through 2011 Reg. Sess.); KY. REV. STAT. § 421.500 (West, Westlaw through 2011 Legis. Sess.).

¹⁸⁷ Many thanks to research assistant, Joe Carpenter, for this insight.

sion.¹⁸⁸ Arizona and Virginia are two such examples. Notably, it is the position of the National Association of Pretrial Services Agencies (“NAPSA”) on diversion and confession that enrollment in a pre-trial diversion program “should not be conditioned on a formal plea of guilty.”¹⁸⁹ Of importance to the discussion here, however, it is also their position that “[an] informal admission of responsibility may be acceptable as part of a service plan.”¹⁹⁰ Arizona’s statute is, on its face, apparently straightforward, providing only for post-conviction diversion; however, actual practice is widely divergent from this seemingly straightforward scheme. By contrast, Virginia’s statute is more complex on the issue of an admission or finding of responsibility. While Virginia’s actual practice vis-à-vis diversion is relatively consistent, it does not take full advantage of the statutory possibilities promised. The two approaches are discussed in the following sections.

On the one hand, it would be a mistake to assume that statutory schemes present the full picture on the scope of diversion and diversion-like programs in family violence criminal cases. That is, one cannot assume that states that do not explicitly provide for diversion in their criminal statutes do not employ some sort of formal or informal diversion-like scheme.¹⁹¹ The Arizona practice, discussed here, presents a classic example of this. On the other hand, it would also be a mistake to assume that because a state’s statutory provisions provide for a defendant’s admission of responsibility prior to being diverted from traditional criminal punishment, prosecutors in practice take advantage of this provision. Virginia provides a prime example of this latter situation. Thus, as discussed in the following sections, law on the books can at times over-promise the possibility for promoting public acceptance of responsibility, and at others understate its potential to do so.

4. *Two Case Studies: The Arizona & Virginia Approaches*

Moving in the direction recommended by the NCJFCJ, Arizona amended its use of diversion in domestic violence cases in 2004, limiting diversion to cases only where a weapon was not involved.¹⁹² In addition, in non-weapon cases, Arizona’s amended statute places the option of offering diversion squarely within the discretion of prosecutors.¹⁹³ Its prior statutory scheme and actual practice around diversion, however, provide a classic example of how law in action diverges from law on the books, and how even

¹⁸⁸ ARIZ. REV. STAT. § 13-3601 (West, Westlaw through 2011 First Reg. Sess.). VA. CODE. ANN. § 18.2-57.3 (Michie 2003).

¹⁸⁹ NAPSA, *Performance Standards & Goals for Pretrial Release & Diversion*, *supra* note 161, at §3.3.

¹⁹⁰ *Id.*

¹⁹¹ Maryland is one such state that does not provide black letter law for diversion, but, according to my experience working in the state, employs a deferred prosecution or *nolle prosequi* approach in the majority of its domestic violence cases.

¹⁹² ARIZ. REV. STAT. § 13-3601 (West, Westlaw through 2011 First Reg. Sess.).

¹⁹³ *Id.*

within the same state diversion practices differ from jurisdiction to jurisdiction. Arizona's statutes prior to the 2004 amendments required entry of a guilty finding in order for an offender to be given diversion.¹⁹⁴ Even under this earlier statutory scheme, however, Arizona did not require an actual admission of guilt by the offender or even a plea bargain that would, to a certain extent, implicitly reflect an acceptance of responsibility.¹⁹⁵

Prosecutors' use of and experience with diversion in domestic violence cases differed substantially in the two most populous areas in the state, namely Tucson and the Phoenix metropolitan area. Under the direction of some prosecutors in Tucson, the practice has been that domestic violence cases routinely resulted in plea bargains for post-conviction referral to diversion.¹⁹⁶ In other words, in the Tucson courts, misdemeanor domestic violence prosecutors historically typically were able to obtain pleas of guilt as a prerequisite to offenders entering diversion programs. By contrast, in the Phoenix metropolitan area, despite the apparent statutory requirement that diversion be post-conviction only, in practice post-conviction diversion was not always the sole route to diversion.¹⁹⁷ In these courts, post-conviction diversion in fact accounted for just a small fraction of those domestic violence cases that were actually sent to diversion.¹⁹⁸ The majority of domestic violence cases in Phoenix and nearby Mesa typically were pled out pre-conviction, although terms of the pleas typically included a requirement that the offender participate in a certified batterer's intervention program comparable to that used in diversion programs.¹⁹⁹ Furthermore, these agreements typically included an additional term that the offender not object to the admission into evidence of what would possibly be an otherwise inadmissible police report should he fail to complete the required intervention program.²⁰⁰ In addition, although the typical practice in Mesa and Phoenix was that an offender entering into diversion would be ordered to receive counseling, the statute defining diversion did not itself require counseling, but merely required a period of probation coupled with terms that aimed to protect the victim's safety.²⁰¹

Post-conviction diversion would appear to be more attractive to prosecutors than pre-conviction agreements to admit certain evidence, as many prosecutors would anticipate that an offender would fail to complete the

¹⁹⁴ *Id.*

¹⁹⁵ Interview with John Pombier, Mesa City Attorney and former head of Phoenix City Attorney's Domestic Violence Unit (Apr. 29, 2003).

¹⁹⁶ During the time I worked in Arizona, I observed this common practice.

¹⁹⁷ In our program, *RESTORE*, offenders were able to enter through means other than post-conviction diversion.

¹⁹⁸ According to Mr. Pombier, a mere five to ten percent of diversion cases result from "sub-section (m)" plea agreements or conviction. Interview with John Pombier, *supra* note 195.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

mandated counseling program, given the difficulty of prosecuting domestic violence cases after a period of time has elapsed (such as would be the case several months post-plea). However, as a practical matter, Phoenix and Mesa prosecutors often were forced to settle for a pre- rather than post-conviction plea, since judges in those courts often ordered diversion as the sole punishment even post-conviction—which they were empowered to do under the pre-2004 law.²⁰² This typically happened against the wishes of both the prosecutor and the victim. That is, in these major metropolitan jurisdictions, under the pre-2004 statutory scheme, defense attorneys were disinclined to enter into a post-conviction diversion, choosing to go to trial unless a pre-conviction plea was offered by the prosecutor. This dynamic, triggered by divergent judicial practices and norms in Tucson versus Phoenix, explains the predominance of pre- rather than post-conviction pleas in the Phoenix/Maricopa County area.²⁰³

In both the Tucson and Phoenix/Mesa jurisdictions, however, and under both the pre-2004 and the post-2004 statutory schema, in those instances where offenders in fact enter a guilty plea, the plea bargain and entry of the guilty plea typically happen when the victim is not present.²⁰⁴ That is, such an admission typically takes place at the point of either an arraignment or a pre-trial hearing, which victims typically do not attend.²⁰⁵ Thus, the benefit to victims of hearing an admission of guilt or acceptance of responsibility rarely, if ever, happens in Arizona despite the possibility that its statutory scheme and actual practice would provide for it.

Virginia's diversion statute²⁰⁶ provides for diversion upon one of two events: either (1) a guilty plea by the offender,²⁰⁷ or (2) a finding by the judge that there is sufficient evidence to convict²⁰⁸ (a type of modified *Alford* plea²⁰⁹ in which a defendant enters a plea acknowledging only that there is sufficient evidence to convict).²¹⁰ Despite that the statute provides for different routes to diversion, the practice in Virginia by prosecutors, judges, and defense counsel who deal with family violence cases is not so varied. Three different practices are evident in Virginia, and all three are in direct opposition to the recommendations of the NCJFCJ.²¹¹

First, in Virginia, resort to diversion is the norm rather than the exception in the majority of family violence cases, despite the NCJFCJ's recommendation against diversion.²¹² Second, little assessment is made to

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ VA. CODE ANN. § 18.2-57.3 (Michie 2003).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *North Carolina v. Alford*, 400 U.S. 25, 38 (1970).

²¹⁰ See Bibas, *supra* note 2, at 98 (discussing *Alford* pleas).

²¹¹ NCJFCJ RECOMMENDATIONS, *supra* note 27, at 15.

²¹² *Id.*

determine if there has been prior violence such that diversion would be inappropriate.²¹³ Third, rarely, if ever, do offenders confess to violence in order to receive the benefits of diversion. Rather, offenders are usually diverted only after a finding by the judge of sufficient evidence to convict.²¹⁴

Thus, it is evident that despite the particularly strong promise of Virginia's statutory scheme in promoting public acceptance of responsibility for domestic violence, this remains an unfulfilled promise in practice. Further, in those instances where offenders directly (or even by proxy—i.e. through their attorney) accept responsibility and admit guilt, this typically happens when the victim is not present.²¹⁵ That is, as is the case in Arizona, such admissions typically happen at the point of either an arraignment or a pre-trial hearing, and victims typically do not attend those proceedings. Where the victim does not hear the actual admission of guilt and acceptance of responsibility, the benefits of that confession are significantly limited.

CONCLUSION

There are currently a number of barriers to restorative justice ends—rightly or wrongly, necessary or not—that exist within our legal system.²¹⁶ Some of these barriers are informal; some are formal. On an informal level, in our adversarial model of justice, contrasted with the European trial system where lawyers play a more limited role, winning and losing dominates the process.²¹⁷ Further, it can be argued that a weak trial system encourages defendants' dishonesty.²¹⁸ Formal barriers include restrictive rules on evidence, such as the hearsay and exclusionary rules where truth is sacrificed to procedural values²¹⁹ and constitutional protections of defendants, including the Fifth Amendment right to confront one's accuser or the right to counsel.²²⁰ In the context of the right to counsel at the time of police interrogation, one can argue that the purpose of the presence of counsel is for

²¹³ *Id.*

²¹⁴ VA. CODE ANN. § 18.2-57.3 (Michie 2003).

²¹⁵ Interview with Margaret Reed, Assistant Commonwealth's Attorney, Henrico County, Virginia (2005).

²¹⁶ See generally, e.g., WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT (1999) (arguing that the U.S. court system focuses on winning more than establishing truth); NICHOLL, *supra* note 99, at 47–49 (contrasting traditional court systems, which focus on individual crimes, and community policing, which focuses on broader policy goals).

²¹⁷ Pizzi, *supra* note 216, at 3, 18–24.

²¹⁸ *Id.* at 70–73 (discussing signs of a weak trial system: low formal priority on truth; plea bargaining; pro-forma recitation of facts and admission of those facts rather than a qualitative probing of what the defendant did; and federal judges' new requirement to sentence defendants not just for what they plea to, but also for the actual crimes committed).

²¹⁹ *Id.* at 25–45.

²²⁰ U.S. CONST. amend V.

preventing clients from talking about their crimes.²²¹ The defendant's Fifth Amendment right to remain silent, presumption of innocence, and privilege against self incrimination further inhibit acceptance of responsibility.²²² In light of these formal and informal barriers to a batterer's acceptance of responsibility, the goals of restorative justice for offenders, victims, and their communities are not met.

We are left with a number of questions at this point. First, assuming the goals of restorative justice are valid and desirable, and that we are correct in saying that for both defendants and victims these goals are not met by the formal legal system as it currently is constructed, should these goals be sought from *within* our formal legal adversarial system or outside of it? Second, regardless of which route you choose—internal or external—how can we make this happen? That is, what would it look like to accommodate these goals within the system or, alternatively, how can we further restorative justice ideals and goals outside our system? It is my suggestion that an expanded emphasis on victim impact statements and confessions within the context of diversion or diversion-type programs may be one way of reaching these goals. The expressive and symbolic function of law in social norm creation and change suggests that repeated public confessions of acts of family violence may serve to excise generally held beliefs that allow intimate abuse to continue: that family violence is rare, that it is not harmful, and that it is a private matter rather than a matter of public concern. In this way, courts have the potential to function as active norm entrepreneurs in the area of intimate violence.

Since there is minimal evidence to date that incarceration results in any widespread reduction in future offending by the majority of batterers, shouldn't we pursue the unique benefit to victims offered by diversion predicated on confession—the therapeutic effect *for the victim* of hearing an offender's admission of what he has done to her?²²³ Diversion's potential for providing this benefit should not be ignored. A public confession of wrongdoing may go a long way not only to restoring the victim's reputation as an

²²¹ PIZZI, *supra* note 216, at 50–59.

²²² *Id.* at 62–68; *see also* NICHOLL, *supra* note 99, at 47–48; U.S. CONST. amend V.

²²³ *See infra* Part II.B.2 (discussing benefits to victims of hearing public admissions of guilt). Further, research shows that public trials are not what most victims of gendered violence want. *See generally* Des Rosiers, et al., *supra* note 133. I have discussed this idea elsewhere. *See generally* C. Quince Hopkins, *Rescripting Relationships*, *supra* note 61 (discussing civil rights remedies for intimate violence). *But cf.* JOHNSTON, SPECTRAL EVIDENCE, *supra* note 54, at 145.

[Many victims] feel a tremendous sense of relief and victory. They get strong by suing. . . . The legal system is so important to the American consciousness. If you can take it to court, there's a way in which you symbolically get vindicated that doesn't happen in any other way.

Id. (quoting ELLEN BASS & LAURA DAVIS, A COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE 310 (1988)) (internal quotation marks omitted) (statement by Mary Williams).

honest person, but also restoring her sense of the world as a place where truth exists. In addition, batterers' pre-existing tendency to engage in apology-behaviors could be leveraged to facilitate this public truth-telling effort in diversion cases. In contrast with acquaintance sexual assault offenders, batterers face less life-long sanctions like sex offender registration, and so are less likely to resist the truth-telling process within the parameters of the existing criminal justice system. Enhanced provisions encouraging—or even requiring—inclusion of the victim's and offender's immediate communities of family and friends in this process is likely to further these efforts.

Finally, an enhancement of justice systems' responses that encourage rather than discourage public acceptance of responsibility can serve a larger expressive or symbolic function. We should consider the potential impact of such public truth-telling provisions in the law on society more generally. If the United States is culturally and doctrinally averse to acceptance of responsibility, this is one way of creating a contrary message.

