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## LESSONS UNLEARNED: WOMEN OFFENDERS, THE ETHICS OF CARE, AND THE PROMISE OF RESTORATIVE JUSTICE

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# LESSONS UNLEARNED: WOMEN OFFENDERS, THE ETHICS OF CARE, AND THE PROMISE OF RESTORATIVE JUSTICE

## **Cover Page Footnote**

Professor of Law, Hamline University School of Law. My thanks goes to my colleague, Howard Vogel, who made suggestions on a draft of this paper; my student Dawn O'Rourke, whose seminar paper on gender disparities in sentencing encouraged me to consider these issues; Scott Michael, who served as my research assistant on this project; and Marriet Manis, who shared her experiences in the corrections systems with me.

## LESSONS UNLEARNED: WOMEN OFFENDERS, THE ETHICS OF CARE, AND THE PROMISE OF RESTORATIVE JUSTICE

*Marie A. Failinger*\*

Latasha, the child of an alcoholic father and herself an alcohol abuser by thirteen, was arrested at nineteen after she hit a police officer with a baseball bat.<sup>1</sup> The officer was attempting to arrest her when she tried to take her child back from her boyfriend and his new girlfriend and instead ended up assaulting the girlfriend's mother.<sup>2</sup> It was Latasha's second assault arrest.<sup>3</sup> Latasha's mother, who separated from her father at ten, described Latasha as incorrigible; she said Latasha's father "screwed up Latasha by using her to get back at me."<sup>4</sup>

Chris, a twenty-two year-old woman, was arrested for permitting her husband to sexually abuse her five and nine-year-old nieces.<sup>5</sup> Chris's father was an alcoholic and was abusive to his wife and children. Once he pushed Chris's mother down the stairs, breaking her arm, while another time, he beat her brother so badly that his eardrums were broken.<sup>6</sup> In addition, he hit Chris so hard that it caused her speech to be "unintelligible," and as a result, she was described as "'nervous' and slightly retarded."<sup>7</sup> She was placed in special education classes after the second grade, and was "easily led."<sup>8</sup> When she was twenty-one, she

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1. Kathleen Daly, *Women's Pathways to Felony Court: Feminist Theories of Lawbreaking and Problems of Representation*, 2 S. CAL. REV. L. & WOMEN'S STUD. 11, 31 (1992).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 34.

6. *Id.*

7. *Id.*

8. *Id.*

married a thirty-five-year-old trucker. In accounting for her failure to stop her husband's abuse of the children, Chris suggested that she acted to please her husband, so he would love her.<sup>9</sup>

Betsey, a twenty-three-year-old woman, was a drug abuser whose face was scarred from injuries she received when she was pushed out of a moving car while turning a "trick."<sup>10</sup> Betsy burned her scalp when she improperly applied a delousing salve to kill the imaginary vermin that she thought were crawling in her hair during a drug overdose.<sup>11</sup> She was arrested for possession of drugs, carrying a concealed weapon, check-forgery, fencing stolen goods—crimes she admitted to but was never charged for—as well as a robbery she claims she did not commit.<sup>12</sup> Betsey's mother left her abusive father, who had taunted her by saying that Betsey would have "ninety-nine kids" before she got out of school.<sup>13</sup> As a result, she forced Betsey to wear unattractive clothes, attend church twice on Sundays, and stay home at night.<sup>14</sup> After Betsey dropped out of school, her live-in boyfriend's mother, Marlene, encouraged her to work in prostitution in the streets near a naval base.<sup>15</sup> Marlene's "man" (who prostituted her) introduced Betsey to her "man," and Betsey and her man's two "wives-in-law" (other prostitutes with relationships with the same man) worked together in Milwaukee, Memphis, Nashville, and Florida.<sup>16</sup> She went through many men in her descent into drugs, and she was particularly touched by one man who tried to help her get off drugs without asking anything in return; however, he was ultimately imprisoned for forgery.<sup>17</sup>

The steep rise in female offenders since the 1960s<sup>18</sup> has finally caused

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9. *Id.*

10. See ELEANOR M. MILLER, STREET WOMAN 54 (1986).

11. *Id.* at 54-55.

12. *Id.* at 55.

13. *Id.* at 56.

14. *Id.* at 57.

15. *Id.* at 58.

16. *Id.* at 58-59.

17. See *id.* at 61.

18. See RONALD BARRIE FLOWERS, WOMEN AND CRIMINALITY: THE WOMAN AS VICTIM, OFFENDER AND PRACTITIONER 78-79 (1987). Flowers notes that arrests of women have steadily increased since 1960, with the most prominent increases occurring between 1960-75, including a one-thousand percent increase in drug arrests, and other increases for stolen property, fraud, weapons, and driving under the influence. *Id.* at 79-80. Steffensmeier and Allen suggest that there has been a substantial increase in women's arrests, from eleven percent of arrests in 1960 to nineteen percent in 1995, with the bulk of the increase in property crimes such as larceny, fraud, and forgery (e.g., from fifteen percent of arrests in 1960 to forty percent in 1995). By contrast, arrests for homicide, aggravated assault, and drug violations have declined. *Id.* at 10; Darrel Steffensmeier & Emilie Allan, *The Nature of Female Offending: Patterns and Explanations* in FEMALE OFFENDERS: CRIMINAL

criminologists, lawyers, judges, and others to consider why they have not learned more about women offenders' lives, in order to better understand and explain why they enter, and how they proceed through the criminal system.<sup>19</sup> The rise in women's crime is particularly confounding because the overall crime rate has dropped.<sup>20</sup> Between 1990 and 1996, the state court convictions of women increased forty-two percent for felonies, thirty-seven percent for drug offenses, and thirty percent for violent felonies, while the overall crime rates in the same courts have dropped significantly.<sup>21</sup> There also has been an "explosion" in the number of incarcerated women. Prior to the war on drugs, about two-thirds of the women were put on probation and they represented less than five percent of the inmate population, however, by 1998, seven-and-a-half percent of all federal inmates were women, and seventy-two percent of them were drug offenders.<sup>22</sup>

The study of these disturbing statistics has resulted in a number of theories that try to explain the recent increase in the number of women in prison.<sup>23</sup> Some suggest that the increase can be attributed to the economic instability of single-parent families that many women offenders head.<sup>24</sup> Others argue that the turn toward mandatory sentencing for drug offenses has affected women the most, because they are least likely to be able to

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PERSPECTIVES AND EFFECTIVE INTERVENTIONS 9-10 (Ruth Zaplin ed., 1998); Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and their Children*, 11 STAN. L. & POL'Y REV. 133, 138 (1999).

19. See generally Myrna S. Raeder, *Creating Correctional Alternatives for Nonviolent Women Offenders and Their Children*, 44 ST. LOUIS U. L.J. 377 (2000) (noting national news and Department of Justice attention to this topic).

20. See Jennifer Ward, *Snapshots: Holistic Images of Female Offenders in the Criminal Justice System*, 30 FORDHAM URB. L.J. 723, 723 (2003).

21. *Id.* at 723 n.1.

22. See Raeder, *supra* note 19, at 379-80. Raeder also notes that by mid-1998, America housed eighty thousand women in prison and sixty-four thousand in local jails. *Id.* at 379-80.

23. For a brief summary of the history of these theories, see Ward, *supra* note 20, at 726-28. Ward describes three types of theories, centering on psychology, biology, and socioeconomics. For example, Konopka focused on puberty, identification with one's mother, changes in women's social positions, and "indistinctive authority resulting from low self-esteem and loneliness" as critical conditions in women's criminality. *Id.* at 727-28. By contrast, Eleanor and Sheldon Glueck suggested that environment and biological conditions had significant effects on offenders' chances of being rehabilitated. *Id.* at 728. Ward herself notes that female offenders commit less serious crimes than men, are more often victims of past physical or sexual abuse, play a greater role in caring for minor children, have less economic stability, and are more problematic as substance abusers. *Id.* at 730.

24. See, e.g., FLOWERS, *supra* note 18, at 99-100, 122. Raeder notes that the vast majority of women in correctional facilities have children, and that perhaps two-hundred thousand children in the United States have incarcerated mothers. Raeder, *supra* note 19, at 380.

trade information for a reduced sentence.<sup>25</sup> Still others point to the increase in incarceration rates for non-violent offenses that women traditionally engage in, such as larceny, fraud, embezzlement, and shoplifting, as part of the gender equalization trend pushed by uniform sentencing guidelines.<sup>26</sup>

Lauren Snider argues that the feminist alteration of frameworks of meaning that reject the traditional passive “woman in trouble” stereotype has created a new sort of paradigm of the female criminal.<sup>27</sup> Whether she actually exists or not, the new paradigmatic woman of criminal policy discourse is the “predatory, rational, calculating Female Criminal, the violent gang girl,<sup>28</sup> or the irresponsible, out-of-control Bad Mother/Child Abuser” who “justifies the surge of punitiveness reflected in incarceration

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25. See, e.g., Lauren Snider, *Constituting the Punishable Woman: Atavistic Man Incarcerates Postmodern Woman*, 43 BRIT. J. CRIMINOLOGY 354, 368 (2003); see also FLOWERS, *supra* note 18, at 100; Eda Katharine Tinto, *The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws*, 76 N.Y.U. L. REV. 906, 909-14, 933 (2001) (describing “inverted sentencing” and noting that in the nine years following the passage of mandatory drug laws in New York, the number of women in prison went up 156 percent as compared to a rise of only forty-nine percent for men); Patricia M. Wald, *Why Focus on Women Offenders?*, CRIM. JUST. Spring 2001 at 10, 12. For a brief history of impetus behind this change, see Erik Luna, *Punishment Theory, Holism and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 255-57; see also Cassidy Kesler, *Where Women Fit: Gender and the Federal Sentencing Guidelines Summary*, 15 FED. SENT. R. 192 (2003) (noting that women offenders commit mostly non-violent offenses and thus are less likely to receive full downward adjustments because of acceptance of responsibility, which applies to higher-level offenses).

26. See Acoca & Raeder, *supra* note 18, at 134 (explaining rising rates as due to mandatory minimums, sentencing reform movements, and “get tough on crime” campaigns); Raeder, *supra* note 19, at 380 (noting that the Federal Sentencing Guidelines mandate that “family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range”); see also Steffensmeier & Allan, *supra* note 18, at 11 (noting that the targeting of serious forms of lawbreaking has increased arrests of female offenders). Mary-Christine Sungaila notes, however, that while sex cannot be taken into consideration, some gender-based circumstances can be taken into consideration, such as the reality of duress by the female offender’s boyfriend or husband. See Mary Christine Sungaila, *Taking the Gendered Realities of Female Offenders Into Account: Downward Departures for Coercion and Duress*, 8 FED. SENT. R. 169 (1995).

27. See Snider, *supra* note 25, at 367-68; Ward, *supra* note 20, at 728-29; see also Steffensmeier & Allan, *supra* note 18, at 10 (debunking the view that the women’s movement and women’s increased participation in the public sphere have contributed to more crime by women, noting that typically those women arrested are economically marginal women who have not reaped the benefits of feminist successes).

28. Steffensmeier and Allen suggest that gang girls have not simply played the role of secondary players to their men; rather, in many gangs, a women’s status is determined by their female peers. Gangs play an integral role in initiating girls into violent offending, although they continue to defer to male gang members and mimic traditional female roles. Steffensmeier & Allen, *supra* note 18, at 13-14.

rates.”<sup>29</sup> While this paradigm shift may account for the rise in women’s incarceration, there is no strong evidence that these women do not benefit as others did in the past from the “chivalry” or “paternalism” of the system that did not hold women fully accountable. Though some students of the criminal system have made this charge, others contend that chivalry, if it existed, worked only in favor of middle-class white women, and that paternalism does not explain why young women receive more punitive treatment than men, and fewer procedural protections in the system.<sup>30</sup> Judge Patricia Wald argues that women commit the same crimes, but the means they use are different—e.g., they usually do not carry weapons or plan the crimes, and they are often coerced into criminal behavior—so their punishment under a “just deserts” theory should be less severe.<sup>31</sup>

Eleanor Miller, by contrast, debunks the argument that the rise in crime is caused by either single objective factors, such as women’s labor force participation, or subjective factors, such as new paradigms or women’s own re-understandings of their sex roles.<sup>32</sup> She suggests, based on “street women” she interviewed in Milwaukee, that a complicated set of factors may better account for the increasing visibility of women’s crime.<sup>33</sup> These factors include marginal workforce participation and accompanying economic stress, the influence of the men in these women’s lives, the relationships of their family networks to deviant street networks, and other factors that are harder to predict such as the thrill of committing crime.<sup>34</sup>

Still others who study women’s crimes are focused more on ostensible cures for crimes rather than causes. They argue that formal equal treatment of men and women in criminal sentencing, pushed by a liberal agenda, has in fact obscured the real ways in which women are placed at a disadvantage in the post-conviction criminal system. On one hand, these writers have

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29. See Snider, *supra* note 25, at 367-68; see also FLOWERS, *supra* note 18, at 86, 101-103 (the findings of Fred Adler and Rita Simon, who suggest that women are coming to parity with men in terms of type and frequency of criminal behavior).

30. FLOWERS, *supra* note 18, at 83-84. Flowers notes, however, that some studies show that women who pleaded not guilty and took their chances at trial did seem to get acquitted more often for offenses like robbery, burglary, or larceny, and were sentenced to prison less often. However, he points out that women’s crimes tend to be less violent and any violence they commit is often unplanned, which may account for sentencing disparities. *Id.* at 84. See Raeder, *supra* note 19, at 379 (noting that minority women were “particularly hard hit” by mandatory drug minimum sentences, for example, the Hispanic female inmate population increased seventy-one percent from between 1990 and 1996).

31. Kesler, *supra* note 25, at \*3; see Wald, *supra* note 25, at 10.

32. See MILLER, *supra* note 10, at 3-6.

33. *Id.*

34. *Id.* at 162, 174, 177-79; see also FLOWERS, *supra* note 18, at 121 (noting Cesare Lombroso’s criticism of the new views that women become prostitutes to satisfy a need for excitement).

documented actual inequalities in rehabilitation options offered women, from mental health and employment options in prison, to the provision of adequate health care that accounts for women's particular reproductive and other health risks.<sup>35</sup> For example, Shearer notes that women have fewer imprisonment options, and are more rarely assigned to prisons based on their individual treatment needs, the severity of their crime, or issues of security.<sup>36</sup>

On the other hand, those who study the criminal system have demonstrated how formal equality does not address the real difference in women's situations. For example, criminologists have documented that women in the criminal system are more likely to abuse drugs and alcohol as a means of medicating themselves in response to the significant physical, sexual, and emotional violence they experienced as children.<sup>37</sup> Shearer notes that techniques used to treat male drug abusers, such as group settings and confrontation, "tend to be threatening to many women and often inhibit the ability of female substance abusers" to address past physical or sexual abuse, and feelings of worthlessness or the need to please others.<sup>38</sup> In addition, Judge Wald cites the failure of correctional systems to provide for gynecological or pregnancy-related health, noting that "postpartum care is frequently slapdash," and counseling is rare.<sup>39</sup>

Moreover, unlike male offenders, most women are caregivers and supporters of children; more than two-thirds of incarcerated women have children.<sup>40</sup> Women's incarceration disrupts not only their own lives, but

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35. See FLOWERS, *supra* note 18, at 156-57 (describing lack of proper medical care, poor diet, comparatively disadvantageous recreational facilities, and limited vocational and training programs for women except in "women's work" such as sewing and cosmetology); Stephanie S. Covington, *The Relational Theory of Women's Psychological Development: Implications for the Criminal Justice System*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 156-57 (Ruth T. Zaplin ed., 1998).

36. See Robert A. Shearer, *Identifying the Special Needs of Female Offenders*, 67 FED. PROBATION 46, 46 (2003).

37. See Covington, *supra* note 35, at 116; Raeder, *supra* note 19, at 381; Shearer, *supra* note 36, at 46. Covington notes that eighty percent of California's women prisoners were the victims of adolescent abuse. As children, twenty-nine percent were physically abused, thirty-one percent were sexually abused, and forty percent were emotionally abused. Adolescent offender studies suggest similar abuse histories. This abuse, and the resulting disconnection and violation of these women's lives, leads to social isolation and a strong risk of drug abuse. Covington, *supra* note 35, at 116, 120-21; see also Steffensmeier & Allen, *supra* note 18, at 12 (noting the rising levels of drug dependency and subsequent motivation to commit other crimes to support such habits). They note that women who cease drug use regularly cease to be involved in burglary and robbery.

38. See Shearer, *supra* note 36, at 47.

39. See Wald, *supra* note 25, at 14.

40. See Covington, *supra* note 20, at 116; Raeder, *supra* note 5, at 380. Wald notes that about one-and-a-half million children have at least one parent in prison, since eighty-eight

also the lives of their children. In addition to increasing the troubling responsive behavior of children who are torn from their mothers at a young age,<sup>41</sup> children can literally lose their mothers because of their incarceration for non-violent offenses. New laws designed to put the children's interests first permit parental rights to be terminated more quickly when the mother is absent.<sup>42</sup> Moreover, few women's treatment programs embrace the reality that women need skills to support their children, and to re-learn interpersonal skills that suffered from their poor relationships with their children's fathers.<sup>43</sup>

This article focuses on the reality that women's relationality, and particularly their relationships with men in their lives,<sup>44</sup> profoundly affects the behavior that lands them in the criminal justice system. Covington has described how dysfunction in women offenders' relationships leads to drug abuse and other crime, and how important it is that women offenders be treated in relational systems.<sup>45</sup> I argue that restorative justice, which is essentially grounded on an ethical understanding of crime and treats the offender as an interacting subject/agent, is a necessary avenue of response to most women offenders' crimes, and that corrections must go beyond a psychological approach that treats crime as a form of illness, or a systemic model which attempts primarily to rectify deficits in women's social situation. My claim is a modest "maybe" in terms of the success of this approach because, to my knowledge, no systems have studied the relative long-term effectiveness of treatment-based, services-based, traditional

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percent of all offenders have children. In the federal system, she notes, eighty percent of the women have young dependent children, seventy percent were the primary care parent, and sixty-six percent were single mothers. Wald *supra* note 25, at 14.

41. See Wald, *supra* note 25, at 15; Ward, *supra* note 20, at 732. Raeder cites Judge Weinstein's observation in *United States v. Concepcion*, 795 F. Supp. 1262, 1282 (E.D.N.Y. 1992), that "[r]emoving the mother in such a matriarchal setting destroys the children's main source of stability and guidance and enhances the possibility of their engaging in destructive behavior." Raeder, *supra* note 19, at 380.

42. See Raeder, *supra* note 19, at 381 (noting that the confluence of the Adoption and Safe Families Act of 1997 and increasing drug penalties for women has resulted in the potential termination of parental rights for virtually all mothers who do not have caretaking relatives and are incarcerated for more than fifteen months); see also Covington, *supra* note 35, at 116 (noting that female inmates feel "enormous guilt" about being absent from their children and worry about whether they will retain custody when they get out).

43. See Shearer, *supra* note 36, at 47 (discussing the lack of training focusing on parenting skills and vocational rehabilitation for women).

44. See, e.g., Steffensmeier & Allen, *supra* note 18, at 16 (noting that women are "far more likely than males to be motivated by relational concerns and to require a higher level of provocation before turning to crime").

45. See Covington, *supra* note 35, at 113-29; see also Raeder, *supra* note 19, at 381 (noting that women are disproportionately victimized by sexual and physical abuse, and more likely than men to be addicts, to be unemployed, and to have mental illness).

incarceration, and restorative justice approaches on women offenders.

Indeed, restorative justice scholars would argue that “effectiveness” in restorative processes should not be measured by the usual markers, such as decrease in recidivism, because its value is in restoring the victim of criminal behavior first, rather than the punishment or rehabilitation of the offender.<sup>46</sup> Nonetheless, restoration of the offender to the community and the creation of a new relationship between the community and both the victim and the offender are important benefits of restorative approaches.<sup>47</sup> It seems that restorative advocates may be right—if these processes produce justice, the fact that they cannot demonstrate any more “effectiveness” by traditional markers than the current system is probably not nearly as important as those involved in correctional system would advocate. Thus, my argument is essentially an appeal to ethics and common sense, not statistics, about why restorative systems might be especially appropriate for those women who approach criminal choices using what Carol Gilligan describes as an “ethics of care,” rather than an “ethics of rights.”<sup>48</sup>

### I. THE RELATIONAL REALITY OF OFFENDERS’ LIVES

Professor Kathleen Daly has given us the stories of Latasha and Chris, real lawbreakers, in response to what she describes as “the leading feminist scenario” about the “street woman” that is used to explain why women break the law.<sup>49</sup> This scenario describes how abusive homes push young women out of the house, cause them to run away, or otherwise become part of a deviant environment, beginning their law-breaking in “petty hustles or prostitution” that later turns to drug use and addiction as they live in the streets, which leads to further lawbreaking to support their habits. Their disinterest in education, low-paid or unskilled jobs, and pregnancies force them to turn to either welfare or illegal activity in order to support themselves. Their lawbreaking is often supported by relationships with men also involved in crime; they spend their time in the “revolving criminal justice door” between incarceration and the streets.<sup>50</sup> While Daly

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46. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 9-10, 14-18 (2002); Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 980 (1998).

47. ZEHR, *supra* note 46, at 24, 29, 38.

48. *See* Minow, *supra* note 46, at 975.

49. *See* Daly, *supra* note 4, at 13-14.

50. *Id.* at 14; Steffensmeier & Allan, *supra* note 18, at 12, 16 (noting that drug use is “more likely to initiate females into the underworld and criminal subcultures and to connect them to drug-dependent males who use them as crime accomplices or exploit them as ‘old ladies’ to support their addiction”).

lauds the feminist scenario for taking account of realities that previous descriptions of women lawbreakers often did not—e.g., their status as runaways from abusive or strict parents, their use of their bodies as a primary means of support, and the importance of their children—she argues that the origins of women’s crime are still not fully accounted for.<sup>51</sup>

Miller, who studied street women in Milwaukee, corroborates this theme. Her narratives of the lives of street women in Milwaukee portray a complexity that make the most complex academic description of street women seem simplistic and almost dishonest. I describe just one of these stories in depth because such stories almost strain the credulity of the typical reader of a law review article who has been brought up in a much different environment. Sandra, the other woman whose story Miller tells in depth, begins life as a small-town Norwegian American with working class parents, and “ends” at twenty-three with a pregnancy and a prison record. Between the ages of nine and twelve, she tries to “divorce” her parents, runs away from foster care, is expelled and then sent to a school for emotionally disturbed children and later a state mental institution (from which she runs away), and then finally lands in a state institution for delinquents where she learns forgery, shoplifting, and prostitution.<sup>52</sup> In the next four years, she runs away numerous times from both her family home and the correctional institution, and then starts “turning tricks,” drinking, and smoking marijuana at age thirteen.<sup>53</sup> Between the ages of sixteen and eighteen she gets involved with a check forger, runs away from juvenile lockup, and works as a prostitute in Milwaukee and Miami.<sup>54</sup> She also moves in with a heroin user (Al), a pimp who beat one woman prostitute to death.<sup>55</sup> She moves out, but gets into hard drugs, and then meets up with Al again at a party and goes back to him “out of loneliness.”<sup>56</sup> She turns over her life savings of ten thousand dollars to him.<sup>57</sup> From age eighteen to twenty-three, she works at a topless bar, started an escort service with a female partner and four other employees, and gets involved with a new boyfriend who gambles and hustles.<sup>58</sup> She also pimps another woman in Florida to raise money for attorney’s fees for her boyfriend.<sup>59</sup> Additionally, her heavy drug use continues with a subsequent boyfriend,

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51. Daly, *supra* note 4, at 14-15.

52. See MILLER, *supra* note 10, at 44-45.

53. *Id.* at 46.

54. *Id.* at 46-47.

55. *Id.* at 48.

56. *Id.*

57. *Id.*

58. *Id.* at 49-51.

59. *Id.* at 50-51.

which results in her getting arrested for selling drugs to an undercover agent.<sup>60</sup> She then discovers that she is pregnant, but not by her gambler boyfriend whom she still hopes to return to when he gets out of prison.<sup>61</sup>

Within the complexity of Daly's and Miller's stories of women criminals is a steady theme: women's relationality, as much as anything, accounts for their status as criminals, as well as the road they take after entering the criminal system, either re-offending or exiting the system. Eda Tinto reminds us, critically, that women are not "in a relationship," as if the relationship is "separate from the woman and disconnected from her actions and choices as an individual."<sup>62</sup> Rather, as Tinto points out, the relationship itself "influenc[es] and shap[es] the personal choices a woman makes. The relationship, and the choice to be in a relationship, comprise a part of the woman's person."<sup>63</sup> This reality significantly influences how women enter the criminal justice system, and why they keep revolving through its doors.

Daly's research suggests that women often become criminals because they fall into intimate relationships with men who are criminals, while Miller's research implies that women who may be introduced into crime by other women accelerate their levels of criminal behavior when they become attached to men. As intimate partners of men involved in drug activity, women themselves often become drug abusers.<sup>64</sup> More significantly, in the most ordinary ways in which they maintain their relationships, some can become witting or unwitting accomplices in their partners' drug activities. Tinto describes how quasi-fictionary legal doctrines extend the tentacles of the law to embrace women whose chief fault is intimate connection with drug-abusing criminals: women are arrested for "constructive possession" of illegal substances because they live with or are in the company of men who possess drugs.<sup>65</sup> Women engage in what would otherwise be non-criminal activity that is identified as "aiding and abetting," such as accompanying a male intimate to a drug sale, answering the phone or the door in an apartment out of which the intimate sells drugs, or using money that is the product of a drug sale for household needs for the family.<sup>66</sup>

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60. *Id.* at 51.

61. *Id.* at 52.

62. See Tinto, *supra* note 25, at 917.

63. *Id.*

64. *Id.*; see also Steffensmeier & Allan, *supra* note 18, at 12.

65. See Tinto, *supra* note 25, at 922.

66. See Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 977-79 (1993) (noting the difficulty women have dissociating themselves from their partners' crime given its relationship with familial needs).

Miller's research with "hard-core" women criminals suggests that even those women who fully understand that they are engaged in criminal behavior do so at the behest and for the sake of their "man," the person who may alternately pimp, protect, woo, beat, and care for them.<sup>67</sup> Indeed, despite the wide variety of social and economic backgrounds from which these women come, and the varied reasons they give for hustling, when these women were asked why they got involved in particularly dangerous crimes or deviant street behavior, "they were unanimous in saying that it was because of some 'man'."<sup>68</sup> Some women help their boyfriends or husbands engage in such activities in minor ways, such as delivering money or drugs.<sup>69</sup> Tinto notes that women are socialized to "stand by [their] man," and thus provide assistance both as men commit crime and as they attempt to avoid being caught for it.<sup>70</sup> Women may also be sent out to engage in crime by men who perceive that their "marks" are more likely to fall for a woman.<sup>71</sup> Women may be fronts for men whose previous contacts with the law have made future criminal activity (and its accompanying higher punishment) too risky, so they initiate new young women into increasingly serious crimes.<sup>72</sup>

Similarly, as Chris's case suggests, women may become criminals because of their failure to act in the face of a husband's or a lover's criminal activity. Particularly in cases involving their children or others for whom they have legal responsibility, women's failure to stop male intimates from physically or sexually abusing others may result in criminal charges.<sup>73</sup> Moreover, their failure to turn intimates into the police for criminal behavior they know is occurring may result in charges against them that police utilize to coerce testimony against those intimates.<sup>74</sup>

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and activities); Tinto, *supra* note 25, at 924-25.

67. See MILLER, *supra* note 10, at 37-38, 40-42.

68. See *id.* at 162; Steffensmeier & Allen, *supra* note 18, at 16.

69. See Tinto, *supra* note 25, at 927.

70. *Id.* at 932-34.

71. For example, Miller describes the experience of one young woman, whose brother lured her into check forgery when he saw that she unflinchingly obeyed his request to cash a bad check. MILLER, *supra* note 10, at 79-80.

72. *Id.* at 178.

73. See, e.g., Jeanne A. Fugate, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 274, 279 (2001) (noting that caretakers charged with failure to protect their children are almost exclusively female, whether they are the children's mothers or not, because society has higher expectations that they will perform their "maternal role" in shielding the children from both male intimates and others).

74. See, e.g., Steffensmeier & Allen, *supra* note 18, at 11 (arguing that women are arrested more often because law enforcement can then get incriminating evidence against their associated male offenders, particularly for "male" crimes such as burglary, robbery, fencing stolen property, and drug dealing).

Unfortunately, descriptions of women offenders can too easily simplify the ways in which women are in relationships with male intimates, portraying them as passive victims or resistant abuse survivors only. Tinto notes that “women offenders are often victims of crime at the same time that they choose to commit a crime.”<sup>75</sup> This paradox abstracts a complex relationship that women who are intimates with male criminals may experience, a Janus with many faces.

One face of these relationships is psychological, evidencing the work of psychologists like Gilligan who have made us aware that women fear separation and isolation, and that part of their security is the preservation of relationships with others.<sup>76</sup> Sandra returns to a pimp, thief, and killer because she is lonely.<sup>77</sup> Even women who are proud of their ability to hustle on the streets without being taken advantage of perceive that these skills are primarily “something for a woman ‘to fall back on’ when she was without a man to take care of her.”<sup>78</sup> Women may assist offenders in order to please them and thus protect a loving relationship that they perceive as necessary to their own survival and meaning as a person, as Chris’s case suggests.

A second face of such relationships is social: in staying with and assisting criminal intimates who shelter these women and their children, women offenders may be attempting to model their relationships according to the socially desirable expectation of a family with both father and mother, with father at the head. Miller reports, “[i]t is common for a ‘man’ who wants a woman to work for him to buy presents for her children, to support them, and to participate to some extent in their care.”<sup>79</sup> Indeed, men often use the women’s children to renew contact with a woman who has deserted them for abuse or failure to stand by her.<sup>80</sup>

A third face of these relationships may be purely pragmatic: lacking employment skills, women in relationships with criminal males may rightly perceive that they need the economic and social support of the offending

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75. See Tinto, *supra* note 25, at 920.

76. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 42-43 (1982); Carol Gilligan, *Hearing the Difference: Theorizing Connection*, 10 *HYPATIA* 120, 124 (1995) [hereinafter Gilligan, *Hearing*] (noting the paradox that as women become care ethicists, they silence themselves with others, give up relationships to have relationships, and then feel stranded in their isolation).

77. See MILLER, *supra* note 10, at 48.

78. *Id.* at 166.

79. *Id.* at 124.

80. *Id.* For example, men may contact their former lovers to tell them that a child who is living with the mother’s relative is sick or has had an accident. See Tinto, *supra* note 25, at 919 (noting that women may try to keep their families together rather than abandon a relationship with a criminal father of their children).

male to survive. Miller suggests that this is particularly true for women without children, or whose children have been taken from them, because of the unavailability of all aid but perhaps general assistance.<sup>81</sup> As a result, she reports, these women “become completely vulnerable to the ‘men’ who control the streets and/or to their drug habits.”<sup>82</sup>

A fourth face of these relationships is similarly survivalist, but at a much more basic level: women offenders often correctly believe that their choice to leave the offender or refuse to do his bidding will result in substantial physical violence, or in the case of addicted offenders, that their choice will result in being cut off from the supplies that seem their lifeline.<sup>83</sup>

Similarly, the relationships between women offenders and their children are more complex than most of these accounts indicate. Different studies describe several different relational aspects of offender mother-child relationships. For example, some studies note that women offenders frequently take out the rage that they have suppressed from their own childhood experiences on their children, or neglect or abandon their children as they descend into the hopeless vortex of drugs and crime.<sup>84</sup>

Others, as suggested, choose to emphasize the pragmatic choices of women offenders, whether with or apart from male intimates, who follow mothering instincts into economic criminal activity to ensure the survival of their children.<sup>85</sup> Still others describe the high motivation that women offenders have to get off drugs during pregnancy in order to protect their fetuses,<sup>86</sup> and others the strong desire of many mothers not to have their children follow them into crime.<sup>87</sup> Miller, for example, notes the chill one street hustler experiences when she sees her daughter con relatives into buying her a forty-seven dollar gold necklace.<sup>88</sup> Or they may note the lower chance of recidivism experienced by women who are allowed to

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81. See MILLER, *supra* note 10, at 123; see also Steffensmeier & Allen, *supra* note 18, at 16 (noting that “‘doing crime for one’s kids or family’ plays a greater role in female than male offending,” suggesting that women’s risk-taking is “more protective of relationships and emotional commitments”).

82. See MILLER, *supra* note 10, at 123.

83. See Tinto, *supra* note 25, at 919.

84. See MILLER, *supra* note 10, at 101, 123; see also ZEHR, *supra* note 46, at 31-32.

85. See MILLER, *supra* note 10, at 123; Steffensmeier & Allen, *supra* note 18, at 11.

86. See Mary E. Roper, *Reaching the Babies Through the Mothers: The Effects of Prosecution on Pregnant Substance Abusers*, 16 LAW & PSYCHOL. REV. 171, 177 (2001) (noting that drug addicts’ guilt over their abuse is exacerbated during pregnancy, and they have a strong desire to be drug-free, but have a difficult time breaking their dependency).

87. See MILLER, *supra* note 10, at 124 (noting, however, that drug dealers will use children as “fronts” by secreting drugs or stolen items in baby clothes, diaper bags, or buggies).

88. See MILLER, *supra* note 10, at 166.

keep strong relationships with their children, who are their emotional lifeline. It seems unclear whether women's motivation not to recidivate comes because they fear the loss of their children, who are their personal sources of meaning, or because they are determined to give their children a better life than the one they are forced into because of their mother's incarceration.

Nevertheless, these more obvious ways in which women's relationality is critical to their involvement in crime as well as their prospects for rehabilitation obscure the less obvious. Articles on women's criminality recite the highly disproportionate incidence of childhood physical, sexual, and emotional abuse that is found among female offenders, and the commonplace experience that they are abandoned by their husbands and the fathers of their children.<sup>89</sup> The articles note the resulting higher incidence of mental illness, drug addiction, and unemployment among female offenders as compared to male offenders.<sup>90</sup>

Such recitations appear to treat these abusive relationships as ancient history which has left its deposit of damage on the woman offender's psyche that needs therapy, much like a car accident that has crippled a victim. In fact, women's complex responses to these experiences of abuse suggest quite a different reality, as they range from the violent way in which Latasha lashes out at others, to the passivity Chris shows when she knows her vulnerable children are being severely abused.

These stories suggest that these women offenders continue to be in an actual relationship with their abusers or abandoners long after the abuse or abandonment has occurred, and long after the one who has harmed them has left the scene, even in cases where they may have seemingly "replaced" their abusers with other male intimates. Covington explains that most women offenders are "trauma survivors," having suffered or witnessed violence or stigmatization because of their failure to conform to social expectations of them.<sup>91</sup> Their abuse at the hands of these men is not ancient history which they have left behind, nor is it damage to be bandaged. When they are medicating themselves with drugs and alcohol, they are doing so to escape the daily reality of the confrontation with their abusers that they re-experience repeatedly. When they lash out at others, their children, or their victims, they are lashing out at those others as surrogates for the abusers they wish they could fight back against. They

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89. See Covington, *supra* note 35, at 121-22.

90. See Raeder, *supra* note 19, at 381; Steffensmeier & Allen, *supra* note 18, at 16 (noting that women offenders have higher incidences of childhood or adult abuse, and have more records of biological and psychological abnormalities than men).

91. See Covington, *supra* note 35, at 126.

rehearse old events, even if they are now in the role of perpetrators rather than victims. It is important to recognize that women offenders, not unlike many other women in distress, maintain their emotional relationships long after they have no contact in the physical world with those with whom they continue to be in relationships.

Most contemporary studies of women offenders acknowledge that there is not one simple description of women offenders—they run the gamut from calculating, violent aggressions to passive victims.<sup>92</sup> In reality, rarely do these studies describe women offenders as complex human beings who continue to be in relationships, and act out of relationship, with the many others who have influenced their life stories. Nor do these stories fully suggest how women offenders may be simultaneously motivated by conflicting sets of emotions and values that cannot be reduced to the archetypes of a woman as a victim, a woman as a calculating criminal, a woman as a violent gang girl, or a woman as an irresponsible mother.<sup>93</sup>

Any successful correctional model must be built on a relational understanding of women offenders that accounts for the paradoxical and complex nature of any particular woman offender's emotions, perceptions, and behavior, and is made even more complicated by the specific experiences of women in specific communities with their own unique strengths and pathologies. It must make a difference, in any criminal system purporting to, minimally, prevent recidivism, that American Indian women offenders have a higher incidence of childhood abuse and alcohol-related offenses, while Hispanic offenders are often identified by the system as "ultra-feminine," and Caucasian female drug offenders are often ignored.<sup>94</sup> It must make a difference that African American poverty-class women are often introduced to street life because their extended family networks interlink with deviant street networks.<sup>95</sup>

Such a system must also acknowledge by its complexities that women are simultaneously victims and perpetrators, self-involved and altruistic, foolish and canny about the effects of their decisions on others, as well as being simultaneously oblivious to their moral agency and constantly aware

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92. See FLOWERS, *supra* note 18, at 133-44. Flowers claims that women who assist their spouses in raping others make up the majority of terrorists in the United States, and that these rape abettors "surpass their counterparts in viciousness and cruelty." *Id.* He further suggests that women gang members are more likely to fight other gang women than the average person. *Id.* Moreover, he believes that women con artists are often morally blameworthy, finding excitement in the "con" game, or carrying out crime in response to an "abrasive family relationship." *Id.*

93. See Snider, *supra* note 25, at 367-68.

94. See Ward, *supra* note 20, at 740, 741, 743.

95. See MILLER, *supra* note 10, at 74.

that their actions provoke reactions. At the same time, such a system cannot promise to provide the resources necessary to ensure full social, emotional, and economic healing to women in the corrections system. Even if there were the political will to provide a full panoply of services to every woman in the corrections system, the prospects that such services could largely eradicate unhealthy and abusive relationships are daunting. The question then remains: how should a corrections system that is bound to produce very imperfect results as it works with someone whose life is as complex as Sandra's, understand the relationship of these women offenders, victims, and the community in these cases?

## II. MOVING FROM TRADITIONAL CORRECTIONS THEMES TO AN ETHICAL APPROACH

Four criminological themes appear to have dominated the discourse over appropriate corrections responses to women offenders over the past thirty years. The first, the liberal theme, which seeks formal equality between men and women in sentencing and/or treatment for similar convictions as a symbolic gesture of the social equality of men and women in society generally, seems to be roundly regarded as a failure by those who write about women's correctional issues in this century.<sup>96</sup> As previously suggested, some have placed the failure of these programs at the feet of formal inequality in the provision of treatment and opportunities provided to male and female inmates. As suggested earlier, "separate" treatment for women has only produced "unequal" treatment in terms of the variety and quality of correctional services offered to women, from job skill and re-orientation programs, to counseling and medical services, whether measured by formal or actual equality standards.<sup>97</sup> Second, the actual inequality which has resulted from treating female prisoners according to a male model has contributed to a failure of the system to show positive gains, both in taking in women into corrections systems and in sending them out successfully. Medical services that do not take into consideration women's different medical needs arising from their different biological makeup, or counseling and social services that do not account for women's different roles in their children's lives, would seem to make failure certain.<sup>98</sup>

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96. See FLOWERS, *supra* note 18, at 162 (noting how inadequate prison conditions call for reform); Shearer, *supra* note 36, at 47; see also Wald, *supra* note 25, at 14–15.

97. See *supra* notes 35–37 and accompanying text.

98. See, e.g., Snider, *supra* note 25, at 365 (noting the failure of male systems to show any economic, educational, or social advantage for women, and their preference for benefits to males and the corrections system).

Three other themes currently compete for attention in real-life corrections proposals. I use the term “theme” rather than “model” to underscore the fact that in most discussions of women’s corrections, these agendas function like musical themes that predominate in a symphonic piece rather than closed models that try to explain everything about women offenders through the model and exclude other explanations. Many who focus on one of these themes acknowledge the importance of systemic approaches, and would be quick to acknowledge that in the ideal world, the full range of concerns expressed by all of these themes should be met by any successful corrections system.<sup>99</sup> They would, perhaps, argue that attention to their “theme” brings one closer to the “truth” of offenders’ reality, or it is more likely to score success in preventing recidivism or returning women offenders to mainstream society, or at least more likely to be practically successful, given financial and other constraints on corrections systems

One theme, described by Professor Snider, suggests that power relationships and gender are mutually constructing and reinforcing in the corrections system. This theme would explain much about the nature of corrections failures. Snider cites Bosworth’s study of confined women inmates who resisted threats to “identity and self-esteem” and “demoralizing [and] degrading prison-issue concepts of themselves, their motivation and their offence” by defining themselves “through their spirituality, sexual orientation, race, class, education or even . . . as a mother . . . .”<sup>100</sup> Under this theme, then, the key relational dynamic in corrections is power, and the creation of over-and-under relationships between the corrections system, the officials within it, and the inmates.<sup>101</sup> The chief goal of any successful corrections system is to encourage and engender the ability of women to resist any further destruction of women’s self-concept.<sup>102</sup>

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99. See Ruth T. Zaplin, *Female Offenders: A Systems Perspective*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 65 (Ruth T. Zaplin ed., 1998); see also Susan Baugh et al., *Mental Health Issues, Treatment and the Female Offender*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 223 (Ruth T. Zaplin ed., 1998) (arguing that community-based programs that offer supervision and mental health treatment offer better possibilities for rehabilitation than incarceration in part because women in community-based programs are able to maintain their connections with their children).

100. See Snider, *supra* note 25, at 366.

101. Joyce Dougherty, *Female Offenders and Childhood Maltreatment: Understanding the Connections*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 150-52 (Ruth T. Zaplin, ed., 1998); Snider, *supra* note 25, at 366 (discussing disciplinary control strategies of even feminist reform movements).

102. See Snider, *supra* note 25, at 371.

A second corrections theme might be coined a traditional psychotherapeutic or medical theme. In this theme, as suggested earlier, the woman offender is perceived to be suffering from a mental or emotional disability—post-traumatic stress in the eyes of one author<sup>103</sup>—and to be acting criminally out of her illness or disability. That disability is often described as lack of self-esteem or self-worth,<sup>104</sup> but it may also refer to the offender’s emotional or physical violence enacted on others or the self in suicidal attempts, which is considered primarily a mark of the offender’s illness or disability.<sup>105</sup> Consistent with the medical theme, its advocates suggest that if appropriate treatment is offered, just as with treatment of a physical disability, the offender should either be able to eradicate an emotional or psychological illness,<sup>106</sup> or learn how to live an effective and full life with an emotional prosthesis just as an amputee can resume his life with a physical one. For example, Dougherty argues that creation of healthy relationships with others may require breaking down emotional barriers of female offenders, exploring their “developmental environments,” including childhood abuse histories, and then working with them on recovery from childhood traumas.<sup>107</sup>

A third theme is built primarily around a skills/services approach. Pursuing this theme, advocates suggest that the primary problem that women offenders face is that they are not equipped to live self-sufficient

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103. See Baugh et al., *supra* note 99, at 217-18 (noting Teplin’s study which showed that one of three female offenders probably suffers from post-traumatic stress disorder (PTSD), resulting in flashbacks, nightmares, and sudden emotions, avoiding close ties, anxiety, and other symptoms); Covington, *supra* note 35, at 113.

104. See, e.g., Bernard Weitzman, *The Treatment of Female Offenders: Individual Psychotherapy in Systems-Theory Perspective*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 171-77 (Ruth T. Zaplin ed., 1998) (arguing that working with a woman’s negative self-regard is the most important contribution that psychotherapy can make to the treatment of women offenders).

105. See Dougherty, *supra* note 101, at 240-41 (discussing women criminals’ normalization of childhood maltreatment).

106. For examples of the use of therapeutic models of criminal behavior, see *id.* at 236-37, 242 (discussing the need for women criminals to break down their emotional walls and give up their maladaptive behaviors such as interpersonal violence); see also Conrad G. Brunk, *Restorative Justice and the Philosophical Theories of Criminal Punishment*, in THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE 42 (Michael L. Hadley ed., 2001) (arguing that in the “therapeutic state,” crime is “a deviant behavior stemming from an illness suffered by the offender [patient or victim or both], the offender’s family, or the offender’s society,” for which the offender/patient is not responsible.). But see Weitzman, *supra* note 104, at 166-67 (challenging the traditional psychotherapy paradigm as applicable for women criminals). Snider, *supra* note 25, at 364 (noting the “pathologizing, individualizing, and disempowering” effects of the “offender-as-victim” paradigm).

107. See Covington, *supra* note 35, at 126-28; Dougherty, *supra* note 101, at 242.

lives in the real world without resorting to crime.<sup>108</sup> Advocates suggest that women offenders cannot fit within the economic, social, and political structures that law-abiding citizens can because of deficits in their skills and circumstances.<sup>109</sup> Women offenders do not have the education or skills to achieve gainful employment, and as a result, some who focus on a skills/service approach concentrate on providing education and employment services, though in many programs it is difficult to get beyond traditional women's vocations.<sup>110</sup> Similarly, any dysfunction in women offenders' relationships with their children may be deemed a skills deficit, which parenting classes and mentoring can significantly alleviate, if not completely resolve.<sup>111</sup> Even psychologically related problems, such as substance abuse which is essentially self-medication of women's traumatic response to earlier abuse, are treated somewhat technically: unlike the psychotherapy theme, which seeks to overcome the psychological trauma like an illness, the skills/services theme attempts to equip women with the skills they need to cope with self-esteem and other psychological issues, so that they can function competently in non-criminal society.

In all three of these themes, the woman functions as a subject, but only at best as a resisting subject. In the power/resistance model, the discourse is focused on a woman's identity as a creature responding to the impersonal forces of correctional control around her. In that sense, she is the object of other forces, the harsh impersonality of the corrections system that has her in its power, or even the direct abusive actions of those who wield power to rape, physically abuse, demean, or diminish her. To the extent she is a subject, she is only a respondent—she retains an identity not by acting as an agent, but by resisting the actions of the agent/system or agent/officer

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108. See, e.g., Zaplin, *supra* note 99, at 67-68; Zaplin & Dougherty, *Programs that Work: Working with Prostitutes*, in *FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS* 340-44 (Ruth T. Zaplin, ed., 1998) (describing parenting, emotional management, and basic life skills needed for offenders to become "self-reliant and self-supporting individuals"). Raeder, *supra* note 66, at 910-13 (discussing the increase in female crime due to economic marginalization); see also Steffensmeier & Allan, *supra* note 18, at 10-11, 44 (discussing how patriarchy pushes women into crimes through victimization, role entrapment, economic marginalization and vulnerability).

109. See Zaplin, *supra* note 99, at 68.

110. See FLOWERS, *supra* note 18, at 157 (noting that virtually all of women's vocational training programs are in traditional women's positions such as sewing, clerical skills, food services, and cosmetology).

111. For an example of a rehabilitative model that focuses on the lack of skills of offenders, see Zaplin & Dougherty, *supra* note 108, at 336-37, 340-44 (describing court-mandated reunification services that include parent education, planned contact, and other obligations, and a three-phase program focused on parenting classes, parent support groups, and work with offenders in "emotional management, identifying individual deficits, and learning stress management strategies").

through identity-preserving strategies.

In arguments stressing the psychotherapeutic theme, the focus of the corrections system can largely focus on reorganizing and re-fitting the disarrayed internal workings of the offender's mind. By rehearsing and naming her abuse before a trained professional, and by attempting to release the grip that an abuser continues to hold upon her, the offender is again a subject, but the focus of the psychological model is almost exclusively upon her own subjectivity.<sup>112</sup> Or, to the extent that focus is interpersonal, the women offender is a reacting subject, who is seeking to assert herself in resistance against those who have made her a victim. Where in the previous model she was a survivor of abusive power, here she is a survivor of disability. And, once more, the goal is to make her a subject whose actions in seeking a cure are focused upon, and will largely benefit herself, her own well-being, her own peace of mind, and her own autonomy, albeit with important side effects for her children and others with whom she will have relationships in the future.

For advocates stressing the services theme, the offender is a subject reformulating her self-concept and her abilities in a way that will enlarge her horizon of opportunities when she leaves the correctional system. As a subject, the offender is expanding her capabilities in a way that makes her more flexible and powerful as a subject acting upon the outside world. She is adding to the skills, expertise, and competencies she has to integrate herself into the social, political, and economic institutions which formerly had no place for her, and left her to survive through dependence upon a male intimate.

Many arguments for correctional reform, of course, do not only focus upon women offenders' needs. They also account for the needs of the children those offenders leave behind. Thus, for example, recent model corrections programs have provided cottage-like correctional facilities that enable mothers to live with their children during periods of confinement, or advocate more home confinement and community corrections options for women who are mothers.<sup>113</sup> Yet, beyond touting the positive effects of the interaction of women and children on each other, these models do not fully flesh out what it means for women offenders to be conceived of as agents and not just subjects.

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112. *But see* Weitzman, *supra* note 104, at 166-67 (arguing that systems theory practitioners who have criticized traditional therapies for focusing on the causal structure of individuals' mental life instead of the dysfunctional patterns that individuals in the system co-create, do not give enough credit to individually oriented psychotherapists for noticing systemic concerns).

113. *See* Raeder, *supra* note 19, at 378-79 (noting the lack of funds for such programs).

I would suggest that a corrections policy that predominantly understood the corrections process as a system of ethical interaction would better capture the complexity of many women offenders' experience as primarily relational human beings, and has the best hope of helping women not only to understand, but to act out their moral agency. I believe that restorative justice has the best chance, of the currently available corrections responses, to reflect an ethical perspective in its response to offenders.

### III. MOVING TO WOMEN AS AGENTS: THE ETHICS OF CARE AND WOMEN'S RESPONSIBILITY

It is not surprising that, in systems which have a great stake in demonstrating success in changing lives, the complexity of human experience and human interactions is likely to be simplified or elided. As in any experiment, if too many variables exist, it is difficult to show how an impact on one of them causes a real change in result. Nonetheless, focusing on the need for provable and replicable results in corrections is likely neither to produce replicable results, nor to portray a real social picture of how women experience their world in relation to the others with whom they have interacted and continue to interact.

Moreover, to promise results that are not realistically obtainable because of average human limitations and the incorrigibility of human evil can result in a public attitude of defeat about the system. Indeed, the almost complete rejection of the rehabilitation model among "average folks" would appear to stem more from reformers' rosy and overzealous promising of results to the public than from any evidence that it is less effective than retributive systems at making safer communities.<sup>114</sup> Public resignation to the belief that no utilitarian corrections approaches are viable will inevitably rebound to focus exclusively on retributive or incapacitation theories, which do not require any evidence of "outputs."<sup>115</sup> Such a reaction to the failure of over-promising systems is not only costly in terms of the more frequent and lengthier sentences that must be meted out to

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114. See Frank B. W. Hawkinshire, *Social Treatment: A Multiphased Event*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 83, 86, 89 (Ruth T. Zaplin, ed., 1998) (noting that neither side in the rehabilitation controversy has proven its case).

115. Retribution focuses on just punishment for past behavior, not prediction of what the offender will do in the future. See, e.g., ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 8, 10 (1975). Incapacitation certainly protects society from possible future crimes, but it is not based on some prediction about who is in fact likely to commit a crime. See *id.* at 51-52 (noting that since most criminals do not commit crimes in prison, incapacitation prevents the commission of crimes but that many incarcerated people are not likely to re-offend).

restore a just balance between victim and offender or to ensure (again, in a foolproof way) that no likely offenders are on the streets, resulting in more cries for new prison beds and corrections staff. It is also costly in terms of lost social and economic opportunities for those who will not recidivate but are over-incarcerated because they cannot be distinguished from likely recidivists.<sup>116</sup>

Indeed, as shocking as it may seem to pure retributivists, over-incarceration is costly even in the case of those who commit minor crimes, the cost of which is outweighed by the benefits of their remaining free.<sup>117</sup> For example, only those who are purists on the symbolic weight that unpunished crime visits upon the community could fail to appreciate that it might make more sense not to incarcerate a working mother, who supports her children by occasionally underestimating her employment income to her caseworker (the crime of welfare fraud). If viewed only from an economic perspective, the amount of money the government “loses” by not offsetting her extra employment income against her welfare check would be vastly outweighed by the cost of incarcerating her and putting her children into the foster care system.<sup>118</sup> And, such a simplistic cost-benefit analysis would not take into account the intangible benefits her children and family members gain by her care and support for them.<sup>119</sup>

There is a way out of this dilemma that avoids the false promises of utilitarian theories, while offering ways in which the corrections system can respond to the realities of offenders’ lives, instantiating social values about criminal activity. That is to begin to treat the woman offender in the

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116. See, e.g., John J. Donahue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. OF LEGAL STUD. 1, 40 (1998) (noting that prison is likely to lower future productivity and increase psychological stress for prisoners and their families); John Hagan & Ronitz Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities and Prisoners*, 26 CRIME & JUST. 146 (1999) (describing the numerous social and psychological costs of imprisonment on families).

117. For example, it would be cheaper for the state to repay a bank that lost \$10,000 to an employee-embezzler, than to spend the money to incarcerate the embezzler for a year. See *infra* note 118.

118. See Donahue & Siegelman, *supra* note 116, at 4-6 (suggesting that the cost of incarceration is about \$36,000 per inmate plus \$19,554 to provide welfare, food stamps, and medical benefits to her child). While that cost that might still be incurred by society if the custodial parent was not in prison, but on public assistance, if the parent is economically self-sufficient before prison, the cost of imprisonment of a mother with one child would rise to over \$55,000 on these calculations. *Id.*

119. See Raeder, *supra* note 19, at 378-79. Raeder describes a demonstration project that housed offenders and their children under seven in residential facilities outside a prison which permitted a stable environment for the children. *Id.* Non-abusive, non-violent offenders facing prison terms under seven years who were primary caretakers were eligible. *Id.*

literature not simply as either an object of corrections programs or as only a subject to be empowered, or as a person to be made healthy or skilled. It is, instead, to treat women offenders as moral agents, who are in responsive relationships to others, both past and present. In fact, I expect that many “line” corrections professionals who work with women do treat them as agents, rather than objects or subjects. But, the systemic obsession for provable results bears the risk not only of clouding their perspective about what their relationship to their clients’ agency means, but can also leave them with a persistent and unwarranted sense of failure because the results promised by the three other themes, and demanded by politicians and the public, have not been fully obtained.

To treat a woman offender as an agent is to treat her as someone who is accountable for her actions upon others, as well as a person who is shaped by action of others upon her, actions both past and present, actions both verbal and physical. As I have suggested, it is to treat her through the rubric of ethics rather than psychology, medicine, or as a cog that needs to be fit into a social system. To use theologian H. Richard Niebuhr’s language, it is to treat the woman offender as a responsible self.<sup>120</sup> Niebuhr argued that being a responsible self has four dimensions: first, the agent proposes to respond to action upon herself; second, she interprets the action upon her prior to responding or the question she is expected to answer; asking, “What is going on? What is being done to me? What is my end? or What is my ultimate law?”<sup>121</sup> Third, the agent is accountable, or in Niebuhr’s words, she expects that someone else will answer her answers, or evaluate her response.<sup>122</sup> Niebuhr argues that an agent’s action is like a statement in a dialogue. Such a statement not only seeks to meet, as it were, or fit into, the previous statement to which it is an answer, but is made in anticipation of reply. It looks forward as well as backward; it anticipates objections, confirmations, and corrections. It is made as part of a total conversation that leads forward and is to have meaning as a whole.<sup>123</sup> That conversation may be action or it may be words, but the dynamic is the same. Finally, Niebuhr argues that our action is “responsible” when it “is response to action upon us in a continuing discourse or interaction among beings forming a continuing society,”<sup>124</sup> and when it recognizes both continuity in the self and continuity in the

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120. H. RICHARD NIEBUHR, *THE RESPONSIBLE SELF: AN ESSAY IN CHRISTIAN MORAL PHILOSOPHY* 6-7 (1963).

121. *Id.* at 63.

122. *Id.* at 64.

123. *Id.*

124. *Id.* at 65.

community of other agents to which the individual is responding.

This dialogical way of understanding human agency may not immediately seem relevant to the systemic problems of dealing with an average woman offender. Carol Gilligan, and others who have posed a “different voice” in which women imagine their lives, suggest how a woman’s strong sense of relationality can be both a positive and limiting force in her ability to confront critical ethical issues like deciding whether to commit a crime.<sup>125</sup>

The usual caveat applies, of course: we must be mindful of the danger of “essentializing” this “different voice”—e.g., by suggesting that women function with an ethics of care and men function with an ethics of rights, a claim which has proven both incorrect and potentially perverse.<sup>126</sup> Later studies have shown a decided skew among women toward a care ethics approach, and among men toward a rights ethics approach, but large numbers of men and women do not operate according to their own gender’s typing, and even switch approaches depending on the problem they are presented with.<sup>127</sup> But that reality speaks more to the need for corrections systems to understand how individual offenders think about moral problems than to ignore the “different voice” of many women offenders in the system. If we speak as if “women do X” and “men believe Y,” we may include women who do not operate from this perspective in a system that is unresponsive to their ethical analysis, and may exclude men who are primarily “care ethicists.” However, there are also dangers in ignoring such differences altogether because of the fear of essentialism. To construct a corrections system based on the assumptions of an “ethics of rights” would similarly be to ignore the reality of many women offenders’ lives in a way that might make corrections programs futile where they are concerned.<sup>128</sup> The reader will, perhaps, thus forgive my use of the general language of “women” and “women offenders,” if she can keep in mind that per these criticisms, I am referring to some significant subset of the larger class of women offenders.

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125. See Gilligan, *Hearing*, *supra* note 76, at 120; William C. Spohn, *Conscience and Moral Development*, 6 THEOLOGICAL STUD. 122,128-29 (2000).

126. See Gilligan, *Hearing*, *supra* note 76, at 2-3 (noting that such an ethic is not essentially associated with women but that women are ones who voice these realities); Spohn, *supra* note 125, at 128-29 (arguing that justice and care do not exhaust the moral considerations that most people utilize, and noting that social setting and relationship may affect “care ethics”).

127. See Gilligan, *Hearing*, *supra* note 76, at 6.

128. See Naomi R. Cahn, *Speaking Differences: The Rules and Relationships of Litigants’ Discourses*, 90 MICH. L. REV. 1705, 1716 (1992) (suggesting that litigants’ use of a relational style disadvantages them in a rule-oriented legal culture).

A woman's instinct of caring for others in relationships certainly is positive in many respects. It is critical in maintaining social bonds that permit family units and other human relations that are so necessary for human life to continue. Indeed, to the extent that crime is about human relationships gone astray in some profound way, in which—at least in many crimes—one person deeply injures another in ways that have lifelong reverberations, women's unthinking relationality may pose a real opportunity. Some studies have suggested that men committing some of the most serious offenses, such as rape, simply "have no clue" about the nature of the harm they inflict on victims.<sup>129</sup> If Gilligan and others are right, that should not be a surprise. A "rights ethicist" matures through separation and individuation, resulting in a "search for autonomy, the wish to gain control over the sources and objects of pleasure, in order to shore up the possibilities for happiness against the risk of disappointment and loss."<sup>130</sup> The rights ethicist thus begins with "his responsibility to himself, a responsibility that he takes for granted, [and] then considers the extent to which he is responsible to others as well . . . recognizing that 'you have to live with other people'" which requires him to seek "rules to limit interference and thus to minimize hurt."<sup>131</sup>

An unmatured rights ethicist whose concrete imagination of the world begins and almost ends with himself—that is, a person who operates on the world from the perspective of his own needs and desires and has little natural empathetic connection to the needs of others—would not be expected to fully grasp, except perhaps in the abstract way, how profoundly he violates another when he sexually harasses, assaults, or rapes her, for example. It should not be a big surprise when a concrete desire to subdue or overpower or take from another prevails over an abstract recognition that such behavior is morally wrong. By contrast, a "care ethicist" who is instinctively tuned to others' feelings and actions as much as, or even more than, her own, is part of the way to recognizing the nature of the harm she has caused another in crime.

Yet, a care ethics "psychology" also has its limitations, and never so much as when care ethicists are in early stages of moral development. Gilligan's original description of the three stages of women's moral

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129. See, e.g., Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 866, 888 (2002); see also Brandi Stellings, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185, 205 (1993) (describing Ellen Scarry's argument that women's experience of rape is unimaginable to men).

130. See Gilligan, *supra* note 76, at 8, 46.

131. *Id.* at 37.

decision-making on a similar issue—the question whether to have an abortion—fits the self-reports of the women offenders in Miller’s book. Following Kohlberg, Gilligan notes that in a child’s pre-conventional morality, “judgment is egocentric and derives moral constructs from individual needs,” with an “initial focus on caring for the self in order to ensure survival.”<sup>132</sup> In these earliest moral stages, “the self, which is the sole object of concern, is constrained by a lack of power that stems from feeling disconnected and thus, in effect, all alone. The wish ‘to do a lot of things’ is constantly belied by the limitations of what has in fact been done.”<sup>133</sup> Morality is simply a matter of sanctions imposed by society.<sup>134</sup>

More mature womens’ conventional judgment constructs moral problems as problems “of care and responsibility in relationships . . . relationships . . . of obligation to exercise care and avoid hurt. The inflicting of hurt is considered selfish and immoral in its reflection of unconcern, while the expression of care is seen as the fulfillment of moral responsibility.”<sup>135</sup> “[The fusion of this concept] with a maternal morality that seeks to ensure care for the dependent and unequal characterizes the second perspective.”<sup>136</sup> But in the conventional stage, a woman’s conflict between altruism and the needs of the self can result in her seeking to avoid responsibility for choices she has made, isolating herself to avoid hurt, or working on the pretense that she is not an agent.<sup>137</sup>

Miller’s street women, many of whom are just moving into physical adulthood, describe their relationships with the men and children in their lives in a way that hovers between pre-conventional and conventional morality of the “care ethics” type. On one hand, when street women ask why they hustle, they report that they do it for the excitement or the money, suggesting a focus on their own immediate needs. Many suggest that they continue in the relationships they have, or continue in their life of crime in order to meet their survival needs.<sup>138</sup> Like pre-conventional moralists, street women cut themselves off from others to avoid hurt: they distrust women even more than the individual men who inhabit their lives, imagining them as “jealous, gossipy troublemakers” who are natural enemies in the conflict over men, who utilize these conflicts to control

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132. *Id.* at 73-74.

133. *Id.* at 75.

134. *Id.* at 79.

135. *Id.* at 73.

136. *Id.* at 74.

137. *Id.* at 81-82.

138. See Tinto, *supra* note 11 at 919 n.59.

women.<sup>139</sup>

Still others mimic the pre-conventional pattern of failure to take responsibility, noting that they were involved in crime because of a man, or because they are “innately evil, controlled by something beyond themselves.”<sup>140</sup> As Georgia says, “A person’d have to be possessed [to do what I have done.] Deep down inside I believe I have a problem. I’m beyond the point where anybody can reach me. I’m a money fanatic.”<sup>141</sup> While acknowledging that their crime in principle merited punishment, such women were also quick to object to inequities in the criminal justice system, including its failure to overlook their crimes in some circumstances.<sup>142</sup> Anita says,

There’s people out there that hurt children . . . that get teenagers hooked on drugs and shit. They’re out there on the streets. And they take me [for armed robbery.] I made one mistake, now, since I been grown, all of them other things was from the time I was fifteen up to seventeen . . . this here is the only case I done since I been grown, and they took my freedom away from me . . . Why me?<sup>143</sup>

Some of these women suggested that the moral imbalance in the system meant that they were “owed” some illegal acts without punishment.”<sup>144</sup>

On the other hand, in both words and actions, street women suggest that their needs for attachment, and their focus on the needs and desires of their “man” and their children, play heavily in their moral decision-making processes. Most women aspire to raise their children in comfort and away from the street with a man who will “be faithful to them and care for them.”<sup>145</sup> They do not involve their children in their work, except as unwitting “fronts,” and often cite their children’s needs as a motivation to hustle over straight work that does not sustain their families.<sup>146</sup> And, as suggested, most are clear that they do not want their children assuming street life.<sup>147</sup> Yet, Miller notes the “catch 22” that makes it difficult for women to stop criminal behavior: “[o]n the one hand, children are a moral

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139. MILLER, *supra* note 10, at 160.

140. *Id.* at 162.

141. *Id.* at 163.

142. *Id.* at 167.

143. *Id.* at 168.

144. *Id.* (internal quotations omitted).

145. *Id.* at 155.

146. *Id.* at 124-25.

147. *Id.* at 124.

force militating against involvement in street life, while, on the other, they are responsibilities that promote it and sometimes physical links to ‘men’ involved in it.”<sup>148</sup> The sort of efforts women will go to on behalf of their “man” are illustrated over and over again in Miller’s narratives. Indeed, street women often link up with a lover, agree to prostitution to support him, and then accede to his wishes to take another woman to work for him and share his bed, becoming his “bottom woman” who can spend more time at home and less on the streets.<sup>149</sup>

Gilligan’s book, *A Different Voice*, and subsequent work suggest two important ways in which women’s relationality can prevent a woman from becoming a responsible self in the Niebuhrian sense. We might call them the “circle of care” problem and the “moral agency” problem.

First, because many women’s relations with others are concrete and historically shaped as opposed to abstractly deduced from principles,<sup>150</sup> women’s ethical perspectives will similarly be shaped by the concrete relationships in which they are enmeshed. To cut to the chase, it should not be a surprise that women offenders are often caught assisting their male intimates in crime, whether that assistance is comprised of quotidian “household maintenance” activities such as answering the door at the couple’s drug house, or more sinister activities such as planning and participating in a robbery. If ethics follows existence, then it stands to reason that women will make choices as moral agents that reflect their intimate ties. That is, they will understand their direct and primary moral responsibilities to be in maintaining and supporting the familial bonds that they experience as meaningful and morally demanding. It should not be a surprise that a mother refuses to give up her son to the cops, or that a wife assists her husband in a drug deal. From the perspective of the concrete moral system in which she lives, such a woman is likely to perceive the abstract demands of society telling her that drugs are no good for the community as a whole to be unconvincing against the very concrete demands of her family for a secure existence. One way we might describe this is to say that these women’s “circles of care” are too small.

Similarly, it should not be surprising if women “partners in crime” are found more among the least educated and affluent members of society, even excluding economic explanations for crime. Middle and upper-class women are more often exposed—particularly through higher education, but also through employment, civic responsibilities, and other community

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148. *Id.* at 126.

149. *Id.* at 41.

150. See Gilligan, *supra* note 76, at 26-32.

activities—to a larger variety of interpersonal experiences beyond those of their own family and neighborhood, making it more possible for them to imagine how they are in relation not only to those with whom they live every day, but those others who constitute a wider community. Just to take higher education as an example, through a novel or play or film, a woman can experience and empathize with another human being whose life-experience is very different from her own, and thus enter into a relation that she did not have. Through the study of history, a woman can be exposed to countless others who have suffered or thrived because of the moral response of individuals just like her.

A second problem that Gilligan identifies in her classic work is that women who operate from a care approach can deny their moral agency. This denial of agency is quite the converse of male “rights ethicists” who tend to maximize their agency by framing the responses of others from within the framework of their own needs and desires, thereby minimizing the effects of their actions on others because they cannot really imagine, except in an analogizing, abstract way, those same needs and desires in others. In her study of women who are trying to make abortion decisions, Gilligan demonstrates how women who run into conflict between the needs of their unborn children and their own (or those of other loved ones) often resolve that tension by the pretense that they are not making moral decisions with human consequences.<sup>151</sup>

This play results from several aspects of the way in which women who function from a care ethics perspective see the world. First, after they have passed the initial “selfish” level of moral development, women at the level of “care” do not identify their own needs as being important.<sup>152</sup> Second, they tend not to acknowledge possible conflicts with the ways in which others might perceive the moral situation. They assume that their empathetic relationship with others and any judgments they may be intuitively making about what best meets others’ needs are shared by those upon whom they act, without considering the possibility that the acted-upon might have quite different ideas about these needs.<sup>153</sup> Third, such women do not easily acknowledge the possibility that there might be an actual conflict in the responsibilities that they owe all of the parties affected by their actions; to acknowledge such a possibility is to acknowledge the fact that they must harm someone, and that they cannot care for

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151. *Id.* at 81.

152. *Id.* at 74 (describing the “disequilibrium” that results from the exclusion of a woman’s self in her moral decision-making).

153. *Id.* at 8

everyone.<sup>154</sup> Finally, because such women are responding to the perceived needs of others, they may not have a good sense that they are active subjects; i.e., that their actions cannot only fill “holes” in the lives of others’ need, but also can change the relationship or situation to a new one.

In this situation of necessarily conflicting interests, Gilligan argues, “[a]lthough the feminine identification of goodness with self-sacrifice clearly dictates the ‘right’ resolution of this dilemma, the stakes may be high for the woman herself, and in any event the sacrifice of the fetus compromises the altruism of an abortion motivated by concern for others.”<sup>155</sup> Because such a premium is placed, in this moral system, on women’s putting their own needs and desires last, if recognizing them at all, women who follow the instinct to preserve their own interests by sacrificing the fetus create the psychological subterfuge that they are not acting, or that they are not harming anyone when they act.<sup>156</sup>

Gilligan proposed that many women move to higher stages of moral development from this position. In the next stage, they come to acknowledge the reality that they are making choices that will affect others, and that they are responsible for the choices they make—“a shift in concern from goodness to truth,” as women assess the morality of an action “not on the basis of its appearance in the eyes of others, but in terms of the realities of its intention and consequence.”<sup>157</sup> A second transition occurs when the care ethicist re-conceives the notion of goodness to “encompass the needs of both self and others, to be responsible to others and thus to be ‘good’ but also to be responsible to herself and thus to be ‘honest’ and ‘real.’”<sup>158</sup> By “elevating nonviolence to a principle . . . she is able to assert a moral equality between self and other and to include both in the compass of care. Care then becomes a universal injunction, a self-chosen ethics . . . .”<sup>159</sup>

But, not all women who make moral decisions out of a “care” perspective make these two transitions. Women offenders, especially those whose psychological or economic preservation lies in their ties to their male intimates who are also strong-willed offenders, may have strong incentives to deny that they are morally responsible agents. It may be psychologically and morally less discordant for them to admit that there is a conflict between the needs of their man or family and the needs of the wider society. This is apparent especially when they commit crimes that

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154. *Id.* at 80.

155. *Id.*

156. *See id.* at 84, 86.

157. *Id.* at 81-82.

158. *Id.* at 85.

159. *Id.* at 90.

sometimes have no visible human victims, such as drug crimes, embezzlement, welfare fraud, and other property crimes. It may be more palatable for them to block out all harm to themselves and their loved ones in their focus on possible harm to their male intimate, and to frame threats to the family in terms of the male offender's failure to achieve his criminal goals and to avoid detection. Thus, assistive behavior that satisfies the male offender's desires or protects him from being arrested may seem to satisfy women's needs both to protect their loved ones and to protect themselves. For such women to admit that there might be a divergence in interests between their children and their male intimate, or between themselves and the male offender in the family, would require them to admit that they will need to harm someone whose needs are more important to them than their own.

#### IV. THE RESTORATIVE JUSTICE RESPONSE WITHIN AN ETHICS OF CARE

Restorative justice approaches would appear to be more promising in responding to the "circles of care" and "moral agency" problems that offender women who respond out of an ethic of care may pose. Restorative justice, in contrast to retributive justice, is fundamentally relational. One of its most fundamental principles is that "[c]rime is a violation of people and of interpersonal relationships."<sup>160</sup> Like women operating with an ethics of care, restorative justice not only recognizes but also assumes that human beings are interconnected, that relationships are central, and that crime is "a tear in the web of relationships."<sup>161</sup> Restorative justice, then, starts where such women start: with the concrete, with human interaction; indeed, interaction not only of those physically present at the "scene of a crime," but those who are present because the victim and offender are living their lives out of a continuing relationship with them and those in the community who are indirectly affected by the crime. Thus, family members who have made a victim more vulnerable to damage by the emotional impact of crime, previous abusers of either victim or offender, and those who exercise moral influence on the offender such as parents and elders may be involved in many restorative justice processes such as sentencing circles and family group conferencing.<sup>162</sup>

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160. ZEHR, *supra* note 46, at 19.

161. *Id.* at 19-20.

162. Sentencing circles are one form of restorative justice practice that involve offenders, victims, and members of the community, including immediate neighbors, family members, police officers, and even judges in a round-robin discussion of the harms imposed by the offender. These discussions seek to get the offender to acknowledge his or her remorse and

Restorative processes also speak to the concreteness of care ethicists' relational imagination about their responsibility. They require a woman offender to sit in a circle with those whom she has harmed, emotionally as well as economically. This enables the woman offender to hear the full complexity of the harm she caused through narrative, and to experience the emotions that both individual and community as victims experience as a result of that crime.<sup>163</sup> A woman offender who is surrounded by people whom she has actually harmed, may, through restorative encounters, become more capable of expanding her circle of care to include concrete others who have been harmed by her actions, including members of the community who cease being impersonal. A drug offender can start to empathize with the distraught daughter of an addict who cannot care for her because of the drugs, or a mother who is scared because her kids are drug couriers, or a police officer who despairs at the waste of life he sees every day. An embezzler can expand her circle of care from her own family, to the bank accountant who has to clean up the mess left by her crime, or the bank customers who are frightened by the insecurity of their accounts. Restorative processes urge offenders to care about the needs of others, as they have been taught to care for their most immediate circle, rather than to turn away from caring.

None of these opportunities are offered by traditional retributive practices because, with the exception of the actual individual victims, few of the people whom a woman offender has affected actually appear in pre-trial, trial or post-trial procedures. A person who becomes addicted because of the offender's behavior and the mother whose children are involved with dealing are not likely to be called to the stand to give evidence. Even for those victims who appear, the rules of evidence and the traditional manner of presentation of witness testimony discourage the expression of pain, fear, and other emotions experienced by victims. Indeed, the retributive system discourages any relational bonding between the offender and the victim, portraying crime as an offense against the state<sup>164</sup> and the victim as a mere tool facilitating prosecution or a bystander

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to set an appropriate reparation for the victim, and to initiate a discussion about what the offender needs to avoid re-offending. See Arthur W. Blue & Meredith A. Rogers Blue, *The Case for Aboriginal Justice and Healing the Self Perceived Through a Broken Mirror*, in *THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE* 76-77 (Michael A. Hadley ed., 2001); ZEH, *supra* note 46, at 50-51. Family group conferencing is a method of dealing with neglected, abused or delinquent children which brings all members of the extended family together with professionals to determine how the child's best interests will be served. *Id.* at 47-49.

163. See, e.g., Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. SOC. POL'Y & L. 263, 270-271 (2000) (describing the process of having the offender listen to the victim).

164. See also ZEH, *supra* note 46, at 16 (noting that the criminal process discourages

awaiting satisfaction.

Second, restorative processes identify women offenders as persons worthy of a response, as persons to whom the community needs to be responsible. Many women offenders live lives as both victims and offenders.<sup>165</sup> Traditional retributive systems downplay, and indeed in some cases erase, the ways in which women offenders have been victimized by both their male intimates and others in their past, at least until sentencing. It is not considered relevant to the woman's culpability until that victimization is manifested in extreme ways, such as in the defenses of duress and insanity. And, with the success of determinate sentencing, little of a woman's (or man's) experience as a victim is taken into consideration even at that stage.<sup>166</sup>

By contrast, restorative processes begin with the understanding that healing in the community cannot occur, even the victim's healing, until the offender "comes clean" about why she committed such an offense and takes responsibility for it.<sup>167</sup> Such a process requires the offender to tell the story of her background as both an offender and possibly as a victim of others' abuse and neglect. The restorative focus on "equal concern and commitment" to the offender as a person worthy of community regard and the offering of community support<sup>168</sup> has the potential of enabling care ethicists who are "stuck" at the conventional stage to re-conceive their relationships with others. First, as the community begins to regard the offender as someone who is worthy of concern in a complex calculus of differing interests, the offender herself may come to see that she is someone who needs to be included in the "circle of caring," enabling her to transition to Gilligan's third stage of truth-telling and a redefinition of the good to include herself.<sup>169</sup>

Second, for those whose actions are driven largely by others' judgments of them, rather than their own sense of themselves, restorative processes may reflect back to women offender's aspects of their character that they

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offenders from understanding or empathizing with their victims, and encourages them to look out for themselves).

165. See ZEHR, *supra* note 46, at 30-31.

166. See, e.g., Tinto, *supra* note 25, at 921, 936-37, 939-40 (discussing the mandatory drug sentencing laws' refusal to look at women's relationships and culpability in sentencing).

167. See Luna, *supra* note 25, at 233, 293-94.

168. See ZEHR, *supra* note 46, at 40; Luna, *supra* note 25, at 233 (noting that the restorative justice system operates according to the presumption that offenders should be restored to their communities by their acceptance of responsibility and community reintegration).

169. See Gilligan, *supra* note 76, at 90.

have not seen in themselves. This includes capacities such as concern for others, strength in difficult circumstances, and the ability to make independent decisions. This “reflected light” may make it possible for women offenders to begin to see a difference between the needs and desire of their male intimates and the needs and interests of themselves and their children in a way that was not immediately apparent to them before, as they were making instinctive choices to assist their male intimates to achieve these intimates’ goals.

Moreover, to the extent that care ethicists tend to confuse their own perceptions of the situation with those in their circle of care, the confrontative processes of restorative justice may allow women to be challenged about their perceptions of the situation. If they are forced to confront their victims and family members, those victims and family members will challenge care ethicists’ predisposition to “fuse” their own perceptions with those of their victims, assuming that their victims experience their wrongdoing as the offenders do.

Perhaps most importantly, restorative justice processes also respond to the second problem Gilligan highlights: they take seriously the idea that offenders are moral agents, even when they are also victims. Restorative justice advocates have noted how the traditional justice system reinforces perpetrators’ natural instincts, sometimes based on their own past abusive experience, that they are the real victims and that their victims’ harms are somehow illusory.<sup>170</sup> Moreover, in many cases, women offenders are indeed victims and legitimately see themselves as such. By contrast, retributive systems put the state against the individual offender. Therefore, the offender may be encouraged to continue in their denial of the fact that they have harmed anybody by their crime, and to project denial out onto the victim or others in the system.

In Niebuhr’s terms, restorative processes mimic the dialogical imagination of responsible persons. Offenders who are seriously open to participating in the process can begin to understand that they are acted upon by others. The process can allow offender women to identify the ways in which they are in relationship with those ghosts of their past, with whom they continue in a relationship, sometimes by making them a part of the problem and a part of the solution, as in family conferencing.<sup>171</sup> If such

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170. *Id.* at 16 (noting that the retributive system encourages defendants to rationalize their behavior).

171. Shearer notes that family interventions with women who have substance abuse problems resulting from childhood traumas can be successful even when the whole family does not participate. Shearer, *supra* note 42, at 47; *see also* C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23

processes are conducted with sensitivity toward the offender's possible victimization, they can help the victim finally attend to the stages of victimhood that give rise to her "need" to take out her aggression against another—the stages of shock, denial, panic at the realization of what she has lost, suppression of her grief and fear, anger at the perpetrator, and desire for justice.<sup>172</sup> It may permit the offender to express her feelings of rage about those in her life who have harmed her in an egalitarian setting that requires her also to acknowledge how she has perpetuated that abuse by her crime, and thus discourages its repetition in the future.

Second, restorative processes push women offenders to see that they are making moral choices to take action in response to others, and that when they act—either to commit crimes or to restore victims—they are acting in anticipation of particular responses of others. To be more concrete, a woman offender who has passively participated in a robbery may be able to see, for the first time, that the victim's fear and subsequent months of trauma is a direct result of her being present with the male offender. She may, for the first time, come to see that something that she can offer to the victim, whether monetary restoration, an apology, or even a recognition of harm that she has caused, can actually help the victim to be freed from her fear, desire for revenge, or even the guilt that victims experience.<sup>173</sup>

Third, the participation of community and family members in restorative processes can take in the element of larger moral responsibility that the responsible self is always attuned to as she makes moral decisions for the future, the reality that she is responding to and within a larger community.<sup>174</sup> From these vantage points, the decisions about how to conduct her life to repair the harms caused and reassure those who are traumatized by her crime can potentially empower her as an agent, and a responsible one. When confinement is deemed necessary, it is particularly critical to follow such restorative processes with confinement that permits such women to continue in relationship with their children is because this permits parents to continue their journey toward a responsive and responsible self.<sup>175</sup>

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ST. LOUIS U. PUB. L. REV. 289, 306-309 (discussing family group conferencing in families with domestic abuse, and noting that both partner and child abuse, as well as typical abusive controlling behavior, was significantly reduced after such conferencing).

172. See Olga Botcharova, *Implementation of Track Two Diplomacy*, in FORGIVENESS AND RECONCILIATION: RELIGION, PUBLIC POLICY, & CONFLICT TRANSFORMATION 281-83 (Raymond G. Helmick & Rodney L. Petersen eds., 2001).

173. See Minow, *supra* note 46, at 969 (noting that restorative justice helps victims move beyond anger and powerlessness, and find the capacity to forgive).

174. See Gilligan, *supra* note 76, at 90, 100; Niebuhr, *supra* note 120, at 65.

175. See, e.g., Raeder, *supra* note 19, at 379, 381-82 (describing the Family Unity

Finally, restorative processes, which include the offender in their circle of care, allow women offenders to be the objects of response by others who express commitment and care for them altruistically,<sup>176</sup> without any motive to use them to commit crimes. Restorative processes attempt to see women offenders as valuable in their own right, not simply an extension of a male intimate. Ideally, such processes can create in these women a sense that they are in reciprocal solidarity with these others, not simply abandoned by society and left to fend for themselves using their own devices, which becomes neither an excuse for the past, nor a reality of the cause of future crime.

## V. CONCLUSION

I have argued that restorative justice might be a valuable defining theme for correctional approaches to women offenders, particularly those whose offenses are closely tied to their relationships with male intimates. Restorative processes accept the relational reality of many women's lives, the sense in which they understand relation as both essential to meaning in their lives and potentially violative of the self-giving character which informs both their needs and their attempts to lead responsible lives. With other arguments, including Gilligan's, these processes emphasize both the "responsible" and the "self" of Niebuhr's ethical demand, understanding that the self cannot be accepted, actualized, indeed engendered, except in response to individual others, including those others that constitute one's whole community.

By requiring women to accept their roles as responsible actors and as objects of the responses of others in the very concrete way that the dialogue of past action, current remorse, and future promise-giving occurs in restorative processes, such processes accept women's concrete relationality as a positive given, while encouraging them to broaden their relations beyond the small and suffocating circle in which they are trapped. They require women to accept their role as agents, not simply subjects, and as moral actors, not simply passive victims.

Beyond their relationships with their victims, the practicing of responsible selfhood in the restorative process can teach women offenders a lesson in their relationships with overpowering intimates as well. As they

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Demonstration Project that keeps mothers and children together). Raeder notes that Canadian officials have estimated that more than half of its female prison population could be released and successfully reintegrated into the community with gender-appropriate community services. *Id.* at 381.

176. See ZEHR, *supra* note 46, at 68 (noting that restorative processes address offenders' needs, including the needs to be supported, treated respectfully, healed, and reintegrated).

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come to accept responsibility for their own wrongdoing, they can turn to their intimates who have encouraged, enticed, or even threatened them into crime, and demand an account of these men's own responsibility for what has happened, neither absolving themselves too cheaply for the wrong they have caused, nor re-forming themselves into hapless women victims of male Svengalis. With the power of the circle around them, the temptation to give in to the force or charm with which male intimates reject their part in harming others and the community can be suppressed. Within the power of the circle, the dialogue of offender to offender, each acknowledging simultaneous victimization and responsibility, holds out greater promise for a life lived ethically in response to others, including the intimate circle of lovers and children which so often survives the offender's movement through the criminal justice system.

This theme, as I have suggested, holds more concrete promise for our coming to terms with what is possible for repeatedly broken individuals. Far from over-promising the remaking of offenders into saints, or the curing of pathologies that run deep in offender networks of relationship, the restorative approach finds victory in the moment when an offender acknowledges, with remorse, what harm she has done. Rather than diminishing such a victory as small, the restorative movement suggests that it is everything.

In so doing, the restorative movement teaches us a lesson as well. Those who work out of existing themes of offender behavior and rehabilitation are sorely tempted to adopt the view that criminal offenders, particularly women offenders, are indeed "other," so deviant that we cannot accept any resemblance to them in our own lives. Whether they are sick and in need of a cure, deficient and in need of skills, or glorified as deviants challenging a cold and impersonal corrections system, the identification of women offenders as deviants pleases our wish to find ourselves above reproach in our own lives. In recognizing that the restorative paradigm closely resembles the practice of repentance and forgiveness we call forth from each other in the "free world," we are forced to acknowledge that our own offenses against each other are different perhaps in significant degree, but not essentially in kind, from those for which we imprison offenders. We are all offenders; we are all in need of the practice of repentance and forgiveness, not only within the circle of victim and offender, but in every circle we inhabit. To cast off the pretense that our lives are somehow spotless as against one another, as we see offenders mimicking the practices that we are exhorted to live, is itself a corrective to our own corrections.