

FULFILLING THE ASPIRATIONS OF RESTORATIVE JUSTICE IN THE CRIMINAL SYSTEM? THE CASE OF COLORADO

*By Shannon M. Sliva, Elizabeth H. Porter-Merrill, & Pete Lee**

A growing consensus exists among practitioners, policymakers, and scholars that the American criminal system is not fulfilling its aspirations of public safety, behavioral change, and justice. Restorative justice is a promising approach that holds criminal offenders accountable while repairing – rather than perpetuating – harms to victims and to the community. This article discusses historic and current applications of restorative justice in criminal law and describes the potential benefits of restorative justice for the resolution of many criminal cases, including re-centering victims' needs in the justice process while increasing accountability of offenders, redistributing power to communities to redress harms, and refocusing government resources more efficiently and equitably.

We provide a case example of statutory structures in Colorado, which leads the nation in developing law to use restorative justice in adult and juvenile criminal matters. Drawing on lessons from Colorado, we explore challenges for scaling restorative justice in court, correctional, and community settings – namely, living up to its aspirations of accountability, voluntariness, victim-centeredness, and equity. We then summarize key recommendations for effectively

* Shannon M. Sliva, PhD. Assistant Professor, Graduate School of Social Work, University of Denver; Elizabeth H. Porter-Merrill, Director of Restorative Justice, Office of the Colorado State Public Defender; and Pete Lee, Senator, District 11, Colorado General Assembly. The authors would like to acknowledge the Colorado Restorative Justice Coordinating Council for their leadership in restorative justice policy and practice in Colorado. Senator Pete Lee, who led the drafting and sponsorship of almost all Colorado' bills building statutory support for restorative justice, also provided information to assist in documenting the changes in Colorado law and state practice that are presented in this article.

implementing restorative approaches to justice in the American criminal system.

I. INTRODUCTION

Practitioners, policymakers, and scholars increasingly debate appropriate and effective responses to mass incarceration.¹ Between 1980 and 2012, the United States' incarceration rate increased by 222 percent.² By the early 21st century, the United States earned the title of 'the most punitive democracy in the world,'³ based on the oft-cited statistic that 'the United States has less than 5 percent of the world's population, yet we have almost 25 percent of the world's total prison population.'⁴ Incarceration rates⁵ are fundamentally a function of three variables: crime rates, the rate at which courts sentence criminal offenders to prison for those crimes, and the length of sentences served.⁶ Yet, crime rates during this three-decade period have been only weakly associated with the overall incarceration rate.⁷ Instead, changes to sentencing practices – spurred by state and federal laws including increased jail and prison terms, longer mandatory minimums, truth-in-sentencing guidelines, and habitual offender or

¹ See Jonathan Simon, *Mass Incarceration: From Social Policy to Social Problem*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 23, 25 (Joan Petersilia & Kevin R. Reitz eds., 2012) ("There are a number of signs indicating that the impending end of the era of mass incarceration is a broader phenomenon...").

² See *Incarceration Rate in the United States, 1960-2012*, THE HAMILTON PROJECT (May 1, 2014), http://www.hamiltonproject.org/charts/incarceration_rate_in_the_united_states_1960-2012 [<https://perma.cc/T7QM-ZD3H>].

³ See, e.g., PETER ENNS, INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD (2016). The title of this text offers one example of use of the term "most punitive democracy in the world" to describe the United States.

⁴ Michelle Ye Hee Lee, *Yes, U.S. Locks People Up At A Higher Rate Than Any Other Country*, WASH. POST (July. 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country> [<https://perma.cc/LBN4-KYL9>].

⁵The incarceration rate is the number of people incarcerated per 100,000 population.

⁶ See THE HAMILTON PROJECT, *supra* note 2.

⁷ See MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 25 (2006).

three strikes laws – are largely credited with increasing the United States prison population.⁸

At a 2013 American Bar Association meeting, then-Attorney General Eric Holder publicly decried the policies contributing to mass incarceration in the United States as ‘draconian.’⁹ These policies are also ineffective: punitive justice policies have neither significantly deterred crime¹⁰ nor increased satisfaction or well-being of crime victims and survivors.¹¹ Further, the Bureau of Prisons consumes more than a quarter of the Department of Justice budget, with diminishing marginal returns for public safety.¹² A growing body of research shows that incarceration has a damaging effect on family and community health. Children of incarcerated parents are more likely to live in financially unstable homes and to demonstrate behavioral problems and delinquency.¹³ Controlling for other factors, neighborhoods with higher incarceration rates also exhibit greater rates of stress-related mental illness.¹⁴ In short, current United States penal policy does little to prevent crime, often fails to satisfy victims,

⁸ See Franklin E. Zimring, *Penal Policy And Penal Legislation In Recent American Experience*, 58 STAN. L. REV. 323, 333 (2005) (“A large part of the further expansion in prison population was a result of the lengthening of prison terms, and a large part of these longer terms was a result of new penal legislation from Congress and state legislatures that was explicitly designed to increase prison terms.”).

⁹ Mark Memmott, *Holder Decries 'Draconian Mandatory Minimum Sentences'*, NPR (Aug. 12, 2013), <https://www.npr.org/sections/thetwo-way/2013/08/12/211291336/timely-idea-holder-to-pitch-changes-to-drug-enforcement> [<https://perma.cc/G6UG-WULN>].

¹⁰ See, e.g., Tomislav V. Kovandzic et al., “Striking Out” As Crime Reduction Policy: The Impact Of “Three Strikes” Laws On Crime Rates In U.S. Cities, 21 JUST. Q. 207, 232 (2004).

¹¹ See ALLIANCE FOR JUSTICE AND SAFETY, CRIME SURVIVORS SPEAK: THE FIRST EVER NATIONAL SURVEY ON VICTIMS’ VIEWS ON SAFETY AND JUSTICE, <https://allianceforsafetyandjustice.org/crimesurvivorsspeak/> [<https://perma.cc/ZEA4-C3PR>].

¹² See Jason Furman & Douglas Holtz-Eakin, *Why Mass Incarceration Doesn't Pay*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/21/opinion/why-mass-incarceration-doesnt-pay.html> [<https://perma.cc/JF4Q-BBME>].

¹³ See NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 279 (2014).

¹⁴ See Mark L. Hatzenbuehler et al., *The Collateral Damage Of Mass Incarceration: Risk Of Psychiatric Morbidity Among Nonincarcerated Residents Of High-Incarceration Neighborhoods*, 105 AM. J. PUB. HEALTH 138, 138 (2015).

perpetuates cycles of harm in communities, and is costly and inefficient.

By some metrics, the tide has turned in the ‘incarceration nation.’¹⁵ In 2016, United States incarceration rates reached a twenty-year low.¹⁶ Scholars attribute declining incarceration rates only partially to crime trends, instead emphasizing federal and state reforms reducing sentence severity and length, especially for drug offenders.¹⁷ Despite declines in incarceration, the United States continues to incarcerate more people per capita than any nation in the world.¹⁸ Likewise, legislators and reformers continue to seek public safety solutions which reduce reliance on incarceration while becoming more responsive to victim and community needs.¹⁹

Along with other scholars and justice professionals, we propose that restorative justice offers a promising response with the potential to hold criminal offenders accountable while repairing – rather than perpetuating – the harm done to victims and communities. Part II of this article introduces the philosophies and practices associated with restorative justice and provides an overview of historic and current applications of restorative justice in criminal law. Part III argues the potential benefits of restorative justice for the resolution of criminal cases, including re-centering the needs of the victim in the justice process and the accountability of offenders, redistributing power to communities to redress harms, and reallocating government resources more efficiently and equitably.

Part IV introduces a case example of the statutory framework in Colorado, which leads the nation in developing law to use restorative

¹⁵ See, e.g., ENNS, *supra* note 3. The title of this text offers one example of use of the term “incarceration nation” to describe the United States.

¹⁶ See John Gramlich, *America’s Incarceration Rate Is at a Two-Decade Low*, PEW RES. CTR. (May 2, 2018), <http://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/> [<https://perma.cc/69NF-BC66>].

¹⁷ See *id.*; *Policy Shifts Reduce Federal Prison Population*, U.S. COURTS (Apr. 25, 2017), <https://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population> [<https://perma.cc/B4UC-7G53>].

¹⁸ See *Highest to Lowest - Prison Population Rate*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [<https://perma.cc/D7WF-CTSB>].

¹⁹ See, e.g., Amy Solomon & Jake Horowitz, *US Needs Bold Reforms to Transform Probation And Parole*, THE HILL (Jan. 19, 2019, 2:00 PM), <https://thehill.com/opinion/criminal-justice/425807-us-needs-bold-reforms-to-transform-probation-and-parole> [<https://perma.cc/VGT6-CXWX>].

justice in adult and juvenile criminal matters. Drawing on the experiences of Colorado, we explore challenges for restorative justice when implemented at the system level in modern court and correctional settings, namely, living up to its aspirations of accountability, voluntariness, victim-centeredness, and equity. We do not offer restorative justice as a panacea, nor a simple shift in governance; however, we suggest that the benefits of restorative justice practices may be attained with some effort toward resolving these challenges. Part V draws on lessons from Colorado, as well as the legal and social science literature, to summarize key recommendations for cultivating a restorative approach to justice in the American criminal system.

Throughout this article, we use the terms 'victim' and 'offender.' We acknowledge that these terms are limiting in their ability to convey the complex needs and experiences of the people to whom they are applied, and that these labels can be stigmatizing. We use these terms for clarity of reference, in the absence of more appropriate terminology that is equally efficient.

II. RESTORATIVE JUSTICE IN CRIMINAL LAW

A. *Defining Restorative Justice*

Restorative justice is an approach that characterizes crime as an injury to people and communities, and the aim of justice as healing.²⁰ Through the lens of restorative justice, crime is not merely a legal construct but a violation of people and relationships which creates an obligation to make things right.²¹ Restorative justice expands the circle of stakeholders beyond the government and the offending party to include those who have been directly victimized, as well as community members impacted by the harm, such as the family of the victim and offender.²² It engages – if the parties are willing – the victim, the offender, and the community in search of solutions which promote repair, reconciliation, and reassurance.²³

Scholars largely agree that restorative justice is difficult to define, due to the diversity of beliefs, values, and practices that it

²⁰ See Howard ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 19 (2014).

²¹ See *id.*

²² See *id.* at 27.

²³ See HOWARD ZEHR, *CHANGING LENSES* 130–32 (1990).

encompasses.²⁴ Howard Zehr, author of the seminal text guiding the American restorative justice movement, ‘Changing Lenses,’ originally defined restorative justice by reference to a set of principles: (1) a “crime” or wrongdoing is a violation of people and of interpersonal relationships; (2) this violation creates obligations; and (3) the primary obligation is to repair, to the greatest extent possible, the harms caused by the violation.²⁵ Later, a 1997 consensus process led by the Working Party on Restorative Justice adopted the following definition: “Restorative justice is a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”²⁶

Restorative justice includes a diverse set of practices focused on stakeholder involvement and repair of harm.²⁷ The most common practice centers on facilitated face-to-face meetings between stakeholders including the victim and the offender, variously called victim offender reconciliation programs (VORP), victim offender mediation (VOM), victim offender dialogue (VOD), and victim offender mediated dialogue (VOMD).²⁸ In these processes, trained restorative justice facilitators meet separately with both the victim and the offender to prepare them to meet with one another.²⁹ The process culminates with the victim, offender, and facilitator(s) having a face-to-face conversation about the harm and its impact.³⁰ Sometimes, family members or supporters of the victim and offender are also

²⁴ See JOANNA SHAPLAND, GWEN ROBINSON & ANGELA SORSBY, RESTORATIVE JUSTICE IN PRACTICE: EVALUATING WHAT WORKS FOR VICTIMS AND OFFENDERS 4 (2011).

²⁵ ZEHR, *supra* note 20, at 28–29; Lynn S. Branham, *Plowing in Hope: A Three-Part Framework for Incorporating Restorative Justice into Sentencing and Correctional Systems*, 38 WM. MITCHELL L. REV. 1261, 1266 (2011).

²⁶ JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 11 (2001) (citing TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW 5 (1999)).

²⁷ Kay Pranis, *The Practice and Efficacy of Restorative Justice*, 23 J. OF RELIGION & SPIRITUALITY IN SOC. WORK: SOC. THOUGHT 133, 134 (2004); SHAPLAND ET AL., *supra* note 24, at 4.

²⁸ MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE 19 (Peter Rocheleau ed., 2010).

²⁹ *Id.*

³⁰ *Id.*

present.³¹ Other forms of restorative justice processes include family group and community group conferencing, peacemaking and sentencing circles, and neighborhood-based accountability boards.³² When appropriate and possible, stakeholders develop a plan for the responsible parties to repair harms and make amends. Restorative justice plans may include restitution, community service that is meaningful to repairing the harm, and counseling or therapy.³³ Only the participants' creativity limits the variety of reparative acts.

B. The Rise (and Resurgence) of Restorative Justice

The modern criminal system is characterized by its adversarial process and retributive focus;³⁴ however, this has not always been the case.³⁵ On the contrary, restorative justice scholars and proponents often describe it as a common approach to law "in most societies throughout most of human history."³⁶ Its themes are associated with indigenous and tribal practices from Africa to New Zealand, as well as Christian-Judaic religious traditions.³⁷ The restorative justice movement in the United States and Canada is most closely associated with Native American and First Nations' practices, though research suggests that much of the modern restorative justice movement is evolving without a direct connection to Native leadership.³⁸

The decline of community-based and restorative approaches to justice can be traced to the invasion of William the Conqueror and the subsequent influence of English law on the world's legal systems. Prior to the Norman Conquest, Anglo-Saxon law centered on

³¹ *Id.*

³² *Id.* at 12.

³³ Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 680 (2005).

³⁴ Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1663 (1992).

³⁵ See, e.g., Christopher D. Lee, Comment, *They All Laughed at Christopher Columbus When He Said the World Was Round: The Not-So-Radical and Reasonable Need for a Restorative Justice Model Statute*, 30 ST. LOUIS U. PUB. L. REV. 523, 526–29 (2011).

³⁶ See, e.g., LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 44 (2007).

³⁷ UMBREIT & ARMOUR, *supra* note 28, at 6.

³⁸ Shannon M. Sliva, *Finally "Changing Lenses"? State-Level Determinants of Restorative Justice Laws*, 98 PRISON J. 519, 534 (2018).

repayment to the victim.³⁹ Motivated by a need to repay the war financiers, the Normans altered the system of justice to collect restitution for the crown rather than the victim or the victim's family.⁴⁰ Reflecting on the subordinated role of the victim in responding to crimes and resolving conflict, criminologist Nils Christie famously asked, "[c]onflicts are taken away, given away, melt away, or are made invisible. Does it matter, does it really matter?"⁴¹ The British system of jurisprudence became the basis for the United States courts system, usurping indigenous Native American practices reflective of restorative justice principles.⁴²

Despite colonizing movements toward a state-administered justice system, traditional community-based and restorative justice practices have not been lost. They have experienced a resurgence in recent decades and continue to be used parallel to and in concert with court and correctional systems throughout the world. In 1996, the United Nations adopted basic principles and guidelines for using restorative justice,⁴³ and later, a restorative justice handbook.⁴⁴ While the United Kingdom, New Zealand, and Canada instituted national policies favoring restorative justice, the United States has been slower to adopt restorative practices as a systemic response.⁴⁵ Still, an increasing number of states have considered or adopted legislation supporting the use of restorative justice in criminal proceedings, either as an alternative, supplement, or adjunct to other sentencing and

³⁹ See Jan Peter Dembinski, *Restorative Justice: Vermont State Policy*, 29 VT. B.J. 39, 42–43 (2003); *United States v. Ferranti*, 928 F. Supp. 206, 221 (E.D.N.Y. 1996).

⁴⁰ See Dembinski, *supra* note 39, at 42.

⁴¹ Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 7 (1977).

⁴² James W. Zion, *The "One Law for All" Myth*, in JUSTICE AS HEALING: INDIGENOUS WAYS, 73, 76 (Wanda D. McCaslin ed., 2005).

⁴³ *UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, UN ECONOMIC AND SOCIAL COUNCIL (ECOSOC) (July 24, 2002), <https://www.refworld.org/docid/46c455820.html> [<https://perma.cc/WQ3Z-A2YX>].

⁴⁴ See generally UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES (2006), https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf [<https://perma.cc/M E7U-UNZS>].

⁴⁵ Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL'Y PRAC. 77, 80 (2015).

correctional processes.⁴⁶ As of 2014, at least thirty-two American states adopted some form of legislation, extending restorative justice practices into criminal and juvenile law.⁴⁷

A resurgence of the restorative impulse⁴⁸ in American society can be linked, in part, to growing bipartisan interest in reforming the criminal justice system and reducing incarceration, recidivism, and costs⁴⁹ as well as new or renewed focus on the unfulfilled needs of victims.⁵⁰ Nationwide, legislators express concern about recidivism rates of 50 to 70 percent, as well as the increasing percent of state budgets being consumed by departments of corrections.⁵¹ Increasing airtime for victim impact statements (*e.g.*, in the cases of Larry Nassar and Brock Turner) and viral hashtags like #metoo accompany an emerging legal doctrine related to survivors rights.⁵² Among rising voices of victims and survivors, victim advocacy organizations are calling for restorative justice as a part of the solution.⁵³

Increased interest in restorative justice also aligns with the development and expansion of community-based justice solutions

⁴⁶ *Id.* at 85.

⁴⁷ *Id.*

⁴⁸ Kay Pranis, *The Restorative Impulse*, 27 *TIKKUN* 33, 33–34 (2012).

⁴⁹ See David R. Karp & Olivia Frank, *Anxiously Awaiting the Future of Restorative Justice in the United States*, 11 *VICTIMS & OFFENDERS* 1, 3, 13 (2016).

⁵⁰ See, *e.g.*, Lara Bazelon, *The Kavanaugh Hearings Have Demonstrated How Desperately America Needs Restorative Justice*, *SLATE* (Oct. 2, 2018, 7:08 PM), <https://slate.com/news-and-politics/2018/10/kavanaugh-hearings-restorative-justice-christine-blasey-ford.html> [<https://perma.cc/7LPA-2APP>]; Darakshan Raja & Thenmozhi Soundararajan, *Canceling Kavanaugh Isn't the Only Justice Survivors Need*, *REWIRE NEWS* (Oct. 1, 2018, 6:00 PM), <https://rewire.news/article/2018/10/01/canceling-kavanaugh-isnt-the-only-justice-survivors-need/> [<https://perma.cc/G64R-AUEV>].

⁵¹ Colorado cites a per inmate cost of \$39,701 per year in 2018, up from \$38,146 the prior year. Compare COLO. DEP'T OF CORR., COST PER OFFENDER BY FACILITY: FY 2017–18, <http://www2.cde.state.co.us/artemis/crserials/cr132internet/cr13220172018internet.pdf> [<https://perma.cc/X4QY-SWQ5>] with COLO. DEP'T OF CORR., COST PER OFFENDER BY FACILITY FY 2016–17, <http://www2.cde.state.co.us/artemis/crserials/cr132internet/cr13220162017internet.pdf> [<https://perma.cc/GTD3-7HRH>].

⁵² See, *e.g.*, Cara Kelly & Aaron Hegarty, *#MeToo Was a Culture Shock. But Changing Laws Will Take More Than a Year.*, *USA TODAY* (Oct. 4, 2018, 12:18 PM), <https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/> [<https://perma.cc/Q5EV-JNMJ>].

⁵³ See *e.g.*, ALLIANCE FOR JUSTICE AND SAFETY, *supra* note 11, at 28.

seeking to re-invigorate the subjugated role of the community in the court system, including community justice centers,⁵⁴ community prosecution,⁵⁵ community lawyering,⁵⁶ and participatory defense.⁵⁷ The result is a number of innovative victim-centered and community-based initiatives – some labelled restorative justice and others suggesting distinct similarities to restorative justice philosophies – designed to decrease reliance on the government for redressing conflict and crime. This resurgence of interest in restorative approaches to justice demands a closer look at the latest evidence related to the benefits of restorative justice, as well as thoughtful exploration of the viability of restorative justice as a system-level approach.

III. BENEFITS OF A SYSTEM-LEVEL RESTORATIVE APPROACH

A growing body of research links participation in restorative justice processes to increased satisfaction of the victim and offender, increased completion of agreements, reduced recidivism, and an improved cost-benefit ratio when compared with standard justice processes like fines and probation.⁵⁸ Victims and survivors of violent crime report that participation in dialogue processes gives them a voice, answers their questions, offers accountability, and assists with healing.⁵⁹

Despite evidence supporting restorative justice's effectiveness as one-on-one or community-based practices, its efficacy and viability as a system-level response to crime remains underexplored. In this

⁵⁴ See Michael Cobden & Ron Albers, *Beyond the Squabble: Putting the Tenderloin Community Justice Center in Context*, 7 HASTINGS RACE & POVERTY L.J. 53, 59–60 (2010).

⁵⁵ See generally Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002).

⁵⁶ See generally David Dominguez, *Community Lawyering*, 17 UTAH B.J. 31 (2004).

⁵⁷ See generally Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense And The Struggle For Criminal Justice Reform*, 78 ALBANY L. REV. 1281 (2015).

⁵⁸ See Lawrence W. Sherman et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. QUANTITATIVE CRIMINOLOGY 1, 17–19 (2015); Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-analysis*, 85 PRISON J., 127, 129, 131 (2005).

⁵⁹ See UMBREIT & ARMOUR, *supra* note 28, at 129.

section, we extend the theoretical premises and evidenced outcomes of restorative justice to argue the potential benefits in resolving juvenile and criminal cases, including re-centering the needs of the victim in the justice process, increasing the role of accountability, redistributing power to communities to redress harms, and refocusing government resources more efficiently and equitably.

A. Re-Centering the Needs of the Victim in the Justice Process

Restorative justice is fundamentally defined by a focus on the needs of the victims and survivors of crime.⁶⁰ In foundational texts, restorative justice is distinguished from criminal justice as currently implemented in the United States through its central focus on victims.⁶¹ Where the modern criminal system asks what laws have been broken, who broke them, and what punishment is deserved, a system of restorative justice asks who has been hurt, what their needs are, and whose obligation it is to fulfill those needs.⁶² While some criticize restorative justice for inadequately attending to victims in practice;⁶³ repairing the harm victims experience is at the center of restorative justice.

Therefore, perhaps the most important benefit of restorative justice is the opportunity for crime victims to have their needs met in a meaningful way. Victims of crime experience material and physical losses related to property damage, personal injury, and death. Further, there is a significant body of research on the psychological and emotional effects of victimization, including post-traumatic stress disorder (PTSD), depression, and substance abuse.⁶⁴ PTSD rates

⁶⁰ CATHERINE BARGEN ET AL., *SERVING CRIME VICTIMS THROUGH RESTORATIVE JUSTICE: A RESOURCE GUIDE FOR LEADERS AND PRACTITIONERS* 22 (2018), <https://www.justoutcomesconsulting.com/wp-content/uploads/SCVTRJG.pdf> [<https://perma.cc/F993-YE8E>].

⁶¹ ZEHR, *supra* note 20, at 21.

⁶² *Id.*

⁶³ Harry Mika et al., *Listening to Victims - A Critique of Restorative Justice Policy and Practice in the United States*, 68 *FED. PROBATION* 32, 34 (2004); Gerry Johnstone, *Restorative Justice for Victims: Inherent Limits?*, 5 *RESTORATIVE JUST.* 382, 387–92 (2017).

⁶⁴ See e.g., LYNN LANGTON & JENNIFER TRUMAN, *SOCIO-EMOTIONAL IMPACT OF VIOLENT CRIME* 1 (2014) (describing rates of socio-emotional problems following victimization); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 *J. TRAUMATIC STRESS* 119 (2003) (summarizing epidemiological studies on mental health outcomes of violence including posttraumatic stress disorder, depression, substance abuse, and panic).

following a physical assault range from 23 to 39 percent,⁶⁵ while other forms of socio-emotional distress occur in 65 percent of victims of violent crime.⁶⁶ Victims experience core psychological losses, including trust, safety, and sense of self,⁶⁷ as well as feelings of fear, shame, self-blame, alienation, and betrayal.⁶⁸ These experiences affect social relationships, such as family relationships, intimate partner relationships, and occupational relationships, leaving many victims to struggle with personal isolation, family separation, and unemployment.⁶⁹

In addition, secondary victimization, or “second injury,” can also result from interactions with the criminal system and other professional authorities following a crime.⁷⁰ Due to the focus on prosecuting the offender, the victim’s experience may become subjugated. Victims’ interactions with prosecutors, for instance, range from supportive to persuasive to coercive: such as incidences of prosecutors making legal threats to victims who do not participate as desired in providing testimony.⁷¹ Criminological research suggests that victims’ satisfaction with court processes relate to their sense of control during the process and the quality of victims’ interactions with authorities.⁷² The perceived fairness of the criminal system also affects

⁶⁵ Kilpatrick & Acierno, *supra* note 64, at 130.

⁶⁶ LANGTON & TRUMAN, *supra* note 64, at 3, 11.

⁶⁷ Irene Hanson Frieze et al., *Describing the Crime Victim: Psychological Reactions to Victimization*, 18 AM. PSYCHOL. ASS’N 299, 302–04 (1987).

⁶⁸ Anne P. DePrince et al., *Links Between Specific Posttrauma Appraisals and Three Forms of Trauma-Related Distress*, 3 PSYCHOL. TRAUMA: THEORY, RES., PRAC., & POL’Y 1, 1 (2011).

⁶⁹ Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189, 189 (2010).

⁷⁰ Martin Symonds, *The “Second Injury” to Victims of Violent Acts*, 70 AM. J. PSYCHOANALYSIS 34, 38 (2010).

⁷¹ MARY A. FINN, THE EFFECTS OF VICTIMS’ EXPERIENCES WITH PROSECUTORS ON VICTIM EMPOWERMENT AND RE-OCCURRENCE OF INTIMATED PARTNER VIOLENCE 76–78 (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/202983.pdf> [<https://perma.cc/R49Y-J89Y>].

⁷² See JOANNE BELKNAP & CRIS M. SULLIVAN, LONGITUDINAL STUDY OF BATTERED WOMEN IN THE SYSTEM: THE VICTIMS’ AND DECISION-MAKERS’ PERCEPTIONS, FINAL REPORT 34–50 (2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/202946.pdf> [<https://perma.cc/RR8D-S8AC>].

crime victims' recovery, as measured by post-traumatic stress symptoms.⁷³

Because of the frequency and severity of secondary victimization, the needs and rights of victims of crime have been a critical focus of national and global systems over the past three decades, and restorative justice has been a key component of this movement.⁷⁴ In 2014, the National Center for Victims of Crime put forth new policy priorities for the victim's rights movement in the United States, including to 'pursue justice for all crime victims by continuing to reform our justice systems to increase transparency, ensure that victims' voices are heard, and provide meaningful accountability' as well as to 'promote fair and thoughtful roles for institutions in responding to victimization.'⁷⁵ These are challenges which can be met by restorative justice.

Physical, financial, and material losses, which the modern criminal legal process may not fully address, can be partially or fully recovered by a voluntary, victim-centered restorative justice process that culminates in an agreement between the victim, offender, and related stakeholders to ensure harms are repaired as much as possible, including the direct exchange of financial restitution. Offenders participating in restorative processes are significantly more likely to complete restitution agreements than those who do not.⁷⁶ Restorative justice practices are also designed to meet victims' needs related to procedural justice, including those for meaningful choice, a voice in

⁷³ Jo-Anne Wemmers, *Victims' Experiences in the Criminal Justice System and Their Recovery from Crime*, 19 INT'L REV. VICTIMOLOGY 221, 222–23, 229 (2013).

⁷⁴ See generally UNITED NATIONS GENERAL ASSEMBLY, DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER 1–2 (1985), http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf [<https://perma.cc/XF7B-7TYQ>]; UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, HANDBOOK ON JUSTICE FOR VICTIMS 11–44 (1999), https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf [<https://perma.cc/G7AX-5EQR>]; *Help for Crime Victims*, NATIONAL CENTER FOR VICTIMS OF CRIME, <http://victimsofcrime.org/help-for-crime-victims> [<https://perma.cc/M8EV-3GYH>].

⁷⁵ See generally NATIONAL CENTER FOR VICTIMS OF CRIME, ONE DAY: TAKING STOCK, MOVING FORWARD 2 (2014) <https://victimsofcrime.org/our-programs/public-policy/one-day-national-advocacy-agenda> [<https://perma.cc/RJ3Z-SDKB>].

⁷⁶ Latimer et al., *supra* note 58, at 137.

the process, information, validation, and compensation, while attending to personal safety.⁷⁷ A substantial body of research with crime victims and survivors participating in restorative justice also suggests that a dialogue with the offender results in high levels of satisfaction, reduced trauma symptoms like fear and anger, improved sense of empowerment or control, and a sense of personal healing.⁷⁸ By utilizing restorative justice practices to resolve – or supplement the resolution of – criminal cases, system stakeholders can better address victim and survivor needs.

B. Increasing the Role of Accountability in the Justice Process

The central tenets of restorative justice are clear about the role of the offender, or the person who has caused harm, in a restorative justice process. In short, the offender is personally obligated to repair the harm they caused as much as possible.⁷⁹ The repair of harm begins with accountability, extends to deep listening and expressions of remorse, and leads to an agreement to make amends in ways acceptable to the victim (or other stakeholders, depending on the model) and responsive to the victim's needs.⁸⁰ This conceptualization of obligation differs from legal obligations of the offender to the state or the state to the victim. It removes the state from the equation and returns responsibility for the harm to the persons directly affected by it: the victim, the offender, and, as we will discuss in the next section, their respective communities.

Restorative justice's call for direct accountability is in contrast to modern criminal court processes, in which there are few spaces for 'safe' apology.⁸¹ Rather, the American criminal system has "created a

⁷⁷ Jo-Anne Wemmers, *Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice*, 9 INT'L REV. OF VICTIMOLOGY 43, 45–48, 53 (2002).

⁷⁸ SHERMAN & STRANG, *supra* note 36, at 62–65; Lawrence W. Sherman et al., *Twelve Experiments in Restorative Justice: the Jerry Lee Program of Randomized Trials of Restorative Justice Conferences*, 11 J. OF EXPERIMENTAL CRIMINOLOGY 501, 502 (2015). See also BARGEN ET AL., *supra* note 60, at 27–28; Latimer et al., *supra* note 58, at 136.

⁷⁹ ZEHR, *supra* note 20, at 27.

⁸⁰ Toran Hansen & Mark Umbreit, *State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence*, 36 CONFLICT RESOL. Q. 99, 105 (2018).

⁸¹ Michael C. Jones, Comment, *Can I Say I'm Sorry? Examining the Potential of an Apology Privilege in Criminal Law*, 7 ARIZ. SUMMIT L. REV. 563, 569 (2014).

tension between apologies and the administration of justice,”⁸² characterized primarily by constitutionally-authorized self-protection from legal liability.⁸³ Despite the challenges of apology within a court context, social science suggests that offenders may benefit from apologizing in a number of ways, including accessing psychological growth, repairing relationships, and preventing further harm to the victim.⁸⁴ In contrast, subjugation of the offender’s agency during the justice process can provoke resentment, which lessens the offender’s bonds with the community and respect for the law, reducing the likelihood of successful reintegration and criminal desistance.⁸⁵

A body of research demonstrates that restorative justice practices increase offenders’ engagement in the justice process and sense of accountability to victims and survivors. Across four studies of apology in restorative justice, offenders were 6.9 times more likely to apologize to the victim in restorative justice settings than in court: 74 percent of offenders participating in a restorative process apologized, compared to 71 percent of offenders in court who did not apologize.⁸⁶ In a sample of 650 Colorado youth participating in restorative justice diversion programs, youth who had offended reported an increased sense of accountability, empathy, and remorse on measures administered before and after participation.⁸⁷ Increased accountability was associated with improved outcomes: 97 percent of youth completed their restorative justice contracts, 98 percent reported that they were highly satisfied with the experience, and 91.8 percent did not recidivate at the one-year marker.⁸⁸

Perceptions of increased accountability following restorative justice processes extend to victims. Those participating in the Colorado Department of Corrections Victim Offender Dialogue

⁸² *Id.*

⁸³ Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1028 (1999) (“[I]t is liability, or the fear of liability, that forms the central barrier to apology in most disputes.”).

⁸⁴ *Id.* at 1019–21.

⁸⁵ Michael M. O’Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89 MARQ. L. REV. 305, 323–24 (2005).

⁸⁶ Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 189 (2003).

⁸⁷ *Restorative Justice in Juvenile Diversion: An Evaluation of Programs Receiving Colorado RJ Cash Funds*, OMNI __, __ (2018) (forthcoming May 2019).

⁸⁸ *Id.*

program report that the dialogue gave them a chance to know that the offender was truly accountable for their actions.⁸⁹ This is consistent with the experiences of law enforcement personnel in Colorado working with restorative practices. In legislative testimony to support the use of restorative justice in Colorado courts, a Longmont city police officer testified about his initial reluctance to embrace what he saw as the liberal approach of restorative justice: “I was a cop. I wasn’t soft. I wasn’t going to hug the tree of restorative justice (laughter from other witnesses).”⁹⁰ He then spoke of learning through experience with the practices that “the teeth of our restorative justice program are sharper than those of our criminal justice system.”⁹¹ These accounts support the potential of restorative justice practices to elicit meaningful accountability from offenders more effectively than modern criminal processes.

C. Redistributing Power to Communities to Redress Harms

The restorative justice ideal is an exchange between a triad of stakeholders: victim, offender, and community. It aligns with a holistic and communitarian worldview that precludes complete understanding of the harm – or meaningful treatment of the victim or the offender – in the absence of their community context.⁹² From this viewpoint, the community is implicated in the harm caused and also has a stake in determining how it should be repaired.⁹³ Likewise, the community may have a role in helping to repair the harm or supporting the offender in doing so.⁹⁴

The restorative justice framework is consistent with the definition of community as “personal connectedness both to other individual human beings and to a group.”⁹⁵ Depending on the context and the type of harm, community may include the family members, friends, or neighbors of the victim or offender. It may include members of a school or workplace where harm occurred. In larger-scale conflicts, it

⁸⁹ Joshua Keffer, *Colorado Department of Corrections Restorative Justice*, VIMEO, <https://vimeo.com/156627643> [<https://perma.cc/QA89-BSUV>].

⁹⁰ Shannon M. Sliva, *A Tale of Two States: How U.S. State Legislatures Consider Restorative Justice Policies*, 20 CONTEMP. JUST. REV. 255, 261 (2017).

⁹¹ *Id.*

⁹² Pranis, *supra* note 48, at 34.

⁹³ See Christie, *supra* note 41, at 10.

⁹⁴ *Id.*

⁹⁵ Paul McCold & Benjamin Wachtel, *Community Is Not a Place: A New Look at Community Justice Initiatives*, 1 CONTEMP. JUST. REV. 71, 71 (1998).

may refer to a community of interest or experience, such as members of a religious or ethnic group.⁹⁶ The state is not a reasonable or an acceptable substitute for the community's interest in harm caused between two or more of its members.⁹⁷ Rather, in restorative justice, "the justice process belongs to the community."⁹⁸

The modern criminal system is associated with a breakdown of community and civic participation, in part enabled by the increasing urbanization and bureaucratization of society.⁹⁹ However, recent reforms following the tough-on-crime era include an increasing role for local communities in crime response.¹⁰⁰ Community policing forged an entry point for problem-solving courts, collaborative defense, and community prosecution models.¹⁰¹ In addition, states are increasingly turning to community corrections as a mechanism for reducing the prison population and decreasing criminal justice spending; the population of Americans serving probation or parole is twice that of those incarcerated.¹⁰²

In 2017, the Harvard Kennedy School's Executive Session on Community Corrections published a consensus document arising out

⁹⁶ See generally Mark Umbreit, Ted Lewis & Heather Burns, *A Community Response To A 9/11 Hate Crime: Restorative Justice Through Dialogue*, 6 CONTEMP. JUST. REV. 383 (2003).

⁹⁷ Mark S. Umbreit, et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 256 (2005) ("From a restorative perspective, the primary stakeholders are understood to be individual victims and their families, victimized communities, and offenders and their families. The state and its legal system also clearly have an interest as a stakeholder but are seen as more removed from direct impact. Thus the needs of those most directly affected by the crime come first.").

⁹⁸ Howard Zehr & Harry Mika, *Fundamental Concepts of Restorative Justice*, 1 CONTEMP. JUST. REV. 47, 53 (1998).

⁹⁹ Albert W. Dzur, *Restorative Justice and Civic Accountability for Punishment*, 36 POLITY 3, 13 (2003) ("Far from being a natural response to harmful acts, formal crime control measures like imprisonment are the product of social distances that open up in modern urban life.") (citing NILS CHRISTIE, *LIMITS TO PAIN: THE ROLE OF PUNISHMENT IN PENAL POLICY* (1981)).

¹⁰⁰ Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 322–23 (2002).

¹⁰¹ *Id.*

¹⁰² *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, THE PEW CHARITABLE TRUSTS (Sept. 25, 2018), <https://www.pewtrusts.org/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities> [https://perma.cc/FV4X-PMLG].

of three years of work.¹⁰³ This document describes a new paradigm for community corrections, centered on “the well-being and safety of our communities, which is rooted in the social bonds of neighborhoods and families.”¹⁰⁴ The Harvard group concluded that to accomplish the goal of successful community integration, community corrections should focus on facilitating individuals success and effective integration into community life and helping them repair any harm caused to their fellow citizens’ to help individuals promote community well-being.¹⁰⁵ The Harvard group’s recommendations directly align with or can be furthered by restorative practices: members recommend a shift from “offender focused” to “victim centered,” an emphasis on repayment of debt to individuals and communities, a call for “family inclusive” programming, and a recommendation to engage communities to leverage relationships and social networks in churches, neighborhood groups, and schools.¹⁰⁶

Connection and belonging are fundamental human needs. Further, social bonds help people stay connected to their communities and prevent crimes of self-interest.¹⁰⁷ When crime does occur, repairing relationships and encouraging empathy builds community and undermines the cycles of poverty and crime.¹⁰⁸ In addition, increasing community engagement in the justice process promotes ownership and excites a sense of responsibility for the welfare of community

¹⁰³ See *Toward an Approach to Community Corrections for the 21st Century: Consensus Document of the Executive Session on Community Corrections*, HARVARD KENNEDY SCHOOL (2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/Consensus_Final2.pdf[<https://perma.cc/23FP-M8UM>].

¹⁰⁴ *Id.* at 2.

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* at 5–7.

¹⁰⁷ FRANK P. WILLIAMS, III, & MARILYN D. MC SHANE, CRIMINOLOGICAL THEORY 194–96 (Charlyce Jones Owen et al. eds., 3rd ed. 1999) (describing Travis Hirschi’s Social Control Theory: “Society serves as a restraint on behavior and if restraints are loosened, self-interested behavior will emerge.”). For a deeper understanding of the role of social bonds and social control in criminological theory, see JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 82 (1992).

¹⁰⁸ Kate E. Bloch, *Conceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L.J. 201, 205 (2009) (Restorative justice “seeks to invoke empathy, generally in the offender, but also sometimes in the victim of the harm and in the larger community affected by the harm. Empathy is the bridge to restoration.”).

members.¹⁰⁹ Restorative justice can play a central role in fulfilling these aims.

Restorative practices like Circles of Support and Accountability (COSAs) offer one model for engaging the community in repairing the harms caused by crime. The COSA model was popularized in Canada as a community-based method for assisting high-risk sex offenders in reintegrating into the community.¹¹⁰ Trained community volunteers provide support for persons returning to the community following incarceration for a sexual offense.¹¹¹ Replicated experimental research on COSA outcomes demonstrate 70 to 83 percent reductions in sexual recidivism compared to matched control groups.¹¹² Cost-benefit analysis of the Minnesota Department of Corrections COSA program showed an 82 percent return on the state's investment in COSAs due to reduced recidivism.¹¹³

Another promising restorative model for community-engagement is the use of community-involved courts, such as community justice courts,¹¹⁴ community justice hubs,¹¹⁵ and neighborhood accountability boards.¹¹⁶ Vermont's Community Justice Network provides a model for community boards, in which volunteers negotiate reparative

¹⁰⁹ Christa Obold-Eshleman, *Victims' Rights and The Danger of Domestication of the Restorative Justice Paradigm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 580–81 (2004).

¹¹⁰ See generally Robin J. Wilson et al., *Circles of Support and Accountability: Engaging Community Volunteers in the Management of High-Risk Sexual Offenders*, 46 HOWARD J. CRIME & JUST. 1 (2007).

¹¹¹ *Id.* at 8–10.

¹¹² See Robin J. Wilson et al., *Circles of Support and Accountability: A Canadian National Replication of Outcome Findings*, 21 SEXUAL ABUSE 412, 420 (2009).

¹¹³ See generally Grant Duwe, *Can Circles of Support and Accountability (COSA) work in the United States? Preliminary Results From a Randomized Experiment in Minnesota*, 25 SEXUAL ABUSE 143 (2012).

¹¹⁴ See, e.g., *Promoting a Restorative Approach to Conflict and Crime in Vermont Communities*, COMMUNITY JUSTICE NETWORK OF VERMONT, <http://cijnvt.org/> [<https://perma.cc/9UDP-WQ4H>].

¹¹⁵ See, e.g., Yana Kunichoff, *Should Communities Have a Say in How Residents are Punished for Crime?*, THE ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/chicago-restorative-justice-court/524238/> [<https://perma.cc/E8LP-B79C>].

¹¹⁶ See, e.g., Tessa Duvall, *Neighborhood Accountability Boards Sanction Offenders Through Apologies, Essays and Community Service*, THE FLORIDA TIMES-UNION (Mar. 26, 2016, 10:58 A.M.), <https://www.jacksonville.com/news/2016-03-26/story/neighborhood-accountability-boards-sanction-offenders-through-apologies-essays> [<https://perma.cc/BFN3-D2TK>].

agreements with offenders.¹¹⁷ A Department of Justice funded report found that reparative probation in Vermont decreased the odds of a new conviction during probation by 23 percent when compared with standard probation.¹¹⁸ These promising practices demonstrate the benefits of community engagement in the justice process, both as a process and an outcome.

D. Refocusing Government Resources

Restorative justice may reduce government expenses as well as the high costs associated with courts and corrections.¹¹⁹ In 2012, the United States criminal system spent \$130 billion for law enforcement, \$60 billion for the judiciary, and \$83 billion for corrections.¹²⁰ This level of spending reflects a per capita cost of \$872 per American per year.¹²¹ The criminal system is not only costly to operate; criminal spending reflects high opportunity costs for society in the form of unfunded and underfunded solutions with better outcomes.¹²²

In contrast, evidence exists that community-based restorative justice models offer high satisfaction and reductions in offending at a reduced cost. For instance, in 36 direct comparison cases, restorative justice reduced costs associated with the criminal justice process as well as subsequent costs associated with the treatment of victim trauma.¹²³ Another study of ten randomized trials of restorative justice

¹¹⁷ David Karp, *Community Boards and Juvenile Justice in Vermont 1* (unpublished article), <http://www.skidmore.edu/campusrj/karp-vitae-files/technical-reports/Community-Boards-and-Juvenile-Justice-in-Vermont.pdf> [<https://perma.cc/D9PC-EMGW>].

¹¹⁸ John A. Humphrey et al., *Reparative versus Standard Probation: Community Justice Outcomes*, VERMONT DEP'T OF CORR. 2, 18, <http://www.doc.state.vt.us/about/reports/reparative-v-probation/view> [<https://perma.cc/Y6XX-U77D>].

¹¹⁹ See generally *Restorative Justice Conferencing, Adult Criminal Justice, Benefit-Cost Results*, WASH. STATE INST. FOR PUB. POL'Y (2018), <http://www.wsipp.wa.gov/BenefitCost/ProgramPdf/558/Restorative-justice-conferencing> [<https://perma.cc/DM9D-RBJH>].

¹²⁰ EXEC. OFFICE OF THE PRESIDENT OF THE U.S., *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM* 43 (Apr. 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice> [<https://perma.cc/X5F7-WNGR>].

¹²¹ *Id.* at 44.

¹²² See Albert W. Dzur, *Restorative Justice and Civic Accountability for Punishment*, 36 *POLITY* 3, 11 (2003).

¹²³ Lawrence W. Sherman & Heather Strang, *Restorative Justice: The Evidence*, THE SMITH INSTITUTE, at 4 (2007), http://www.iirp.edu/pdf/RJ_full_report.pdf [<https://perma.cc/9XQW-Z5PY>].

conferences in the United Kingdom demonstrated 3.7–8.1 times more benefit as measured by crimes prevented.¹²⁴ Based on a separate cost benefit analysis of restorative justice for low-risk offenders, scholars found a net benefit of \$8,702 per participant across twenty-one studies.¹²⁵

Restorative justice models are not only associated with efficiency, they are associated with equity.¹²⁶ When properly implemented, restorative justice practices empower marginalized voices and promote non-domination, facilitating social justice aims.¹²⁷ In contrast, the American criminal system has high rates of racial disparity at all stages of the process. Black Americans are more likely than White Americans to be arrested for a crime; once arrested, convicted; and once convicted, sentenced more punitively.¹²⁸ Black Americans are 5.9 times as likely – and Hispanic Americans 3.1 times as likely – to be incarcerated as White Americans.¹²⁹ These disparities are traceable, in large part, to discretionary decision-making by police, prosecutors, and judges, as well as sentencing policies that disproportionately impact people of color.¹³⁰ If fully actualized, restorative alternatives to current justice models may reduce unequal impacts of punishment.¹³¹ For instance, early research shows that school-based restorative discipline is a promising approach to

¹²⁴ See generally Lawrence W. Sherman et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. QUANTITATIVE CRIMINOLOGY 1 (2015).

¹²⁵ Elizabeth K. Drake et al., *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, 4 VICTIMS & OFFENDERS 170, 186 (2009).

¹²⁶ Restorative school discipline is often touted as a pathway to reducing discipline disparities and achieving equity aims. See generally Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 25 J. EDUC. & PSYCHOL. CONSULTATION 1 (2015); Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline Through Restorative Justice*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION (Daniel J. Losen ed., 2015).

¹²⁷ John Braithwaite, *Restorative Justice and Social Justice*, 63 SASK. L. REV. 185, 190 (2000).

¹²⁸ *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (Apr. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/D577-H39U>].

¹²⁹ U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016, 8 TBL.6 (2018).

¹³⁰ Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J., 87S, at 99S (2011).

¹³¹ See generally Braithwaite, *supra* note 127.

interrupting the school to prison pipeline while reducing racial disparities.¹³² The use of restorative discipline in schools reduces suspensions and expulsions while reducing disparities in suspension rates between Black and White students and between high and low-income students.¹³³

If used thoughtfully, restorative justice holds the potential to not only mitigate disparities but also to offer a meaningful process for responding to racial inequities in the justice system. By engaging communities, restorative justice can increase the transparency of decision-making, improve trust relationships between communities and law enforcement agencies, and repair harms to communities of color.¹³⁴ States and communities committed to system-level use of restorative justice may consider how to turn the lens of restorative justice inward and utilize promising practices to engage in dialogue about inequity in the criminal system.

IV. COLORADO AS A LABORATORY FOR RESTORATIVE JUSTICE LAWMAKING

“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

¹³² CATHERINE H. AUGUSTINE ET AL., CAN RESTORATIVE PRACTICES IMPROVE SCHOOL CLIMATE AND CURB SUSPENSIONS? AN EVALUATION OF THE IMPACT OF RESTORATIVE PRACTICES IN A MID-SIZED URBAN SCHOOL DISTRICT (2018).

¹³³ *Id.*; See also Yolanda Anyon et al., *Restorative Interventions and School Discipline Sanctions in a Large Urban School district*, 53 AM. EDUC. RES. J. 1663 (2016).

¹³⁴ Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 2, 487 (2009) (“... disparities undermine the legitimacy of the law and legal authorities in black neighborhoods and diminish the capacity of residents to engage in collective problem solving...”) and at 496 (“...welcomes members of the community into the criminal justice process, giving them an institutionalized opportunity to be heard and to make a difference in the way that drug offenders are handled...”).

–Justice Louis D. Brandeis’
dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

A handful of American states experimenting with large-scale use of restorative justice – such as Vermont¹³⁵ and Colorado¹³⁶ – serve as Justice Brandeis’ laboratories of democracy, wherein we can gain valuable insight into the implementation and impact of restorative approaches in the juvenile and criminal systems. With a robust statutory scheme throughout the criminal and juvenile codes, as well as within its revised statutes for schools, Colorado leads the nation in restorative justice policy adoptions¹³⁷ and is well-positioned to assist in assessing the viability of restorative justice as a legal response. This section provides an overview of the statutory structure for restorative justice in Colorado and describes some findings to date related to the implementation and outcomes of restorative justice policy adoptions. It then explores challenges to the aspirations of restorative justice, as experienced in a state with robust statutory support for restorative justice, and describes the strengths and limitations of Colorado’s current efforts to overcome these challenges.

A. Colorado Statutory Scheme for Restorative Justice

Between 2007 and 2018, the Colorado General Assembly enacted seven bills¹³⁸ resulting in forty-four statutes related to restorative

¹³⁵ See Donna Rogers, *Restorative Justice in Practice: The Community Justice Network of Vermont*, *Corrections Forums* 36, 36 (July/Aug. 2018) (In 1998, Vermont Department of Corrections initiated partnerships with municipalities to develop community justice centers (CJCs) for restorative justice implementation. Twenty CJCs now thrive throughout the state); see also Jan Peter Dembinski, *Restorative Justice: Vermont State Policy*, 29 VT. B.J. 39, 40–42 (detailing how Vermont enacted one of the most comprehensive restorative justice programs by rethinking the department of corrections and community corrections).

¹³⁶ Shannon M. Sliva, *A tale of two states: how U.S. state legislatures consider restorative justice policies*, 20 J. CONTEMP. JUST. REV. 255, 259 (2017).

¹³⁷ Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL’Y PRAC. 77, 85 (2015).

¹³⁸ See H.R. 1129, 66th Gen. Assemb. (Colo. 2007); H.R. 1117, 66th Gen. Assemb. (Colo. 2008); H.R. 1032, 68th Gen. Assemb. (Colo. 2011); H.R. 1254, 69th Gen. Assemb. (Colo. 2013); H.R. 1094 (Colo. 2015); H.R. 1039, 71th Gen. Assemb. (Colo. 2017); S.R. 220, 115th Cong. (Colo. 2017).

justice. Colorado's restorative justice laws uniquely create a state restorative justice council¹³⁹ and mandate the assessment of a small fee in all juvenile and adult criminal cases.¹⁴⁰ The state restorative justice council disperses the funds to advance restorative justice principles and practices throughout Colorado by supporting the development of programs, serving as a central repository for information, assisting in education and training, and providing technical assistance for programs and aspiring programs.¹⁴¹ While scholars struggle to define restorative justice, another unique aspect of Colorado's legislative scheme is the adoption of a statutory definition:

'Restorative justice practices' means practices that emphasize repairing the harm caused to victims and the community by offenses. Restorative justice practices include victim-offender conferences, family group conferences, circles, community conferences, and other similar victim-centered practices. Restorative justice practices are facilitated meetings attended voluntarily by the victim or victim's representatives, the victim's supporters, the offender, and the offender's supporters and may include community members. By engaging the parties to the offense in voluntary dialogue, restorative justice practices provide an opportunity for the offender to accept responsibility for the harm caused to the victim and community, promote victim healing, and enable the participants to agree on consequences to repair the harm, to the extent possible, including but not limited to apologies, community service, reparation, restoration, and counseling. Restorative justice practices may be used in addition to any other conditions, consequences, or sentence imposed by the court.¹⁴²

The remaining statutes encourage the use of restorative practices in schools,¹⁴³ identify a place for restorative justice in Colorado's

¹³⁹ COLO. REV. STAT. § 13-3-116 (West 2018) (establishing a state restorative justice council).

¹⁴⁰ COLO. REV. STAT. § 18-25-101 (West 2018) (creating a \$10 restorative justice fee for each adult convicted of a crime and juvenile adjudicated a delinquent).

¹⁴¹ See COLO. REV. STAT. § 18-25-101(3)(a) (West 2018) (authorizing state restorative justice council to disperse funds generated by restorative justice surcharge); see also COLO. REV. STAT. § 13-3-116(1)(a) (West 2018) (enumerating state restorative justice council's purpose).

¹⁴² COLO. REV. STAT. § 18-1-901(3)(o.5) (West 2018) (defining restorative justice for adult criminal matters); cf. COLO. REV. STAT. § 19-1-103(94.1) (West 2018) (using similar language to define "restorative justice" for juvenile matters).

¹⁴³ See, e.g., COLO. REV. STAT. § 22-32-144(2)(a) (West 2018) (encouraging the use of restorative justice in resolving conflict in schools, including bullying,

Victim Rights Act,¹⁴⁴ and create a legal structure for the use of restorative justice at several points along the criminal and juvenile-system continuums (e.g., pre-file, post-file pre-plea, guilty plea, sentencing, re-sentencing, and post-sentencing).¹⁴⁵

Colorado law emphasizes the integration of restorative justice principles into the institutions designed to prosecute and punish juveniles. The legislature intends the children's code to, among other things, restore public safety by creating a juvenile justice system that provides the opportunity for restorative processes:

The general assembly finds that the intent of this article is to protect, restore and improve the public safety by creating a system of juvenile justice that will appropriately sanction juveniles who violate the law and, in certain cases, will also *provide the opportunity to bring together affected victims, the community and juvenile offenders for restorative purposes*. The general assembly further finds that, while holding paramount the public safety, the juvenile justice system shall take into consideration the best interests of the juvenile, the victim and the community in providing appropriate treatment to reduce the rate of recidivism in the juvenile justice system and to assist the juvenile in becoming productive members of society.¹⁴⁶

To the extent the state's policy remains unclear, the next statutory subsection asserts that Colorado favors restorative justice in juvenile prosecutions. The Colorado legislature declares that victims and the community should be afforded an opportunity to participate in restorative justice with juvenile offenders:

physical conflicts, theft, property damage, harassment, and truancy); COLO. REV. STAT. § 22-30.5-522 (West 2018).

¹⁴⁴ See, e.g., COLO. REV. STAT. § 24-4.1-302.5(1)(1.5) (West 2018) (creating the right of victims to be informed about the possibility of restorative justice, including victim offender dialogues); see also COLO. REV. STAT. § 24-4.1-303(11)(g) 2018 ("The district attorney shall inform a victim of . . . the availability of restorative justice practices . . . which includes victim-offender conferences").

¹⁴⁵ See, e.g., COLO. REV. STAT. § 19-2-303(1) (West 2018) (policy favoring restorative justice as part of juvenile pre-file diversion); COLO. REV. STAT. § 18-1.3-101(8) (West 2018) (authorizing use of restorative justice as part of adult diversion); COLO. REV. STAT. § 19-2-311 (West 2018) (encouraging use of restorative justice in Division of Youth Services); see also Kate E. Bloch, *Conceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L.J. 201, 202 (2009) (discussing how restorative justice can occur before, during, or after any stage of the criminal system).

¹⁴⁶ COLO. REV. STAT. § 19-2-102(1), (West 2018) (emphasis added).

The general assembly hereby finds that the public has the right to safe and secure homes and communities and that when a delinquent act occurs such safety and security is compromised; and the result is harm to the victim, the community and the juvenile offender. The general assembly finds that *the juvenile justice system should seek to repair such harm and that the victims and communities should be provided with the opportunity to elect to participate actively in a restorative process that would hold the juvenile offender accountable for his or her offense.*¹⁴⁷

Colorado law expressly promotes incorporating restorative justice at several points along the juvenile system continuum. At the beginning of the continuum, law enforcement officers may divert youth for petty offenses and municipal violations into a program governed by restorative principles.¹⁴⁸ The law encourages restorative justice as an alternative to formal prosecution for youth facing their first juvenile filing.¹⁴⁹ Restorative justice is also encouraged as part of prosecutor diversion programs.¹⁵⁰

If a juvenile case is not diverted from the court system, trial judges must inform juveniles about the possibility of participating in restorative justice during first-appearance advisements¹⁵¹ and plea advisements.¹⁵² Colorado courts may order a restorative justice assessment for juveniles prior to sentencing,¹⁵³ and most felony and misdemeanor adjudications require probation to conduct a restorative justice assessment in its pre-sentence investigation report.¹⁵⁴ Restorative justice is explicitly listed as a sentencing option for

¹⁴⁷ COLO. REV. STAT. § 19-2-102(2) (West 2018) (emphasis added).

¹⁴⁸ COLO. REV. STAT. § 19-2-302.5 (West 2018).

¹⁴⁹ COLO. REV. STAT. § 19-2-512(2) (West 2018).

¹⁵⁰ COLO. REV. STAT. § 19-2-303(1) (West 2018) (establishing policy that restorative justice should be integrated into juvenile diversion whenever possible); COLO. REV. STAT. § 19-1-103(44), (94.1) (West 2018) (enumerating restorative justice, including victim offender conferences, as a juvenile diversion service).

¹⁵¹ COLO. REV. STAT. § 19-2-706(1)(a) (West 2018) (requiring courts to advise juveniles about restorative justice at their first appearance).

¹⁵² COLO. REV. STAT. § 19-2-708(2) (West 2018) (requiring courts to advise juveniles about restorative justice when entering a guilty plea at a providency hearing).

¹⁵³ COLO. REV. STAT. § 19-2-905(4) (West 2018) (authorizing courts to order a restorative justice suitability assessment for juveniles prior to sentencing).

¹⁵⁴ COLO. REV. STAT. § 19-2-905(4) (West 2018) (requiring a restorative justice assessment for adjudications for felonies and misdemeanors not contained in title 42 - The Traffic Code).

juvenile offenders,¹⁵⁵ and restorative justice may be ordered as a condition of probation.¹⁵⁶

Toward the end of the juvenile system continuum, the Division of Youth Services (DYS), composed of detainment and commitment facilities, must create a therapeutic, rehabilitative culture that is trauma sensitive and includes restorative justice;¹⁵⁷ DYS must “establish, maintain, and operate” a community accountability program incorporating restorative justice principles;¹⁵⁸ and DYS may incorporate victim-initiated victim/offender dialogues into its treatment of youth in its custody.¹⁵⁹ For juveniles incarcerated as adults in prison, the Colorado Department of Corrections (CDOC) may offer restorative justice practices if the process is victim-initiated,¹⁶⁰ and it must operate a program to assist with reintegration into the community upon release, which may include restorative justice practices.¹⁶¹

Colorado law also integrates restorative justice principles into the adult criminal system. For example, one purpose of the criminal code is “[t]o promote acceptance of responsibility and accountability by offenders and to provide restoration and healing for victims and the community while attempting to reduce recidivism and the costs to society by the use of restorative justice practices.”¹⁶²

Colorado statutes outline the availability of restorative justice for adults similar to that of the juvenile system at various stages along the criminal system continuum. Prosecutor’ offices are encouraged to offer restorative justice as part of a pretrial diversion program¹⁶³ and

¹⁵⁵ COLO. REV. STAT. § 19-2-907(1)(l) 2018 (authorizing courts to sentence juvenile offenders to restorative justice after being assessed for suitability).

¹⁵⁶ COLO. REV. STAT. § 19-2-925(2)(l) 2018 (authorizing courts to order a restorative justice assessment for juvenile as probation condition).

¹⁵⁷ COLO. REV. STAT. § 19-2-203(4)(b)(V)(O) (West 2018).

¹⁵⁸ COLO. REV. STAT. § 19-2-309.5 (West 2018) (establishing “community accountability program” that “adheres to the principles of restorative justice” within the Division of Youth Services).

¹⁵⁹ COLO. REV. STAT. § 19-2-311 (West 2018) (establishing victim offender dialogue pilot program within the Division of Youth Services).

¹⁶⁰ COLO. REV. STAT. § 17-34-101 (West 2018).

¹⁶¹ COLO. REV. STAT. § 17-34-102(4) (West 2018).

¹⁶² COLO. REV. STAT. § 18-1-102(1)(e) (West 2018).

¹⁶³ COLO. REV. STAT. § 18-1.3-101(8) (West 2018) (recognizing restorative justice programs may serve as prosecutor diversion programs).

to consider it in plea negotiations.¹⁶⁴ And when defendants appear for arraignment, courts must advise them about the possibility of restorative justice practices.¹⁶⁵ While the criminal code does not expressly require courts to advise adult offenders about the possibility of restorative justice during providency or plea advisements, a complete and accurate providency advisement should inform defendants of all possible sentencing options, including restorative justice.¹⁶⁶

Sentencing policy for adults in Colorado echoes policy for juvenile adjudication consequences. Before sentencing, probation departments must include a restorative justice assessment in presentence investigation reports.¹⁶⁷ Courts may order restorative justice as an alternative to or a part of an adult offender's sentence¹⁶⁸ and as a condition of probation.¹⁶⁹ And, when imposing a sentence on an adult offender, Colorado courts must consider several sentencing goals as outlined by the legislature.¹⁷⁰ These goals include using restorative justice practices to (1) promote the offender's acceptance of responsibility and accountability, (2) provide restoration and healing for victims and the community, and (3) reduce recidivism and costs to society.¹⁷¹ Absent the addition of a restorative justice component, punishment alone, such as incarceration, fails to achieve Colorado's sentencing goals.¹⁷²

¹⁶⁴ COLO. REV. STAT. § 16-7-301(2)(f) (West 2018) (authorizing prosecutors to agree to a restorative justice assessment, including a victim offender conference assessment, as part of a plea agreement).

¹⁶⁵ COLO. REV. STAT. § 16-7-202(1) (West 2018) (requiring advisement for defendants charged with felonies, class one misdemeanors, class one misdemeanors, and offenses with a possible penalty of more than one year incarceration).

¹⁶⁶ See COLO. REV. STAT. § 18-1-102.5(1)(f) (West 2018).

¹⁶⁷ COLO. REV. STAT. § 16-11-102(1.9)(b.5) (West 2018).

¹⁶⁸ COLO. REV. STAT. § 18-1.3-104(1)(b.5)(I) (West 2018) (authorizing courts to consider restorative justice, including victim offender conferences, as an alternative to incarceration).

¹⁶⁹ COLO. REV. STAT. § 18-1.3-204(2)(a)(III.5) (West 2018) (authorizing courts to order restorative justice as probation condition).

¹⁷⁰ See COLO. REV. STAT. § 18-1-102.5 (West 2018).

¹⁷¹ COLO. REV. STAT. § 18-1-102.5(1)(f) (West 2018).

¹⁷² *Id.*

The Victim Rights Act requires that prosecutors advise victims about the availability of restorative justice.¹⁷³ Colorado policy, using restorative language and principles, encourages victim restitution and reparation during sentencing, during parole, or through a local correctional or detention facility, such as a jail.¹⁷⁴ Further, the CDOC is encouraged to offer victim offender dialogues between survivors and incarcerated offenders.¹⁷⁵

Under Colorado law, restorative justice may be used for felonies, misdemeanors, petty offenses, and municipal violations,¹⁷⁶ as well as in school-based criminal offense conflicts.¹⁷⁷ In an effort to protect certain types of victims, courts are precluded from ordering restorative justice for a victim of four offenses: sex assault, domestic violence, stalking, and protection-order violations.¹⁷⁸ To be clear, Colorado law

¹⁷³ COLO. REV. STAT. § 24-4.1-303(11)(g) (West 2018) (“The district attorney shall inform a victim of . . . the availability of restorative justice practices . . . which includes victim-offender conferences”); *see also* COLO. REV. STAT. § 24-4.1-302.5(1.5) (West 2018) (victims possess a right to be informed about the possibility of restorative justice practices including victim offender conferences).

¹⁷⁴ COLO. REV. STAT. § 17-28-101(2) (West 2018).

¹⁷⁵ COLO. REV. STAT. § 17-28-103 (West 2018). (authorizing victim offender dialogue program in the Department of Corrections).

¹⁷⁶ *See, e.g.*, COLO. REV. STAT. § 18-1.3-104(1)(b.5)(I) (West 2018) (only exempting four enumerated offenses from courts’ authority to order restorative justice as a sentencing alternative for criminal defendants); COLO. REV. STAT. § 19-2-905(4) (West 2018) (only enumerating four exceptions to courts’ authority in ordering restorative justice as part of a juvenile’s sentence); *see also* COLO. REV. STAT. § 19-2-905(4) (West 2018) (authorizing courts to sentence a juvenile to restorative justice as a condition of probation if adjudicated of an offense that would be a felony or a misdemeanor but not a traffic offense if committed by an adult); COLO. REV. STAT. § 16-7-202 (West 2018) (explaining arraignment advisement, which includes possibility of restorative justice sentencing component, for felonies, drug misdemeanors, class-one misdemeanors, and offenses other than driving offenses with a maximum penalty of more than one year in prison).

¹⁷⁷ *See* COLO. REV. STAT. § 22-32-144(2)(a) (West 2018) (encouraging schools to consider restorative justice first when remediating conflicts such as bullying, theft, class disruption, physical altercations, harassment, internet harassment, property damage, and truancy).

¹⁷⁸ *See, e.g.*, COLO. REV. STAT. § 19-2-905(4) (West 2018) (enumerating exceptions to courts’ authority in ordering restorative justice as part of a juvenile’s sentence); *accord* COLO. REV. STAT. § 19-2-907(1)(I) (West 2018); COLO. REV. STAT. § 19-2-907(1)(I) (West 2018) (enumerating exceptions to court’s authority in ordering restorative justice as a condition of a juvenile’s probation); *see also, e.g.*, COLO. REV. STAT. § 18-1.3-104(1)(b.5)(I) (West 2018) (enumerating exceptions to courts’ authority in ordering restorative justice as part of a

does not prohibit the use of restorative justice for these offenses, and it does not preclude restorative justice *except* by court order. For example, because Colorado restorative justice law is designed to be centered on victims' needs, a prosecutor can and should agree to offer restorative justice to an offender whenever a victim requests it, even if the person is a victim of an enumerated exception.¹⁷⁹

B. On the Ground in Colorado: Aspirations Versus Reality

System administrators report that statutory structure for restorative justice in Colorado has contributed to the legitimacy of restorative practices as a criminal response and has made conversations about the use of restorative justice more robust.¹⁸⁰ In addition, key components of legislation – like the creation of the state restorative justice council, the collection of fees to support restorative justice development, and the creation of data-driven pilot projects for juvenile diversion and post-sentencing victim offender dialogues – have generated resources for implementation and clarified roles and responsibilities related to the administration of restorative justice in the state. Still, stakeholders emphasize the importance of additional structure or resourcing to support the implementation of many Colorado statutes.¹⁸¹

Colorado's experiments in restorative justice also further illuminate the tensions of implementing restorative justice in the modern criminal court system. Whereas legal scholars have extensively discussed theoretical tensions between restorative justice and existing legal structures like sentencing uniformity,¹⁸² due

defendant's sentence); COLO. REV. STAT. § 18-1.3-204(2)(a)(III.5) (West 2018) (enumerating exceptions to court's authority in ordering restorative justice as a condition of a defendant's probation).

¹⁷⁹ See COLO. REV. STAT. § 16-7-301(2)(f) (West 2018) (authorizing prosecutors to consent to a defendant's restorative justice assessment as part of a plea agreement without any exceptions).

¹⁸⁰ See Shannon M. Sliva, Mariah Shaw, & Tyler M. Han, *Policy to Practice: An Implementation Case Study in Restorative Justice* 1, 14 (unpublished manuscript). On file with author.

¹⁸¹ *Id.* at 14–15.

¹⁸² See generally Michael M. O'Hear, *Is Restorative Justice Compatible with Sentencing Uniformity*, 89 MARQ. L. REV. 305 (2005).

process,¹⁸³ and other constitutional rights,¹⁸⁴ little is published about the realities of implementing restorative justice into law. We discuss four areas in particular where the aspirations of restorative justice have been met with challenges when introduced into the criminal court context in Colorado. These include challenges to the aspirations of accountability, voluntariness, victim-centeredness, and equity. We further describe the strengths and limitations of Colorado's current efforts to overcome these challenges and identify future areas of focus if these challenges are to be fully remediated.

1. Can Restorative Justice Achieve Aspirations of Victim-Centeredness?

Responsiveness to the needs of crime victims and survivors is at the center of restorative justice philosophy and practice. However, it is necessary to acknowledge and account for the difficulties of centering the role of victims in the existing criminal court system, which focuses on determining what the offender deserves rather than what the victim needs.¹⁸⁵ The "just deserts" model enables relative ease in the standardization of justice: an eye for an eye.¹⁸⁶ In contrast, the needs of victims and survivors following a crime vary based on a number of factors not related to the crime itself, including the victim's prior experiences with crime and victimization; the pre-crime status of their health, finances, and social network; their beliefs about justice and punishment; and the timing of their own personal healing process. The range of victim needs may result in less standardized sentencing decisions, which are based on factors outside of the offender's

¹⁸³ See generally Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL'Y 301 (2007).

¹⁸⁴ See Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667 (2004); see also Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution*, 3 APPALACHIAN J.L. 1 (2004).

¹⁸⁵ Ellen K. Alexander & Janis Harris Lord, *Impact Statements: A Victim's Right to Speak, A Nation's Responsibility to Listen*, OFFICE FOR VICTIMS OF CRIME (1994), https://www.ncjrs.gov/ovc_archives/reports/impact/impact.htm [<https://perma.cc/QS24-9WXR>] ("The criminal justice system became so focused on protecting the rights of the accused that it lost sight of the needs and rights of the victim.").

¹⁸⁶ Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOCIAL PSYCH. 284, 285 (2002) ("The central precept of just deserts theory is that punishment be proportionate to the harm.").

control.¹⁸⁷ In addition, the timing of victims' readiness or ability to participate may not support offenders' rights to timely resolution of their case.

In Colorado, the aspiration of restorative justice toward victim-centeredness has been challenged in other ways as well. Namely, the philosophy of restorative justice assumes that victims wish to participate in restorative processes with the offender. While there is significant evidence that victims want a voice in the justice process, there is less information available about *how* victims would like to contribute input. In Colorado, diversionary restorative processes proceed without the involvement of direct victims in about half of all cases, in most cases because the processes seek to address crimes without a clear direct victim (e.g. drug crimes) or because victims decline the opportunity to participate.¹⁸⁸ Practitioners working with Colorado diversion cases – most frequently juvenile misdemeanor cases – suggest that the most common reason for non-participation of victims is lack of interest.¹⁸⁹ According to program administrators, many victims declining participation in these types of cases express satisfaction with the likely resolution of the case without their presence or choose not to spend more time resolving the case.¹⁹⁰ Instead, community members or surrogate victims – prior victims of a similar offense – represent the victim's perspective in the restorative justice process. This is consistent with observations that some victims may prefer to “delegate this decision-making process wholly to officials and professionals.”¹⁹¹

A related but unique conflict arises in crimes of serious violence in Colorado. Restorative processes are rarely offered in these cases prior to sentencing; instead, they are most likely to occur post-

¹⁸⁷ It should be noted that there is significant evidence that sentencing decisions based on standardized guidelines also result in disparity, *and* that it is increasingly considered desirable to include greater context in sentencing decisions. *See, e.g.,* Michael Tonry, *Can Deserts Be Just in an Unjust World?*, Minnesota Legal Studies Research Paper Series Research Paper No. 14-10 (2014). *See also* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 15 UTAH L. REV. 15, 22 (2003) (“Attempts to create consistence for offenders may produce gross inconsistencies for victims.”).

¹⁸⁸ OMNI, *supra* note 87, at 8.

¹⁸⁹ Discussed among program administrators at 2018 RJ Council meeting discussing the results of the independent evaluation report.

¹⁹⁰ *Id.*

¹⁹¹ Johnstone, *supra* note 63, at 391.

sentencing and focus on victim healing and satisfaction rather than reparations.¹⁹² In these cases, significant debate exists in Colorado about when and how victims and survivors of serious, violent crimes should be offered the opportunity to request a restorative process with the offender. Correctional officials who oversee the state's Victim Offender Dialogue (VOD) program are responsive to concerns that victims and survivors who are contacted about VOD may experience additional pain or trauma as a result of the contact or that they may feel pressure or obligation to participate in a dialogue that benefits the offender more than the victim.¹⁹³ Yet, some scholars suggest that the common reason for non-participation of victims in VOD is that they have not been offered the opportunity to participate.¹⁹⁴

Colorado has responded to the challenges of balancing victim engagement and victim protection through both policy and practice mechanisms, with partial success to date. The Colorado legislature provides statutory guidance on the voluntary nature of restorative justice for victims of crime.¹⁹⁵ Colorado statute further restricts the practice of VOD in the CDOC to victim-initiated cases.¹⁹⁶ As a result, the only way many Colorado victims and survivors may learn about the possibility of VOD is through an informational bulk mailing.¹⁹⁷ No mechanism exists by which CDOC offenders can convey to the victim or survivor their willingness to engage in a dialogue and staff are reticent to discuss a dialogue with victims unless the fit is apparent. This eliminates the likelihood that victims will feel pressure to participate in an unwanted dialogue. However, perhaps as a result of limited engagement with victims and survivors in serious cases about restorative options, only fourteen VODs have been completed in

¹⁹² See *Impact Statements: A Victim's Right to Speak, A Nation's Responsibility to Listen*, COLO. ORG. FOR VICTIM ASSISTANCE, (Feb. 20, 2019), <http://www.coloradocrimevictims.org/vod.html> [<https://perma.cc/WKF3-22W9>].

¹⁹³ See, e.g., Johnstone, *supra* note 63.

¹⁹⁴ *Id.* at 387.

¹⁹⁵ See, e.g., COLO. REV. STAT § 18-1.3-204(2)(a)(III.5) (West 2018) (“Nothing in this subparagraph shall be construed to require a victim to participate in restorative justice practices or a restorative justice victim-offender conference.”).

¹⁹⁶ See COLO. REV. STAT § 17-28-103 (West 2018).

¹⁹⁷ Victims opting-in to Colorado's Victim Notification system may receive brochures or general information about the state's High Risk Victim Offender Dialogue program, along with information about other available victim services

CDOC since authorizing legislation passed in 2011.¹⁹⁸ In an effort to expand access to VOD while maintaining protections for victims and survivors, CDOC partnered with the state victim advocacy organization, the Colorado Organization for Victim Assistance (COVA), to increase awareness of VOD as an option.¹⁹⁹ Since 2018, COVA has developed a webpage, released an online advertisement, and allocated staff to assist in screening referrals.²⁰⁰ The results of increased outreach to victims through COVA are yet to be seen.

In addition, the Colorado Restorative Justice Council developed and published Practitioner Standards for the use of restorative justice in the state.²⁰¹ These standards articulate the commitment of the Colorado restorative justice community to maintain victim-centered practices and include in standards of training ‘Victim Awareness, Resources and Rights.’²⁰² While the Practitioner Standards provide useful guidance to restorative justice professionals in Colorado, criminal justice system actors such as prosecutors, defense attorneys, judges, victim witness coordinators, and victim advocates do not observe them. These actors remain the starting point for restorative processes in the current criminal system. However, evidence in Colorado suggests that, despite statutory requirements for advisements for victims and defendants about the availability of restorative practices, many system actors remain unaware of available practices, are unwilling to utilize them, or are unsure when or how to approach participants about these options.²⁰³ In response, the Colorado Restorative Justice Council began partnering with the Colorado Organization for Victim Assistance in 2018 to provide a series of trainings focused on the interface between restorative justice and victim services.²⁰⁴

¹⁹⁸ See *Impact Statements: A Victim’s Right to Speak, A Nation’s Responsibility to Listen*, COLO. ORG. FOR VICTIM ASSISTANCE, (Feb. 20, 2019), <http://www.coloradocrimevictims.org/vod.html> [<https://perma.cc/WKF3-22W9>].

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ Colorado Restorative Justice Council, *Restorative Justice Facilitator Code of Conduct and Standards of Training and Practice* (2015), https://www.rjcolorado.org/literature_152001/Restorative_Justice_Facilitator_Code_of_Conduct_and_Standards_of_Training_and_Practice [<https://perma.cc/7FPP-C58E>].

²⁰² *Id.* at 1.

²⁰³ See Sliva et al., *supra* note 180, at 19–20.

²⁰⁴ See *Creating Collaboration Between Victim Service and RJ Providers Training*, COLO. ORG. FOR VICTIM ASSISTANCE, <http://www.coloradocrime>

Colorado continues to work on building relationships among victim services and restorative justice professionals. We suggest that “victim-centeredness” in the criminal system fundamentally means that victims have the right to information about available services, including restorative justice, and the right to choose which ones meet their needs. There is evidence to suggest that victims prefer proactive, rather than protective, outreach related to restorative opportunities.²⁰⁵ In addition, victims’ varying needs can be best supported by a range of restorative practices, available at different points in the criminal system and with different kinds of participation from the affected stakeholders. This honors the offender’s right to a timely process while also honoring the victim’s readiness and personal response to trauma. Victims who do not wish to participate in a restorative process at adjudication or sentencing, for instance, may later wish to participate in a post-sentencing dialogue. As a result, it is important to educate prosecutors, victim witness coordinators, and other criminal system professionals who interface with victims about available options and the ways in which they may benefit victims, as well as when and how to offer victims empowering choices about their participation in restorative practices.

2. Can Restorative Justice Achieve Aspirations of Accountability?

Restorative justice is designed to encourage open and honest dialogue in a safe environment to allow for repair of harm and provide the opportunity for heartfelt apology. Yet, American juvenile and criminal systems limit or prohibit communication between defendants and victims. Prosecutors arguably speak on behalf of victims and the court process rarely afford victims a voice, except at sentencing through victim impact statements. Similarly, defense attorneys act as a proxy for juvenile and criminal defendants and their ethical responsibilities require them to shield their clients from making statements to police, prosecutors, the court, and even victims, for fear their clients’ statements will be used as evidence against them at

victims.org/victim-service--rj-training.html [https://perma.cc/6Y5E-AQK3] (last visited Feb. 20, 2019).

²⁰⁵ See Tinneke Van Camp & Jo-Anne, *Victims’ Reflections on the Protective and Proactive Approaches to the Offer of Restorative Justice: The Importance of Information*, 58 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 415, 416 (2016).

trial²⁰⁶ or as justification for a harsher punishment.²⁰⁷ Post-sentencing, protection orders prohibit people convicted of offenses from contacting the people they harmed, even for the purpose of apology and reparation.²⁰⁸

Participation requirements for restorative justice generally require that offenders take accountability – that is, admit they harmed victims and others – before they can participate in a restorative dialogue.²⁰⁹ If the offender faces a juvenile adjudication or criminal convictions, a significant tension arises between participating in a restorative process and the constitutional rights designed to protect the accused throughout the modern system.²¹⁰ While the government’s interest in prosecuting offenders promotes the adversarial system, victims and others affected by crime may prefer a healing, restorative process.

The adversarial system establishes a framework of procedure before the trier of fact determines guilt and the court assigns punishment. This system was created in response to historically unfair and unjust legal systems, such as the English Star Chamber, the Spanish Inquisition, and the French monarchy’s abuse of the letter de

²⁰⁶ MODEL RULES OF PROFESSIONAL CONDUCT r. 1.3 cmt. (AM. BAR ASS’N 2018) (“A lawyer must...act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”); *see also* Strickland v. Washington, 466 U.S. 668 (1984) (holding criminal defendants have Sixth Amendment right to the effective assistance of counsel); *see also* U.S. CONST. amend. VI; *see also* COLO. CONST. ART. II, § 16; *see also* U.S. CONST. amends. V, XIV (providing privilege against self-incrimination); *see also* COLO. CONST. ART. II, § 18.

²⁰⁷ *See, e.g.*, People v. Young, 987 P.2d 889, 894–95 (Colo. App. 1999) (holding a defendant must invoke privilege against self-incrimination both at trial and sentencing to be afforded protection from a harsher sentence for lack of remorse or failure to accept responsibility).

²⁰⁸ COLO. REV. STAT § 18-1-1001(1) (West 2018) (mandating, without listing exceptions, that protection orders entered against every adult charged with a criminal offense from first appearance “until final disposition of the action.”); *see also* COLO. REV. STAT § 18-1-1001(8)(b) (West 2018) (defining “until final disposition of the action” as “until the defendant completes his or her sentence.”).

²⁰⁹ UMBREIT & ARMOUR, *supra* note 28, at 91–92.

²¹⁰ *See, e.g.*, U.S. CONST. amends. V (privilege against self-incrimination and due process right), VI (rights to public trial by peers, effective assistance of counsel, and confrontation), XIV (incorporating fundamental constitutional rights against the states); *see also* Miranda v. Arizona, 384 U.S. 436 (1966) (establishing a prophylactic advisement regarding the privilege against self-incrimination for custodial interrogations).

cachet.²¹¹ In the United States, the federal Constitution and Supreme Court precedent establish a framework for deciding guilt only after the crucible of trial, including the fundamental right to confront one's accusers.²¹² The adversarial system provides necessary protection against wrongful accusations, racially-biased decision-making, and hyper-punitive sentencing schemes. However, the consequence of this rights-based adversarial system is that many prosecutors and defense attorneys "envision themselves [more] as gladiators out to win than as healers and problem-solvers."²¹³

For restorative justice to thrive within the adversarial system, policymakers and criminal justice stakeholders must determine how to protect the sanctity of restorative dialogue by precluding the admissibility of statements made during restorative processes.²¹⁴ Confidentiality guarantees are critical to both defense attorneys and restorative justice facilitators. Without protections for offender statements, defense attorneys will be reluctant to allow their clients to participate in restorative justice: and may even provide ineffective assistance of counsel if a client's statements made during a restorative process are later used in court to establish guilt.²¹⁵ Likewise, without protections for all statements made during restorative processes, restorative justice facilitators are subject to subpoenas and can be held in contempt of court if they refuse to comply, including refusing to disclose statements.²¹⁶ This is a specific concern expressed by

²¹¹ See *In re Oliver*, 333 U.S. 257, 268–69 (1948).

²¹² See, e.g., *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004) (discussing the adversarial process and the Sixth Amendment Confrontation Clause); see also U.S. CONST. amends. IV (right to privacy and against unlawful searches, seizures, and arrests), V (privilege against self-incrimination and due process right), VI (rights to public trial by peers, effective assistance of counsel, and confrontation), XIV (incorporating these fundamental rights as required under state due process).

²¹³ ZEHR, *supra* note 20, at 77.

²¹⁴ A variation of this tension exists if a juvenile or adult offender is required to admit responsibility as prerequisite to participation in a diversion-based restorative justice process. Because charges have not been formally filed, the right to counsel has not yet attached; if the decision to take accountability is made without an opportunity to consult with counsel, a person may be admitting responsibility without understanding all the potential legal consequences.

²¹⁵ See *Strickland v. Washington*, 466 U.S. 668 (1984) (concluding criminal defendants possess Sixth Amendment right to the effective assistance of counsel); U.S. CONST. amend. VI; see also U.S. CONST. amends. V (privilege against self-incrimination), XIV; accord COLO. CONST. art. II, § 18.

²¹⁶ See, e.g., COLO. R. CRIM. P. 17(h)(1), (2).

Colorado facilitators and defense attorneys when asked about the future of restorative justice.

Colorado law attempts to resolve the tension around offender accountability in a few contexts. First, the adult diversion statutes offer protection for statements made during diversion programming, including restorative justice processes; however, statements are still admissible for impeachment purposes in the event that the defendant chooses to testify at trial.²¹⁷ Second, if a court orders restorative justice as part of a sentence, including probation, statute protects offenders' statements if the offender does not commit a new offense during the restorative process.²¹⁸ Third, the statute for first-time juvenile petty offenses or municipal violations provides a complete protection for statements made during the restorative process.²¹⁹ While supportive in specific instances, these statutes fall short of offering necessary protections for statements made during all restorative justice processes throughout the juvenile and criminal system continuums.

In response to Colorado restorative justice practitioner concerns, an attempt was made in 2017 to introduce confidentiality legislation to protect all restorative justice practices. Prosecutor and correctional stakeholder opposition led to the bill's demise. Other states have joined Colorado in exploring creative ways to resolve the tension between offender accountability and the adversarial process. For instance, Illinois recently attempted to secure a state supreme court rule to this end and is now pursuing a legislative solution.²²⁰ And the San Francisco District Attorney's Office entered into a memorandum of understanding with the San Francisco Public Defender's Office to protect statements made not only for restorative justice purposes but

²¹⁷ See COLO. REV. STAT. § 18-1.3-101(9)(d), (e), (10)(e) (West 2018) (protecting statements a defendant makes during diversion except "a statement of the facts the charge is based upon authored by the defendant" and agreed upon by defense counsel, if the defendant is represented, and the prosecutor; statement of facts may be used for impeachment evidence).

²¹⁸ COLO. REV. STAT. § 18-1.3-104(1)(b.5)(I) (West 2018) ("Any statements made during the conference shall be confidential and shall not be used as a basis for charging or prosecuting the defendant unless the defendant commits a chargeable offense during the conference."); *see also* COLO. REV. STAT. § 18-1.3-204(2)(a)(III.5) (similar provision for probation).

²¹⁹ COLO. REV. STAT. § 19-2-302.5(5)(a) (West 2018) ("The contract and any statements contained in the contract or made by the juvenile to the screening entity administering the contract shall not be used against the juvenile.").

²²⁰ Telephone Interview with Era Lauder milk, Deputy of Policy & Strategic Planning, Law Office of the Cook Cty. Pub. Def. (Dec. 10, 2018).

for all collaborative, problem-solving, court programming.²²¹ Colorado is exploring other options, including implementing district attorney policy, developing memoranda of understanding between district attorney offices and the state public defender's office, drafting immunity agreements and other case-by-case agreements, and gaining buy-in on statewide best practices.²²²

It is also worth noting that spaces exist for protected admissions of guilt in the form of apology embedded in alternative dispute resolution, plea bargaining, and settlement processes for criminal cases.²²³ In addition, evidentiary protections exist for settlement negotiations in civil court processes for the very purposes of encouraging dialogue and coming to reparative agreements. In short, more legal space exists for apology within the juvenile and criminal systems than is currently being utilized.²²⁴ Whether formed from new legislation or forged from existing precedents, the foothold of restorative justice in the adversarial process will remain tenuous until a satisfactory solution is implemented to protect accountability in restorative processes.

3. Can Restorative Justice Achieve Aspirations of Voluntariness?

Restorative justice, at its best, ensures that everyone who participates does so voluntarily and authentically. As discussed in a prior section of this article, requiring or coercing victim participation is contrary to restorative principles and replicates the victim disempowerment present in the modern criminal system.²²⁵ Further, requiring or coercing offender participation presents problems. For

²²¹ Telephone Interview with Katy Miller, Chief of Alt. Programs & Initiatives, S.F. Dist. Attorney's Office (Feb. 28, 2019).

²²² See Press Release, Colorado Office of State Court Administrator, Agencies Sign Agreement To Expand Restorative Justice Practices In Colorado (July 31, 2018), available at <https://www.denverda.org/wp-content/uploads/news-release/2018/Restorative-Justice-Expansion-Agreement.pdf> [<https://perma.cc/RJ7P-UKVN>]; Doug Chartier, *DAs and Public Defenders Work for Restorative Justice*, L. WK. COLO. (Aug. 17, 2018), <https://lawweekcolorado.com/2018/08/das-and-public-defenders-work-for-restorative-justice/> [<https://perma.cc/FW7R-B2EH>].

²²³ Michael C. Jones, *Can I Say I'm Sorry?: Examining The Potential Of An Apology Privilege In Criminal Law*, 7 ARIZ. SUMMIT L. REV. 563, 569–570 (2014).

²²⁴ Jonathan R. Cohen, *Advising Clients To Apologize*, 72 S. CAL. L. REV. 1009, 1068 (1999) (“While our laws could be and should be reworked to make “safe” apology easier, our existing legal rules allow apologies to play a much larger role in legal disputes than they now do.”).

²²⁵ See *supra* Part IV.B.1.

offenders in particular, the coercive nature of the modern criminal system complicates voluntary and authentic participation in restorative justice. Prosecutors have a significant amount of discretion in deciding who will or will not be charged and the number and severity of charges pursued.²²⁶ In addition, increased reliance on plea bargaining has resulted in a growing number of innocent people pleading guilty to avoid the risk of lengthy prison sentences.²²⁷ Like all contracts, a plea bargain reflects a bargained-for-exchange, where each side provides a promise or some other consideration in exchange for a return promise or consideration.²²⁸ “Plea bargaining has long overtaken trial as the primary means of resolving cases in the American criminal justice system, and the number of trials is now miniscule compared to the number of guilty pleas.”²²⁹ According to best estimates, plea bargains resolve between 90 and 95 percent of federal and state cases.²³⁰

Given the weight of potential liberty and sentencing consequences for offenders, a tension thus arises in ensuring offender participation in restorative justice is voluntary and genuine. Offenders do not always perceive the restorative justice process as voluntary; some offenders may feel they have no choice but participate.²³¹ Research shows that coerced apologies from offenders are less remorseful and less likely to resolve conflict than non-coerced apologies.²³² Some argue that receiving a legal benefit in exchange for participation in restorative justice is inherently coercive.²³³ In short, the offender

²²⁶ See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2009).

²²⁷ Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) (describing significant pressures brought to bear on defendants to plead guilty).

²²⁸ *Plea Bargain*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²²⁹ Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 309 (2007).

²³⁰ Lindsey Devers, *Research Summary: Plea and Charge Bargaining*, U.S. Department of Justice: Bureau of Justice Assistance, BUREAU JUST. ASSISTANCE, U.S. DEP'T JUST. 1 (2011) <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/XX4E-L6RT>].

²³¹ UMBREIT & ARMOUR, *supra* note 28, at 94.

²³² Alana Saulnier and Diane Sivasubramaniam, *Effects of Victim Presence and Coercion in Restorative Justice: An Experimental Paradigm*, 39 LAW & HUM. BEHAV. 378, 384 (2015).

²³³ See, e.g., Rebecca Beitsch, *With Restorative Justice, Offenders Avoid Prison and Victims Get a Bigger Voice*, STATELINE (July 25, 2016), <https://www.>

voluntariness tension manifests in two ways: ensuring the offender is not forced to participate and ensuring the offender participates genuinely.

Colorado law attempts to limit the likelihood of an offender's involuntary participation in restorative justice by crafting juvenile and adult criminal statutes so that an offender is only required to be assessed for participation in restorative justice.²³⁴ The statutes support the completion of assessments for eligibility but do not require an offender to participate in a restorative justice process.²³⁵ Voluntary offender participation provisions should be embedded in all of Colorado's restorative justice laws. But even statutes which provide for voluntary offender participation cannot cure the coercive nature of the criminal system.

As to the second manifestation of offender voluntariness discussed above, it is important to note that a criminal defendant may receive a legal benefit for participating in restorative justice *and* participate in the process with the best of intentions to take accountability and repair the harm he or she caused. While it may be tempting to implement a broad rule that offenders should not receive a legal benefit for participating in restorative justice to ensure authentic offender participation, such a rule ignores the realities of plea bargaining and that offenders often relinquish constitutional rights to participate in restorative justice.

Colorado policy recognizes that offenders may receive a legal benefit for participating in restorative justice. For example, the diversion statutes expressly contemplate the use of restorative justice, and the result is that an offender's case is diverted from the juvenile or criminal process: an attractive legal benefit.²³⁶ When courts impose

[governing.com/topics/public-justice-safety/sl-restorative-justice-states.html](https://perma.cc/HA9N-4QTL) [https://perma.cc/HA9N-4QTL] (The title of this article – “offenders avoid prison” – captures the challenge described here, in a way that is typical of dialogue in the field).

²³⁴ COLO. REV. STAT. § 19-2-905(4) (West 2018) (“the court may order the juvenile to participate in an assessment to determine whether the juvenile would be suitable for participation in restorative justice practices that would be a part of the juvenile's sentence”); *see also* COLO. REV. STAT. § 18-1.3-104(1)(b.5)(I) (West 2014) (authorizing a court to order restorative justice as a sentencing alternative if defendant is eligible, which includes an interest in participating).

²³⁵ *See id.*

²³⁶ *See* COLO. REV. STAT. § 19-2-303(1) (West 2018) (restorative justice should be integrated into juvenile diversion whenever possible); *see also* COLO. REV. STAT. §

sentences, they must consider a number of sentencing goals and options, one of which – as discussed – is restorative justice.²³⁷ Accordingly, judges may reasonably consider imposing sentences with shorter periods of incarceration for defendants willing to participate in restorative justice and longer periods of incarceration for defendants unwilling to take accountability and repair the harm caused. Further, Colorado’s statute authorizing plea negotiations explicitly authorizes prosecutors to consider restorative justice in its plea-offer decisions.²³⁸

The restorative principle of voluntariness cannot be fully achieved when integrating restorative justice into the coercive modern juvenile and criminal systems. Nevertheless, Colorado policy thoughtfully addresses this issue, and some of its laws offer a model for other jurisdictions struggling with this tension. Colorado will undoubtedly continue to explore the nuances of ensuring offender participation in restorative justice is voluntary and authentic, as should the entire country.

4. Can Restorative Justice Achieve its Aspirations of Equity?

Restorative justice promises greater equity, using strategies like bringing everyone to the table and leveling power differentials to improve equitable processes and outcomes.²³⁹ For instance, many restorative practices occur in a circle arrangement, with no participant sitting higher than or separate from others.²⁴⁰ Principles of

19-1-103(44) (West 2018) (defining juvenile diversion as a decision not to take legal action in exchange for participating in specific services); COLO. REV. STAT. § 18-1.3-101(2) (West 2018) (prosecutor may suspend the prosecution of a defendant for diversion services); COLO. REV. STAT. §18-1.3-101(8) (West 2018) (diversion programs may include restorative justice).

²³⁷ COLO. REV. STAT. § 18-1-102.5 (West 2018) (enumerating restorative justice as a goal of criminal sentencing); *see also* COLO. REV. STAT. § 19-2-907(1)(I) (West 2018) (authorizing courts to sentence juvenile offenders to restorative justice after being assessed for suitability); COLO. REV. STAT. § 18-1.3-104(1)(b.5)(I) (West 2014) (authorizing courts to consider restorative justice as an alternative to a punitive sentence).

²³⁸ COLO. REV. STAT. § 16-7-301(2)(f) (West 2017).

²³⁹ Marilyn Armour & Shannon Sliva, *How Does It Work? Mechanisms Of Action In An In-prison Restorative Justice Program*, 62 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 759, 767 (2018).

²⁴⁰ KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING* 11 (2015).

relationships and respect are integral.²⁴¹ While restorative justice aspires to equity, it is important to acknowledge the likelihood that restorative practices imbedded in the criminal system will simply replicate the biases and disparities currently evidenced in arrest, sentencing, and conviction patterns.²⁴² Critical scholars express particular concern about the ways in which restorative justice practices may be co-opted by the systems into which they are integrated.²⁴³

In Colorado, statute defines eligibility for restorative justice in standardized ways, specifying, for instance, the types of offenses which may be referred to during the restorative process.²⁴⁴ However, the discretion of law enforcement officers and prosecutors extends to discretion about when to offer a restorative process and to whom.²⁴⁵ Furthermore, determining eligibility for restorative practices inherently requires some amount of discretion, such as the discretion to determine whether the offender is expressing full accountability, whether the victim is participating voluntarily, or whether participants will cause harm to one another. As long as human decision-making is involved, we cannot eliminate the likelihood that implicit bias will influence selection for restorative justice.

One way that Colorado seeks to mitigate racial disparities in the application of restorative justice is by measuring and monitoring the demographic characteristics of offenders engaging in restorative processes. A 2018 report reviewing juvenile diversion programs in Colorado indicates that the racial makeup of youth participating in restorative diversion is comparable to the composition of the

²⁴¹ *Id.* at 27.

²⁴² JANE DICKSON-GILMORE, E. J. DICKSON-GILMORE, CAROL LA PRAIRIE, *WILL THE CIRCLE BE UNBROKEN?: ABORIGINAL COMMUNITIES, RESTORATIVE JUSTICE, AND THE CHALLENGES OF CONFLICT AND CHANGE*, xxi (2005).

²⁴³ Mandeep K. Dhami & Penny Joy, *Challenges to Establishing Volunteer-Run, Community-Based Restorative Justice Programs*, 10 *CONTEMP. JUS. REV.* 9, 20 (2007).

²⁴⁴ *See, e.g.*, COLO. REV. STAT. § 18-7-109(5)(d) (West 2018) (courts are required to order a restorative justice assessment for juveniles convicted of posting, possessing, or exchanging sexually explicit images); COLO. REV. STAT. § 18-1.3-501(1.5)(a) (West 2018) (if a defendant is convicted of third-degree assault of a peace officer, restorative justice is required if the victim wants to participate and the defendant is appropriate).

²⁴⁵ *See, e.g.*, COLO. REV. STAT. § 19-2-302.5 (West 2015) (law enforcement may offer a program with restorative principles to youth charged with municipal violations and petty offenses); COLO. REV. STAT. § 19-2-512(2) (West 2013) (prosecutor may offer restorative justice to youth).

communities served; however, the State is unable to provide comparison data for the racial makeup of the justice-involved population in these communities.²⁴⁶ Without additional information, it is impossible to tell whether restorative justice in Colorado ameliorates, replicates, or exaggerates racial disparities in arrest, diversion, and sentencing. In Denver Public Schools, studies demonstrate that restorative approaches to school discipline are applied equally or more often for students of color than white students; however, the use of restorative practices has not reduced the suspension gap between black and white students.²⁴⁷

In Colorado and elsewhere, communities seeking to implement restorative justice approaches must continue to monitor and attend to racial disparities in the criminal system. In addition, communities should further explore how restorative justice impacts other marginalized populations who are over represented in the criminal system, including people with mental health diagnoses and people with substance abuse treatment needs. At minimum, communities and programs should include goals related to equity in their planning and ensure that data is available to measure the identified outcomes. Subsequently, program planning should include efforts to ensure the equity of restorative practices, such as engaging with law enforcement and officers about decision-making processes related to selection for restorative justice.

V. RECOMMENDATIONS

Acknowledgment of the challenges accompanying the implementation of restorative justice into the criminal system does not preclude its benefits or its potential. Lessons from Colorado provide a foundation for specific recommendations that may improve the integration of restorative justice into the modern court system. These include recommendations related to the prioritization of particularly beneficial statutory supports, development of multiple entry points for restorative justice, expansion of applications for high-harm cases, and engagement in system-wide dialogue about repairing harms caused or exacerbated by the criminal system itself.

²⁴⁶ OMNI, *supra* note 87, at 8.

²⁴⁷ Yolanda Anyon et al., *Restorative Interventions and School Discipline Sanctions in a Large Urban School District*, 53 AM. EDUC. RES. J. 1663 (2016).

A. States Should Prioritize Statutory Supports that Provide Necessary Structure, Generate Resources for Implementation, and Resolve Legal Tensions.

Restorative justice options are among the legislative solutions that states are considering during the current era of criminal justice reform.²⁴⁸ Evidence from Colorado suggests that statutory supports are beneficial for promoting the use of restorative justice in the criminal system and legislative changes that attend to structural and resourcing needs have had the greatest impact. In particular, Colorado statutes create a state restorative justice council consisting of a diverse group of stakeholders to oversee strategic planning and resource allocation related to restorative justice,²⁴⁹ generate funds for restorative justice development through court fees,²⁵⁰ and implement pilot projects supported by state funding and monitored through data collection and reporting.²⁵¹ In addition, lawmaking that helps resolve legal tensions between restorative justice and current practices, such as statutory confidentiality and voluntariness protections for restorative processes, are viewed as having an important role.

Other statutes which clarify the purposes of sentencing codes, require advisements related to restorative justice and add restorative justice to diversion and sentencing options. These assist in legitimizing restorative justice but experience limited use by criminal-system actors like prosecutors and judges.²⁵² Based on outcomes in Colorado, states seeking to add statutory supports for restorative justice to their criminal codes should prioritize changes that are most likely to be implemented. They should also remember that lawmaking is only one piece of the puzzle; states should prepare to support the implementation of statutes by educating affected stakeholders on statutory changes, clarifying roles and responsibilities, and allocating required resources.

²⁴⁸ Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL'Y PRAC. 77 (2015).

²⁴⁹ COLO. REV. STAT. § 13-3-116 (West 2017).

²⁵⁰ COLO. REV. STAT. § 18-25-101 (West 2017).

²⁵¹ COLO. REV. STAT. § 19-2-510.5 (West 2015).

²⁵² See Shannon M. Sliva et al., *supra* note 180, at 14–15, 19–20.

B. States Should Expand Entry Points for Restorative Justice Along the Juvenile and Criminal System Continuums and Should Use Various Practices.

A diverse set of tools is needed to effectively address the complex problems of crime and justice in the United States. Restorative justice represents a valuable tool: it consists of a number of diverse practices, which can be adapted to the needs of all parties. The Colorado legislature encourages points of entry into restorative justice processes at various stages: pre-file, post-file pre-plea, guilty plea, sentencing, re-sentencing, and post-sentencing. In addition, Colorado practitioners frequently accept referrals directly from law enforcement or from the community, outside of formal court and correctional processes. This is important because victims and survivors of crime, as well as offenders, demonstrate varying levels of interest in or readiness for restorative processes at different times in their healing processes.

In addition to elucidating issues of timing, experiences in Colorado validate that different types of restorative justice practices can be responsive to the ways in which victims and offenders may want to engage with one another. Restorative practices exist upon a continuum rather than a binary; they may draw on surrogate participants or one-way communications (*e.g.* victim impact statements and letter writing) to meet some goals of restorative justice.²⁵³ Whether or not a formal restorative process is appropriate in each case, restoration of the individuals and communities affected by crime should still be considered as an essential outcome of sentencing and corrections. System-wide approaches to restorative justice should allow victims and offenders to consider their readiness for a dialogue, community-based process, or other restorative or reparative practice – and make informed voluntary choices – at each stage of the process.

C. States Should Leverage the Cost-saving Promises of Restorative Justice by Broadening its Application to High-harm Cases.

Despite strong evidence that restorative justice is beneficial for achieving justice aims, restorative justice is most frequently used in the United States among low-risk populations in school-based or juvenile diversion contexts. This is also the case in Colorado, where administrators have observed that restorative justice is unlikely to yield its promised returns if its use is restricted to low-risk spheres or

²⁵³ See also UMBRIET & ARMOUR, *supra* note 28, at 261.

if programs engage in net-widening by focusing restorative justice resources only on cases that were unlikely to be filed formally or likely to be dismissed.

The current use of restorative justice in Colorado is largely consistent with national trends: the state's pre-filing diversion pilot programs serve juveniles in cases of non-traffic misdemeanors or Class 3, 4, 5 and 6 felonies.²⁵⁴ Based on the success of these programs, the state legislature enabled district attorneys to waive the original "first offense" limitation.²⁵⁵ In addition, local jurisdictions are testing the use of restorative practices in adult cases and more serious cases. In 2017, Colorado passed legislation intended to increase the inclusion of restorative justice conferences in plea bargains by authorizing the district attorney to consent to a suitability assessment for participation.²⁵⁶ Similarly, Colorado and other states should continue to explore restorative justice as an option to replace or supplement costly correctional approaches while also increasing public safety.

D. States Should Engage in System-wide Dialogue About Restorative Solutions for Repairing Harms Caused by Crime and Those Harms Perpetuated by Current Justice Practices.

The fulfillment of restorative justice's potential as a state-level or system-wide approach to crime depends upon the authentic engagement of both community members and criminal system actors with a number of challenging issues. This may, in fact, be the most significant barrier to the proliferation of restorative justice, as it calls for the reinvigoration of communities frustrated and disengaged with the criminal system. Consider, for instance, the common trope of shirking jury duty; for many Americans, the opportunity to participate

²⁵⁴ H.B. 13-1254, 69th Gen. Assemb. (Colo. 2013). This created pilot programs in four districts. The bill specified that District Attorneys would identify juvenile first offenders who have committed non-traffic misdemeanors or Class 3, 4, 5 and 6 felonies and screen them for participation.

²⁵⁵ H.B. 15-1094, 70th Gen. Assemb. (Colo. 2015). This was cosponsored by Senators Linda Newell and John Cooke. It expanded the scope of the pre-filing diversion pilot program created by HB13-1254 to allow the inclusion of juvenile offenders who committed municipal and petty offenses and to enable DAs to use their discretion to waive the first offense limitation.

²⁵⁶ H.B. 17-1039, 71st Gen. Assemb. (Colo. 2017). This was sponsored by Representative Pete Lee and Senator Daniel Kagan. Intended to increase the inclusion of restorative justice conferences in plea bargains, the bill added a provision to the applicable statute, 16-7-301.

in the administration of justice has grown futile.²⁵⁷ Likewise, police officers, lawyers, judges, and other justice professionals are often portrayed in pop culture contexts as jaded, disillusioned, or uncompassionate.²⁵⁸

Restorative justice may offer both the means and the end to this confounding dilemma. Restorative practices can be used to engage communities in meaningful ways by allowing them to reclaim ownership of conflict²⁵⁹ and contribute to building a better system for responding to crime. In Colorado, the legislatively-created state restorative justice council facilitates ongoing dialogue among all stakeholders and engages community networks in identifying solutions to barriers that arise. By engaging in system-wide dialogue about the needs of victims, offenders, and communities – each of whom are central stakeholders in the delivery of justice – states can imagine restorative solutions for repairing the harms caused by crime, as well as the harms that many community members have experienced as a result of unresponsive and ineffective justice practices.

VI. CONCLUSION

Restorative justice is associated, both theoretically and empirically, with a number of benefits, including helping people impacted by crime heal, holding offenders accountable, strengthening families and communities, reducing prison populations while improving public safety, and addressing racial biases and disparities. These claims have largely been tested in small programmatic contexts. Colorado serves as a “laboratory”²⁶⁰ for restorative justice lawmaking and provides an opportunity to assess the claims of restorative justice in the criminal system. In Colorado, efforts are underway to better understand how restorative justice approaches can fulfill aspirations of restorative justice. While more study is required to fully resolve challenges, Colorado lawmakers, administrators, and criminal system

²⁵⁷ *E.g.*, Bootie Cosgrove-Mather, *Jury Duty Dodgers Rile Judges*, CBS NEWS (2004) (“...all-American custom: dodging jury duty...”), <https://www.cbsnews.com/news/jury-duty-dodgers-rile-judges> [<https://perma.cc/L2QR-FK4W>].

²⁵⁸ *E.g.*, Dawn K. Cecil, *Prisons in Popular Culture*, OXFORD RES. ENCYCLOPEDIA CRIMINOLOGY (2017).

²⁵⁹ Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977).

²⁶⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

actors are able to offer insights which further meaningful inquiry and advance strategic efforts to integrate restorative practices into the American criminal system in ways that benefit all stakeholders. We hope other “laboratories” across the nation join Colorado in exploring restorative justice and its potential to offer justice through healing.