

2011

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

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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

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INTRODUCTION

The Model Penal Code (MPC) has been heralded as “one of the greatest intellectual accomplishments of American legal scholarship of the mid-twentieth century.”¹ The Code articulated not just substantive law, but addressed other procedural and policy matters.² Its conception has also clarified many confusing state law concepts; for example, the mens rea requirements for crimes.³ Courts often cite the MPC for its rationales and legal scholars use the code copiously for research purposes.⁴ The MPC is also integrated into the core curriculum at many law schools.⁵ In essence, the Model Penal Code has played a key role in sculpting our current criminal justice system.⁶

However, theorists have begun to criticize the Model Penal Code as being inadequate.⁷ The code is argued as being outdated, too subjective, and too focused on culpability.⁸ Another criticism of the code is its disregard of

1. Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 219 (2003).

2. See PAUL H. ROBINSON & MARKUS DIRK DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 4 (1999), available at www.law.upenn.edu/fac/phrobins/intromodpencode.pdf (“[T]he Model Penal Code acknowledge[s] the importance of retributive concerns, and it also gave prominence to more utilitarian functions such as: the deterrence of criminal conduct and, in the event that this failed, to diagnose the correctional and incapacitative needs of each offender.”). John Austin, a popular legal utilitarian, characterized the law as “commands, backed by threat of sanctions, from a sovereign, to whom people have a habit of obedience.” JOHN AUSTIN, THE PROVIDENCE OF JURISPRUDENCE DETERMINED 5 (2d ed. 1861).

3. See Michael Willrich, *Criminal Justice in the United States*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER 195, 215 (Michael Grossberg & Christopher Tomlins eds., 2008) (“[T]he drafters” created an integrated law of theft to replace the long menu of crimes. . . . The Code’s central theme was its reaffirmation of *mens rea*. In place of the confusing area of terms the common law used to define *mens rea*, the Code specified ‘four modes of acting with respect to the material elements of offenses . . .’”).

4. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 327 (2007).

5. Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 298 (1998).

6. See, e.g., Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1098, 1140 (1978) (noting commentators agree that the MPC was “stunningly successful in accomplishing the comprehensive rethinking of the criminal law”); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 137 (3d ed. 2001) (“[Certain portions] of the Model Penal Code [have] had great . . . influence on the direction of American criminal law.”).

7. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 479 (1992) (criticizing the rigid and formulaic *mens rea* hierarchy of the MPC).

8. See Lynch, *supra* note 1, at 221–22, 230 (stating that the code no longer focuses on rehabilitation, that many legal theories have been created from subjective readings of the MPC, and that punishment levels are based on subjective emotions and motivations such as whether a murderer’s motivation was based on the heat of passion or extreme indifference to human life).

alternative viewpoints, especially those expounded in legal scholarship.⁹ The American Law Institute has acknowledged that the MPC is in need of an update, especially in the area of sentencing, and has been working on this project for a number of years.¹⁰

Certainly the MPC could be discarded, but it seems a shame and also unnecessary to wholly supplant such an important piece of work. In addition, a complete shift away from the traditional justice system is problematic and unlikely.¹¹ Instead, a more realistic approach would be to develop a restorative model statute in order to complement, but not replace, the current system. As such, this comment will be correctly using the term “restorative justice” instead of “restorative processes.”¹²

Our traditional criminal system is known as a retributive justice system.¹³ Retribution can be defined as administering criminals their “just deserts” for their crimes.¹⁴ It is a concept that has historic reachings to the Old Testament.¹⁵ The MPC follows a “consequentialist” theory formed on the belief that criminals will be deterred from committing subsequent crimes by the punishment imposed on them.¹⁶ However, in some cases this theory is not equitable, for example, where the social benefit is grossly outweighed by the punishment.¹⁷ Retribution itself causes problematic issues at both the political

9. See Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 61 (2000) (“Scholars should be encouraged to supplement any official commentaries with other comprehensive commentaries. While the official commentary would retain its significance as an elucidation of the drafters’ motives, alternative commentaries could afford to move beyond exegesis . . . and thereby explore alternative approaches to general and specific topics in penal law.”).

10. *Publications Catalog*, THE AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=93 (last visited January, 2011).

11. See HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 59–60 (2002) (“Restorative justice advocates the dream of a day when justice is fully restorative, but whether this is realistic is debatable, at least in the near future We also must not lose those qualities which the legal system at its best represents: the rule of law, due process, a deep regard for human rights, [and] the orderly development of law.”).

12. See Paul H. Robinson, *The Virtues of Restorative Processes, The Vices of “Restorative Justice*, 2003 UTAH L. REV. 375, 377 (2003) (stating how “restorative processes” are a substitute for the criminal justice system and not just a complement to it).

13. *Hudson v. United States*, 522 U.S. 93, 100–01 (1997).

14. Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 30 (1987).

15. See *Deuteronomy* 19:21 (“[L]ife for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”).

16. Dubber, *supra* note 9, at 53.

17. Georgia Lee Sims, *The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System*, 62 VAND. L. REV. 1053, 1060 (2009); see Erwin Chemerinsky, *Life in Prison for Shoplifting: Cruel and Unusual Punishment*, 31 HUM.

and practical levels.¹⁸ Retributive justice has also been found to create a never-ending cycle of anger and revenge.¹⁹ One could argue that the only difference between retribution and revenge is that the former is carried out by an institution and the latter by an individual.²⁰

Finally and most importantly, victims and their needs are often and largely ignored by a criminal justice system grounded on retributive principles.²¹ While victims may introduce victim impact statements²² there is a general reluctance to allow these statements to be used in court proceedings.²³ Also, victims are not notified that they have the ability to participate²⁴ because there is no mandatory method of notification in many states nor is the victim ensured of their right to be present.²⁵ Additionally, victims are often disappointed at

RTS. 11, 11 (2004) (noting California's three strikes rule, which has placed 360 individuals in jail, with life sentences, for shoplifting).

18. See Edward Rubin, *Just Say No To Retribution*, 7 BUFF. CRIM. L. REV. 17, 18–19 (2003) (noting that the high rate of incarceration “wastes human and fiscal resources and produces only limited crime control benefits,” and how political pressures cause courts and politicians to enact “counterproductive policies”).

19. Michelle Maiese, *What Retributive Justice Is*, BEYOND INTRACTABILITY (May 2004), http://www.beyondintractability.org/essay/retributive_justice/.

20. Rubin, *supra* note 18, at 46.

21. Charlotte V.O. Witvliet et al., *Retributive justice, restorative justice, and forgiveness: An experimental psychophysiology analysis*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 10, 11 (2008).

22. Kristin Henning, *What's Wrong with Victim's Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1107, 1127 (2009) (noting that victims may introduce verbal or written statements at upcoming criminal justice or parole hearings to “help the judge understand the full extent of harm, stress, and trauma the offender's conduct has caused the victim”).

23. See, e.g., Trey Hill, *Victim Impact Statements: A Modified Perspective*, 29 L. & PSYCHOL. REV. 211, 216–17 (2005) (noting how these statements might be improperly used by jurors to evaluate a victim's worth and how judges, while less likely to be improperly influenced, might still be prejudiced in their determinations); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (stating that victim impact evidence would violate the Eighth Amendment if it was “so unduly prejudicial that it rendered [a] trial fundamentally unfair”).

24. See Susan E. Gegan & Nicholas Ernesto Rodriguez, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*, 8 ST. JOHN'S J. LEGAL COMMENT. 225, 244–45 & n.96 (1992) (“[O]f the 5,580 victim impact statement obtained by prosecution . . . only six victims were notified by the [Parole] Board about pending parole hearings.”).

25. See Jeffrey A. Cross, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release From Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 U. LOUISVILLE J. FAM. L. 915, 929 (1996) (noting that in Texas, Massachusetts, New Mexico, and Utah, law enforcement agencies are only required to make a “good faith” or “reasonable” effort in contacting a victim); see also Maureen McLeod, *Getting Free: Something New Has Been Added: Parole Boards are Turning to Victims Before Making Their Decisions*, 4 CRIM. JUST. 12, 15 (1989) (“Victim notification may also be withheld if the victim fails to satisfy one or more legally prescribed conditions. Three of these procedural prerequisites—registration with the paroling authority, maintenance of a current address, and

the lack of any reaction from a criminal even if these impact statements are introduced.²⁶

Restorative justice advocates a process that allows those involved in a crime (the victim, the offender, and others affected) to more directly address the harm that was caused and help heal the victim.²⁷ This theory of law also attempts to stop both the cyclical violence bred by the retributive system and reoccurrence of crimes by using restitutionary agreements instead of, or in conjunction with, incarceration.²⁸ It borrows heavily from Native American and Aboriginal notions of justice.²⁹ It takes many forms, but encourages less “formal” mechanisms for responding to crimes.³⁰ Most importantly, restorative justice places special attention on the needs of the victim, guaranteeing their involvement during the restorative process.³¹

The first section of this comment will detail what restorative justice is, some benefits of restorative justice over retributive justice, and the advantages of, and need for, a model restorative justice statute. The second section will address key elements that a restorative justice model statute should contain including, but not limited to: facilitator selection and training, the screening process of victims and offenders, types of restorative justice programs, and restorative justice in response to particularly sensitive cases. Section three focuses on the practical issues with creating and integrating a restorative justice statute and maintaining a restorative program. In section four, potential concerns about restorative justice are identified and addressed including sentencing disparity and possible re-victimization of victims.

I. WHAT IS RESTORATIVE JUSTICE?

Surprisingly enough, restorative justice is not a new concept, and many believe that it has been the dominant theory of criminal justice throughout the world.³² Scholars theorize that it has existed since humans first began forming

cooperation with criminal justice personnel—are fairly common contingencies with victims’ rights legislation.”).

26. Henning, *supra* note 22, at 1170.

27. Mark Umbreit, *What is Restorative Justice*, CTR. FOR RESTORATIVE JUST. & PEACEMAKING 1, 1 (1999), http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/RJ_Principles/default.asp.

28. Carrie J. Niebur Eisnaugle, *An International “Truth Commission”: Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT’L L. 209, 215 (2003).

29. Umbreit, *supra* note 27, at 1.

30. HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE 43–44 (2002).

31. See Gregory Toomey, *Community Courts 101: A Quick Survey Course*, 42 IDAHO L. REV. 383, 391 (2006) (noting that there is an attempt to restore and empower the victim).

32. MARIAN LIEBMANN, RESTORATIVE JUSTICE: HOW IT WORKS 37 (2007).

communities,³³ and was utilized as the primary form of justice in most cultures.³⁴ The fact that it has only recently become so popular in the United States can be attributed to burgeoning dissatisfaction with the limitations of the current justice system.³⁵ Restorative justice is used in many other parts of the globe including, but not limited to Europe, Australia, New Zealand, and South Africa,³⁶ and has been in practice in many nations for some time.³⁷

A. *The Goals of Restorative Justice*

Retributive justice, the MPC, and our traditional justice system are concerned more with a combination of “righting a wrong” and punishing the wicked.³⁸ Thus, certain individuals might have difficulty understanding that restorative justice’s purpose is not punishment but restoration of the offender and victim.³⁹ While retributive justice focuses on punishing the wrongs of the past, restorative justice focuses on how to change future behavior.⁴⁰ Whereas retributive justice is focused on “violation[s] of the law,” restorative justice focuses on the “conflict between individuals that result[ed] in [the] injury to [the] victim.”⁴¹ Indeed the goal of many restorative justice programs is to

33. See Elmar G.M. Weitekamp, *The History of Restorative Justice*, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 75, 78–81 (Gordon Bazemore & Lode Walgrave eds., 1999) (stating how leaderless tribes used to commune and negotiate restitution for crimes); see also JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 5 (2002) (stating that restitution-based justice systems existed in pre-modern Europe, North America, the Pacific, and Africa).

34. John Braithwaite, *Restorative Justice*, in THE HANDBOOK OF CRIME AND PUNISHMENT 323 (Michael Tonry ed., 1998).

35. See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 19 (2003) (“One 1998 survey . . . indicated that 75% of over 4000 respondents liked ‘the idea of totally revamping the way the criminal justice system works,’ even without assuming anything about what the alternatives would be.” (citation omitted)).

36. Umbreit, *supra* note 27, at 1.

37. For example, Austria’s restorative justice code, the Jugendgerichtsgesetz, has been utilized since 1988 and the Criminal Code of the Republic of Poland has utilized restorative justice in Articles 53(3), 60(2.1), and 66(3) since 1997. RESTORATIVE JUSTICE ONLINE, <http://www.restorativejustice.org/university-classroom/02world/europe1> (follow “Austria” or “Poland” hyperlink) (last visited Jan. 10, 2010).

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

39. BRAITHWAITE, *supra* note 33, at 251.

40. Kathleen Daly, *Revisiting the Relationship between Retributive and Restorative Justice*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 35 (Heather Strand & John Braithwaite eds., 2000).

41. Eisnaugle, *supra* note 28, at 213.

provide “peace-of-mind and comfort to victims” and the reintegration of the offender back into the community.⁴²

This reflects the theory of “therapeutic justice” or the study of the “extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.”⁴³ The focus of both therapeutic and restorative justice is on “the law’s healing potential.”⁴⁴ One can view restorative justice as a balancing of different considerations: “a balance between the therapeutic and retributive models of justice[,] a balance between the rights of offenders and the needs of victims[, and] a balance between the need to rehabilitate offenders and the duty to protect the public.”⁴⁵

Another way to phrase this is that there must be a balance between the needs of the victim, the offender, and the community, all the while promoting the needs of all three.⁴⁶ To this end any successful restorative justice program should offer three things: a “focus on the experience of the victim”, a “need for accountability . . . of the . . . offender”, and the “opportunity [for the victim, offender, and members of the community affected by the crime] to actively participate in the sanctioning process.”⁴⁷

B. *Some Benefits of Restorative Justice Versus Retributive Justice*

1. Victims are Helped Through Restorative Justice

“Repayment” has extremely different connotations in the context of restorative justice versus retributive justice. In the retributive sense, a criminal must “pay” for his wrongs, often through imprisonment.⁴⁸ As a result, the view is that “victims are often (mis)used as witnesses in a criminal investigation and then left alone with their grievances and losses.”⁴⁹ While retributive justice addresses the harms caused to the state, restorative justice focuses on the harm dealt to the victim.⁵⁰ In fact, a recent study showed that eighty percent of victims felt that the process and result was fair in restorative

42. Katherine Beaty Chiste, *The Justice of the Peace in History: Community and Restorative Justice*, 68 SASK. L. REV. 153, 153 (2005).

43. Teresa W. Carns et al., *Therapeutic Justice in Alaska’s Courts*, 19 ALASKA L. REV. 1, 2 (2002).

44. *Id.* at 3.

45. LIEBMANN, *supra* note 32, at 33.

46. STRANG, *supra* note 30, at 44.

47. Stephanie A. Beauregard, *Court-Connected Juvenile Victim-Offender Mediation: An Appealing Alternative for Ohio’s Juvenile Delinquents*, 13 OHIO ST. J. ON DISP. RESOL. 1005, 1013 (1998).

48. Rubin, *supra* note 18, at 28.

49. Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543, 550 (2004).

50. Jennifer L. Kerrigan, *“It’s Not World Peace, But . . .” Restorative Justice: Analysis of Recidivism Rate in Campbell Law School’s Juvenile Justice Project*, 30 CAMPBELL L. REV. 339, 341–42 (2008).

justice cases compared with the thirty-seven percent who went through the traditional criminal justice system.⁵¹ In addition, one study showed that over ninety percent of people engaging in the restorative justice process would recommend the process to others.⁵²

Victims emerge from a restorative justice setting feeling “less upset about the crime, less apprehensive, and less afraid of re-victimization.”⁵³ Forgiveness is another beneficial result of restorative justice that emerges on its own.⁵⁴ A recent study shows that individuals feel more comfortable in situations when any form of justice was used, and restorative justice was much more conducive to forgiveness.⁵⁵ Restorative justice meetings have also been viewed as the best environment to help victims overcome their fears of the offender.⁵⁶ In addition, researchers have found that these settings are far more likely to produce sincere apologies from offenders; something that is extremely important to the recovery of victims.⁵⁷ Research has also shown that offenders, who complete a restorative meeting, are much more likely to pay full restitution than if they are ordered by the court.⁵⁸

2. Communities are Helped Through Restorative Justice

Restorative justice is not only a matter of restoring victims and offenders, but also healing the affected community.⁵⁹ Crimes are often perceived as being a matter between a number of identifiable individuals; however, a community may be affected as much as a victim.⁶⁰ As much as a victim’s

51. Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 31 (2001).

52. Mark S. Umbreit & William Bradshaw, *Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross-National Comparison*, 61 FED. PROBATION 33, 34 (1997).

53. Lucy Clark Sanders, *Restorative Justice: The Attempt To Rehabilitate Criminal Offenders and Victims*, 2 CHARLESTON L. REV. 923, 929 (2008).

54. Witvliet et al., *supra* note 21, at 11.

55. *Id.* at 17–18.

56. Lawrence W. Sherman et al., *Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials*, 1 J. EXPERIMENTAL CRIMINOLOGY 367, 370 (2005).

57. *Id.* at 387–88.

58. Mark S. Umbreit, *Juvenile Offenders Meet Their Victims: The Impact of Mediation in Albuquerque, New Mexico*, 31 FAM. & CONCILIATION COURTS REV. 90, 97 (1993); *see also* Christa Pelikan & Thomas Trenczek, *Victim Offender Mediation and Restorative Justice: The European Landscape*, in HANDBOOK OF RESTORATIVE JUSTICE 63, 78 (Dennis Sullivan & Larry Tiff eds. 2006) (noting that in some countries compliance rates have been as high as one-hundred percent).

59. BRAITHWAITE, *supra* note 33, at 11.

60. *See* Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 306 (2003) (“But insofar as those who form the relevant community of which the victim is a member *identify* with the victim and with one another, and thus constitute a

needs are ignored in traditional criminal proceedings, the community at large is left even further unrepresented.⁶¹

Crimes often harm the general community and merely redressing a specific harm to an individual will not amend the harm caused to the community.⁶² Both peace and quality of life are extremely important to a community and can be disturbed by something as simple as a burglary or robbery.⁶³ A more serious event like a murder or a hate crime might have long-lasting and damaging effects on a community. In South Africa, peacemaking committees, which utilize restorative practices, concentrate on restoring the status quo and creating tranquility and harmony within a community.⁶⁴ The hope of these programs suggests that the ensuing peace will lead to a safe and harmonious community in which to live.⁶⁵

3. Recidivism Rates are Decreased

While recidivism reduction is not the overarching goal of restorative justice, researchers have found that one “happy side-effect” of a well structured restorative justice program is a decrease in recidivism.⁶⁶ Recidivism

community in an appropriately deep sense, those community members can also be understood as victims.”).

61. See Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 753–54 (2000) (noting how the community is only represented through broad state representatives, prosecutor and judge, or through general references to “the People”). However, some organizations do acknowledge the community as a separate entity worthy of restoration. See *Restorative Justice*, NATIONAL INSTITUTE OF JUSTICE (Nov. 26, 2007), <http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/welcome.htm> (“4. The second priority is to restore the community, to the degree possible. 5. The offender has personal responsibility to victims and to the community for crimes committed.”).

62. Paul McCold, *What is the Role of Community in Restorative Justice Theory and Practice*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 155, 157 (Howard Zehr & Barb Toews eds., 2004) (noting that both community service or “retraining” of offenders might prove successful in this goal); see also Susan Sarnoff, *Restoring Justice to the Community: A Realistic Goal?*, 65 FED. PROBATION 33, 38 (2001) (noting that crimes affect communities in community-specific ways such as drops in property values, large scale fear, and loss of trust in a community).

63. Lode Walgrave, *Community Services as a Cornerstone of a Systemic Restorative Response to (Juvenile) Crime*, in RESTORATIVE JUVENILE JUSTICE, *supra* note 33, at 129, 138–39.

64. See Declan Roche, *Restorative Justice and the Regulatory State in South African Townships*, 42 BRIT. J. CRIMINOLOGY 514, 515 (2002) (noting that peacemaking is focused on resolving specific conflicts and peace-building addressing the underlying conflicts in the community like poverty, lack of employment, and lack of basic amenities).

65. Daniel W. Van Ness, *New and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 258 (1993).

66. Gwen Robinson & Joanna Shapland, *Reducing Recidivism: A Task for Restorative Justice?*, 48 BRIT. J. CRIMINOLOGY 337, 339–40 (2008).

is generally defined as the commission of another criminal act after the completion of an offender's sentence so as to end in a re-arrest, reconviction, or return to prison.⁶⁷ The hope of restorative justice is that offenders will see the harm they have caused and take responsibility for their actions, which in turn will reduce recidivism.⁶⁸ Incarceration without a restorative component, deprives the offender of the reassurance and confidence that he is capable of reform, resulting in a decrease in self-esteem and motivation to rehabilitate themselves and increasing the probability that the offender will become a recidivist.⁶⁹ Recent statistics have shown that recidivism rates are fairly high.⁷⁰ This is most likely caused by the shortage of any actual rehabilitation programs suitable for reintroducing offenders back into society while they are in prison.⁷¹ Restorative justice serves the important purpose of not only helping the victims, but actively focusing on rehabilitating the offenders when possible.⁷²

67. *Recidivism*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17> (last visited August 23, 2010). When describing a group of offenders it is expressed as a percentage. Daniel S. Nagin et al, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 120 (2009).

68. Ruth Ann Strickland, *Restorative Justice*, in 5 STUDIES IN CRIME & PUNISHMENT 41 (David A. Schultz & Christine DeJong eds., 2004).

69. PAUL W. REVE, PRISON LIFE AND HUMAN WORTH 15 (1974).

70. *Recidivism*, *supra* note 67 (noting that in 2007, approximately 16% or 188,875 people on parole were reincarcerated); *see also* OFFICE OF POLICY AND MANAGEMENT, STATE OF CONNECTICUT, 2010 ANNUAL RECIDIVISM REPORT 10 (2010), http://www.ct.gov/opm/lib/opm/cjppd/cjresearch/recidivismstudy/2010_0215_recidivismstudy.pdf (noting that in Connecticut, between 2005 and 2008, 67.5% of offenders were rearrested, 53.7% were convicted of a new criminal offense, and 56.5% were returned to prison with new charges).

71. Jeremy Coylewright, *New Strategies for Prisoner Rehabilitation in the American Criminal Justice System: Prisoner Facilitated Mediation*, 7 J. HEALTH CARE L. & POL'Y 395, 402 (2004) ("While high rates of recidivism reveal the ineffectiveness of the current rehabilitative framework in America's prisons, the low rates of rehabilitative programming received by prisoners suggests a lack of rehabilitative commitment by prison officials and legislators Only one-quarter of prisoners receive vocational training and only one-third receive any educational training prior to release"); *see also* Steve Manas, *Prisoners Benefit From NJDOC Programs But Readjustment Remains Difficult*, MED. NEWS TODAY (Jan. 27, 2010), <http://www.medicalnewstoday.com/articles/177267.php> (noting the lack of help that inmates with mental and physical issues received before they were thrust back into society).

72. It is important to note that while offender rehabilitation is an important aspect of restorative justice, and will still be addressed, the victim's welfare is always the primary focus. *See* Margarita Zernova, *Aspirations of Restorative Justice Proponents And Experiences of Participants in Family Group Conferences*, 47 BRIT. J. CRIMINOLOGY 491, 499 (2007) ("[Representatives] feared that if the victim came to the conference, she would have felt uncomfortable, because the conferences looked more like a birthday party for the offender, rather than a criminal justice intervention.").

Many studies have shown that restorative justice is apt to reduce recidivism rates significantly.⁷³ Some point out that many individuals would not be repeat offenders if we did not force them into “daily interaction” with other criminals through incarceration.⁷⁴ Restorative justice allows a community to help define new and novel sentences other than traditional incarceration.⁷⁵ But more fundamentally, during a restorative process, offenders must not only take responsibility for their actions but pay reparations to a victim or community.⁷⁶ Restorative justice, in essence, transforms the way that offenders view their actions.⁷⁷

Another problem with the traditional criminal justice system is that an offender’s background is often completely ignored, or only limited facets of it are considered during sentencing.⁷⁸ Presentence reports (PSIs), which provide relevant information about an offender to a judge for sentencing, are provided

73. See, e.g., *Report Shows Restorative Justice Reduces Crime by 27%*, SHEFFIELD TELEGRAPH (July 1, 2008), <http://www.sheffieldtelegraph.co.uk/headlines/Report-shows-restorative-justice-reduces.4238005.jp>; Kerrigan, *supra* note 50, at 357 (noting a 16-24% drop in recidivism rates for juvenile offenders); William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 156 (2003) (noting studies suggest that reoffense rates are 33% lower for victim-offender mediation program participants); T. Bennett Burkemper et al., *Restorative Justice in Missouri’s Juvenile System*, 63 J. MO. B. 128, 129 (2007) (noting that after analyzing 63 programs there was a “nine to twenty-seven percent decrease in recidivism rates,” and that participants in the program were “one-third less likely” to become repeat offenders); JIM DIGNAN, REPAIRING THE DAMAGE: AN EVALUATION OF AN EXPERIMENTAL ADULT REPARATION SCHEME IN KETTING, NORTHAMPTONSHIRE 39–40 (1990) (noting that offenders who went through a full mediation process were 6.2% less likely to reoffend than those who had a third party mediator carry the messages back and forth).

74. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 65 (1999) (“[Prisoners in jail] learn new skills in the illegitimate labor market or suffer demeaning experiences that engender defiance, shame and rage.”).

75. *Id.* at 66–67 (stating that in Australia drunk drivers have their licenses and ultimately their cars taken away instead of being incarcerated).

76. Eisnaugle, *supra* note 28, at 215.

77. See Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 457–58 (2007) (“[Restorative justice] seems to be an effective way of making the offenders care ‘Most offenders [see] right and wrong in pragmatic terms—the action is right if you can get away with it, wrong if you are caught and punished.’” (quoting Richard Delgado, *Prosecuting violence: A Colloquy on Race, Community and Justice*, 52 STAN. L. REV. 751, 765 (2000))).

78. These facets remain important because many factors may affect the likelihood of recidivism, such as demographic information, psychiatric diagnosis, and family history. See generally Judith DeJong et al., *Factors Associated with Recidivism in a Criminal Population*, 180 J. NERVOUS & MENTAL DISEASE 543 (1992) (detailing a study of 348 men convicted of various crimes in an attempt to calculate their likelihood of recidivism).

in some but not all cases.⁷⁹ However, PSIs differ in quality, and some judges find them to be a waste of time.⁸⁰ In addition, these reports typically do not include recommendations on the most effective method to restore an offender and victim.⁸¹ While restorative meetings may discuss many of the same facts contained in a presentence report the process should ensure that the discussion is more thorough and comprehensive than a PSI.⁸²

4. The Cost-Effectiveness of Restorative Justice Proceedings

Currently, the criminal justice system is plagued by high costs and backlogged court dockets.⁸³ There is a general consensus that restorative practices are “less costly and require less time,” overall.⁸⁴ It is also surmised that because recidivism rates are lowered, there will be corresponding cost and time savings.⁸⁵ However, without a more systemic implementation of

79. Federal presentence reports include, among other things, the defendant’s prior criminal record, the defendant’s financial condition, and circumstances affecting the defendant’s behavior. FED. R. CRIM. P. 32(d). Certain states like Michigan may have slightly more intricate presentence reports including: family history, marital history, education history, employment history, economic data, military record, health history, and substance abuse/mental health history. MICHIGAN COURTS, PRESENTENCE INVESTIGATION 6 (2008), available at http://courts.michigan.gov/scao/resources/publications/manuals/prbofc/prb_sec4.pdf.

80. Megan Stephens, *Lessons from the Front Lines in Canada’s Restorative Justice Experiment: The Experience of Sentencing Judges*, 33 QUEEN’S L.J. 19, 43 (2007) (“[S]ome are very good and some . . . just take up space.” (quotation omitted)).

81. *Id.*

82. See *infra* text accompanying notes 163–165.

83. See Edward J. Imwinkelried, *The Right to “Plead Out” Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L. J. 341, 381 (1991); DAVID W. RASMUSSEN & BRUCE L. BENSON, *THE ECONOMIC ANATOMY OF A DRUG WAR* 32 (1994) (“Congestion of the criminal justice system may not be relieved even if all criminal justice aspects of the system are simultaneous[ly] expanded.”).

84. Gabbay, *supra* note 77, at 433 n.56; see also Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 369 (2005) [hereinafter *Justifying Restorative Justice*] (noting a cost-benefit analysis showed that the cost of dealing with a case through a restorative justice program was \$80 versus \$2649.50 through the court system. In addition, the Chiliwack Restorative Justice program handles an average of 100 cases annually and saves approximately \$260,000 a year); Burkemper et al., *supra* note 73, at 129 (noting that Genesee County in New York estimates that it saved more than \$4 million by implementing a restorative system).

85. See Allison Morris, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 596, 605 (2002) (“The implementation of restorative justice [] has resulted in significant and real changes: fewer young offenders now appear in courts, fewer young offenders are now placed in [welfare shelters] and fewer young offenders are now sentenced to custody. This all, of course, had to result in considerable cost [and time] savings.”).

restorative justice programs, there is not enough data to support any sort of decisive data-based conclusion.⁸⁶

Other than being time-consuming, trials are also extremely expensive.⁸⁷ That is why prosecutors so highly value guilty pleas as an alternative to trials.⁸⁸ In cases of non-violent crimes, restorative justice is often used in place of a trial, beginning after a guilty plea.⁸⁹ There is no evidence which shows that it cannot also be applied to violent crimes.⁹⁰ Both drug court and justice system programs offer alternative remedies to traditional incarceration sentencing and have been shown to be extremely successful.⁹¹ This provides a double benefit: it clears an offender's record and the community service helps compensate the community for the harm caused by the criminal behavior.⁹²

Incarceration rates and inmate populations have also dramatically increased in the last half-century since the inception of the Model Penal Code.⁹³ The costs of imprisoning criminals is already prohibitively expensive⁹⁴ and continues to climb,⁹⁵ primarily due to high rates of recidivism which act as rotating doors in and out of the prisons.⁹⁶

86. Gabbay, *Justifying Restorative Justice*, *supra* note 84, at 368.

87. For example, one death penalty trial cost \$125,000 not including appeals or second trials. Richard C. Dieter, *What Politicians Don't Say About the High Costs of the Death Penalty* (1995), <http://www.fnsa.org/v1n1/dieter1.html>.

88. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1978 (2008).

89. Catherine Pugh, *What Do You Get When You Add Megan Williams to Matthew Shepard and Victim-Offender Mediation? A Hate Crime Law that Prosecutors Will Actually Want to Use*, 45 CAL W. L. REV. 179, 225 (2008).

90. *See infra* note 394.

91. Sanders, *supra* note 53, at 935.

92. *Id.*

93. *See, e.g.*, Dubber, *supra* note 9, at 54 ("Since the publication of the Code, the war on crime has quadrupled the incarceration rate The number of federal drug offenders increased 18-fold from a paltry 3,000 to over 50,000"); Nagin, *supra* note 67, at 117 (noting that the incarceration rate has risen more than five times from 96 per every 100,000 in 1970 to 501 per 100,000 in 2006); WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 (Dec. 8, 2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf> (noting there were 1,610,446 sentenced prisoners by the end of 2008 and the prison population continues to grow at the rate of 1.8% on average since 2000).

94. *See* William Spelman, *The Limited Importance of Prison Expansion*, in THE CRIME DROP IN AMERICA 97, 97 (Alfred Blumstein & Joel Wallman eds., 2000) (stating that the government spends \$20 billion annually on prison expansion and this could provide child care to every family that cannot afford it, college education of every high school graduate, or a living wage to every unemployed youth).

95. *See* Amelia M. Inman & Millard W. Ramsey, Jr., Comment, *Putting Parole Back on the Table: An Efficiency Approach to Georgia's Aging Prison Population*, 1 J. MARSHALL L.J. 239, 242 (2008) ("State governments spent \$42.9 billion on corrections in 2005, and that spending is estimated to increase by an additional \$27 billion through 2010.")

96. *See* Linda D. Maxfield et al., *Panel IV: Accomplishing the Purposes of Sentencing—Criminal History and Recidivism*, 15 FED. SENT'G REP. 185, 185 (2003) (noting the greater the

C. *The Lack of Legislation*

Despite restorative justice's popularity, there is currently no federal restorative justice statute.⁹⁷ Nineteen states have enacted legislation integrating restorative justice into their juvenile justice systems.⁹⁸ Twenty-nine states in total authorize and encourage the use of victim-offender mediation in criminal cases.⁹⁹ However, even with these advancements, no one state has developed a comprehensive restorative justice statute; and those that do, only address the subject generally.¹⁰⁰

There is the question of whether and why legislation is needed. Legislation can have the positive effect of promoting restorative justice as a priority and imperative.¹⁰¹ In order to avoid "marginalization" and "underutilization" in the criminal justice system, there must be some sort of legal authority not only backing, but requiring restorative justice.¹⁰² Legislation also provides statutory authority for individuals attempting to implement restorative justice.¹⁰³ Finally, legislation can be utilized to protect both offenders' and victims' rights from arbitrary deprivation.¹⁰⁴ Thus, legislation is essential for the successful implementation of restorative justice.

The appropriate mechanism for providing a new legal framework is a model code. The Model Penal Code was instrumental in catalyzing criminal

criminal history, the higher the rate of recidivism which in turn leads once again to greater criminal history).

97. Sandra Pavelka, *Restorative Juvenile Justice Legislation and Policy: A National Assessment*, 4 INT'L J. RESTORATIVE JUST. 100, 100-01 (2008).

98. Sanders, *supra* note 53, at 929.

99. *Id.* at 929-30.

100. See IND. CODE § 31-10-2-1 (2009) (noting that the purpose of the statute is to "acknowledge the responsibility each person owes to the other[,] . . . ensure that [juveniles] are treated as persons in need of care, protection and rehabilitation[,] . . . [and to] use diversionary programs when appropriate.").

101. For example, New Zealand's enactment of the Children, Young Persons, and Their Families Act precipitated the idea of family group conferences, a classic means of implementing restorative justice. Children, Young Persons, and Their Families Act 1989 (N.Z.). See *infra* text accompanying notes 171-201.

102. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 51 (2006), http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf ("In the absence of statutory requirements, it may be difficult for a restorative justice programme to insert itself into the daily routine of the criminal justice system. Legislation may be useful in providing the impetus for a more frequent use of the restorative justice process.").

103. For example, the Minnesota Community Correctional Services Act now requires that "every county [prosecutor] [should] establish a pretrial diversion program for offenders." MINN. STAT. § 388.24(2) (2009).

104. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 51 ("[Legislation] can also be used to promote predictability and certainty in the use of the restorative process as well as to establish all of the necessary legal safeguards.").

justice reforms across the country.¹⁰⁵ The United Nations has noted the usefulness of model codes as “immediately applicable legal framework[s]” to implement change and promote legal certainty.¹⁰⁶ In addition, a model code has the added benefit of being able to draw inspiration from many different sources.¹⁰⁷ This allows the most ingenious proposals to emerge, leaving out ineffective ideas.¹⁰⁸ Finally, because model codes are informative and not mandatory, they allow the drafters of laws to continue exercising their discretion and contour the model code to meet the needs of their jurisdiction.¹⁰⁹

II. KEY COMPONENTS OF A RESTORATIVE JUSTICE STATUTE

A. *Facilitator Selection, Training, and Certification*

No program, no matter how progressive and beneficial, can succeed without a staff of highly trained and competent individuals. A facilitator’s role is “to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.”¹¹⁰ To insure impartiality, cultural differences and other “power imbalances” should be considered.¹¹¹ In addition, the facilitator should be present to insure that both parties act respectfully to each other¹¹² in order to avoid the very possible re-victimization of the victim.¹¹³ Facilitators are also essential to assist both the victim and offender formulate their agreement.¹¹⁴ A facilitator may even amend an agreement made between an offender and victim to either correct an error, or in response to a change in the circumstances under which the agreement was originally made.¹¹⁵ However,

105. ROBINSON & DUBBER, *supra* note 2, at 1.

106. Bruce M. Oswald, *Model Codes for Criminal Justice and Peace Operations: Some Legal Issues*, 9 J. CONFLICT & SECURITY L. 253, 257 (2004).

107. Neil J. Kritz & William Schabas, *Preface* to 1 MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE xvii, xviii (Vivienne O’Connor & Colette Rausch eds., 2007).

108. See Brianne E. Rhan, *The Good, Better, and Best Approach to Criminal Environmental Laws: Taking a Little From Each to Form a Model Penal Statute*, 12 ALB. L. ENVTL. OUTLOOK J. 200, 229 (2007) (noting how certain states’ statutes should be incorporated into a model statute because of their strength).

109. See Kritz & Schabas, *supra* note 107, at xviii (“The Model Codes are a tool of assistance and not imposition. They expand the range of options available to drafters of post-conflict criminal laws.”).

110. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 100.

111. *Id.*

112. *Id.* at 102.

113. See BRAITHWAITE, *supra* note 39, at 139 (noting that studies show that restorative justice techniques, if not properly implemented can increase re-victimization risk of the victim).

114. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 7, 18.

115. For example, a facilitator might amend an agreement if the victim and offender verbally agreed upon something, but it was left out of the written agreement; or if an offender agrees to work at a charitable organization, does so successfully for half his agreement term, but then must move away to keep his job. See *Crimes (Restorative Justice) Act 2004* (ACT) pt 8 s 55 (Austl.).

the facilitator, must be cautious in his amendment and be certain that the final agreement still reflects the original intent of the offender and victim.

In general, there seems to be no consensus as to what amount of time or training is needed to become a competent facilitator.¹¹⁶ However, all training should: (1) introduce the facilitator to the concepts and goals of restorative justice; (2) familiarize the facilitator with the procedures of the specific programs with which he or she will be working; (3) hone a facilitator's communication skills through exercises; (4) help the facilitator understand the "victimization experience"; and (5) teach the facilitator about the traditional criminal process the offender would ordinarily go through.¹¹⁷ Also important to the training are role-playing exercises and the shadowing of other experienced facilitators.¹¹⁸ Finally, facilitators must continue to educate themselves even after certification.¹¹⁹

Another important issue is how, and from what populations, facilitators should be chosen.¹²⁰ One view is that only "certified" professionals should be utilized.¹²¹ However, the fear is that this will not only exclude other competent individuals, but also that these professionals will compromise the program because of their loyalty to traditional notions of criminal justice.¹²² Another approach to the selection of facilitators is to use a simple interview and

116. See, e.g., MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 55 (1994) (detailing how four programs required three different lengths of time to train mediators); Shelia D. Porter & David B. Ells, *Mediation Meets the Criminal Justice System*, 23 U. COLO. LAW. 2521, 2523 (1994) (noting that Colorado training involves a twenty-one hour training session followed by thirty hours of solo or co-mediation experience in at least ten different cases); *Restorative Justice Program*, OFFICE OF THE DEAN OF STUDENTS, U. OF OR. (2010), <http://studentlife.uoregon.edu/SupportandEducation/StudentConflictResolutionServices/RestorativeJusticeProgram/tabid/139/Default.aspx> (explaining that the University of Oregon Campus Restorative Justice Program requires thirty hours of training, an application, an interview, and completion of training).

117. UMBREIT, *supra* note 116, at 150.

118. Beauregard, *supra* note 47, at 1035.

119. This ensures that a facilitator understands the latest techniques and advances in the field. See COLLEGE OF EDUC. AND HUMAN DEV., U. OF MINN., VICTIM-OFFENDER MEDIATION ASSOCIATION RECOMMENDED ETHICAL GUIDELINES 7 (1998), http://www.cehd.umn.edu/ssw/rjp/Resources/RJ_Dialogue_Resources/Training_Resources/VOMA%20ethics.pdf. However, in this author's opinion, such programs should be governmentally funded as they are with public defenders and prosecutors. *Id.* at 7–8.

120. See W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM. J. TRIAL ADVOC. 501, 524 (2008).

121. *Id.*; see also *Crimes (Restorative Justice) Act 2004* (ACT) pt 8 s 40 (Austl.) (noting that a professional could be interpreted to be a lawyer; however with "sufficient legal training" a lawyer need not be utilized).

122. Leverton, *supra* note 120, at 524.

application process to select competent individuals to train from the general populace.¹²³

Thus far, the latter approach, drawing volunteers from the general populace, has had success.¹²⁴ It has the advantage of quickly spreading awareness of restorative justice¹²⁵ and anticipates that potential lack of restorative justice professionals to handle the demand of their caseloads. There are two overarching reasons why a facilitator should be selected from the local population. First, the future facilitator will hopefully be knowledgeable about the local culture and community in which the crime took place.¹²⁶ Second, recruiting volunteers helps keep the community involved, which comports with one of the underlying precepts of restorative justice; that the community itself is harmed by the crime.¹²⁷ A potential, and promising, blended approach is to use experts for the screening process, if available, and community volunteers for the actual meetings.

Whichever population the volunteers are drawn from, some important qualities that an individual must possess are: empathy, organization, effective verbal communication, and conflict management, among others.¹²⁸ Also, a certain level of objectivity is key to any competent facilitator to ensure that the

123. See generally MINISTRY OF JUSTICE, RESTORATIVE JUSTICE FACILITATOR SELECTION TOOLKIT 2-4 (2008), http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/restorative-justice-info-for-providers/documents/copy_of_Facilitator-Selection-Toolkit-April-2008.pdf.

124. See, e.g., Susan M. Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 LAW & SOC'Y REV. 139, 163 (2004) (noting that despite strict selection criteria, each facilitator selected for the program, although experienced, had a very different background: a former youth corrections counselor, a chair of a community council (who had no previous experience in the criminal justice system), and an individual participating in prison advocacy work).

125. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 49 ("The use of volunteers can also enable community members to develop skill sets and to assume a major role in the response to crime and social disorder in their community as well as to facilitate problem solving and offender and victim reintegration.").

126. *Restorative Justice: Fact Sheet*, DEP'T OF JUST. CAN. (2010), <http://www.justice.gc.ca/eng/pi/pcvi-cpcv/res-rep.html>. While a local professional will be likewise knowledgeable, there might be a danger that the professional carries a scholarly, rather than practical, knowledge of local culture.

127. Community involvement is sometimes seen as an "essential element" of a successful restorative justice program. Pelikan & Trenczek, *supra* note 58, at 81; see also UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 49 ("Efforts should be made to ensure that volunteers are recruited from all segments of the community, with appropriate gender, cultural, and ethnic balance. Their presence will help forge deeper links between the community and the justice system.").

128. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 65-66.

process remains as fair as possible.¹²⁹ Interested applicants could be asked to fill out an application form questioning, among other things: their availability, references, their reasons for wishing to become a facilitator, their prior experiences with mediation of any kind, and general knowledge about the criminal justice system and restorative justice.¹³⁰

B. Screening Process for Victims and Offenders

1. Who is Eligible to Participate in a Restorative Meeting?

Aside from those who will facilitate the meetings, another important consideration is who should be admitted to attend these mediation sessions. In order for restorative justice to function, the victim, the offender, and any other individuals present must be willing to make the process work.¹³¹ To this end, careful screening on a case-by-case basis is crucial.¹³²

In Uganda, a pre-printed form filled out by the probation officer is used to assess the offender's eligibility for the program.¹³³ Considerations include: the offense, particulars of the offence, previous convictions, background of the offender, attitude of the offender, and the attitude of the victim.¹³⁴

Certain elements should be present in order to help restore the victim, hold the offender accountable in a meaningful way for the harm caused by his or her crime, and finally leave the parties satisfied with the process. First, the victim must wish to meet the offender.¹³⁵ However, the victim must be interested in the restorative justice process itself, not just in a chance to confront his or her offender.¹³⁶ In addition, restorative justice may not be appropriate or may

129. See Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT RESOL. 85, 122 (2007) (“[Facilitators] that seem overly accusatory or overly understanding of the offender’s conduct . . . can obstruct the process and contribute to unreasonable results.”).

130. For a detailed example of such a form, see MINISTRY OF JUSTICE, *supra* note 123, at 15–18. Note that no matter how knowledgeable, no individual can become an effective facilitator without proper training.

131. Jan Bellard, *Victim Offender Mediation*, THE COMMUNITY MEDIATOR 1, 3–4, (Fall 2000), available at <http://www.voma.org/docs/bellard.pdf>.

132. Rachel Alexandra Rossi, Note, *Meet me on Death Row: Post-Sentence Victim Offender Mediation in Capital Cases*, 9 PEPP. DISP. RESOL. L.J. 185, 186 (2008).

133. Uganda Community Service Regulation 2001, available at http://www.restorativejustice.org/10fulltext/ministerofinternalaffairs/at_download/file.

134. *Id.*

135. Umbreit et al., *supra* note 51, at 30–31.

136. See Michael Alberstein, *Restorative Justice as Internalization of the Rule of Law: Combining Restoration with Retribution in the Film Festen*, 8 CARDOZO J. CONFLICT RESOL. 405, 418 (2007) (“[A] threatened, suspicious victim might experience fear and not receive the full benefit even in front of a remorseful offender.”); see also Ellen Waldman, *Restorative Justice and the Pre-Conditions for Grace: Taking Victim’s Needs Seriously*, 9 CARDOZO J. CONFLICT RESOL. 91, 107 (2007) (noting that Rwandan victims still suffering emotional trauma from the genocidal massacre received much less solace from meeting with their offenders).

require special measures for certain cases, like child sexual abuse cases, because of the vulnerable nature of the victim.¹³⁷ As a result, it is important to note details like: the victim's prior relationship with the offender, if any, the impact the offense had on the victim, and what relationship the victim wishes to maintain with the offender after the process.¹³⁸

The offender, in turn, must take accountability for his actions and present no danger to the victim.¹³⁹ This may include the writing of a full confession, the preparation of a sincere apology, and being prepared emotionally for the encounter.¹⁴⁰ The danger is that the offender might be putting on a charade. The sincerity of the offender's feelings could be confirmed by a referral from the defense attorney, prosecutor, judge, or screening expert.¹⁴¹ Other considerations might be: the offender's prior history of violence and crime, history of attempts to use restorative processes, mental health, and substance abuse problems.¹⁴² One important element is that the victim and the offender must both agree on the basic facts of the case.¹⁴³

The Australian Restorative Justice Act is also careful to consider the mental competence of the victim and offender. Eligible victims must be of a certain age and have the mental cognizance to agree to take part in the program.¹⁴⁴ However, if they are too young, a family member may be substituted for the victim as long as that family member is old enough and possesses sufficient mental cognizance.¹⁴⁵ An offender is only eligible if the offender: accepts responsibility, is at least ten years of age, has the mental cognizance to agree to take part in the process, and does so.¹⁴⁶

137. Annie Cossins, *Restorative Justice and Child Sex Offenses*, 48 BRIT. J. CRIMINOLOGY 359, 372 (2008). Special measures might include having an immediate family member accompany or replace the victim, if the victim is too young. *Crimes (Restorative Justice) Act 2004 (ACT)* pt 8 s 43 (Austl.).

138. VENEZIA KINGI ET AL., REVIEW OF THE DELIVERY OF RESTORATIVE JUSTICE IN FAMILY VIOLENCE CASES BY PROVIDERS FUNDED BY THE MINISTRY OF JUSTICE 3.2 (2008), available at <http://www.justice.govt.nz/publications/global-publications/r/review-of-the-delivery-of-restorative-justice-in-family-violence-cases-by-providers-funded-by-the-ministry-of-justice-may-2008/chapter-3-national-survey-of-restorative-justice-providers>.

139. Robinson, *supra* note 12, at 377.

140. This could include a sense of contrition or self-abasement. Alberstein, *supra* note 136, at 418.

141. Mary Koss & Mary Achilles, *Restorative Justice Responses to Sexual Assault*, VAWNET: THE NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 1, 8 (2008), available at http://new.vawnet.org/Assoc_Files_VAWnet/AR_RestorativeJustice.pdf.

142. KINGI, *supra* note 138, at 3.1.

143. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 100.

144. See *Crimes (Restorative Justice) Act 2004 (ACT)* pt 5 s 17(1) (Austl.) ("A victim of an offence is eligible for restorative justice in relation to the offence if . . . the victim is at least 10 years old; and the victim is capable of agreeing to take part in restorative justice.").

145. *Id.* s 17(2).

146. *Id.* s 19(1).

2. Who Should Act as the Referring or Screening Entity?

In most cases, prosecutors are the main referrers for offenders wishing to enroll in restorative justice programs.¹⁴⁷ This allows the prosecutor to drop the charges if an offender successfully completes his or her restorative agreement.¹⁴⁸ Another possibility is to have a separate government “referring agency” offer their opinion about whether a particular offender is suitable for restorative justice.¹⁴⁹ This alleviates the worry that a prosecutor might discriminate against an offender who is a suitable candidate for restorative justice, but has committed a more “major crime”, and thus should still be prosecuted for political reasons. A favored approach would be to utilize a different referring entity depending on the stage of the criminal process.¹⁵⁰

A victim’s eligibility could be evaluated by a facilitator or, if enrolling in a non-profit program, by that program’s screening board. In general, victims should always be given the opportunity to engage in a restorative process with or without the offender present.¹⁵¹ However, not every restorative program is appropriate for every victim.

C. *When Restorative Justice Programs Can be Implemented in the Criminal Process*

Generally, there are four places within a criminal justice system where restorative justice can be introduced:

- (a) at the police level (pre-charge); (b) the prosecution level (post-charge but usually before trial)[;] (c) at the court level (either at the pre-trial or sentencing stages[)]; and (d) corrections (as an alternative to incarceration, as part of or in addition to, a non-custodial sentence, during incarceration, or upon release from prison[]).¹⁵²

A viable statute must address which programs are compatible with each stage of the criminal justice process.

147. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 72.

148. *Id.*

149. Much like the bond commissioner in Saint Louis might offer her opinion to the judge about the amount and type of bond that should be given to a defendant. *See* Robert Patrick & Heather Ratcliffe, *Judge Blocks Bonds Firm From Posting for Defendants in St. Louis*, ST. LOUIS POST-DISPATCH, Jan. 22, 2010 (“Judges looking for answers have focused attention on . . . [the bond commissioner] whose job . . . is to advise them on what bond to set for criminal defendants. [The bond commissioner] does not have authority to set or change felony case bonds on her own.”).

150. For example, if the offender has been apprehended and a prosecution referral has been made then the prosecutor or a separate board may make the referral, however if the offender either pleads guilty or is found guilty of the offense only the Courts may refer the offender for the program. *Crimes (Restorative Justice) Act 2004* (ACT) Table 22 (Austl.).

151. *See infra* text accompanying notes 315–326.

152. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 13.

D. Types of Programs

Although there are many different formats that the restorative process can take,¹⁵³ the following programs are the most commonly utilized.¹⁵⁴ It is also important to note that while restorative justice may provide a separate prosecutorial process than that of a trial (if conducted in lieu of a trial), the agreement merely serves as a suggestion, addition to, or modification of, the final sentencing phase.¹⁵⁵ These programs are never meant to serve as a complete replacement for our current criminal justice system.

1. Victim-Offender Mediation

One of the first types of restorative justice programs developed was victim-offender mediation (VOM).¹⁵⁶ These programs may be operated at any point during the criminal process.¹⁵⁷ Because of the direct form of the meeting between the victim and offender, there is some debate about whether VOM should be used for more serious crimes.¹⁵⁸ However, with the addition of certain safeguards, such as specialized training and a more rigorous screening process, there are very few situations where an offender or victim should be excluded.¹⁵⁹

The program itself has four steps. The first step is the screening process, previously discussed, to ensure that both the case and the participants qualify for the process.¹⁶⁰ The second step involves each participant meeting with the facilitator, who will explain the process to each party and help them identify

153. See generally CHARLES K. BARTON, RESTORATIVE JUSTICE: THE EMPOWERMENT MODEL 63–69 (2003).

154. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 15 (“While restorative justice programmes vary on a number of key dimensions, there are also a number of commonalities. These are evident in the description in the selection of programmes presented below.”).

155. It is still possible for a judge to impose his or her own sanction when the need arises for public safety, equity or other concerns; for example, an offender convicted of pre-meditated murder.

156. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 17.

157. Ilyessa Willikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO ONLINE J. CONF. RES. Part II.B (2004).

158. Compare Willikoff, *supra* note 157, at Part II.B (“Such . . . crimes include homicide, vehicular homicide, assault, and rape.”) with Mark S. Umbreit et al., *Victim Offender Mediation: An Evolving Evidence-Based Practice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 58, at 52, 60 (noting that victim-offender mediation practices have increased in the fields of murder, vehicular homicide, manslaughter, armed robbery and sexual assault).

159. One example might be a mentally incompetent or insane individual who does not possess the ability to understand what they have done. Willikoff, *supra* note 157, at Part II.B.

160. Farbiarz, *Victim-Offender Mediation: A New Way of Disciplining America’s Doctors*, 12 MICH. ST. U. J. MED. & L. 359, 366 (2008).

their goals.¹⁶¹ This is also an important step for the facilitator to “establish rapport” with each party, earn their trust, and convey a sense of security.¹⁶²

The third step involves the victim and offender engaging in a voluntary meeting where the victim is afforded an opportunity to ask questions of the offender.¹⁶³ Victims tell their story and explain how they have been affected by the offender’s actions. Offenders respond by offering either an apology, an explanation, or both.¹⁶⁴ The facilitator’s main goal is to help the victim and offender understand exactly what issues need to be discussed and foster communication between the two participants.¹⁶⁵

The final step involves a discussion of the victim’s losses with the end result being a reparation agreement.¹⁶⁶ These agreements do not always involve money; sometimes the reparation is in the nature of service to the victim or the community.¹⁶⁷ If at a pre-sentencing stage and the parties are unable to reach an agreement, the case should be returned to the traditional criminal justice system.¹⁶⁸ If at a post-sentencing phase, then the agreement will simply have no effect on the sentence. However, in an extremely high number of cases the parties are able to reach a signed agreement.¹⁶⁹ Follow-up meetings may be arranged by the facilitator for a variety of purposes, and are often as important as the initial meeting.¹⁷⁰

2. Community and Family Group Conferencing

Family and community group conferencing are usually operated at the court-level stage of the offense.¹⁷¹ This format is slightly more expansive than traditional victim-offender mediation as friends, family, and other supporters of the victim and offender are also present at these conferences.¹⁷² During these conferences, members may partake in the proceedings by sharing their

161. *Id.*

162. Kimberly N. Grant, *Ten Dollars for Twenty-Four Years*, 15 DISP. RESOL. MAG. 19, 23 (2008), available at http://www.americanbar.org/content/dam/aba/publishing/dispute_resolution_magazine/dispute_magazine_rev_DR_Fall_20085.authcheckdam.pdf.

163. Willikoff, *supra* note 157, at Part II.B.

164. Farbiarz, *supra* note 160, at 367.

165. Porter & Ells, *supra* note 116, at 2521.

166. Farbiarz, *supra* note 160, at 367.

167. Mary Ellen Reimund, *Mediation in Criminal Justice: A Restorative Approach*, 46 ADVOCATE 22, 23 (2003).

168. *Id.*

169. Umbreit & Bradshaw, *supra* note 52, at 34 (“Many programs report an agreement rate of 95 percent or more.”).

170. See Umbreit et al., *supra* note 158, at 55 (“[Follow up efforts] may involve keeping track of agreed-upon restitution. It may [also] involve making referrals to other services when requested.”).

171. Strickland, *supra* note 68, at 43.

172. *Id.*

views or opinions, or by simply asking questions.¹⁷³ In addition, because the other members are presumably lending support to the victim and offender, it helps keep both from feeling judged.¹⁷⁴

While the two conferences share many similarities, there are minute differences.¹⁷⁵ Family group conferencing is extremely effective in the context of rehabilitating and reuniting drug-addicted parents with their children.¹⁷⁶ It is a logical conclusion that family group conferences should be used primarily for other “victimless crimes” where the primary harm is actually felt by the offender but still damages the integrity of the familial unit.¹⁷⁷

These conferences have proven extremely effective in the context of youth offenders.¹⁷⁸ However, there is no evidence indicating that a community approach cannot be applied to offenders of all ages.¹⁷⁹ Originating in New Zealand, the system has some very basic similarities to and differences from victim-offender mediation.¹⁸⁰ Rather than focus simply on the victim and offender, the conferences also attempt to restore a community or family.¹⁸¹ One advantage is that because the community is directly involved in the process, it is more likely to be supportive of both the restoration of the victim and the reintegration of the offender.¹⁸² Also, because the offender’s family is

173. LIEBMANN, *supra* note 32, at 85.

174. BRAITHWAITE, *supra* note 39, at 141.

175. Family group conferencing may still involve the victim, but it seems to be more applicable to situations where the harm felt is not as widespread. For example, a firebombing incident at a school might impact the entire community while a simple battery might affect only a very small number of people.

176. Robert Victor Wolf, *Promoting Permanency: Family Group Conferencing at the Manhattan Family Treatment Court*, J. CENTER FOR FAMILIES, CHILD. & CTS. 133, 135–36 (2003) (noting the success of family group conferencing in the Manhattan Family Treatment Court in helping to rehabilitate negligent crack-addicted parents by educating them about the harm caused to their children, learning more about their families, helping them identify resources to support a functional family, and breaking the cycle of addiction).

177. A “victimless crime” is one that does not directly inflict personal or property harm on another individual. Common examples include possession of drugs, prostitution, and gambling. THOMAS J. GARDNER & TERRY M. ANDERSON, CRIMINAL LAW 16 (2009).

178. See Willie McCarney, *Restorative Justice: An International Perspective*, 3 J. CENTER FOR FAMILIES, CHILD. & CTS. 3,7 (2001) (noting that in the United Kingdom all youth offender panels operate group conferencing).

179. Community and family conferencing can instead be seen as a favored approach to youth offenders that is not exclusive for youth offenders. As to date, there is insufficient research to conclude one way or the other.

180. CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, OFFICE OF JUSTICE PROGRAMS, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS 3 (2000) [hereinafter FAMILY GROUP CONFERENCING], available at http://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176347.pdf.

181. *Id.* at 5.

182. *Id.*

there, the offender's background will be discussed and taken into consideration even more.¹⁸³ The community itself is also charged with supervising the offender and ensuring that the offender adheres to the terms of the agreement.

The process is once again accomplished in four stages. Stage one is the initial screening process. In stage two, the facilitator identifies exactly who will be part of the group and what professionals are needed and helps prepare all participants for the meeting.¹⁸⁴ If during a community conference the body wishes to elect a community representative to speak for the community as a whole, when necessary, this action can also be taken at this stage.¹⁸⁵

Stage three is the meeting itself. The session may be opened with a prayer, blessing, or any other custom mutually agreed on by all parties as the setting is technically deemed "informal."¹⁸⁶ The facilitator must then introduce each of the participants and describe the purpose of the meeting.¹⁸⁷ A police officer or social worker may read the charges alleged against the offender;¹⁸⁸ the offender responds by telling his or her story and the victim responds with his or her feelings.¹⁸⁹ Things discussed may include: "how the crime occurred, how it has affected [all parties], and how the harm can be redressed."¹⁹⁰ The other individuals in the conference, whether related to the victim or offender, can then discuss the impact the offense had on their lives.¹⁹¹ The victim is then asked to discuss exactly what he desires from the conference, which will move the conferencing session into its final stage.¹⁹²

The final stage involves the family or community members, the victim, and the facilitator.¹⁹³ At this point the group has three tasks.¹⁹⁴ First, it must

183. *See id.* ("Family dynamics play a major role in juvenile delinquency, and far too few programs effectively address these issues.")

184. Examples of "professionals" may include a translator if the offender does not speak the language of the community or a psychiatrist if there are some more deep-seated mental health issues to work through. *See* LIEBMANN, *supra* note 32, at 85.

185. Note that this would not preclude community members from also expressing their sentiments during a certain time in the process, but merely help facilitate efficiency for when the "community" needs to speak as one.

186. Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand: Family Group Conferences as a Case Study*, 1 W. CRIMINOLOGY REV. (1998), <http://wcr.sonoma.edu/v1n1/morris.html>.

187. *Id.*

188. *Id.* One example might include if the offender is very young and his family might move away before he completes his service.

189. *See* LIEBMANN, *supra* note 32, at 85.

190. *Id.*

191. Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, in *A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, AND CONTEXTS* 231 (Jerry Johnstone ed., 2003).

192. FAMILY GROUP CONFERENCING, *supra* note 180, at 2.

193. LIEBMANN, *supra* note 32, at 85.

194. *Id.*

formulate a plan that addresses the concerns and needs of the victim.¹⁹⁵ Second, it must then create a contingency plan in case the first plan fails to be completed.¹⁹⁶ Third, it must decide on how to “implement, monitor, and review the plan.”¹⁹⁷ Finally, the other members are brought back into the room, and the initial group is reformed.¹⁹⁸ The group will then discuss the proposed plan and modifications will be made based on suggestions by the offender and his family/supporters before the rehabilitation plan is finalized and executed.¹⁹⁹

Unlike family conferences, community conferences do not happen just once; instead, they are continuing events set in place to ensure that offenders are complying with the terms of their reparation agreement.²⁰⁰ If offenders choose not to continue with the conferences or violate the terms of their agreement, they might return to a traditional criminal process for trial or be re-sentenced by a judge.²⁰¹

3. Circle Sentencing

Healing and sentencing circles are currently used primarily by Native Americans and the aboriginal people of Canada.²⁰² The focus of circles is less about reparations and more about rehabilitation and reintegration of the victim and offender back into the community.²⁰³ The main focus is to “reintegrate the victim and the offender into the community by providing respect for each individual and caring support systems.”²⁰⁴ For victims, the circle serves as a form of self-validation; for offenders it serves as a mechanism to explore options on how they will make reparations and how they can reintegrate into society.²⁰⁵ In addition, a circle process can “help reconnect an offender to his community” and “rebuild broken relationships.”²⁰⁶

Healing and sentencing circles have had some experimental use in the United States.²⁰⁷ Their primary usefulness is at the court level as a

195. *Id.*

196. *Id.*

197. *Id.*

198. *See Strickland, supra* note 68, at 43.

199. *Id.* at 43–44

200. *Id.* at 43.

201. *Id.* at 42, 44.

202. *Id.* at 51.

203. *Id.*

204. Strickland, *supra* note 68, at 51.

205. *Id.*

206. MARGARITA ZERNOVA, RESTORATIVE JUSTICE IDEALS AND REALITIES 17 (2007).

207. The first program was implemented in 1996 in Minnesota. Michelle Maiese, *Restorative Justice*, in ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 1706 (Jack Rabin ed., 2008).

replacement for a trial before sentencing takes place.²⁰⁸ The outline of a traditional process is as follows:

1. The offender applies for the process;
2. The victim engages in a healing circle;
3. The offender engages in a healing circle;
4. The victim and offender meet during a sentencing circle to formulate a sentencing plan;
5. Follow-up circles take place to monitor the offender's progress.²⁰⁹

The healing circles are private events involving very few people, hand-selected by the victim or offender.²¹⁰ The purpose of the victim's healing circle is to establish his self-worth, hear stories about similar events that happened to other victims, and openly share thoughts of the community and victim without the chance of conflict.²¹¹ The group members sit in an actual circle, and each member is given an opportunity to speak as they are passed the "talking piece."²¹² This "talking piece" helps facilitate communication more clearly between members of the circle.²¹³

The healing circle for the offender focuses mainly on why the offender committed the crime, how the offense harmed the victim, and steps the offender might take to reconcile with, and make reparations to, the victim.²¹⁴ Most importantly, the circle lets the offender know he is being supported and

208. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 22 ("[Circle sentencing] generally supports the sentencing phase.").

209. OFFICE OF JUSTICE PROGRAMS ET AL., RESTORATIVE JUSTICE FACT SHEET: SENTENCING CIRCLES, <http://www.courts.ca.gov/SentencingCircles.pdf> (last visited Feb. 7, 2011).

210. Janelle Smith, *Peacemaking Circles: The "Original" Dispute Resolution of Aboriginal People Emerges as the "New" Alternative Dispute Resolution Process*, 24 *HAMLIN J. PUB. L. & POL'Y* 329, 358 (2003).

211. *Id.* at 358–59.

212. *Id.* at 353 ("The talking piece is an object with symbolic meaning or one which represents wisdom. For example, in one sentencing circle a dream catcher was used as the talking piece, because the offender's brother, while in prison, had made the dream catcher for the offender.").

213. *See id.* at 353–54.

The talking piece promotes better listening because 'participants listen better when they know that they will not have an opportunity to speak until the talking piece reaches them.'

Furthermore, the talking piece prevents people from responding without thinking since the talking piece must be passed around the entire circle before a participant has another chance to speak. Thus the talking piece allows all participants to fully express themselves at a pace controlled by the participants.

Id. at 354.

214. *Id.* at 359.

thus more quickly reintegrates him back into the community.²¹⁵ Multiple follow-up circles can also be held for the victim or offender as needed.²¹⁶

Both the victim and offender finally meet during the sentencing circle.²¹⁷ Unlike healing circles, sentencing circles are extremely expansive—consisting of all interested parties such as the victim, the offender, their supportive friends and family members, and even interested community members.²¹⁸ In addition, these circles may resemble a court proceeding and include the judge, attorneys, police, and a court reporter.²¹⁹ The group members sit in an actual circle, and each member is given an opportunity to speak as they are passed the “talking piece.”²²⁰ Each member of the circle who is not an official of the court is encouraged to tell their life story in a personal narrative to help the other members of the circle better understand their situation.²²¹ The final decision is made by a consensus of the entire circle ensuring that “every participant has a stake in the circle’s success.”²²² If a decision cannot be made, as with other restorative justice processes, the case can be referred to the traditional criminal justice system.²²³

Although the results of the circles are submitted to the court, the decisions are not binding upon a court, and it is usually not mandatory for judges to adopt the suggestion of the sentencing circle.²²⁴ However, if the judge, prosecutor, defense attorney, and a court reporter are present at the circle, the agreement may serve as the final disposition of the case.²²⁵ However, this does require that the offender first legally plead guilty.²²⁶ An offender would not

215. *Id.*

216. Follow-up circles can be held for any purpose, but primarily are used to follow up on the victim or offender’s progress. Smith, *supra* note 210, at 359.

217. *See id.* at 350 (“During the preparation stage, participants hold separate circles ‘to explore issues and concerns and prepare all parties to participate effectively.’ The third stage is the gathering stage where all parties join in one circle to ‘express feelings and concerns and to develop mutually acceptable solutions to issues identified.’” (citation omitted)).

218. Strickland, *supra* note 68, at 51.

219. Smith, *supra* note 210, at 347.

220. *Id.* at 353.

221. *See id.* at 354–55.

Storytelling helps participants learn more about each other and ultimately reach an appropriate resolution to the problem. Personal narratives allow participants to see the speaker in another light when they are allowed to define themselves. Furthermore, personal narratives uncover commonalities between people, opening the possibility for connections between participants. By hearing stories, social distance and stereotypes about other people are reduced.

Id.

222. *Id.* at 355–56.

223. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 58.

224. *See id.* at 23.

225. Smith, *supra* note 210, at 349.

226. *Id.* at 348.

have to plead guilty for a victim or offender to engage in a healing circle or to have a sentencing circle agreement that is not binding upon the court.

What differs most about circle sentencing is that the process itself is most important and not the final sentence/agreement.²²⁷ Although used sparingly thus far in the United States, it has had great success where implemented.²²⁸ It has been noted that most offenders manage to complete their sentences because the process is much “tougher” on the offender and only those who are “truly motivated” will apply for it.²²⁹

4. Victim Impact Panels and Surrogate Groups

The distinction between victim impact panels and surrogate groups is two-fold. First, with victim impact panels, the only connection that needs to exist between the victims and offenders is the type of crime that was committed.²³⁰ Second, these panels have historically been mandatory for offenders as part of their sentence rather than of a voluntary nature.²³¹

Although victims benefit greatly from victim impact panels,²³² the main purpose of the panel is to rehabilitate offenders.²³³ However, surrogate groups

227. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 24.

228. See Bazemore & Umbreit, *supra* note 191, at 235 (“Those that have been involved with circles report that circles empower participants to resolve conflict in a manner that promotes sharing of responsibility for outcomes, generates constructive relationships, enhances respect and understanding among all involved, and fosters enduring, innovative solutions.”).

229. See Heino Lilles, Territorial Judge in Whitehorse, Can., Circle Sentencing: Part of the Restorative Justice Continuum, Address at “Dreaming of a New Reality,” the Third International Conference on Conferencing Circles and other Restorative Practices (August 9, 2002), available at http://www.iirp.org/library/mn02/mn02_lilles.html (noting that the agreements that arise from these sentencing circles are “tougher” than other restorative justice methods). It can also be assumed that the process might be tougher on the offender than even the traditional criminal justice system as the offender must truly accept what they have done as opposed to an Alford plea.

230. See Jayne W. Barnard, *Allocation for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 81 (2001) (“The offenders of the victim presenters are not present.”).

231. See Eric W. Nicastro, *Confronting the Neighbors: Community Impact Panels In the Realm of Restorative Justice and Punishment Theory*, 9 ROGER WILLIAMS U. L. REV. 261, 271 (2003) (noting that victim impact panels are not voluntary).

232. TRACY M. GODWIN, ET AL., PEER JUSTICE AND YOUTH EMPOWERMENT AN IMPLEMENTATION GUIDE FOR TEEN COURT PROGRAMS 83 (1998) (“By serving on a victim impact panel, victims: find that the telling of their story lightens their personal pain, which promotes their own healing process; experience something positive from a previously devastating event; and believe that through telling their stories they may be preventing some other family from having to suffer a similar victimization.”).

233. *Id.* at 81 (“[Victim impact panels] can: allow offenders, perhaps for the first time, to consider the pain and suffering drunk driving can cause to other people; help offenders move beyond being ‘stuck’ in focusing on their own ‘bad luck’; serve as a first step in breaking down denial of alcoholics or those addicted to other drugs; imprint images of real people in offenders’

could also be formed for victims by placing offenders who have fully accepted and repented for their crimes on the panel and by sharing their experiences, providing comfort to the victims. Traditionally, these panels have been used for those convicted of drunk driving, but have the potential to be used for any type of offense as the behavior they wish to change is linked to many other crimes.²³⁴

Panel members consist of three or four victims of a similar crime.²³⁵ After the panel is assembled, the panel members are given the opportunity to tell their stories in a non-judgmental manner to the offenders.²³⁶ Although some time is given for the offenders to ask questions, the main purpose of the meeting is for the offenders to listen to the panel members.²³⁷ Although offenders are not faced with their particular victim, the panels have been shown to be extremely effective due in part to their smaller nature.²³⁸

5. Online Dispute Resolution

One recent approach to restorative justice is known as online dispute resolution (ODR). Meetings can take place utilizing a myriad of online communication techniques including e-mails, text messaging, or video conferences, separately or in conjunction with traditional meetings.²³⁹ The thought is that this approach can be an alternative when face-to-face meetings are not possible.²⁴⁰

minds, which may replay when drinking and driving is again an option; and change behavior and save lives.”).

234. Barnard, *supra* note 230, at 81–82 (“(1) VIP programs make it impossible for defendants to escape into the anonymity of the criminal justice system; (2) VIPs require defendants to reflect on the pain of their victims in the presence of others; and (3) VIPs have at their core the fundamental belief that, if exposed to the harm their conduct has caused, some criminal offenders may change their behavior and ultimately become better social actors.”); *see also Crime Victim Services*, IOWA EIGHTH JUDICIAL DIST. DEP’T OF CORRECTIONAL SERVICES, <http://www.8thjdcbc.com/Victim%20Services.htm> (last visited Feb. 7, 2011) (discussing how victim impact panels can be used to help individuals who have been the victims of sexual offenses).

235. Barnard, *supra* note 230, at 81.

236. *Id.*

237. *Id.*

238. Marilyn Peterson Armour et al., *Bridges to Life: Evaluation of an In-Prison Restorative Justice Intervention*, 24 MED. & L. 831, 837 (2005) (“Small groups helped offenders open up and express their feelings, experience self-acceptance, and feel optimistic. Offenders commented on the synergistic effect of experiencing both victim panels and small groups. ‘I thought the victim impact panels were just that . . . impacting. It really allowed me to feel the effect, feelings the victim feels. I also thought the small groups were very important’”).

239. Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24 OHIO ST. J. ON DISP. RESOL. 349, 362 (2009).

240. *Id.* at 365. One example is when the continued threat of violence between the victim and offender make restorative justice too risky.

The elements required for any successful online dispute resolution meeting are: convenience to the parties, expertise of the mediators, and viable technology.²⁴¹ Indeed, those who lack prolonged access to the internet may have difficulty engaging in ODR.²⁴² While a notable disadvantage is that nonverbal communication is all but unnoticeable,²⁴³ ODR is advantageous in aiding parties in increasing their verbal communication skills.²⁴⁴ Many believe that the informal nature of ODR will allow offenders to misbehave and make inappropriate comments.²⁴⁵ However, the message delay between communications allows the mediator to retract hasty messages and provides the parties an opportunity to reiterate their thoughts.²⁴⁶

6. Encouragement of Other Programs

These are, of course, not all the approaches restorative justice can take. Restorative justice is wonderfully malleable and can manifest itself in many forms. Some states, like Montana, simply list both the programs and tools available to pursue restorative justice goals.²⁴⁷ Other states, like Minnesota, prefer to award grants to local governments and non-profit organizations to develop their own restorative justice programs.²⁴⁸ Hawaii has its own system of restorative justice known as Ho'oponopono.²⁴⁹ This program is currently

241. ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 93–94 (2001).

242. Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 0004, ¶ 25 (2003), <http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html>.

243. KATSH & RIFKIN, *supra* note 241, at 148.

244. *Id.* at 151–53.

245. Rogers, *supra* note 239, at 376.

246. GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* 23 (2004).

247. MONT. CODE ANN. § 2-15-2013 (2009).

Restorative justice programs include but are not limited to victim-offender meetings, family group conferencing, sentencing circles, use of victim and community impact statements, restitution programs, constructive service, victim awareness education, victim empathy programs, school expulsion alternatives, peer mediation diversion programs and community panels. [Tools] may include but are not limited to: providing educational programs on the philosophical framework of restorative justice . . . technical assistance to schools, law enforcement, youth courts, probation and parole officers, juvenile corrections programs and prisons . . . housing a repository for resources and information to coordinate expertise in restorative justice.

Id.

248. MINN. STAT. §§ 611A.77(2) , 611A.775 (2009).

249. Andrew J. Hosmanek, *Cutting the Cord: Ho'oponopono and Hawaiiin Restorative Justice in the Criminal Law Context*, 5 PEPP. DISP. RESOL. L. J. 359, 359 (2005).

being applied in civil and family court (including battered spouse cases), but is expected to eventually make a move to the criminal justice system.²⁵⁰

Local programs also often transform as they gain support. The Victim Offender Reconciliation Program (VORP) has met with great success in Elkhart, Indiana.²⁵¹ Although initially developed to handle unemployment fraud cases, it was soon adapted to handle many other types of crimes.²⁵² For example, prosecutors first began referring a variety of “non-felony offenses” to the program including: assaults, thefts, harassments, and criminal mischief.²⁵³ Currently, there are as many felony as non-felony offenses referred to the program with burglaries, robberies, thefts, and forgeries being the most common.²⁵⁴ Incredibly serious offenses are also being handled by the program including a number of murder, vehicular homicide, kidnapping, and sexual assault cases.²⁵⁵

E. *Particularly Sensitive Cases*

Along with when a specific program may be used, and the nature of the program, another important factor to consider is the nature of the case being addressed, as some programs may only be effective in certain cases.

1. Domestic Abuse

It is a widely held belief that restorative justice cannot benefit victims of domestic abuse/violence;²⁵⁶ however, statistics show that victim-offender mediation has proven extremely effective in these situations.²⁵⁷ ODR is another method that can be utilized to ensure that the parties maintain equality

250. *Id.* at 368.

251. Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1653 (2000) (noting that, in an eight-year period, over 5,000 cases were handled through VORP).

252. *See id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. LIEBMANN, *supra* note 32, at 284 (“It is not so long ago that domestic violence cases were still seen as private affairs where men had the right to do what they liked Women’s organizations rightly do not want to see the clock turned back and domestic violence ‘privatized’ by restorative approaches.”).

257. *See id.* at 294 (showing how, out of 100 mediated cases, the recidivism rate was sixteen percent, but in one-hundred and eight of the cases taken to court, fifty-nine were dismissed and forty three percent of the remaining cases showed recidivism); *see also* Christa Pelikan, *Victim-Offender Mediation in Domestic Violence Cases—A Research Report*, RESTORATIVE JUSTICE ONLINE, <http://www.restorativejustice.org/10fulltext/pelikan-christa.-victim-offender-mediation-in-domestic-violence-cases-a-research-report> (last visited Feb. 7, 2011) (“VOM with its potential for empowerment can play an important role within an ongoing process that can be characterized as a ‘spiral of empowerment’; this spiral empowerment corresponds and counteracts the (well-known) spiral of violence that often affects the lives of women.”).

of power.²⁵⁸ In addition, the confidential nature of ODR may encourage many domestic abuse victims to come forward and face their accusers.²⁵⁹

2. Sexual Abuse or Rape Cases

Many concerns arise when considering both sexual abuse and rape cases. These include: that the victim may be re-victimized by the offender due to an extreme power difference, that sex offenders may “re-stimulate” themselves by feeding on the negative emotions of the victims, and that many cases may involve psychologically fragile children.²⁶⁰ In Canada, a combination of healing circles and community conferencing has proven effective.²⁶¹ An offender is formally charged at a police station, but then facilitators delay sentencing as long as possible.²⁶² Separate healing circles are then held for different groups of individuals, including the offender, the victim, the victim’s family, the offender’s spouse, and others.²⁶³ Before the sentencing hearing all groups are brought together to discuss the effects of the offense in a community conference.²⁶⁴

ODR is another possible solution in these situations as it increases “a sense of separation and insulation.”²⁶⁵ Physical separation can assist in lessening the power of manipulation the offender potentially can exert over the victim.²⁶⁶ In addition, it can eliminate the offender’s ability to threaten the victim through non-verbal cues like physical movements and voice inflection.²⁶⁷

3. Hate Crimes

Hate crimes are extremely difficult because the impetus for the crime is prejudice, an emotional quality not easily reasoned with.²⁶⁸ Because hate

258. Rogers, *supra* note 239, at 367.

259. *See id.* at 367–68 (“[M]any victims of domestic violence are unwilling to prosecute their attackers because of concerns about publicity, privacy and family preservation. Perhaps victims of domestic violence . . . would like to address the problem, without having to experience the polarizing adversarial system.”).

260. LIEBMANN, *supra* note 32, at 295.

261. *Id.* at 302.

262. *Id.*

263. *Id.*

264. *Id.*

265. Rogers, *supra* note 239, at 372.

266. *See id.* (“Some rape victims experience a feeling of continued, forced connection with their rapists. One survivor claims to have felt as though she . . . ‘share[d] [her] life with [her] rapist. He [was] the husband to [her] fate.’”).

267. *See id.* at 373 (explaining how online dispute resolution “allows the [extensively trained] mediator to monitor the effect that the mediation is having on the victim and allows the mediator to communicate with the victim without any possibility of manipulation by the abuser.”).

268. Brian Sapir, *Healing a Fractured Community: The Use of Community Sentencing Circles in Response to Hate Crimes*, 9 CARDOZO J. CONFLICT RESOL. 207, 233 (2007).

crimes involve so much of the community, the focus on healing, reintegration, and examination of underlying causes of behavior through circle sentencing is advocated as the best approach for these crimes.²⁶⁹ The healing circle is an extra step that is needed to strip away the negative stigma that the offender is a “monster” so that the community can view the offender as a person.²⁷⁰ Also, by understanding the offender’s stereotypical viewpoints, the community can better educate both the offender and others, correcting their faulty misperceptions.²⁷¹ ODR provides the additional benefit that the internet is borderless and internationally accessible.²⁷² While the race of the parties may not be unknown to each other, the mediator will be able to remain anonymous and hence himself free from potential racial bias.²⁷³

F. *The Nature and Implementation of Agreements*

An agreement is a personal creation between a victim and offender and may include one or more of the following: a formal apology by the offender to the victim or community affected by the offender; a plan to address the offender’s negative behavior, a work plan to be fulfilled by the offender on behalf of a victim or a community; and financial reparations to be paid by the offender to a victim or a community.²⁷⁴ It is important that an agreement is not unlawful in any way, degrading or humiliating to the offender or anyone else, or likely to cause distress to the offender or anyone else.²⁷⁵ In addition, an agreement should be in writing and signed by each participant in the meeting.²⁷⁶

Monitoring can occur in two ways. First, subsequent restorative meetings can be held to monitor both the offender’s and victim’s progress.²⁷⁷ Second, the facilitators must also monitor offenders to ensure that they are completing

269. *See id.* (“Involving the community in the healing process is of utmost importance when dealing with hate crimes because of its ability to tear a community apart along racial/ethnic/religious lines.”).

270. *Id.* at 234.

271. *See id.* (“By learning of the negative and ignorant ways they might be viewed, the community can educate others similar to the offender in such a way as to prevent further incidents.”).

272. Sarah Rudolph Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now and Where We Should Be*, 38 U. TOL. L. REV. 193, 205 (2006).

273. Rogers, *supra* note 239, at 377 (stating that an offender may judge mediators by their race, skin color, or perceived social class and this may affect how much they trust those mediators).

274. *Crimes (Restorative Justice) Act 2004 (ACT)* pt 8 s 51 (Austl.).

275. *Id.* pt. 8 s. 51(4).

276. *Id.* pt. 8 s. 52(1).

277. This can be measured by ascertaining: the offender’s percentage of completion of their task, the offender’s thoughts about the process and their emotional growth, and the victim’s amount of emotional rehabilitation.

their agreement.²⁷⁸ If a facilitator reasonably and objectively believes that an offender has failed to comply with an agreement, he may report this matter to the court.²⁷⁹ However, if an offender successfully completes an agreement, a facilitator should feel free to report this to the court as well.²⁸⁰ But an offender should not know that a facilitator will monitor him in order to prevent the offender from acting with an inconsistent or ulterior motive for completing the agreement.

G. Other Useful Statutory Considerations

The Australian Restorative Justice Act begins by detailing the five objectives of the Act, including the purpose of restorative justice.²⁸¹ This is useful for understanding exactly why restorative justice has been selected for incorporation into the criminal justice system and garnering support for it. Also useful is the “dictionary” at the end of the act that acts as an index for the location of important terms which are initially defined and located in the act.²⁸²

New Zealand has also created safeguards in their restorative justice statute due to their concern for victims of offenses.²⁸³ Beyond discussing only the offense, these meetings can be arranged for victims to discuss concerns they may have about “judicial officers, the lawyer for the offender, a member of the court’s staff, a probation officer, or a prosecutor.”²⁸⁴

278. Such monitoring can be as simple as contacting an organization weekly to ensure that the offender is actually performing their service for that organization. *Id.* pt 8 s 57(1).

279. *Id.* pt 8 s 57(2).

280. See Bruce P. Archibald, *Let My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice*, 16 CARDOZO J. INT’L & COMP. L. 1, 34 (2008) (“[T]he court must dismiss a charge if there has been full compliance with a restorative justice outcome agreement.”).

281. *Crimes (Restorative Justice) Act 2004* (ACT) pt 2 s 6 (Austl.).

The objects of this Act are as follows: (a) to enhance the rights of victims of offenses . . . [and to] empower[] victims to make decisions about how to repair the harm done by offences; (b) to set up a system of restorative justice that brings together victims, offenders and their personal supporters in a carefully managed, safe environment; (c) to ensure that the interests of victims of offenses are given high priority in the administration of restorative justice under this Act; (d) to enable access to restorative justice at every stage of the criminal justice process without substituting for the criminal justice system or changing the normal process of criminal justice; [and] (e) to enable agencies that have a role in the criminal justice system to refer offences for restorative justice.

Id.

282. *Id.* pt. 1 s. 3.

283. See Victims’ Rights Act 2002, pt 1 s 3 (N.Z.) (“The purpose of this Act is to improve provisions for the treatment and rights of victims of offences.”).

284. *Id.* pt. 2 s. 9.

III. PRACTICAL ISSUES

A. *Level of Integration*

There is a question about whether restorative justice can be integrated into our criminal justice system or if its only role is that of a replacement.²⁸⁵ There are three options regarding the implementation of restorative justice: that it replace the conventional justice system, that it run parallel but separate to the conventional justice system, or that it act as a supplementary modification to the conventional justice system. The first two options seem the most logical as restorative justice in its purest form seems to be at complete odds with the traditional criminal justice system;²⁸⁶ however, the third approach has the highest probability of success.

Currently, the most popular and effective approach is restorative programs acting as a supplement to the criminal justice system. Due to the complexity of some cases, some advocate that both restorative and criminal justice be utilized.²⁸⁷ For example, in a murder case, a criminal sanction is necessary, in combination with a restorative process, because of the serious nature of the crime and for public-safety reasons.²⁸⁸ Most importantly, acting in conjunction with the traditional criminal justice system allows restorative justice to gain “greater systemic acceptance.”²⁸⁹ Sometimes these implementations come in

285. 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, 669 (2005).

286. See Braithwaite, *supra* note 74, at 2 (“If we take restorative justice seriously it involves a very different way of thinking about traditional notions such as deterrence, rehabilitation, incapacitation, and crime prevention. It also means transformed foundations of criminal jurisprudence, and of notions of freedom, democracy, and community.”); see also, Sarnoff, *supra* note 62, at 34 (“[T]he very nature of the criminal justice system . . . runs counter to restorative justice principles; so enhancing it, rather than replacing or at least reforming it, is antithetical to restorative justice regardless of the worthy intentions of the program implementers.”).

287. For example, in sexual violence cases there are often complex cultural and psychological issues at play. Jeanine Oury, *The Rape Epidemic in the Congo: Why Impunity in the Congo Can Be Solved By International Intervention*, 6 LOY. U. CHI. INT’L L. REV. 421, 430 (2009).

288. See Paul H. Anderson, *Exploring Alternatives to the Incarceration Crisis*, 3 U. ST. THOMAS L.J. 375, 385 (2006).

We in the judicial branch see many people who offend—who violate the law. Many have mental illness or severe emotional problems, and many are before us because they did something stupid or succumbed to the improper influence of others. But . . . there are some people who are completely incapable of living peacefully in a civil society [and that] need to be segregated We need to identify who these people are and we need to incarcerate them.

Id.

289. See Reimund, *supra* note 285, at 672 (“No one has a magic wand to wave that will instantly transform the criminal justice system into a restorative one. Showing individual program successes within the system helps lay the groundwork for the infiltration of restorative attitudes and approaches within the criminal justice system.”).

small advances. For example, Hawaii has a statute explicitly ordering the integration of restorative justice practices into their reentry programs.²⁹⁰

Some states have incorporated restorative justice more fully in their criminal justice systems. Vermont, in particular, addresses the goals of restorative justice and attempts to directly integrate those ideals into the system rather than as optional goals.²⁹¹ Furthermore, Vermont's statute attempts to implement restorative justice wherever feasible into its criminal process.²⁹² The legislature focuses on aiding the recovery of the victim, reducing recidivism, and reintegrating offenders into the community.²⁹³

However, many programs in the United States are often at the periphery of a state's criminal justice system. Many states only utilize restorative justice practices for younger offenders. Juvenile offenders are viewed as being "less able to understand the wrongfulness of their act[s]" and "more malleable", hence easier to reform.²⁹⁴ South Carolina's Children's Restorative Justice Provision deals exclusively with young offenders.²⁹⁵ Alaska's criminal justice program likewise is restricted to juveniles.²⁹⁶ Pennsylvania passed Act 33 in 1995 which completely redefined the goal of the juvenile justice system.²⁹⁷ The new purpose of the statute is to provide balanced attention to the victims of crimes, the community, and juvenile offenders.²⁹⁸

B. Structuring of the System

Other than the level of integration, in what way should restorative justice be structured if officially adopted and integrated into criminal justice systems? Because the state and federal justice systems are separate, there would need to

290. HAW. REV. STAT. § 353H-3 (2010).

291. See VT. STAT. ANN. tit. 28, § 2a (2000) ("It is the policy of this state that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses.").

292. See *id.* ("It is the intent of the general assembly that law enforcement officials develop and employ restorative justice approaches whenever feasible and responsive to specific criminal acts pursuant to [laws concerning] court diversion . . . sentencing, and . . . persons in the custody of the commissioner of corrections.").

293. *Id.*

294. Walgrave, *supra* note 49, at 545.

295. See S.C. CODE ANN. § 63-1-20(C) (2007) ("It shall be the policy of this State to concentrate on the prevention of children's problems . . .").

296. See ALASKA STAT. § 47.12.010 (2011) ("The goal of this chapter is to promote a balanced juvenile system in the state to protect the community, impose accountability for violations of law, and equip juvenile offenders with the skills needed to live responsibly and productively.").

297. THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION COMMITTEE OF THE PENNSYLVANIA COMMISSION OF CRIME AND DELINQUENCY, MISSION AND GUIDING PRINCIPLES FOR PENNSYLVANIA'S JUVENILE JUSTICE SYSTEM 1 (2004).

298. *Id.*

be separate procedural statutes and sources of funding for each.²⁹⁹ Because each state has its own separate system of criminal justice, it is expected that there will be diversity between the structuring of each statute's system of restorative justice implementation. Some states funnel funding to local governments and public interest groups to develop restorative justice programs.³⁰⁰ However, many other states and countries integrate restorative justice into their criminal justice system, which is operated from one centralized authority.³⁰¹

One novel approach, and possible compromise, is known as "democratic experimentalism" where a central governmental agency grants authority to decentralized public non-profit service providers to create their own systems of resolution.³⁰² The service provider must provide detailed accounts of their "activities, goals, and performance" to the centralized agency.³⁰³ In return, the central agency merely reviews the practicality of the experiment in order to encourage the creation of new programs.³⁰⁴

There are a myriad number of other approaches to integrating restorative justice into criminal justice systems. In many regions, local private non-profit organizations have developed outside of the judiciary to provide support to the restorative justice movement. Barron County Restorative Justice Programs, Inc. offers victim-offender mediation and victim impact panels.³⁰⁵ The National Organization for Victim Assistance (NOVA), among other things,

299. See 24 THE ENCYCLOPEDIA AMERICANA 214 (1995) ("[T]here are now functioning in the United States 51 separate systems of courts, one for each of the states and another for the federal government.").

300. See WASH. REV. CODE § 13.40.510 (2010) (stating that proposals must include, among other things, input of the community, how the community will be involved, and how the funding will help contribute to the goal of the proposed program).

301. Australia's program is run through its centralized government stemming from the Restorative Justice Act of 2004. See *Crimes (Restorative Justice) Act 2004* (ACT) pt 2 s 6 (Austl.). The Parliament of New Zealand runs their restorative justice programs through the Victim's Act of 2002. See *Victims' Rights Act 2002*, pt 1 s 3 (N.Z.). Minnesota's state government also governs their restorative justice programs. See MINN. STAT. §§ 611A.77(2) , 611A.775 (2009).

302. Gabbay, *supra* note 129, at 92.

303. *Id.*

304. See *id.* ("The central authority . . . limits itself to 'identification of a problem and simultaneous authorization of local experimentation on condition that the experimentalist entities . . . assure rights of democratic access to relevant participants, fully disclose their methods and results, and submit to evaluations comparing performance across jurisdictions.'").

305. *Organizational Information*, BARRON COUNTY RESTORATIVE JUSTICE PROGRAMS, INC., <http://www.bcrlp.org/> (last visited Feb. 9, 2011).

acts as a valuable information source and directory helping victims locate a viable restoration program.³⁰⁶

C. Averting Constitutional Problems

Restorative justice should be implemented in a way that protects offenders' constitutional rights and averts constitutional challenges to restorative justice procedures.³⁰⁷ Confidentiality is key and any information divulged during meetings should not be used as "admissions of guilt" later on.³⁰⁸ This insures that the victim's Fifth Amendment right against self-incrimination is not violated.³⁰⁹ It is also important to note that "accepting responsibility" (a requisite step for admittance into a restorative program) should be different than pleading guilty.³¹⁰ This non-binding admission has the additional bonus of facilitating more candid and open discussions between the victim, offender, and other participants. It is for this reason that the prosecutor's presence at restorative sessions might be ill-advised. In addition, allowing the defense attorney to be present in a limited manner (as will subsequently be discussed), to advise the offender of their rights, would help alleviate any Sixth Amendment right to legal representation concerns.³¹¹ Securing counsel for offenders before they agree to be enrolled in a restorative justice program, as well as "educating counsel" about the nature of restorative justice, would help assuage Constitutional concerns about restorative justice programs.³¹²

Due process rights are also a key concern in the restorative justice process.³¹³ Without special protection, restorative justice may become just

306. *Other Resources: Phone Numbers and Websites of other Agencies*, NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, <http://www.trynova.org/victiminfo/otherresources/numbersandweb.html> (last visited Feb. 9, 2011).

307. See Tina S. Ikpa, Note, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J. L. & POL'Y 301, 325 (2007).

308. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 34.

309. See Reimund, *supra* note 285, at 685.

310. The Australian Restorative Justice Act embraces the notion that "if an offender accepts responsibility for the commission of an offence to take part in restorative justice, this Act does not prevent the offender from pleading not guilty for the offense." *Crimes (Restorative Justice) Act 2004* (ACT) pt 5 s 20(1) (Austl.); see also Amanda L. Paye, Comment, *Communities Take Control of Crime: Incorporating the Conferencing Model into the United States Juvenile Justice System*, 8 PAC. RIM L. & POL'Y J. 161, 183 (1999) ("[R]equiring a guilty plea prior to allowing offenders to have the option of conferencing may be coercive in itself.").

311. See Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution*, 3 APPALACHIAN J. L. 1, 29 (2004) ("The Sixth Amendment provides that 'in all criminal prosecutions, the accused shall have the assistance of counsel for his defense.' . . . Once the right to counsel attaches, the offender is entitled to counsel at every 'critical stage' of a criminal prosecution." (footnotes omitted)).

312. *Id.* at 30-31.

313. See Reimund, *supra* note 285, at 684.

another form of plea bargaining, a practice which has been questioned by the Supreme Court³¹⁴ and debatably leads to the deprivation of certain fundamental rights of the defendant.³¹⁵ Like entering a guilty plea, an offender should be fully informed of the consequences whether or not they engage in the restorative process.³¹⁶ In addition, in accordance with equal rights provisions, all offenders should have the right to apply, but not necessarily be accepted, into the program.³¹⁷ If an offender is eligible for a restorative program, but for some reason the program is unavailable to him, it can be taken into consideration during the offender's sentencing that he was willing to enroll in the program.³¹⁸ Unlike a guilty plea, offenders should be given the option to desist with the program at any time and continue their case with all rights intact they had before agreeing to the process.³¹⁹ Finally, "[t]he failure to reach . . . a restorative agreement must not be used in subsequent criminal proceedings to justify a more severe sentence than would otherwise have been imposed on the offender."³²⁰ This would also reduce the chances that offenders feel that they are being "forced" into the program.³²¹

314. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (upholding the constitutionality of a plea bargain even when the prosecutor exerts great pressure on the defendant and accepting "as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."); see also Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 206 (2006) ("The lack of transparency in plea bargaining makes it very difficult to detect undue coercion in a particular case Some prosecutors . . . may also pressure defendants to plead guilty by exaggerating the strength of the evidence and threatening harsher treatment to the defendant or his family." (footnote omitted)).

315. See, e.g., Turner, *supra* note 314, at 206; JOEL SAMAHA, CRIMINAL JUSTICE 349 (7th ed. 2006) (noting defendant gives up a myriad amount of rights when they agree to a plea bargain, including: the Fifth Amendment right not to be subjected to compelled self-incrimination; the Sixth Amendment right to trial by jury; and the Sixth Amendment right to confrontation).

316. See Reimund, *supra* note 285, at 685.

317. See discussion *supra* Part III.B (noting that an offender would still have to pass a screening process before being invited to participate in a restorative justice program).

318. In England, in the court of appeals cases *R. v. Barci* and *R. v. Collins*, it was decided that an offender's sentence can still be lessened if the offender was willing to participate but the victim was not. Heather Strang, *Commission on English Prisons Today* (Nov. 7, 2008), http://www.prisoncommission.org.uk/fileadmin/howard_league/user/pdf/Commission/Paper_by_Heather_Strang.pdf.

319. See, e.g., *Brady v. United States*, 397 U.S. 742, 757 (1970) (holding that absent misrepresentation or other impermissible conduct by state agents, a voluntary plea is still valid despite later judicial finding that the plea rested on a misperception by the defendant).

320. INT'L INST. FOR RESTORATIVE PRACS., DEP'T OF JUST. CAN., VALUES AND PRINCIPLES OF RESTORATIVE JUSTICE IN CRIMINAL MATTERS 3, (Jan. 27, 2004), <http://www.iirp.org/pdf/RJValues-DOJCan.pdf>.

321. See ZERNOVA, *supra* note 206, at 74 ("It appeared that [offenders'] attendance was motivated by fear of returning to court and being punished for breach of a court order, as this extract from an interview illustrates: Interviewer: Did you *have to* go to the conference?

D. *Mandatory or Not?*

An imperative question to ask is whether restorative justice should be a mandatory or optional procedural step in the criminal process. The problem remains that not every case is appropriate for restorative justice.³²² However, offering all offenders the opportunity to apply for the program would be both constitutionally and procedurally fair. Upon an offender's acquiescence, the screening process would then dictate whether a specific offender would be admitted.

1. *Mandatory or Persuasive Authority Upon the Court?*

In some jurisdictions, restorative justice, where applicable, is a necessary part of the sentencing process.³²³ In other jurisdictions, the restorative justice process culminates in merely a suggestion which the judge is free to disregard.³²⁴ To what extent should a restorative justice agreement be legally binding when embodied in a sentencing or other court order?

For example, if a judge, a prosecutor, and a defense attorney are present during a meeting with a court reporter, then there is no reason that an agreement could not be binding.³²⁵ However, this may prove inefficient because many court officials are overwhelmed by burgeoning dockets and may not be available for these proceedings. In addition, it is unrealistic to expect open and frank communication to occur with a prosecutor and judge present at a meeting.

A more practical approach would be to make the restorative justice agreement legally binding, but independent of any judicial court judgment or order. This would accomplish the goal of helping victims overcome the trauma inflicted upon them by not only discussing their victimization, but by

Offender: I had to go, because there was no other alternative. They said, 'there is no other alternative, so you have to go through it, otherwise you'll be in more trouble.'"); *see also* Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 760 (2000) ("The mediator may . . . tell the offender that the judge will take his lack of cooperation into account at the time of the sentencing. This . . . confront[s] the offender with a harsh choice: cooperate or go to jail.").

322. CANADIAN RES. CTR. FOR VICTIMS OF CRIME, RESTORATIVE JUSTICE IN CANADA 4 (2011), <http://www.crcvc.ca/docs/restjust.pdf> (last visited Feb. 9, 2011) (noting that if an individual wishes to prove they were wrongfully charged, then the courts are more appropriate).

323. *See* Jugendgerichtsgesetz [JGG] [Youth Courts Law], Aug. 4, 1953, Bundesgesetzblatt [BGB1], as amended, § 15(1), (3) (Ger.) (providing that an offender may be ordered to compensate the victim or apologize in order to gain a suspended sentence or early release on parole).

324. *Juvenile Justice Act 1992*, (Qld) pt 6 s 119A(2)(b)(ii) (Austl.).

325. *See* Smith, *supra* note 210, at 349 (stating how this is done in certain sentencing circle formats).

reasserting control over their lives.³²⁶ It also has the benefit of requiring less judicial resources during a meeting such as a prosecutor and judge. In addition, the agreement could always be taken under consideration by a judge in formulating a new sentencing or court order, or modifying an already existing one.

E. What If Either a Victim or Offender Does Not Wish to Meet?

What if either the victim or offender wishes to take part in the process, but one party does not wish to meet directly? Because of the nature of restorative justice, in a prototypical case, one would hope that both the offender and the victim generally would be willing to engage in the process.³²⁷ If either the victim or offender chooses not to participate, does not wish to meet, or is unavailable, then mediation would seemingly be impossible.³²⁸ This seems to be a fairly problematic issue with many restorative justice programs.³²⁹

One solution is the possibility of an “indirect” mediation where the facilitator meets with each party separately but conveys messages between the two.³³⁰ The facilitator has a greater amount of responsibility in these situations.³³¹ Not only must they be sure to convey a message accurately but also in a constructive manner.³³² Another solution is to enroll the offender in a victim impact panel, in which he has no affiliation with the particular victims, except to have committed the same type of crime that harmed the victims.³³³ A final option, employed in the Australian restorative justice system, is to use a substitute who acts on behalf, and with the authority of, the victim.³³⁴

326. John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, 1 W. CRIMINOLOGY REV. (1998), <http://wcr.sonoma.edu/v1n1/gehm.html> (“Research has characterized the victimization experience itself as a loss of control, loss of meaning, loss of faith in humanity, and a loss of faith in a just and orderly world.”).

327. See TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW 8 (1999), <http://library.npia.police.uk/docs/homisc/occ-resjus.pdf>.

328. *Id.*

329. Lorenn Walker, *Restorative Justice Without Offender Participation: A Pilot Program for Victims*, INT’L INST. FOR RESTORATIVE PRACTS. 1, 2 (Feb. 10, 2004), <http://www.iirp.org/pdf/walker04.pdf> (noting that out of eight restorative justice programs, an average of 47 percent of victims declined the opportunity to engage in restorative justice).

330. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 18.

331. LIEBMANN, *supra* note 32, at 76.

332. *Id.*

333. See STRICKLAND, *supra* note 68, at 40.

334. See *Crimes (Restorative Justice) Act 2004* (ACT) pt 8 s 43 (Austl.) (“A person (a substitute participant) acting for a suitable victim or parent may take part in a restorative justice conference instead of the victim or parent if (a) the victim or parent asks for, or agrees to, the substitution; and (b) the [facilitator] agrees to the substitution.”).

F. *Victims Whose Offenders are Unavailable*

A common problem is that many offenders are never captured, thus leaving their victims without any conventional judicial recourse.³³⁵ In addition, there is the possibility that an offender would not wish to participate in the program or would not qualify for the program. The traditional criminal justice system is always available for offenders who are not eligible for a restorative justice program.³³⁶ Conversely, there is no obvious relief for a victim who is left without an offender.

However, even if there is no offender available, willing to, or interested in participating in a restorative justice program with a victim, restorative justice is not impotent to act.³³⁷ “In a [truly] restorative system, services would start immediately after a crime to address victim needs and to involve the victim, regardless of whether an offender is [ever] apprehended.”³³⁸ Healing circles can also be held separately, without the presence of an offender.³³⁹ “Surrogate” groups also can be extremely effective in situations where offenders who committed similar crimes are held accountable.³⁴⁰

G. *Funding*

Securing funding has been a problematic issue for restorative justice programs despite their success.³⁴¹ This is odd, especially considering that the restorative justice process costs less than the trial process and fulfills the unmet

335. Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 563 (2007); see also Walker, *supra* note 329, at 2 (noting that less than twenty percent of all criminals are arrested).

336. See Jim Consedine, Address at the Restorative Justice and Probation Conference (Dec. 2003), <http://www.catholicworker.org.nz/tj/RJ-PolandSpeech.doc> (“If the offender does not wish to co-operate, the traditional system should remain as a parallel option.”).

337. BRAITHWAITE, *supra* note 39, at 138.

338. ZEHR, *supra* note 11, at 55–56.

339. Smith, *supra* note 210, at 358 (“[T]he healing circle for the victim may be used entirely independent from the offender’s circle. Furthermore, the healing circle may be the only process used in situations where the offender has not been identified or caught.” (footnote omitted)).

340. See Umbreit et al., *supra* note 335, at 560–61 (“Dialogue groups in prisons and other correctional facilities that include offenders, victims of similar crimes, and community members have been shown to benefit all who are involved at a relatively low cost.”).

341. E.g., Cindy Chan, *Restorative Justice Program Faces Funding Woes Despite Success*, THE EPOCH TIMES (Jun. 4, 2009), <http://www.theepochtimes.com/n2/content/view/17784/>.

needs of victims, offenders, and the community for restoration and healing.³⁴² Funding is especially important in the context of training facilitators.³⁴³

However, the concern is that restorative justice programs will lose sight of their vision when they become preoccupied with securing “stable funding.”³⁴⁴ Many state funding programs attach overburdening restrictions or are restrictive when issuing funds.³⁴⁵ For example, states tend to favor restorative methods that solely aid individualized victims which might make it difficult to develop community conferencing programs.³⁴⁶ Without a stable source of funding, lack of money and personnel resources can impede both the development and sustainment of a program.³⁴⁷

In order to circumvent this outcome two things must be done. First, without community input, grant funding may result in “co-optation” and “watering down” of restorative justice programs in a way that that will actually serve to undermine the community involvement and healing that are components of restorative justice.³⁴⁸ Washington’s statute correctly incorporates the input of the community it is attempting to help.³⁴⁹ Second, in order to ensure that restorative justice can flourish in the criminal justice system, there should be secured funding for these programs, just as there is for prosecutors, public defenders, judges, sheriffs, and probationary officers.

342. See, e.g., DEL. CODE ANN. tit. 11, § 9501(a) (2007) (noting the cost saving that restorative justice brings); Marian Head, *Investing in Restorative Justice*, DENVER POST (May 28, 2009), available at http://www.denverpost.com/headlines/ci_12461952 (noting that for the cost of incarcerating ten prisoners in Colorado hundreds of people can be helped through community restorative justice programs).

343. See Matthew Kogan, Note, *The Problems and Benefits of Adopting Family Group Conferencing for Pins (Chins) Children*, 39 FAM. CT. REV. 207, 214 (2001).

344. Mark S. Umbreit, *Avoiding the Marginalization and “McDonaldization” of Victim-Offender Mediation: A Case Study in Moving Towards the Mainstream*, in RESTORATIVE JUVENILE JUSTICE, *supra* note 33, at 213, 226.

345. Marty Price, *Personalizing Crime*, 7 DISP. RESOL. MAG. 8, 9 (2000).

346. Vernon Jantzi, *What is the Role of the State in Restorative Justice*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE, *supra* note 62, at 189, 194.

347. Cara Suvall, Essay, *Restorative Justice in Schools: Learning from Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547, 569 (2009); see also Tony Rosham Samara, *Development, Social Justice and Global Governance: Challenges to Implementing Restorative and Criminal Justice Reform in South Africa*, in RESTORATIVE JUSTICE: POLITICS, POLICIES AND PROSPECTS 113, 130 (Elrena van der Spuy et al. eds., 2007) (noting that most organizations simply do not have the money to maintain their programs and retain staff necessary to run the program without government funding).

348. Robert Weisberg, *Restorative Justice and the Danger of the “Community,”* 2003 UTAH L. REV. 343, 361 (2003).

349. See WASH. REV. CODE ANN. § 13.40.510(2)(a)-(c) (West Supp. 2004) (stating that proposals for restorative programs must include, among other things, input of the community, how the community will be involved, and how the funding will help contribute to the goal of the proposed program).

IV. POLICY ISSUES WITH RESTORATIVE JUSTICE

A. *Possible Lack of Sentencing Uniformity*

There has been longstanding concern in our country about disparity in the sentencing of offenders.³⁵⁰ The concern is that restorative justice may cause even greater sentencing disparity, as communities and victims may differ greatly in their temperaments resulting in widely varying agreements.³⁵¹ However, this worry may not be as problematic as it first seems. Congress has always supported “sufficient flexibility [in sentencing] to permit individualized sentences [in lieu of] mitigating or aggravating factors” (factors that would certainly be considered when formulating a restorative agreement).³⁵² In addition, the Supreme Court has stated that not every person convicted of the same offense need receive the same sentence.³⁵³ As for the states, the majority of sentencing guidelines are now merely persuasive rather than mandatory.³⁵⁴ Also, a restorative agreement is not usually binding upon the court, and judges could still use a formulaic sentencing guideline as a reference point in sentencing.³⁵⁵

Restorative justice agreements may actually help to rectify a different kind of disparity problem in sentencing practices.³⁵⁶ It is often too difficult to determine what an appropriate amount of punishment is without an

350. See, e.g., 29 U.S.C. § 991(b)(1)(B) (2006) (noting how Congress instructed the United States Sentencing Commission to “[avoid] unwarranted sentencing disparities among defendants with similar records” when drafting the federal sentencing guidelines); Adam Lamparello, *Introducing the “Heartland Departure*, 27 HARV. J. L. & PUB. POL’Y 643, 651 (2004) (noting the importance of sentencing disparity in leading to “intense reform efforts”); Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 764 (2006) (stating how sentencing disparity has been characterized as “a threat to public respect for the law”); Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1877 (1995) (“One prominent senator and long-time mandatory penalty advocate has expressed concern over disparity in the mandatory minimum sentencing scheme and has identified prosecutorial discretion as the main culprit in his call for a reexamination of the wisdom of mandatory penalties.”).

351. Oliss, *supra* note 350, at 1877.

352. 28 U.S.C. § 991(b)(1)(B) (2006).

353. *Williams v. Illinois*, 399 U.S. 235, 243 (1970); see also *State v. Roberts*, 440 So. 2d 816, 817 (La. Ct. App. 1983) (stating that defendants are entitled to the same sentencing criteria but not the same sentence).

354. See generally NEAL B. KAUDER & BRIAN J. OSTROM, *STATE SENTENCING GUIDELINES PROFILES AND CONTINUUM* (2008) (profiling the voluntary or mandatory levels of state guideline systems).

355. See *United States v. Booker*, 543 U.S. 220, 264–65 (2005).

356. See *id.* at 226–27, 264, 265 (stating that mandatory sentencing guidelines are no longer constitutional and judges should consider the sentencing guidelines but are not bound by them).

individualized assessment.³⁵⁷ This leads to the opposite issue—“excessive uniformity.”³⁵⁸ Restorative justice goes one step further than individualized assessment of an offender; instead making sure that the particular offender is directly accountable to a specific victim or community for his crimes.³⁵⁹

In addition, under the current retributive viewpoint, offenders should receive a sentence that is directly proportionate to how blameworthy their conduct is.³⁶⁰ Blameworthiness is a matter of two factors: “(1) the amount of harm risked or caused by the offender’s conduct; and (2) the offender’s personal culpability with respect to the harm, encompassing such considerations as *mens rea* and role in the offense.”³⁶¹ Both of these concepts are discussed in any restorative justice meeting.³⁶² Restorative justice has the additional benefit of humanizing the offender, leading to more realistic or, at the very least, appropriate sentences.³⁶³

B. *The Prosecutor’s and Defense Attorney’s Roles*

Criminal restorative justice should not be confused with civil alternative dispute resolution (ADR). While they may seem to share some of the same principles, the truth is that restorative justice and ADR “could not be philosophically further apart.”³⁶⁴ ADR is attorney governed, therefore issues are narrowed to those only legally relevant, and facts are sometimes twisted to conceal clients’ faults.³⁶⁵ This leads to “nontruth” and “nonreconciliation”³⁶⁶—

357. For example, a convicted murderer should always be punished but that particular punishment need not necessarily be death. Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment In Death Penalty Cases*, 66 FORDHAM L. REV. 21, 57 (1997); see also Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards For The Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1026 (1978) (noting that motivations are important to justify a particular punishment).

358. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 210 (1993) (“Ensuring equal treatment of like offenders prevents one form of disparity, but the resulting equal treatment of *unlike* offenders creates another serious problem—*excessive uniformity.*”); Anthony N. Doob & Voula Marinou, *Reconceptualizing Punishment: Understanding The Limitations On the Use Of Intermediate Punishments*, 2 U. CHI. L. SCH. ROUNDTABLE 413, 426 (1995) (“[D]ifferent punishments can serve different purposes at sentencing.”).

359. Michael M. O’Hear, *Is Restorative Justice Compatible With Sentencing Uniformity?*, 89 MARQ. L. REV. 305, 306–07 (2005).

360. *Id.* at 312.

361. *Id.*

362. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 19 (“The main purpose [of mediation] is for the [offender] . . . to become aware of all possible legal and social connections of the criminal act committed”).

363. See O’Hear, *supra* note 359, at 314 (“Empirical evidence suggests that, when people think about sentencing in the abstract, they tend to assume the worst about the offender.”).

364. BRAITHWAITE, *supra* note 39, at 249.

365. *Id.*

the exact opposite of what restorative justice attempts to achieve.³⁶⁷ The solution to this problem is simply to remove defense attorneys from the actual mediation process.³⁶⁸ However, an offender might feel uncomfortable without having counsel present, or the lack of counsel could create constitutional issues.³⁶⁹ The compromise is that a defense attorney should be able to “advise the clients of their rights . . . [but] only in exceptional circumstances should be allowed to speak [during mediation].”³⁷⁰ Even the criminal justice system advocates limiting a defense attorney’s involvement, during traditional proceedings, in some circumstances.³⁷¹

The prosecutor’s role in a restorative justice system has yet to be hammered out. One approach is that prosecutors will merely act as gatekeepers, referring certain offenders to the program and advising them of the sentencing advantages they would receive.³⁷² However, it is important to note that all offenders should be given an equal opportunity to apply for restorative justice programs, with or without a prosecutor’s referral.³⁷³ A prosecutor’s referral might merely act as an “automatic ticket” into a program rather than serve to exclude other offenders. In addition, a prosecutor could always offer his or her opinion about an offender’s involvement in a restorative justice program, much in the same way bail hearings are handled.³⁷⁴

366. *Id.*

367. See Ikpa, *supra* note 307, at 313 (“Defense attorneys often see their role in advocating for clients as one of avoiding, or at least limiting, punishment. The primary advice they give to clients is to deny guilt if possible. However, this is difficult to achieve in restorative justice systems when the objective is for the offender to acknowledge responsibility.”).

368. *Id.*

369. See *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (stating that through the Sixth Amendment an individual “is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arraignment.”).

370. BRAITHWAITE, *supra* note 39, at 249. Exceptional circumstances may include when an offender is mentally ill and cannot continue, or if the defense attorney is invited to speak by the victim.

371. See Robert F. Cochran, Jr., *The Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 J. L. & RELIGION 211, 216 (1999) (“‘It is not the role of defense counsel to persuade a defendant to plead guilty’ . . . the lawyer should merely identify the options for the client and allow the client to choose between them.” (quoting *State v. Holland*, 876 P.2d 357, 362 (Utah 1994))).

372. See Fred Gay & Thomas J. Quinn, *Restorative Justice and Prosecution in the Twenty-First Century*, PROSECUTOR, Sept./Oct. 1996, at 16, 18 (noting how prosecutor’s in Polk County referred offenders and those offenders were allowed to have their charges reduced upon successful completion of the program).

373. See *supra* text accompanying notes 147–150.

374. See Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 49 (1998) (noting that prosecutors are often asked to make a bail recommendation and state their reasons for making such a recommendation).

Both the presence of the prosecutor and the limiting of the defense attorney's role may have Constitutional implications.³⁷⁵ In addition, the goal is to create an environment where the victim and offender can openly speak about their feelings and come to a mutual understanding of what transpired.³⁷⁶ There is a view that both the prosecutor and even the judge should be present as observers during the restorative meetings.³⁷⁷ However, as stated above, there is likely no need for their presence, unless a state adopts an approach where a restorative justice agreement serves as a final sentence.³⁷⁸ In addition, a prosecutor may not be present because of a shortage of available prosecutors and the potential for curtailing open and honest speech.³⁷⁹

C. *Re-victimization of Victim*

One of the concerns about restorative justice, especially victim-offender mediations, is that the victim faces a chance of re-victimization.³⁸⁰ While the restorative process tends to foster victim empathy towards offenders, it can leave victims more vulnerable to re-victimization.³⁸¹ In order to minimize this danger, it is the facilitator's responsibility to separately and adequately prepare each party for the meeting.³⁸² A competent screening process can also exclude a volatile offender who is likely to re-victimize a victim.³⁸³ An offender who accepts responsibility for what he has done, as a precondition to participation in the program, is also much less likely to terrorize a victim.³⁸⁴ In addition, either party may be accompanied by a supporter who could be present but might or might not directly engage in the process.³⁸⁵

375. *See generally supra* Part IV.C.

376. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 17–18.

377. Reimund, *supra* note 311, at 11. The benefits of which were to allow a restorative meeting to act as a court proceeding. *See supra* text accompanying note 325.

378. *See supra* Part IV.D.

379. *See supra* Part IV.C.

380. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 18. Re-victimization is also of particular concern in the context of the particularly sensitive cases discussed in Part III.E.

381. *See* Cossins, *supra* note 137, at 363 (noting that this is a danger especially in gendered crimes).

382. *Id.*

383. *See supra* Part III.B.

384. Bennett Burkemper & Nina Balsam, *Examining the Use of Restorative Justice Practices in Domestic Violence Cases*, 27 ST. LOUIS U. PUB. L. REV. 121, 125 (2007).

385. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 102, at 18.

D. Support

The impetus for a more systemic use of restorative justice practices must come from members of legal and neighborhood communities.³⁸⁶ The support of politicians and the media are also crucial in order to “shape the public’s attitude” towards restorative justice.³⁸⁷ Some state legislatures have already taken note of restorative justice and its benefits. For example, Delaware, realizing the cost-saving implications of restorative justice, expressly authorized the use of victim-offender mediation programs.³⁸⁸ In addition, it is essential that an experienced “restorative justice practitioner” take charge of the programs and be resistant to political pressures to circumvent degradation of the goals of a restorative justice program.³⁸⁹ These practitioners should also be “politically sophisticated” so as to avoid tension if they should reach a position of power.³⁹⁰

However, prosecutors must be among the principle proponents.³⁹¹ The worry is that a prosecutor may dislike restorative justice, seeing it as “soft on crime” and “political suicide.”³⁹² However, many prosecutors have begun to see the merits to restorative justice and have even attempted to implement it.³⁹³ The hope is that once prosecutors realize the benefits of restorative justice to the victim, community, offender and the system in general,³⁹⁴ and

386. Brooke McEwen, *Restorative Justice Coming Full Circle*, MARQ. J. (Sept. 24, 2009), <http://marquettejournal.org/2009/09/24/online-exclusives/restorative-justice/>.

387. Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 425 (2003).

388. DEL. CODE ANN. tit. 11, § 9501 (2007).

389. Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 97 (1998).

390. *Id.*

391. See Gay, *supra* note 251, at 1662.

392. Katherine L. Joseph, *Victim-Offender Mediation: What Social & Political Factors Will Affect its Development?*, 11 OHIO ST. J. DISP. RESOL. 207, 219 (1996).

393. See David M. Lerman, *Forgiveness in the Criminal Justice System: If it Belongs, Then Why is it so Hard to Find?*, 27 FORDHAM URB. L.J. 1663, 1675 (2000) (“Several prosecutors across the country have assumed leadership roles in the [restorative justice] area. Prosecutors in places such as Austin, Texas, Portland, Oregon, Des Moines, Iowa, Denver, Colorado, Milwaukee, Wisconsin, and Philadelphia, Pennsylvania have begun to explore the concepts of restorative justice . . .”).

394. See Gay, *supra* note 251, at 1652 (“Once the prosecutor accepts his role as gatekeeper, it is a short jump to the paradigm shift from the ‘trail ‘em, nail ‘em, jail ‘em’ mentality that pervades the traditional criminal justice system, to the restorative justice mindset that considers every case in light of what outcome best addresses the needs of the victim, community and offender.”); see also Pugh, *supra* note 89, at 186 (“The victim benefits because she can directly face her antagonist and express the impact of the offense. Society benefits because the offender can return to the harmed community to make amends, which reduces recidivism. The offender benefits because it encourages personal accountability as he or she faces the implications of the hate crime.”).

acknowledge that it is a versatile tool used in a wide variety of cases, they will embrace it.³⁹⁵

E. *Education of Law Students*

A simple way to introduce restorative justice to the legal community is during the infancy of an individual's legal career—law school. Law school has a significant influence on future lawyers' lives, “fusing [the] doctrinal knowledge [they gain with former] ideological presumptions.”³⁹⁶ Some professionals are even attempting to influence those “ideological presumptions” before students reach law school.³⁹⁷ The ultimate goal is to move away from the mere study of rules and doctrine and towards their effects on the legal culture and the actual substance of the law.³⁹⁸

What need is there to educate law students about the theory and process of restorative justice? The hope is that law students will learn about criminal behavior from the perspectives of the offenders and victims and become aware of a new paradigm for criminal justice.³⁹⁹ In addition, exposing students to restorative justice early in their legal education allows them to become leaders who “develop the vision, the skills, and the passion” to successfully transform the criminal justice system.⁴⁰⁰ Students who are exposed to restorative justice will be more likely to endorse and utilize restorative justice practices when they become lawyers.⁴⁰¹ In addition, talented students will hopefully remain interested in public interest work and lend their skills to the advancement of the field.⁴⁰² Finally, restorative justice clinics could provide an excellent opportunity for law schools to benefit the community through public service.⁴⁰³

395. See Pugh, *supra* note 89, at 186–87 (“For the prosecutor, [restorative justice programs have] powerful implications in both non-violent and violent cases. In non-violent [crimes] of hate, it replaces litigation with a plea agreement if a defendant makes him- or herself available to the victim In violent [crimes], while [restorative justice] does little to mitigate a prosecutor's burden, capitalizing on it can . . . [benefit] the victim or her family.”).

396. Rachel Anderson et al., *Toward a New Student Insurgency: A Critical Epistolary*, 94 CAL. L. REV. 1879, 1921 (2006).

397. See Jerald Hess, *NGO Update*, 14 HUM. RTS. BRIEF 49, 50 (2006) (stating how Linda Biehl and colleagues travel around the United States teaching youths about restorative justice).

398. Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515, 530–31 (2009).

399. See Janine Geske, *Why Do I Teach Restorative Justice to Law Students?*, 89 MARQ. L. REV. 327, 333 (2005) (showing notes that offenders and victims sent to law students regarding their insights).

400. *Id.* at 333–34.

401. Rachel King, *Restorative Justice: How Law Schools Can Help Heal Their Communities*, 34 FORDHAM URB. L.J. 1285, 1297 (2007).

402. *Id.*

403. *Id.* at 1298.

Marquette University has created a program where law students are exposed to restorative justice so they can be “academically and experientially” prepared to work in the field.⁴⁰⁴ This program is a response to an endemic problem: clinical programs teach law students how to protect the rights of offenders, but fail to educate them about the healing process that is crucial to restorative processes.⁴⁰⁵

CONCLUSION

The current system has a myriad assortment of problems; rather than view restorative justice as combative of the traditional criminal justice system, it can be seen as a method to repair problematic issues including the abandonment of victims and communities, and increasing recidivism rates. Rather than being ignored or treated as a peripheral adjunct to conventional criminal justice systems, restorative justice merely offers the option to efficiently heal both offenders and victims and therefore should be integrated within the system.

Just as the Model Penal Code provided invaluable guidance to policymakers, a model restorative justice statute would help educate legal professionals, policymakers, and legislators about the potential benefits of restorative justice. Since the concept is still relatively new to the United States, the model restorative justice statute could serve as a compendium of knowledge to help states and the federal government create their own restorative justice statutes. Especially with the amendment of the MPC, the timing seems ideal to introduce restorative justice, on a massive scale, into our criminal justice through the promulgation of a model restorative justice statute.

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404. Geske, *supra* note 399, at 328.

405. *Id.* at 332–33.

* J.D. 2010, Saint Louis University School of Law. I would like to thank Professor Lynn Branham for her support and guidance in formulating and writing this comment.

