

4-27-2020

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### Recommended Citation

Lynn Branham, *“Stealing Conflicts” No More?: The Gaps and Anti-Restorative Elements in States’ Restorative-Justice Laws*, 64 St. Louis U. L.J. (2020).

Available at: <https://scholarship.law.slu.edu/lj/vol64/iss2/3>

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**“STEALING CONFLICTS” NO MORE?: THE GAPS AND ANTI-RESTORATIVE ELEMENTS IN STATES’ RESTORATIVE-JUSTICE LAWS**

LYNN S. BRANHAM\*

*This Article first profiles key findings emanating from a statutory analysis of the close to two hundred criminal-justice-related, as well as juvenile-justice-related, statutory provisions in the United States that pertain to restorative justice and practices (RJ/RP). This section of the Article unveils significant gaps and other substantial problems in states’ restorative-justice laws, including ways in which some of them conflict with core restorative tenets. The Article then proffers seven recommended statutory provisions for states’ consideration when enacting or amending their own RJ/RP laws. These recommended provisions, combined with fidelity in their implementation, would help remedy or avert the gaps and anti-restorative elements this study found in existing restorative-justice laws in the United States.*

Criminologist Nils Christie once lamented that laws have created legal systems that are “particularly good at stealing conflicts.”<sup>1</sup> He decried criminal-justice systems’ relegation of the individuals most directly affected by a crime—the person typically referred to as “the victim” and the person who committed the crime—to the sidelines. As cases are churned through the criminal-justice system, the victim becomes, in Christie’s view, largely a “nonentity” and the person who caused the harm a “thing.”<sup>2</sup>

Christie’s criticisms of the law have resonated with the proponents of restorative justice (RJ), which falls within the rubric of what is known as

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1. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 4 (1977).  
2. *Id.* at 5.

“restorative practices” (RP).<sup>3</sup> The focus of restorative justice is on actions that cause harm. During a facilitated dialogue between the person harmed, the person who caused that harm, and others, the person responsible for the harm better understands its depth and breadth and assumes the responsibility of making amends through agreed-upon reparative steps. Restorative justice is therefore considered “reactive” in the sense that it is spawned by past harm-doing.<sup>4</sup> The discipline known as “restorative practices” encompasses restorative justice but also includes a proactive dimension—formal and informal processes to prevent conflict, build and fortify relationships, and avert the infliction of harm.<sup>5</sup>

Proponents of restorative justice have criticized criminal-justice systems, as currently devised, for their failure to afford a person harmed by a crime and the person who inflicted that harm the opportunity to engage in a dialogue, along with others, about how the crime harmed the victim and what the person who caused that harm could do to best remedy or mitigate it.<sup>6</sup> This failure leaves the harm ensuing from a crime unrepaired and the relationships fractured by it never mended. This harm can take many forms, including the shackling of the victim, the person who harmed the victim, and both of their families with hurt, fear, or shame for which conventional processing of a criminal case typically affords no constructive outlet.

In light of the evident failings of the law from a restorative-justice perspective, some might consider it discordant to explore how the law itself, in the form of restorative-justice legislation, could be part of the antidote to these

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3. Ted Wachtel, *Defining Restorative*, INT’L INST. FOR RESTORATIVE PRACTICES 1, 1 (2016), [https://www.iirp.edu/images/pdf/Defining-Restorative\\_Nov-2016.pdf](https://www.iirp.edu/images/pdf/Defining-Restorative_Nov-2016.pdf) [<https://perma.cc/J2E4-T6TJ>]. The term “restorative practices” has a dual meaning, inviting a bit of confusion. First, restorative practices is considered a field of social science. As described by Wachtel, it is “a social science that studies how to build social capital and achieve social discipline through participatory learning and decision-making.” *Id.* Second, the different types of restorative processes, such as the restorative circles and family group decision-making described later in this article (*see infra* notes 46-61 and accompanying text), are called “restorative practices.” *See, e.g., id.* at 7 (referring to a circle as “a versatile restorative practice that can be used proactively, to develop relationships and build community or reactively, to respond to wrongdoing, conflicts and problems”).

4. *Id.* at 1.

5. *Id.*

6. For example, when amplifying why there is a need for a paradigmatic shift to restorative justice, Dr. Paul McCold, a criminologist, explained:

Unlike the existing criminal justice systems that see crime as an offense against the laws of the state and as deviant behavior that needs to be suppressed, punished or treated, restorative justice looks at crime through a different lens. Crime harms people and relationships . . . . Healing, repair of harm to people and relationships, is the goal of restorative justice . . . . Critical to restoration is the central involvement of those most directly affected by the crime. Victims, offenders, and their communities of care must have the opportunity to engage in dialogue and potentially reach mutual agreement.

Paul McCold, *Paradigm Muddle: The Threat to Restorative Justice Posed by Its Merger with Community Justice*, 7 CONTEMP. JUST. REV. 13, 14–15 (2004).

failings. This Article does just that. The first step in that endeavor was the undertaking of an analysis of the close to two hundred existing criminal-justice-related, as well as juvenile-justice-related, statutory provisions in the United States that pertain to restorative justice or restorative practices. Juvenile-justice-related statutes were included in this analysis in order to glean insights that might inform the drafting and modification of restorative-justice legislation focusing on criminal justice.

Part I of this Article summarizes some of the key findings of this statutory analysis. This section of the Article unveils deficits unearthed in many states' restorative-justice laws (also referred to in this article as "RJ/RP laws"), including ways in which some of them conflict with restorative tenets. Part II then spotlights seven statutory provisions for states' consideration when enacting or amending their own RJ/RP laws. These recommended provisions, combined with fidelity in their implementation, would help remedy or avert the gaps and anti-restorative elements this study has found in existing restorative-justice laws in the United States.

#### I. FINDINGS REGARDING EXISTING RESTORATIVE-JUSTICE LAWS IN THE UNITED STATES

A database of restorative-justice laws that have been enacted in the United States provided the starting point for this study's statutory analysis.<sup>7</sup> Utilizing the citations listed in this database, searches were run on Westlaw to locate the most current version of the statutory provisions in the database, excluding those that were school-related. A supplemental search on Westlaw, using different search terms, was then undertaken in August 2018 and again in July 2019 to help ensure no statutes bearing on restorative practices in the criminal-justice and juvenile-justice contexts were overlooked. These searches yielded almost two hundred statutory provisions, which were then evaluated. Seven of the key findings emanating from this evaluation of restorative-justice legislation currently in place in the United States are spotlighted below.

*A. Finding #1: A number of restorative-justice laws in the United States depart from the restorative precept that participation in a restorative practice be voluntary.*

A core premise of restorative justice is that for it to realize its aims, such as the remedying of harm and potential fostering of remorse for causing harm to

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7. This database, now maintained by the Graduate School of Social Work at the University of Denver, can be found at Restorative Justice Laws, GRADUATE SCH. OF SOC. WORK, U. OF DENVER (2019), [https://socialwork.du.edu/content/restorative-justice-laws?field\\_resource\\_type\\_target\\_id=All&field\\_res\\_keywords\\_target\\_id=All&field\\_res\\_locations\\_target\\_id=All&field\\_res\\_owning\\_unit\\_target\\_id=All&field\\_res\\_associated\\_units\\_target\\_id=All#legislativedirectory](https://socialwork.du.edu/content/restorative-justice-laws?field_resource_type_target_id=All&field_res_keywords_target_id=All&field_res_locations_target_id=All&field_res_owning_unit_target_id=All&field_res_associated_units_target_id=All#legislativedirectory) [<https://perma.cc/944M-KZ62>].

others, the participation of people in a restorative process must be voluntary, not forced.<sup>8</sup> One of the concerns underlying this premise is that compelling a person harmed by a crime to participate in a restorative-justice conference will exacerbate the feeling of powerlessness a crime can induce, accentuating its harmful after-effects.<sup>9</sup> Another concern is that if a person who committed a crime is forced to participate in a restorative-justice conference, he or she will be more likely to deny, at least inwardly, the harm stemming from the crime or its full extent and will often blame others during the conference for his or her own poor choices that culminated in the crime.<sup>10</sup> In short, mandated participation in a restorative-justice conference can abnegate the opportunity to understand, and then assume personal responsibility for, the harm one's crime has caused.

A number of RJ/RP statutes in the United States comport with what is considered one of the defining features of restorative practices—the voluntary, not compelled, participation of those most directly affected by harmful criminal behavior.<sup>11</sup> One of the unexpected findings of this study, though, was that a

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8. See Economic & Social Council Res. 2002/12, (July 24, 2002), *reprinted in* U.N. OFFICE ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 99–102 (2006) (“Restorative processes should be used only . . . with the free and voluntary consent of the victim and the offender.”); see also *Restorative Justice Values and Processes*, RESTORATIVE JUSTICE NETWORK (2003), <http://restorativejustice.org/10fulltext/restorativejusticenetwork.pdf> [<https://perma.cc/LM6C-3MX3>], *reprinted in* MINISTRY OF JUSTICE, RESTORATIVE JUSTICE: BEST PRACTICE IN N.Z. 35 (2011) (stating that participation in a restorative process is voluntary and that a process “is not restorative if the participants are present under duress or are expected to speak or act or decide on outcomes in ways contrary to their desires”).

9. See W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM. J. OF TRIAL ADVOC. 501, 514–15 (2008) (describing how compelled participation in what is designed to be a restorative process “can and does lead to re-victimization”).

10. See *id.* at 515 (recounting the “hostile attitudes” of people forced to meet with those they have harmed and observing that voluntary participation leads participants to listen to each other).

11. See, e.g., ALA. CODE § 12-25-32(23)(ii)–(iii) (1975) (defining restorative justice to include “voluntary victim offender conferencing” and “voluntary victim offender mediation”); COLO. REV. STAT. § 18-1-901(o.5) (2018) (defining “restorative justice practices” as facilitated meetings “attended voluntarily” by participants and marked by “voluntary dialogue”); FLA. STAT. § 985.155(4) (2019) (juvenile’s participation in a Neighborhood Restorative Justice Center’s deferred-prosecution program is “voluntary”); OKLA. STAT. tit. 22, § 991a(A)(1)(m) (2014) (person convicted of a crime can be sentenced to a victim/offender reconciliation program provided it secures a “written consent form voluntarily signed” by the sentenced individual and the victim); TENN. CODE ANN. § 16-20-104 (2019) (“Any person who voluntarily enters a dispute resolution process at a [victim-offender mediation] center . . . may revoke the person’s consent, withdraw from dispute resolution and seek judicial or administrative redress prior to reaching a written resolution agreement. No legal penalty, sanction or restraint may be imposed upon the person.”); TEX. GOV’T CODE ANN. § 508.324 (1999) (if victim or victim’s guardian or close relative wants to participate in victim-offender mediation with a person on parole or subject to mandatory supervision, pardons and parole division can facilitate the person’s participation but “may not require” it); WASH. REV. CODE § 13.40.020(27) (2019) (defining “restorative justice” as entailing

number of statutes do not. Some authorize judges or other government officials to require a person who committed a crime to participate in what the statutes denominate to be a restorative process, while others are silent on this question, not specifying that participation in a restorative practice must be voluntary.<sup>12</sup> One statute even goes so far as to authorize a restorative-justice program established in the state's correctional centers "to require" incarcerated individuals to "offer acts and expressions of sincere remorse" for their crimes and their impacts on victims and the community.<sup>13</sup> Many would, no doubt, view "required sincere remorse" as a quintessential example of an oxymoron.

*B. Finding #2: Restorative-justice laws in the United States do not require the securing of informed consent to participate in a restorative process.*

Ensuring that a person's consent to participate in a restorative process is informed has been termed a "best practice" for those in the field of restorative practices to adopt and implement.<sup>14</sup> Obtaining informed consent from participants in a restorative process has value for many reasons. One of the principal benefits is that informed consent helps guard against a person's involuntary participation in a restorative process.<sup>15</sup> If a person culpable of a crime is not apprised, for example, that a refusal to participate in a restorative-

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the "voluntary participation and communication between the victim, the offender, their families, and relevant community members"); W. VA. CODE § 49-4-725(b)(2) (2015) (restorative-justice program to which juveniles may be referred by a court shall include victim-offender dialogues or family group conferencing "attended voluntarily" by the participants, including the victim and juvenile).

12. *See, e.g.*, CAL. WELF. & INST. § 202(f) (2008) (juvenile court "may . . . direct" a minor who engaged in delinquent conduct to participate in victim-offender conferencing, provided the victim consents); N.C. GEN. STAT. § 7B-2506(7) (2018) (court may "order" juvenile adjudicated delinquent to participate in victim-offender reconciliation program); OHIO REV. CODE ANN. § 2152.19(C) (2017) (if victim assents, court's delinquency disposition order "may require" juvenile's participation in a victim-offender mediation program); *id.* § 2929.17(L) (provided the victim approves, a sentence in certain felony cases can include a "requirement" to participate in victim-offender mediation); *id.* § 2929.27(A)(12) (2011) (provided the victim approves, a sentence in certain misdemeanor cases can include a "requirement" to participate in victim-offender mediation); VT. STAT. ANN. tit. 28, § 252(b)(15) (2018) (court may "require," as a condition of probation, participation in the "Restorative Justice Program"); WASH. REV. CODE § 13.40.070(11) (2019) (specifying that participation of victims in victim-offender reconciliation programs "shall be voluntary" with no mention of a parallel requirement for juveniles referred to juvenile court); WIS. STAT. § 938.34(5r) (2019) (court may "order" juvenile adjudicated delinquent to participate in victim-offender mediation if the victim agrees to participate).

13. MO. REV. STAT. § 217.440 (1997).

14. *See, e.g.*, MINISTRY OF JUSTICE, *supra* note 8, at 12; RESTORATIVE JUSTICE COUNCIL, BEST PRACTICE GUIDANCE FOR RESTORATIVE PRACTICE 4, 12–14, 22 (2011).

15. *Cf.* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 812 (1999) (observing that informed consent serves a parallel function in the mediation context).

justice conference cannot be considered by a judge when rendering a sentence in a case, he or she may only agree to participate in the conference due to a fear of being penalized—sentenced more harshly—for failure to participate.

Garnering informed consent is also in keeping with the respect for human dignity, considered one of the underpinnings of restorative justice and practices. Dr. Howard Zehr, a criminologist well known for his expertise in restorative justice, has described respect for “the individuality and worth of each person” as the “supremely important,” “basic value” undergirding restorative justice: “If I had to put restorative justice into one word, I would choose respect: respect for all . . . . If we do not respect others, we will not do justice restoratively . . . .”<sup>16</sup> Ensuring that a person’s consent to participate in a restorative process is informed is a manifestation of this respect for the inherent value of each human being. In the words of Professor Jacqueline Nolan-Haley, informed consent is a “foundational moral and ethical principle that promotes respect for individual self-determination and honors human dignity.”<sup>17</sup>

This study found, though, that restorative-justice laws in the United States generally neither mention nor provide for the securing of informed consent from those participating in a restorative process. The Australian Capital Territory’s Restorative Justice Act provides an example of a starkly different approach to what, at present, is the statutory convention in this country.<sup>18</sup> This Act contains a list of information that must be relayed to prospective participants in a restorative-justice conference—the victim, the victim’s parent (in cases involving a juvenile), and the person who harmed the victim—to ensure that their consent to participate in a restorative-justice conference is informed.<sup>19</sup> The delineated information of which these individuals must be apprised includes:

- The purposes of restorative justice, both generally and in this particular case.
- What happens during a restorative-justice conference.<sup>20</sup>
- Who may participate in such a conference.
- The “nature” of a restorative-justice agreement.<sup>21</sup>
- The right to seek legal advice about participating in a restorative-justice conference.
- That there is no obligation to participate in a restorative-justice conference or to continue participating in a conference once it has commenced.

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16. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 46–47 (2015).

17. Nolan-Haley, *supra* note 15, at 781. For additional observations on the linkage between informed consent and respect for human dignity, see *id.* at 791–92.

18. *Crimes (Restorative Justice) Act 2004* (ACT) (Austl.).

19. *Id.* at s 32A.

20. The Act requires, in somewhat general terms, that participants be informed of the “nature of a restorative justice conference.” *Id.* at s 32A(b)(i).

21. *Id.* at s 32A(b)(iii).

- That if the person accused of criminal conduct has not entered a plea to the crime, he or she can accept responsibility for it for restorative-justice purposes while still pleading not guilty to the crime.
- That if the person accused of the crime is later convicted of it, the court may take into account, at sentencing, that he or she accepted responsibility for the crime during the restorative-justice process.
- That the court, though, is not required to reduce the sentence's severity because of this acceptance of responsibility.
- That the refusal to participate in a restorative-justice conference or to continue such participation cannot be considered by a judge at the time of sentencing.<sup>22</sup>

C. *Finding #3: Most restorative-justice laws in the United States do not address the extent to which, if at all, RJ/RP-related communications are confidential.*

One of the defining features of restorative justice is the "engagement" of the people most affected by a crime—the person who committed the crime, the victim, and members of the community.<sup>23</sup> For this engagement to occur and be meaningful, not skirting or just skimming the surface of what the participants in the restorative process are really thinking and feeling, a safe space needs to be created for open and honest, though respectful, dialogue.

Confidentiality laws can be vital to the creation of such a safe space. Without an assurance that what is said during a restorative-justice conference will remain confidential, participants may be reticent to candidly answer questions the facilitator or others participating in the conference pose to them.<sup>24</sup> A victim may, for example, be unwilling to reveal that the crime triggered a post-traumatic stress disorder (PTSD) or to describe the PTSD's debilitating effects, diminishing the ability of the person who committed the crime to fully comprehend the depth and breadth of the harm ensuing from it. And without the protective umbrella of confidentiality, a person whose crime has harmed others may not be forthcoming in discussing the crime. This reluctance may stem from a fear that the statements may later be used to support the filing of a criminal charge, secure a conviction, or enhance a sentence. The person responsible for

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22. *Id.* at s 32A.

23. ZEHR, *supra* note 16, at 31, 34–35. As mentioned later in this article, the "community" that comprises the third stakeholder in a restorative-justice conference has no uniform definition. Some restorative-justice experts and practitioners refer to "community" in relational terms, while others view "community" from a geographical perspective. *See infra* note 72.

24. The link between confidentiality and candor has long been recognized in the mediation context. The Uniform Mediation Act, for example, is designed to "promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests." UNIF. MEDIATION ACT prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2003).



the harm may also be apprehensive that revelation of what is said during a restorative-justice conference may later lead to the loss or denial of employment or catalyze other adverse consequences outside the realm of criminal justice.

A number of the restorative-justice laws examined during this study address the subject of confidentiality, though most do not. While there are variations in the laws' confidentiality provisions, they typically set forth a general rule that the communications and records of a restorative process are confidential.<sup>25</sup> This general rule, though, is frequently subject to one or more exceptions outlined in the statute.<sup>26</sup> An example of such an exception is when disclosure is required by a mandatory reporting law in instances of suspected child abuse.<sup>27</sup>

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25. See, e.g., COLO. REV. STAT. ANN. § 18-1.3-104(b.5)(1) (2019) (subject to delineated exception, “[a]ny statements made during [a restorative-justice] conference [as part of a sentence to a “specialized restitution and community service program”] shall be confidential and shall not be used as a basis for charging or prosecuting the defendant”); *id.* § 18-1.3-204(2)(a)(III.5) (same when restorative-justice conference is held as a condition of probation); DEL. CODE ANN. tit. 11, § 9503 (2019) (subject to delineated exception, communications related to the subject on which a victim-offender mediation process is focused are “not subject to disclosure in any judicial or administrative proceeding”); 19 GUAM CODE ANN. § 5134(f) (2014) (subject to delineated exceptions, “[a]ll discussions that occur within a Balanced Approach and Restorative Justice process are confidential”); NEB. REV. STAT. § 43-247.03(1) (2019) (subject to delineated exception, discussions during restorative justice practices, such as family group conferences and victim-offender mediation, “shall be confidential and privileged communications”); OR. REV. STAT. § 423.600(3) (2017) (subject to “limited exceptions” established by rule, facilitated-dialogue communications “are confidential, and should not be admissible in any administrative, judicial or arbitration proceeding”); TENN. CODE ANN. § 16-20-103(a) (subject to delineated exceptions, communications related to the subject on which a victim-offender mediation process is focused are “not subject to disclosure in any judicial or administrative proceeding”); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a), (g) (2001) (subject to delineated exceptions, a dispute-related communication of a participant in victim-offender mediation “is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding”).

26. See, e.g., COLO. REV. STAT. ANN. § 18-1.3-104(b.5)(1) (2019) (exception when the defendant commits a “chargeable offense” during the restorative-justice conference); *id.* § 18-1.3-204(2)(a)(III.5) (2019) (same); DEL. CODE ANN. tit. 11, § 9503 (2019) (exceptions when the parties waive the privilege or a communication threatens injury or damage to the person or property of a party to the dispute); 19 GUAM CODE ANN. § 5134(f) (2014) (exceptions when the participants agree to “some level of disclosure,” the law requires disclosure (for, for example, “present child abuse”), or communications reveal “an actual or potential threat to a participant’s safety”); NEB. REV. STAT. § 25-2914.01(4)(c) (2019) (exception when communications are subject to mandatory reporting for “new allegations of child abuse or neglect which were not previously known or reported”); TENN. CODE ANN. § 16-20-103(a)-(b) (exceptions when parties waive confidentiality and when a communicated threat of injury or damage to the person or property of a party involved in the victim-offender mediation is relevant in a criminal case); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(f) (2001) (exception when there is a statutory duty to report abuse, exploitation, or neglect).

27. See, e.g., 19 GUAM CODE ANN. § 5134(f); NEB. REV. STAT. § 43-247.03(1); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(f).

*D. Finding #4: Restorative-justice laws in the United States limit, usually greatly, the crimes to which they apply.*

One of the questions to be addressed when drafting a restorative-justice law is the crimes to which the statute will apply. Research has been conducted that bears on, and can aid in, the resolution of this question. The results of a meta-analysis completed by a team of criminologists of the comparative effectiveness of restorative-justice conferences and traditional court processing in reducing recidivism are particularly germane.<sup>28</sup> This meta-analysis first examined 519 studies of restorative-justice conferences.<sup>29</sup> Only ten of these studies met the stringent criteria established for inclusion in the meta-analysis.<sup>30</sup> To be included in the meta-analysis, for example, the people accused or convicted of crimes who participated in restorative-justice conferences must have been randomly assigned to them and then compared with a control group.<sup>31</sup> In addition, the consent to participate in a restorative-justice conference must have been procured before this random assignment occurred.<sup>32</sup>

The measure of recidivism in all but one of the studies was convictions during a two-year period following the random assignment; the measure of recidivism in the remaining study was arrests.<sup>33</sup> Nine of the ten studies included in the meta-analysis reported lower recidivism following participation in a restorative-justice conference.<sup>34</sup> The difference in the recidivism rate between those who participated in a restorative-justice conference and those who did not ranged from 7% to 45%.<sup>35</sup>

One of the pertinent findings of the meta-analysis was that the recidivism-reduction impact of restorative-justice conferences appears greatest for violent crimes.<sup>36</sup> The researchers who conducted the meta-analysis noted that these research results may signify that the "best return on investment," in terms of recidivism reduction, will occur when restorative-justice conferences are used

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

29. *Id.* at 1.

30. *Id.* at 1, 7.

31. *Id.* at 4–5. The random assignment of victims to participate in restorative-justice conferences is sometimes described, as it was in this meta-analysis, as "quasi-random" because not all of the victims of a crime can be or are identified. *Id.* at 4; Heather Strang et al., *Restorative Justice Conference (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*, CAMPBELL SYSTEMATIC REV. 1, 12, 33 (2013).

32. Sherman et al., *supra* note 28, at 4–5.

33. *Id.* at 10.

34. *Id.* at 11.

35. *Id.*

36. *Id.* at 12.

for violent crimes.<sup>37</sup> Because the reported difference between violent and property crimes was not statistically significant, though, they advised that the data on the apparently greater effectiveness of restorative-justice conferences in reducing recidivism in cases involving violent versus property crimes should be viewed, at this point, “with caution.”<sup>38</sup>

The recidivism-related research findings on the effects of restorative-justice conferences complement other research profiling how restorative-justice conferences can help address the unmet needs of victims, including the victims of violent crimes. Restorative-justice conferences are, for example, more successful in bringing “emotional restoration” to victims than traditional court processing of criminal cases.<sup>39</sup> Studies on the impact of restorative-justice conferences on victims have measured “emotional restoration” in different ways. However, whether the metric was fear of being victimized again by the same person, fear that that person would repeat the crime against someone else, the securing of an apology, or the belief that the apology was sincere, victims participating in restorative-justice conferences reported greater emotional restoration than their counterparts who lacked that opportunity.<sup>40</sup>

When viewed against the backdrop of the research on the effects of restorative-justice conferences on those who have committed crimes and those harmed by them, it is notable that the RJ/RP laws examined during this study do not explicitly extend restorative practices to the full medley of crimes, both violent and nonviolent, felonies and non-felonies. Instead, it is common for statutes to exclude certain crimes from their province. Some laws, for example, allow for a restorative process only in certain misdemeanor cases.<sup>41</sup> Others limit

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37. Sherman et al., *supra* note 28, at 20.

38. *Id.* at 12.

39. Strang et al., *supra* note 31, at 39.

40. *Id.* at 37-39. In the meta-analysis described earlier in this article, the only measure of emotional restoration that did not consistently reveal any difference between the two categories of victims was the victim’s self-blame for the crime that had occurred. *Id.* at 36-37.

41. *See, e.g.*, OHIO REV. CODE ANN. § 2929.27(A)(12) (2011) (authorizing sentences requiring defendants in misdemeanor cases, other than those with a mandatory jail sentence or those involving a “minor” misdemeanor, to participate in victim-offender mediation); W. VA. CODE § 49-4-725(a) (2015) (authorizing diversion of juveniles to restorative-justice programs in cases involving a nonviolent misdemeanor or a status (noncriminal) offense).

their scope to nonviolent crimes.<sup>42</sup> Still others single out particular crimes, such as sex crimes, for which restorative conferencing is unavailable.<sup>43</sup>

*E. Finding #5: Most restorative-justice laws in the United States provide for a limited number of restorative practices, ones that are not considered "fully restorative."*<sup>44</sup>

As mentioned earlier,<sup>45</sup> restorative practices are not confined to the restorative-justice conferences through which harm can be diminished and remedied. Restorative practices also encompass other measures that remedy harm, proactively avert harm or conflict, or perform the dual function of allaying existing harm and forestalling future harm. Two examples of these other restorative practices are family group decision-making (FGDM) and circles, both of which are briefly described below.

#### 1. Family Group Decision-Making (FGDM)

Family group decision-making, which is sometimes referred to as family group conferencing,<sup>46</sup> empowers and equips a family to develop a plan to assist a struggling family member. FGDM can be used for an array of reasons. For example, a family may develop a plan to provide structure and support for a

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42. See, e.g., FLA. STAT. ANN. § 985.155(2)(a)(2014) (authorizing referral to a Neighborhood Restorative Justice Board of a juvenile accused of a nonviolent delinquent act and not previously found to have committed a delinquent, criminal, or other illegal act); MINN. STAT. ANN. § 611A.77 subd. 1 (2013) (authorizing awarding of state grants for victim-offender mediation before or after the filing of a delinquency petition for a nonviolent crime and, in adult cases, after the filing of a charge for a nonviolent crime, except in cases involving a family member or person living in the household); NEB. REV. STAT. § 43-274(3)(a) (2019) (authorizing victim-offender mediation when a juvenile's nonviolent act would constitute a traffic offense, misdemeanor, felony, or status offense); WIS. STAT. ANN. § 165.95(2), (3)(c) (2019) (conditioning eligibility for grants for "programs based on principles of restorative justice" on their banning any "violent offender" from participating). *But cf.* D.C. CODE § 24-902(a-1)(2)(C) (2018) (directing that strategic plan focusing on "youth offenders" address "best practices in restorative justice," including for youth convicted of violent offenses).

43. See, e.g., COLO. REV. STAT. §§ 18-1.3-104(1)(b.5)(1), 18-1.3-204(2)(a)(III.5), 19-2-905(4), 19-2-907(1)(I), 19-2-925(2)(a)(X) (barring court-ordered participation in "restorative justice practices" of people convicted of, or adjudicated delinquent for, unlawful sexual behavior, domestic violence, stalking, or violation of a protective order); 19 GUAM CODE § 5134(d) (excluding from "Balanced Approach and Restorative Justice Programs" juveniles who have committed "serious crimes against persons or property," criminal sexual conduct, or "serious family violence"); MINN. STAT. ANN. § 609.092 subd. 6 (2009) (excluding cases involving domestic violence or domestic assault from restorative-justice program for first-time juvenile offenses).

44. For an overview of the distinction between "fully restorative" and partially restorative processes, see *infra* notes 70–75 and accompanying text.

45. See *supra* notes 3–5 and accompanying text.

46. ELIZABETH SMULL ET AL., FAMILY POWER: ENGAGING AND COLLABORATING WITH FAMILIES 7 (2012).

child who is a chronic truant, foster the return of an incarcerated family member to the community, or aid a member of the family who was sentenced to probation or whose case was diverted altogether from the criminal-justice system in living a law-abiding and productive life.<sup>47</sup>

FGDM entails bringing family members together, including the person for whom a plan is being prepared, to discuss and devise the plan. The “family” participating in the planning process can be, and often is, loosely defined to include other people who have had a pivotal role in the life of the person for whom the plan is being prepared.<sup>48</sup> For example, an employer, favorite teacher, mentor, or best friend might participate in the planning process.

During FGDM, the family first meets with treatment and other service providers who share information about support services and treatment options that are available within the community and explain any pertinent legal requirements or safety-related needs that the plan would have to meet.<sup>49</sup> After the sharing of this information with the family, the service providers and any others present then leave the room, remitting to the family the task of creating a plan tailored to meet the needs of the person for whom it is being prepared.<sup>50</sup> This private family time is considered a “core element”<sup>51</sup>—“the heart”<sup>52</sup>—of family group decision-making. The written plan developed by the family

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47. For accounts of the utilization of family group decision-making in the truancy, reentry, and probation contexts, see *id.* at 21-26, 94-95. See also Magdolna Fabianne Blaha, Vidia Negrea, & Edit Velez, *The Use of Family Group Conferencing/Decision-Making with Prisoners in Prison Probation and During After-Care in Hungary*, in MINISTRY OF JUSTICE & LAW ENF'T, REPUBLIC OF HUNGARY, EUROPEAN BEST PRACTICES OF RESTORATIVE JUSTICE IN THE CRIMINAL PROCEDURE 258, 258-63 (2010) (describing how FGDM is used in Hungary to develop plans for individuals who are soon to be released from prison).

48. See, for example, the definition of “family” in FGDM Guidelines Committee, *Guidelines for Family Group Decision Making in Child Welfare*, AMERICAN HUMANE ASSOC. 25 (2010), <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/FGDM/Documents/FGDM%20Guidelines.pdf> [<https://perma.cc/GPL2-343T>]. “The extended family group defines and decides who is ‘family.’ The family group may include maternal and paternal relatives, stepchildren, half-siblings, friends, community supports, neighbors, religious leaders, tribal elders and other natural supporters who have a significant relationship with the child, parent or other family member.”

49. SMULL ET AL., *supra* note 46, at 87. An example of a safety-related need that a plan for a youth would be expected to meet is the need for the youth to be living with people who will not subject the youth to physical abuse.

50. FGDM Guidelines Committee., *supra* note 48, at 52. See also SMULL ET AL., *supra* note 46, at 91 (describing this stage of FGDM as “the time for families to find their own solutions to problems”).

51. FGDM Guidelines Committee, *supra* note 48, at 52.

52. SMULL ET AL., *supra* note 46, at 91.

members typically outlines responsibilities that family members and the person for whom the plan is being developed will assume under the plan.<sup>53</sup>

## 2. Circles

One of the classic roles of the restorative practice known as a "circle" is to "make visible" the interconnectedness of those in the circle despite what may be their manifold differences.<sup>54</sup> The interconnectedness revealed and fostered by circles begins with the gathering of the group into what, quite literally, is a circle. A circle facilitator, often referred to as the circle "keeper," ensures that all voices are heard during the circle, typically through the use of a "talking piece."<sup>55</sup> When a person holding the talking piece is speaking, the rest of the circle members listen, refraining from interjecting their responses.<sup>56</sup> Unlike the facilitator in a restorative-justice conference, a circle keeper is considered an equal participant in the circle; when holding the talking piece, the circle keeper may tender views and ideas on the questions the circle is discussing and deliberating on.<sup>57</sup>

Circles vary in their focus and purposes. A Circle of Support, for example, can provide a milieu for the support and healing of a victim struggling in the aftermath of a crime.<sup>58</sup> A Circle of Support and Accountability (COSA), on the other hand, is a vehicle for supporting a person who is at an elevated risk of committing a serious crime in his or her efforts to desist from crime.<sup>59</sup> A

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53. For two child-welfare-related FGDM plans that exemplify the exposition of these responsibilities, see PA. FGDM LEADERSHIP TEAM, PENNSYLVANIA FAMILY GROUP DECISION MAKING TOOLKIT: A RESOURCE TO GUIDE AND SUPPORT BEST PRACTICE IMPLEMENTATION 181-86, 239-45 (2008).

54. CAROLYN BOYES-WATSON & KAY PRANIS, HEART OF HOPE RESOURCE GUIDE: USING PEACEMAKING CIRCLES TO DEVELOP EMOTIONAL LITERACY, PROMOTE HEALING, AND BUILD HEALTHY RELATIONSHIPS 29 (2010).

55. KAY PRANIS, THE LITTLE BOOK OF CIRCLE PROCESSES 12, 35-37 (2005).

56. *Id.* at 12, 35.

57. *Id.* at 37.

58. Circles of Support can be used in other instances beyond when a victim is grappling with the aftereffects of a crime. They can be convened whenever someone needs support in coping with a major upheaval in his or her life. *Id.* at 16.

59. In places that adhere to the original COSA model, a group of trained volunteers meet regularly in a circle with a person, known as the "core member," who is at medium or high risk of committing another serious crime, such as a sex offense. Mechtild Höing et al., *Circles of Support and Accountability: How and Why They Work for Sex Offenders*, 13 J. OF FORENSIC PSYCHOLOGY PRACTICE 267, 267-68 (2013). The European COSA model adds an "outer circle" of professionals, such as a core member's probation officer and therapist, to this "inner circle" of three to six volunteers. *Id.* at 268. One of the functions of this outer circle is to assist in arranging the services needed to facilitate the core member's adoption of a law-abiding lifestyle within the community. *Id.*

The dialogue fostered during a COSA has many aims. Examples include: (1) to ensure that the core member understands that while the circle members reject the core member's crime, they accept him as a fellow human being; (2) to help the core member bond with others in what are

Welcome and Reentry Circle provides a means of welcoming a person released from incarceration back into the community, discussing the challenges of reentry facing this person, and identifying steps that can be taken by the returning citizen and circle members to surmount those challenges.<sup>60</sup> Peacemaking Circles can be used for a range of reasons, including to build and strengthen relationships and to defuse conflict and tensions that could erupt into injurious and perhaps criminal actions.<sup>61</sup>

### 3. Incorporating Restorative Practices, in Addition to Restorative-Justice Conferences, into Criminal-Justice Systems

In the criminal-justice context, a restorative practice other than, or in addition to, a restorative-justice conference is sometimes needed to address the depth or breadth of harm ensuing from, or related to, a crime, or to avoid a recurrence of criminal behavior. As mentioned earlier,<sup>62</sup> family group decision-making, Circles of Support, Circles of Support and Accountability, Welcome and Reentry Circles, and Peacemaking Circles may be employed to redress and prevent crime-related harm, strengthen relationships, and further other restorative aims in ways that a restorative-justice conference cannot. Other restorative practices can also help remediate harm that is not the focal point of a restorative-justice conference but is linked to a crime or the person who committed it. One example of such a restorative practice is a circle where an imprisoned person meets with family members to discuss the injurious effects of the imprisoned person's crime and imprisonment on the family members and how to rebound from that harm.<sup>63</sup> Compassionate Witnessing Circles represent another example.<sup>64</sup> These circles focus on helping to alleviate a different kind of

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strong, positive relationships, a protective factor that promotes desistance from crime; and (3) to challenge and change the cognitive distortions, such as blaming the victim or diminishing the seriousness of one's wrongful conduct, that are common when individuals commit crimes or engage in other wrongdoing. *Id.* at 270–71, 276. For additional details on how COSAs are structured and function, see *id.*

60. For a video of a Welcome and Reentry Circle held at a school to which a student was returning after a period of juvenile-justice-related confinement, see Restorative Justice for Oakland Youth & Oakland Unified Sch. Dist., *Restorative Welcome and Reentry Circle*, OUSD (April 26, 2013), <https://www.ousd.org/restorativejustice> [<https://perma.cc/4EYR-CNHX>].

61. For detailed information on Peacemaking Circles, including their theoretical underpinnings, descriptions of some of the different types of Peacemaking Circles, and templates that can be used when facilitating them, see BOYES-WATSON & PRANIS, *supra* note 54.

62. See *supra* notes 46–61 and accompanying text.

63. See Videotape: Vidia Negrea, *RP625prisonFgdm*, INT'L INST. FOR RESTORATIVE PRACTICES (2015) (on file with author). Vidia Negrea, a restorative practitioner from Hungary, has explained why these circles were instituted in a prison in Hungary: to bring restoration to families in "serious crisis" due to the imprisonment by providing a forum where family members can share their needs, feelings, and concerns with the imprisoned person. *Id.*

64. In 2003, Dr. Kaethe Weingarten completed a pioneering work on the process of compassionate witnessing and its healing effects. See KAETHE WEINGARTEN, COMMON SHOCK:

harm that is endemic in the criminal-justice milieu—trauma-related harm, a harm that can afflict both those who commit, and those harmed by, a crime.<sup>65</sup>

The study undertaken for this article revealed that many of the restorative-justice laws in the United States authorize or require the institution of victim-offender mediation.<sup>66</sup> A smattering of others provide for the establishment of community reparative boards,<sup>67</sup> which are also called neighborhood accountability boards, community accountability boards, youth panels, or some other term.<sup>68</sup> It is rare, though, to see specification of, and provision for, a broad range of restorative practices in the statutes. A Colorado statute is one of a small handful of notable exceptions. This statute defines “restorative justice practices” as including “victim-offender conferences, family group conferences, circles, community conferences, and other similar victim-centered practices.”<sup>69</sup>

Not only is it a relative rarity within the United States for a statute to provide for the incorporation of a broad range of specifically identified restorative practices into a state’s criminal-justice system, but most of the practices to which the statutes do allude are not considered “fully restorative.”<sup>70</sup> As mentioned earlier,<sup>71</sup> there is general agreement within the field of restorative practices that there are three chief stakeholders in restorative justice—the person who caused

WITNESSING VIOLENCE EVERY DAY: HOW WE ARE HARMED, HOW WE CAN HEAL 192 (2003). Building on the foundation laid by Weingarten, the International Institute for Restorative Practices provides training (which this author has received) on how to facilitate a Compassionate Witnessing Circle.

65. Many people who commit serious crimes were subjected to trauma-inducing experiences, such as sexual abuse or interpersonal violence, when they were children, and their own crimes can, in turn, spawn trauma in their victims. See Michael S. Martin et al., *Risk of Violence by Inmates with Childhood Trauma and Mental Health Needs*, 39 LAW & HUM. BEHAV. 614, 614 (2015) (reporting the results of studies finding that between 13–55% of male inmates and 43–80% of female inmates were victims of physical or sexual abuse or had witnessed family violence).

66. See, e.g., DEL. CODE tit. 11, §§ 9501(b)(1), 9502(b)(4) (2019); MINN. STAT. § 611A.77 subd. 2 (1)-(2) (2013); MO. REV. STAT. § 217.777(5)(1) (2018); MONT. CODE ANN. § 41-5-1304(1)(k) (2017); TENN. CODE ANN. §§ 16-20-101(b)(1), 16-20-102(b)(3) (2009); TEX. CODE CRIM. PROC. ANN. art. 56.13 (West 2001); TEX. GOV’T CODE ANN. § 508.324 (West 1999); UTAH CODE ANN. §§ 62A-7-112(4)(a)(iv); 78A-6-117(h)(iii), 78A-6-602(e)(vii) (West 2019).

67. See, e.g., FLA. STAT. ANN. § 985.155(3)(a), (4)-(5) (2014) (authorizing establishment in each county of a Restorative Justice Board that “may impose . . . sanctions,” such as “require” restitution or work for the victim, on a juvenile appearing before it as part of a deferred-prosecution program); VT. STAT. ANN. tit. 28, § 910a(a) (West 2012) (requiring the establishment of “reparative boards” in communities).

68. See Mara Schiff et al., *Neighborhood Accountability Boards: The Strength of Weak Practices and Prospects for a “Community Building” Restorative Model*, 36 WASH. U. J. OF L. & POL’Y 17, 18-19 (2011).

69. COLO. REV. STAT. § 18-1-901(3)(o.5) (West 2013).

70. See Wachtel, *supra* note 3, at 3–4 (differentiating between fully, mostly, and partly restorative processes).

71. See ZEHR, *supra* note 23 and accompanying text.



the harm, the victim, and the community.<sup>72</sup> The exclusion of any one of these stakeholders from a restorative practice makes it less than fully restorative under this classic restorative-justice framework.<sup>73</sup> Thus, victim-offender mediation fails to meet the parameters of being fully restorative when, as often happens, participants are confined to the person who caused the harm, the victim, and the mediator, with others (the “community”) absent who could lend perspective about the harm the crime caused and how it can best be remediated.<sup>74</sup> And when people who have committed crimes appear before a community reparative board, the victim is often absent, playing no role in the process of unmasking the crime’s harm and determining how to alleviate and remedy that harm.<sup>75</sup>

F. *Finding #6: Most restorative-justice laws in the United States provide for the incorporation of restorative practices into only one or a few stages of the criminal-justice process.*

A criminal case is marked by multiple stages. The law-enforcement stage precedes the referral of a case to a prosecutor for the potential filing of a criminal charge. During the next stage of the legal process, the pre-charge stage, the prosecutor decides whether to file a criminal charge. If a charge (or charges) is filed, the case moves into the post-charge, pre-conviction stage—the stage where the person charged with a crime has neither pleaded, nor been found, guilty.

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72. See, e.g., Wachtel, *supra* note 3, at 3. Restorative-justice theorists and practitioners ascribe different meanings, though, to “the community” that constitutes the third restorative-justice stakeholder. For example, when some use this term, they are referring to “communities of care.” See Roxana Willis, *Three Approaches to Community in Restorative Justice, Explored Through a Young Person’s Experiences of a Youth Offender Team in England*, 4 RESTORATIVE JUST.: AN INT’L J. 168, 170–71 (2016) (listing examples of restorative-justice experts adopting the community-of-care framework). The “community,” when used in this sense, includes people, such as spouses, parents, siblings, close friends, teachers, and others with whom the victim or the person who harmed the victim has a “significant emotional connection” and who was therefore also “directly affected” by the crime. Paul McCold & Ted Wachtel, *In Pursuit of Paradigm: A Theory of Restorative Justice*, EFORUM 2 (Aug. 12, 2003), <http://www.iirp.edu/pdf/paradigm.pdf> [<https://perma.cc/NL3Y-2PCX>]. To others in the field of restorative justice, “community” has a geographical focus, often the locality in which the person harmed and the person who caused the harm live. Willis, *supra*, at 169. Under this “community-of-place approach,” where “community” is defined in terms of place rather than relational connections, the representatives of the community participating in a restorative process are typically volunteers who live or work in the defined geographical area and are often strangers to the other participants. *Id.* at 171, 172. For additional information on the community-of-care and community-of-place approaches to the meaning of “community” in the restorative-justice context, see *id.* at 170–75.

73. Wachtel, *supra* note 3, at 3–4.

74. *Id.* at 4.

75. See Schiff et al., *supra* note 68, at 20–21 (noting that the “most valid criticism” of neighborhood accountability boards is their “inability or disinterest in engaging victims” and failure to treat victim participation as a priority).

The fourth stage of the criminal-justice process is the postconviction, presentencing stage. At this point in the process, the person accused of a crime has been found guilty of it, though a sentence has yet to be imposed. During the ensuing stage, a sentence is imposed and served. The sentence may be a community-based sentence such as probation, a sentence to confinement in prison or jail, or some mixture of the two kinds of sentences.<sup>76</sup>

Providing access to restorative-justice conferences and other restorative practices at all stages of the criminal-justice system comports with one of the real-life dimensions of a crime's aftereffects—that others cannot dictate when someone will be ready for a restorative dialogue. Some people, for example, may want to participate in a restorative-justice conference very soon after the commission of a crime, while others may need more time, and perhaps much more time, before they feel ready to face and speak with the person who harmed them or whom they harmed.

Most of the states whose existing laws were examined as part of this study limit their application to one or just a few stages of the criminal-justice (or juvenile-justice) process.<sup>77</sup> When the laws are considered in toto though, they span the full spectrum of the justice system—from diversion options in lieu of prosecutorial or court processing at the front end of the legal system to, at the

76. A sentence to probation may, for example, be conjoined with some period of confinement in jail. And a prison sentence may include a period of time when a person may or must be conditionally released from confinement. Being on parole is a classic example of the conditional-release portion of a sentence.

77. For examples of statutes authorizing or requiring that one or more restorative practices be available to divert people from court processing within the criminal-justice or juvenile-justice system, see COLO. REV. STAT. ANN. §§ 19-2-303(1)-(2) (West 2019), 19-2-512(2) (West 2013) (juvenile); HAW. REV. STAT. § 571.31.4(c)(11) (West 2014) (juvenile); MINN. STAT. ANN. §§ 388.24 subd. 2(1) (West 2017), 609.092 (West 2009) (juvenile); NEB. REV. STAT. § 43-260.06(6) (West 2019) (juvenile); N.C. GEN. STAT. ANN. § 7B-1706(a)(4) (West 2019) (juvenile); UTAH CODE ANN. § 78A-6-602(2)(e)(vii) (West 2018) (juvenile). For examples of statutes providing for the incorporation of one or more restorative practices into the sentence or disposition of a case, see COLO. REV. STAT. ANN. §§ 18-1.3-204(2)(a)(III.5) (West 2018) (adult), 18-1.3-104(1)(b.5)(1) (West 2014), 19-2-905(4) (West 2019), 19-2-907(1)(l) (West 2018) (juvenile); 19 GUAM CODE ANN. § 5134(e) (West 2014) (juvenile); MO. ANN. STAT. §§ 217.777(2)(5)(l) (West 2018), 559.021(2) (West 2017) (adult); MONT. CODE ANN. § 46-18-201(4)(o) (West 2019) (adult); N.C. GEN. STAT. ANN. § 7B-2506(7) (West 2019) (juvenile); OHIO REV. CODE ANN. §§ 2152.19(C) (West 2017) (juvenile), 2929.17(L) (West 2009), 2929.27(a)(12) (West 2011) (adult); OKLA. STAT. ANN. § 991a(A)(1)(m) (West 2019) (adult); UTAH CODE ANN. § 78A-6-117(2)(j)(iii) (West 2019) (juvenile); VT. STAT. ANN. tit. 13, § 7030(b) (West 2010) (adult). For examples of statutes authorizing or requiring that one or more restorative practices be instituted in other criminal-justice-related contexts, see COLO. REV. STAT. ANN. § 19-2-309.5(4)(a)(1)(I), (2)(L) (West 2019) (juvenile reentry following confinement); MINN. STAT. ANN. § 244.196 subd. 3 (West 2003) (defining "probation violation sanction" to include participation in a restorative-justice program); MO. ANN. STAT. § 217.440 (West 1997) (within correctional centers (prisons)).

back end, post-release supervision following release from confinement.<sup>78</sup> Vermont is one of the few states with a more expansive law, one encompassing multiple stages of the criminal-justice system. One Vermont statute states that the legislature intends for “restorative justice approaches”<sup>79</sup> to be developed and used by law-enforcement officials “whenever feasible and responsive to specific criminal acts,” for court-diversion purposes, in sentencing, and in postsentencing when individuals are in the custody of the Department of Corrections.<sup>79</sup>

*G. Finding #7: Restorative-justice laws in the United States do not, at present, ensure that there is the funding, training, and other structural support needed for restorative practices to permeate a criminal-justice system.*

#### 1. Funding

Through general appropriations bills, states allocate considerable sums of money to subsidize the costs of what are considered core components of their criminal-justice systems, such as prosecution, courts, and corrections. Sometimes, states pay the full costs of a segment of that system. States typically assume, for example, sole fiscal responsibility for the operation of prisons in the state.<sup>80</sup> Other times, states share criminal-justice-related funding responsibilities with local governments, underwriting, for example, some, though not all, of the costs of operating courts and providing probation services.<sup>81</sup>

Just as adequate funding is needed for the traditional functioning of a criminal-justice system, ample funding support is integral to the institution of restorative justice and practices throughout the system. Funding is needed, for example, to support the training of criminal-justice officials about restorative practices, planning of how to integrate restorative practices into the criminal-justice system, implementation of the plan, and evaluation on an ongoing basis of the plan’s effects and effectiveness.

One of the revelations stemming from the review of the RJ/RP statutes in this country is how weak the funding support is for the integration of restorative

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78. For examples of statutes authorizing the use of restorative practices for diversion purposes, see *supra* note 77. For an example of a statute providing access to a restorative practice (victim-offender mediation) when a person is on parole, see TEX. GOV’T CODE ANN. § 508.324 (1999).

79. VT. STAT. ANN. tit. 28, § 2a(b) (2018).

80. W. David Ball, *Why State Prisons?*, 33 YALE L. & POL’Y REV. 75, 107 (2014). The state funding of prisons has been described as a “correctional free lunch” for localities. *Id.* at 77 (quoting FRANK E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991)).

81. See, e.g., *State and Local Funding for the Illinois Courts*, THE ADMIN. OFF. OF THE ILL. CTS., <http://www.illinoiscourts.gov/General/Funding.asp> [https://perma.cc/ZD5W-VJWS] (last visited Feb. 10, 2020) (reporting that the state and counties in Illinois share the responsibility of funding the courts, including probation services).

justice and practices into criminal-justice (or juvenile-justice) systems. The brunt of the statutes that address funding do so in one of two limited ways.<sup>82</sup> First, some provide for the awarding of grants to support some types of restorative programs.<sup>83</sup> Grants are known as "'soft' money," often funneling only one-time funding to an agency or entity for a designated purpose or leaving the renewal of funding uncertain.<sup>84</sup> The second type of funding-related statutes

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82. A Utah statute reflecting a different approach to the state funding of restorative justice and practices, though, bears noting. See UTAH CODE ANN. § 62A-7-112(4)(a)(iv) (West 2019). This statute is the outgrowth of what has been termed the "Justice Reinvestment Initiative." 35 *States Reform Criminal Justice Policies Through Justice Reinvestment*, THE PEW CHARITABLE TRS. (July 11, 2018), [https://www.pewtrusts.org/-/media/assets/2018/07/pspp\\_reform\\_matrix.pdf](https://www.pewtrusts.org/-/media/assets/2018/07/pspp_reform_matrix.pdf) [<https://perma.cc/NM94-R62P>]. States participating in this initiative implement evidence-based strategies to reduce correctional costs and recidivism. *The Justice Reinvestment Initiative: Experiences from the States*, THE URBAN INST. 1 (July 2013), <https://www.urban.org/sites/default/files/publication/23881/412879-The-Justice-Reinvestment-Initiative-Experiences-from-the-States.PDF> [<https://perma.cc/Y2K8-VJT5>]. The states then reinvest the resulting cost savings into research-based programs and processes that improve public safety while holding people accountable for their law-violating conduct. *Id.*

The Utah statute authorizes the disbursement of funds from the "Juvenile Justice Reinvestment Restricted Account" to support the expansion of victim-offender mediation programs throughout the state. At least on its face, though, the statute does not provide a secure funding base even for this one, partially restorative process. First, the statute does not require that funds be expended to implement this restorative practice statewide. See UTAH CODE ANN. § 62A-7-112(4)(a)(iv) (West 2019) ("Upon appropriation by the Legislature, the department *may* expend funds from the account [for] . . . victim-offender mediation.") (emphasis added). Second, the statute cites victim-offender mediation as only one of several programs and practices to which funds from the account can be funneled, meaning that victim-offender mediation programs, in effect, compete for funding with these other programs and practices. Examples of some of the other programs and practices to which funds may be directed include mobile crisis outreach teams and programs delivering cognitive, behavioral, and family therapy. *Id.* § (4)(a)(ii), (b). See also MD. CODE ANN., STATE GOV'T § 9-3209(b)(2)(iv) (West 2016) (authorizing, but not requiring, the disbursement to restorative-justice diversion programs of savings reaped from implementation of the Justice Reinvestment Coordinating Council's recommendations).

83. See, e.g., CAL. PENAL CODE § 5027(b) (West 2016) (providing for grants that are "one time in nature" to not-for-profit organizations for prison programs grounded on "restorative justice principles"); *id.* § 6046.3(a), (b)(1) (West 2016) (providing for a "competitive grant program" to fund services and programs for people within the criminal-justice system with a history of mental-health or substance-use disorders, with one funding priority being proposals that both "advance principles of restorative justice" and have the demonstrated capacity to reduce recidivism); KAN. STAT. ANN. § 75-7038 (West 2016) (including "balanced and restorative justice programs" on the list of juvenile "community correctional services" for which counties can receive state grants); MINN. STAT. ANN. § 611A.77 subd. 1 (2019) (providing for the award of grants to nonprofit organizations creating or expanding victim-offender mediation programs).

84. Cf. Christine Chinkin & Kate Paradine, *Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords*, 26 YALE J. INT'L L. 103, 170 (2001) (referring to funding-related anxiety due to dependence on grants, a form of "'soft' money" that makes entities' "continued existence and priorities uncertain"); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 260

authorize restorative programs to defray expenses by levying fees on those who opt to participate in a restorative process following their commission of a crime.<sup>85</sup> The effect of these latter statutes is to condition the level of resources available for the restorative practice in question on the capacity and willingness of potential RP participants to pay those fees.

## 2. Other Structural Support

Several years ago, Dr. Shannon Sliva and Carolyn Lambert, then the Program Director of the Consortium on Negotiation and Conflict Resolution at Georgia State University, conducted research to identify statutes in the United States to be included in the earlier-mentioned database<sup>86</sup> of restorative-justice laws in the United States.<sup>87</sup> As part of this study, they also assessed the level of support the identified statutes provided at the time of their study for restorative justice within the criminal-justice or juvenile-justice systems in a state.<sup>88</sup> They reported that seven states provided “structured support” for restorative justice—

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n.45 (2004) (noting that the temporary funding ensuing from soft-money grants results in perennial shifts in the number of existing programs); Alecia Meuleners, *Finding Fields: Opportunities to Facilitate and Incentivize the Transfer of Agricultural Property to New and Beginning Farmers*, 18 DRAKE J. AGRIC. L. 211, 225 (2013) (pointing to the “substantial constraint on program activities” when soft-money grants are the funding source).

85. See, e.g., ALA. CODE § 45-28-82.25(c) (West 2019) (portion of fees paid to participate in “restorative justice initiative program” may be paid to the agency or entity providing restorative-justice-related services); *id.* § 45-39-82.05(c) (West 2019) (same); COLO. REV. STAT. ANN. § 18-1.3-104(1)(b.5)(1) (West 2014) (fee paid by defendant sentenced in a criminal case to participate in a “restorative justice practices victim-offender conference” is based on a sliding scale, cannot exceed \$125, and may be waived by the court); *id.* § 19-2-905(4) (West 2019) (same for juvenile adjudicated delinquent ordered to participate in conference before sentencing); *id.* § 19-2-907(1)(l) (West 2018) (same for juvenile adjudicated delinquent who participates in “restorative justice practices” as part of the sentence); *id.* § 18-25-10(1), (2)(b), (4) (West 2017) (ninety-five per cent of ten-dollar surcharge each person convicted of, or adjudicated delinquent for, a crime must pay is remitted to the state’s “restorative justice surcharge fund” unless the court waives all or part of the surcharge due to inability to pay); MONT. CODE ANN. § 46-18-201(4)(p) (2019) (as a condition of suspending or deferring imposition of part or all of a sentence, court can order defendant to participate in a restorative-justice program and pay a “participation fee” of up to \$150 if the defendant is accepted into the program); OKLA. STAT. ANN. tit. 22, § 991a(A)(1)(m) (West 2019) (program fee of not less than \$15 and not more than \$60 when person convicted of a crime is placed in a “victim/offender reconciliation program”); TEX. CIV. PRAC. & REM. CODE. ANN. § 152.007(a)-(b) (West 2013) (“reasonable fee,” not to exceed \$350, to participate in pretrial victim-offender mediation program).

86. See *supra* note 7 and accompanying text.

87. Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. OF POL’Y PRAC. 77, 81 (2015). The Consortium on Negotiation and Conflict Resolution first maintained this database, beginning in 2015. *Id.* at 85. In 2019, the database was moved to the University of Denver. See *supra* note 7.

88. *Id.* at 83.

Colorado, Minnesota, Missouri, Montana, New Hampshire, Texas, and Vermont.<sup>89</sup>

The benchmarks that a state had to satisfy to be classified as a structured-support state are a bit unclear. The report of the study's findings first said that to be categorized as providing structured support, a state's statute or statutes had to (a) require or "strongly encourage" the utilization of restorative practices in the criminal-justice or juvenile-justice system *and* (b) provide "significant support" for the implementation of these practices into the system.<sup>90</sup> Statutory affirmation that state funds were available for this implementation plus provision in the statute for state-level implementation guidelines was considered one indicator of this significant support.<sup>91</sup> But when explaining later in the report the basis for the conclusion that seven states provided structured support for restorative practices, the report seemed to indicate that a state was classified as providing structured support for restorative practices as long as it met one, not necessarily both, of the two criteria spelled out earlier. The report related that seven states "were coded structured, providing *either* a mandate to use restorative justice in some context *or* a high level of structure for its use."<sup>92</sup>

Despite this ambiguity in the study's findings, its overarching conclusion—that "[n]ationally, restorative justice remains a marginally supported justice practice at the level of state policy"—is clear and noteworthy.<sup>93</sup> The study found that the handful of states with a statute providing "structured support" for restorative justice during one or a few stages within its criminal-justice or juvenile-justice system, such as to divert youth from the juvenile-justice system, did not provide that level of support for the implementation of restorative practices in many other parts of the justice system.<sup>94</sup> For example, many of the seven states deemed to be providing "structured support" for restorative practices in one stage of the justice system gave, in another stage, just a general "nod" to restorative justice or simply mentioned it in a list of implementation options.<sup>95</sup>

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89. *Id.* at 88.

90. *Id.* at 83 ("Statutes offering structured support strongly encourage or mandate the use of restorative justice practices and provide significant support for implementation, such as confirmation of funding and administrative guidelines.").

91. *Id.* While the study cited this "confirmation of funding and administration guidelines" as an example of what sufficed for the "significant support" of the implementation of restorative justice practices needed for a state to be classified as providing "structured support" for restorative justice, it is unclear what other indicators of implementation support would lead or led to a state being categorized as a "structured support" state. *Id.*

92. *Id.* at 88 (emphasis added).

93. Sliva & Lambert, *supra* note 87, at 88.

94. *Id.* at 88–89.

95. *Id.* at 89. *See also id.* at 83, 88 (defining what constituted only "ideological support" for restorative justice as opposed to structured support).

The statutory analysis undertaken for the current study on which this article focuses revealed that, as was true when Sliva and Lambert initially amassed the database of RJ/RP laws in the United States, no state's statutes presently require restorative justice as a statewide, "system-wide criminal justice response."<sup>96</sup> Even in Colorado, which has in place a statutorily mandated, state-level Restorative Justice Coordinating Council,<sup>97</sup> a legislative proposal to import restorative practices into the juvenile-justice system throughout the state ended up being watered down during "the give and take of the legislative process," culminating in a pilot program confined to just four counties.<sup>98</sup>

## II. RECOMMENDATIONS TO GUIDE THE ENACTMENT AND REVAMPING OF RESTORATIVE-JUSTICE LEGISLATION IN THE UNITED STATES

This study's survey and assessment of restorative-justice laws in the United States has unearthed a plethora of substantial gaps and deficiencies in these laws. These statutory deficits include, among others: (a) tepidity in the endorsement of, and authorization for, the utilization of restorative practices throughout the criminal-justice system; (b) the absence of the structural support, funding, and procedural protections, such as confidentiality, needed for restorative justice and practices to be a mainstay of criminal justice; and (c) the flouting at times of core restorative precepts. The revelation of these findings is not necessarily an indictment of past legislative endeavors to begin to bring restorative practices into criminal justice, but rather a recognition that legislators, not steeped in the field of restorative practices, need guidance to aid these endeavors.

This section of the Article represents an effort to provide that guidance. Set forth below are seven recommendations for legislators that stem from the findings of this study. These recommendations identify provisions to include in a criminal-justice-focused RJ/RP law to correct or stave off the statutory problems this study unveiled. While not an all-inclusive list of the recommended contents of such a law, the prescriptions provide a needed foundation for future legislative deliberations and drafting.

### A. *Statutory provision #1: Consent to participate in a restorative practice must be voluntary, and participants have the right to revoke their consent at any time during the restorative process.*

Including a provision in a state's restorative-justice statute banning the compulsion of individuals to participate in restorative processes and spelling out that their participation must be voluntary would help forestall the contravention

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96. *Id.* at 88.

97. See COLO. REV. STAT. § 19-2-213(1)(a) (West 2015).

98. Shannon M. Sliva, *A Tale of Two States: How U.S. State Legislatures Consider Restorative Justice Policies*, 20 CONTEMP. JUST. REV. 255, 262 (2017).

of the basic restorative precept mentioned earlier in this article<sup>99</sup>—that to effectuate the objectives of a restorative practice, participation in it must be voluntary. Also including a sentence in the statute affirming that consent to participate in a restorative process can be withdrawn, without penalty, at any point before the process is concluded would reflect the recognition that the rationales underlying the voluntary-participation requirement apply not only at the outset of a restorative process but throughout it. A few states' statutes already explicitly provide for such revocation of consent.<sup>100</sup>

*B. Statutory provision #2: Participants must provide informed consent to participate in a restorative process.*

Another core provision in a state's restorative-justice law would be geared towards ensuring that the consent to participate in a restorative-justice conference or other restorative process is informed. A general admonition in the statute that the consent must be informed would not suffice, leaving open the question of what a person needs to be aware of in order for his or her consent to be considered informed within the meaning of the law. Instead, a state's restorative-justice statute should specify the baseline information that must be shared before a person decides whether to engage in a facilitated restorative dialogue. Those involved in RJ/RP planning and implementation could require, of course, that before securing consent to participate in a restorative process in the criminal-justice context, information be shared that goes beyond the statutory minima.

The informed-consent provision in the Australian Capital Territory's Restorative Justice Act provides a good starting point for the drafting of a parallel statutory provision in a state.<sup>101</sup> As mentioned earlier in this article,<sup>102</sup> the Australian statute requires that participants in a restorative-justice conference be apprised of the following: (a) the purposes of a restorative-justice conference; (b) what transpires during a conference; (c) who may participate in the conference; (d) the "nature" of a restorative-justice agreement; (e) the right to consult with an attorney regarding participating in a conference; (f) that no one is obliged to participate, or continue participating, in a conference; (g) that a person can plead not guilty to a crime and yet still accept responsibility for it during a restorative-justice conference; (h) that when sentencing someone for a crime, a court may, but does not have to, consider his or her acceptance of

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99. See *supra* notes 8–10 and accompanying text.

100. See, e.g., DEL. CODE ANN. tit. 11, § 9504 (2019) (“[Any] person who voluntarily enters an alternative case resolution process at a victim-offender alternative case resolution program . . . may revoke . . . consent, withdraw from the alternative case resolution process, and seek judicial or administrative redress before reaching a written agreement. A legal penalty, sanction, or restraint may not be imposed on the person for such withdrawal.”).

101. *Crimes (Restorative Justice) Act 2004*, *supra* note 18, at s 32A.

102. See *supra* notes 18–22 and accompanying text.



responsibility for the crime during a restorative-justice conference; and (i) that the refusal of the person being sentenced to participate in a restorative-justice conference cannot be considered by a court when making sentencing decisions.

While the Australian statute provides a general template for a state crafting the informed-consent provision to be included in its own restorative-justice act, I would advise some further fine-tuning of the Australian model. One suggested revision is that a state's restorative-justice statute describe more clearly the information that must be provided about the restorative-justice agreement. The directive in the Australian statute to explain the "nature of a restorative justice agreement" to those contemplating participating in a restorative-justice conference is vague.<sup>103</sup> Including in an RJ/RP statute additional details about the information to be shared about a restorative-justice agreement would help ensure that potential participants in a restorative-justice conference understand what a restorative-justice agreement is and entails. Examples of these statutorily prescribed details include: (a) a restorative-justice agreement's purposes; (b) that the terms of the agreement, including the time limits for meeting them, will be recorded in writing; (c) the people who will receive copies of it; (d) that its execution will be monitored by a designated individual or entity to ensure compliance; and (e) the consequences or potential consequences of breaching an agreement.

A state would also be well advised to include in the informed-consent provision in its restorative-justice statute a requirement that the confidentiality protections afforded by the law and any exceptions to those protections be explained to potential participants in the restorative process.<sup>104</sup> Being informed about the extent to which what transpires during a restorative dialogue can or cannot be shared with others may affect whether a person wants to engage in that dialogue. This information may also help people discern whether they need and should procure the legal advice that they have been told, in conformance with the statute's informed-consent provision,<sup>105</sup> they have a right to seek. Being apprised of the confidentiality protections the law extends to the restorative process may, in addition, spark a more complete and candid conversation about a person's harmful actions and their effects, one unhindered by fears of potential negative employment, reputational, legal, or other effects of statements made during the conversation.

The third recommended refinement of the Australian model stems from the fact that the informed-consent provision in the Australian Capital Territory's Restorative Justice Act focuses solely on restorative-justice conferences. Restorative-justice conferences, however, are not the only restorative practice

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103. See *Crimes (Restorative Justice) Act 2004*, *supra* note 18, at s 32A(b)(i).

104. For a discussion of these confidentiality protections and exceptions to them, see *infra* notes 108-13 and accompanying text.

105. See *supra* notes 101-02 and accompanying text.

incorporated into criminal-justice systems.<sup>106</sup> Therefore, when drafting a statute to bring the wide gamut of restorative practices into its criminal-justice system, a state would also need to spell out the information that, at a minimum, would need to be relayed in order for a person's participation in, for example, family group decision-making to be considered informed.

*C. Statutory provision #3: Subject to limited and defined exceptions, the statements and records from, or related to, a restorative-justice conference and other specified restorative processes are confidential.*

For the reasons outlined earlier,<sup>107</sup> preserving the confidentiality of RJ/RP-related communications and records is vital to the functioning and effectiveness of restorative processes, affecting both the willingness of people to participate in them and the extent to which they are open and truthful during them. A section on confidentiality would therefore be another pivotal part of a well-drafted restorative-justice statute. Recommended points to be incorporated into the confidentiality section of a state's restorative-justice act include the following:

1. All statements made during a restorative-justice conference and other specified restorative processes, or when being screened or prepared to participate in such a conference or process, are confidential and privileged.<sup>108</sup>
2. Exceptions to this general rule include: (1) when the participants agree in writing to limited or unlimited disclosure;<sup>109</sup> (2) when disclosure is

106. *See supra* notes 45–65 and accompanying text.

107. *See supra* notes 23–24 and accompanying text.

108. The connection and distinction between confidential communications and privileged communications is widely misunderstood. Professor Ronald Goldfarb has explained the interface between confidential and privileged communications:

Confidentiality is a principle of legal ethics that governs when communications may be disclosed and when, more commonly, they should remain confidential. Privilege – more absolute – protects against compelled disclosure in a deposition or trial proceeding. “Everything that is privileged is also protected by the confidentiality principle but the converse is not true.”

. . .

There is a fundamental distinction between confidentiality generally and privileged communications specifically. Communications between parties may be confidential, and that confidentiality may and should be honored in most situations. Privilege goes one step further, insulating the parties from sanctions for refusing to testify in a legal proceeding or produce documents requested by subpoena.

RONALD GOLDFARB, *IN CONFIDENCE: WHEN TO PROTECT SECRECY AND WHEN TO REQUIRE DISCLOSURE* 24–25 (2009).

109. The participants in a restorative-justice conference might grant permission, for example, for certain information about the agreement into which they entered at the conclusion of the conference to be shared with designated court or criminal-justice officials. This disclosed information revealing a person's willingness to enter into an agreement to make amends for his or her crime might affect decisions of these officials, prompting, for example, the dismissal of a

required by a mandatory-reporting law, such as one governing child abuse and neglect;<sup>110</sup> and (3) when a statement reveals a threat to the safety of a participant or other person.<sup>111</sup>

3. Memoranda, notes, case files, emails, and other products of the RJ/RP process are likewise confidential and privileged, subject to the three delineated exceptions.
4. RJ/RP staff and volunteers shall have a right of access to all information needed to carry out their duties.<sup>112</sup>
5. RJ/RP researchers may be allowed access to RJ/RP-related records provided that the information is relayed in a way that prevents the identification of any person participating in the restorative process from being ascertained.<sup>113</sup>

*D. Statutory provision #4: Restorative-justice conferences and other restorative practices must be available for all types of crimes.*

As discussed earlier,<sup>114</sup> a number of states exclude more serious crimes from the scope of their restorative-justice-related statutory provisions. One of the

criminal charge or the imposition of a sentence different in type or severity from the one the judge would otherwise have imposed.

Another example of why participants in a restorative-justice conference might be animated to assent to limited or unlimited disclosure about the conference springs from the educational value of real-life stories. Stories about what transpired before, during, and after a restorative-dialogue process can be helpful in aiding others to understand that process and its effects, as well as to discern ways to fine-tune the process. Participants in a restorative-justice conference might therefore consent to the dissemination of information about the conference for educational reasons, though the consent might sometimes include the caveat that steps be taken to preclude the identity of the participants from being ascertained.

110. For examples of statutes instituting this exception to the general rule of confidentiality in a restorative process, see 19 GUAM CODE ANN. § 5134(f)(2) (2014) (exempting communications regarding “present child abuse”) and NEB. REV. STAT. § 25-2914.01(4)(C) (2019) (exempting communications required by the mandatory-reporting law “for new allegations of child abuse or neglect which were not previously known or reported”).

111. For an example of a statute instituting a variant of this exception to the general rule of confidentiality in a restorative process, see 19 GUAM CODE ANN. § 5134(f)(3) (2014) (exempting communications that “reveal an actual or potential threat to a participant’s safety”).

112. See VT. STAT. ANN. tit. 24, § 1966(c) (2018) (according such a right of access “as necessary to carry out their duties within the program in accordance with State and federal confidentiality statutes and policies”).

113. See *Crimes (Restorative Justice) Act 2004*, *supra* note 18, at s 71(3) (authorizing access to restorative-justice database for research, analysis, and evaluation purposes but barring access to information “that would allow the identity of anyone taking part in restorative justice to be worked out”); Oranga Tamariki Act 1989 Children’s and Young People’s Well-being Act 1989 (N.Z.) § 38(2)(b), (3) (authorizing the publishing of the results of “bona fide research” about family group conferences (family group decision-making) but prohibiting the publication of identifying “particulars”).

114. See *supra* notes 41–43 and accompanying text.

discordant effects of these exclusions is that they foreclose victims from experiencing the benefits of restorative practices when the harm a crime caused is the greatest. The constricted scope of current restorative-justice laws in the United States also means that restorative-justice conferences are unavailable in the cases in which, according to the research,<sup>115</sup> they may have their greatest recidivism-reducing impact—those involving violent crimes.

Another criticism leveled against the exclusion of violent crimes from the purview of a restorative-justice law is that it denotes a “lack of trust in those applying the law.”<sup>116</sup> But contrary to the suppositions of lawmakers that may be fueling this distrust, practitioners trained in restorative practices are taught to screen out individuals when their participation would undermine the purposes of a restorative-justice conference—when, for example, the person who committed a crime refuses to acknowledge responsibility for it.<sup>117</sup>

One of the recommended provisions in a state’s restorative-justice statute would therefore extend the statute’s application to all crimes—violent as well as nonviolent, felonies as well as misdemeanors. Some people will likely remonstrate that certain kinds of crimes should be categorically barred from the scope of the legislation. It consequently bears emphasizing that a well-constructed statute would specify that a restorative-justice conference could only be held when (a) the parties have tendered their voluntary, informed consent to participate in it, (b) they have been deemed suitable to participate in a restorative-justice conference by someone trained to conduct such screening, and (c) the facilitator of the conference has the requisite training to foster a dialogue about a crime of that nature and severity.<sup>118</sup>

*E. Statutory provision #5: A broad range of restorative practices must be integrated into the criminal-justice system in the state.*

As discussed earlier in this article,<sup>119</sup> an array of restorative practices are needed to effectively address and remediate the harm ensuing from, and connected to, a crime and to stave off a recurrence of criminal activity. A state’s restorative-justice statute therefore needs to list the restorative practices to be integrated throughout the criminal-justice system in the state. This list would

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115. See *supra* notes 36–38 and accompanying text.

116. Borbála Fellegi, *Building and Toning: An Analysis of the Institutionalization of Mediation in Penal Matters in Hungary*, 14 TEMIDA 21, 29 (2011).

117. TED WACHTEL ET AL., RESTORATIVE JUSTICE CONFERENCING 187 (2010) (noting that to be eligible to participate in a restorative-justice conference, the person who caused the harm should admit having committed the offense).

118. For a resource outlining knowledge and skills that restorative-justice practitioners need to facilitate a restorative process, see RESTORATIVE JUSTICE COUNCIL, *supra* note 14. This manual includes a section on the additional knowledge and skills needed to facilitate “sensitive and complex cases.” See *id.* at 22–24.

119. See *supra* notes 45–65 and accompanying text.

include the practices that are considered “fully restorative”—restorative-justice conferences, family group decision-making, and circles.<sup>120</sup> Additionally, the statute could enumerate some of the kinds of circles falling within its scope. Examples of the types of circles the statute could specify include those spotlighted earlier in this article<sup>121</sup>—Circles of Support (for victims), Circles of Support and Accountability (to promote, among other ends, high-risk individuals’ desistance from crime), Welcome and Reentry Circles (for persons returning to their communities after a period of incarceration), Peacemaking Circles (to be used, for example, proactively to address and resolve conflict before it escalates into violence or other injurious actions), circles for incarcerated people and their families (to promote, for example, healing within a family reeling from the after-effects of a loved one’s crime and imprisonment), and Compassionate Witnessing Circles (for trauma victims, including those who have perpetrated a crime).

The list of restorative practices prescribed by the statute would not purport to be all-inclusive. As the state of knowledge about restorative practices continues to evolve, other restorative practices might be instituted under, and with the aid of, the state’s restorative-justice law.

*F. Statutory provision #6: Restorative practices must be integrated throughout all stages of the criminal-justice process.*

One of the explicit aims of the Australian Capital Territory’s Restorative Justice Act is “to enable access to restorative justice at every stage of the criminal justice process.”<sup>122</sup> To help effectuate this objective, a table in the Act lists the stages of the criminal-justice process during which individuals can be referred for restorative-justice conferencing.<sup>123</sup> The stages range from the front end of the criminal-justice process (when a person receives a warning from, or is apprehended by, a law-enforcement official) to the back end of that process (while a sentence is being served).

Building upon this Australian model, a well-designed restorative-justice statute in a state would espouse the following as one of its aims: “to enable access to restorative justice and practices at every stage of the criminal-justice system.” This statutory provision would help ensure that not only restorative-justice conferences, but the full complement of restorative practices identified in the state’s restorative-justice statute, are available at all stages of the criminal-justice system. Family group decision-making would then, for example, be

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120. For a discussion of the ingredients of a “fully restorative” practice and why victim-offender mediation and community reparative boards generally do not fall within the category of fully restorative practices, see *supra* notes 70-75 and accompanying text.

121. See *supra* notes 58–61 and 63–65 and accompanying text.

122. *Crimes (Restorative Justice) Act 2004*, *supra* note 18, at s 6(d).

123. *Id.* at s 22, Table 22.

available at any stage in the criminal-justice process when needed or helpful to develop a plan to remedy underlying problems that contributed to an individual's choice to commit a crime—problems that, if unaddressed, increase the likelihood that the criminal behavior will recur.<sup>124</sup>

Further tracking the example of the Australian Capital Territory's Restorative Justice Act, a well-drafted state statute would include another recommended provision—a list of the stages of the criminal-justice process when victims and those who harmed them can request restorative conferencing or access to other or additional restorative mechanisms. During any one of these identified stages, criminal-justice officials, judges, or others, such as caseworkers, could also refer a victim, the person who harmed the victim, or both for screening to determine whether they want to, and are ready to, participate in one or more of the many forms of restorative dialogue.

The statutory list denoting the stages of the criminal-justice process when a restorative practice can be accessed would confirm that the law is according access to the full bevy of restorative practices during the following criminal-justice stages:

1. *The law-enforcement stage*: The stage before a referral to a prosecutor.
2. *The pre-charge stage*: The stage after a prosecution referral but before the filing of a criminal charge.
3. *The post-charge, pre-conviction stage*: The stage after the filing of a criminal charge but before the person charged has pleaded, or been found, guilty.
4. *The post-conviction, presentencing stage*: The stage after a conviction but before imposition of the sentence.
5. *The stage when a sentence is being served*: The stage when a person is serving a community-based sentence (such as probation), a confinement sentence (prison or jail), or the conditional-release portion of a sentence (such as parole).
6. *The stage when a violation of a condition of probation, parole, or other conditional sentence has occurred*. By making restorative practices available during this stage, a restorative-justice conference, circle, or family group decision-making could be employed as part or all of the response to a violation of a term of a conditional sentence.

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124. For an overview of family group decision-making, see *supra* notes 46–53 and accompanying text.

*G. Statutory provision #7: The state and communities within the state must work together to ensure that restorative practices are integrated throughout the criminal-justice system and must perform their delineated responsibilities in the planning, implementation, evaluation, and funding of criminal-justice-related restorative practices.*

As mentioned earlier in this article,<sup>125</sup> structural support for criminal-justice-related restorative practices, including funding support, is weak in the United States. Correcting this void within a state and suffusing restorative practices throughout its criminal-justice system will require well-thought-out plans, the funding needed to implement them, care in their implementation, and ongoing evaluation to identify how to further fine-tune each plan and its implementation. The question is: What structure should be in place to foster the requisite planning, funding, careful implementation, and evaluation needed for restorative practices to flourish and a restorative ethos to permeate a state's criminal-justice system?

#### 1. A State-Local Partnership: The State's Role

This Article recommends that a state include several provisions in its restorative-justice statute that together create a state-local partnership to make restorative practices part and parcel of the criminal-justice system in the state. One provision would focus on the state's role in this endeavor. This provision would create a state-level planning entity responsible for providing the state support needed if restorative practices are not only to gain a foothold in criminal-justice systems but become a hallmark of them. Somewhat tracking the Colorado law creating a state-level Restorative Justice Coordinating Council,<sup>126</sup> this planning entity could potentially be called the State<sup>127</sup> Restorative Justice and Practices Coordinating Council (hereinafter "State RJ/RP Council").

Whatever the name of this planning entity, the statute should identify the individuals, by description or title, who would comprise its members. The purpose of this statutory prescription would be to ensure that key stakeholders are members of this planning entity, making it more likely that they understand restorative precepts, subscribe to them, and support their integration throughout the criminal-justice system. Below is an illustration of who might potentially be included on this statutory list:<sup>128</sup>

125. *See supra* notes 82–98 and accompanying text.

126. COLO. REV. STAT. § 13-3-116(1)(a) (2017).

127. The state's name could be added here in the state's restorative-justice law.

128. Colorado's restorative-justice statute requires that its Restorative Justice Coordinating Council include, among other specified persons, the six individuals with restorative-justice experience and expertise mentioned in the first three entries on this illustrative list. *See* COLO. REV. STAT. § 19-2-213(1)(c)(2)(e), (g), (l) (2016). Much of the rest of this list is drawn from the description of the State Criminal Justice Council in the American Bar Association's Model Adult

- A victims' representative with restorative-justice experience.
- Two members of a statewide organization (or organizations) whose primary purpose is to develop and implement RJ/RP programs.
- Three RJ/RP practitioners.
- A person with a felony conviction who has knowledge of, or experience with, restorative practices.
- A county sheriff.
- A chief of a city police department.
- A prosecutor.
- A criminal-defense attorney.
- A judge with jurisdiction in criminal cases.
- The head of a local probation office.
- The director of the department of corrections.
- The chair of the parole board or other entity responsible for community supervision following release from prison.
- The chairperson of a county board.
- A city government official.

The recommended statutory provision focusing on the state's role in importing restorative practices into the criminal-justice system would also outline the responsibilities of the State RJ/RP Council. Examples of these assigned duties include:

1. *State-level planning*: Developing a state-level plan to implement the restorative-justice act and aid communities in their integration of restorative practices into their criminal-justice systems.
2. *Monitoring and evaluation*: Overseeing the implementation of this state plan and evaluating the effects of the restorative-justice statute's implementation.
3. *Training*: Equipping, for example, the members of the community-level Restorative Justice and Practices Coordinating Councils discussed later in this article<sup>129</sup> to perform their RP-related planning, implementation, and other functions.
4. *Technical assistance*: Providing guidance to communities and answering questions that arise as they import restorative practices into their criminal-justice systems.

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Community Corrections Act. MODEL ADULT COMMUNITY CORRECTIONS ACT § III.B. (AM. BAR ASS'N 1992), [http://www.americanbar.org/content/dam/aba/directories/policy/1992\\_my\\_101d\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/1992_my_101d_authcheckdam.pdf) [<https://perma.cc/ZK96-G7XX>]. While the focus of the ABA Model Act is on expanding the availability and use of community-based sentencing options, the proposed restorative-justice statutes whose contours are fleshed out in this article would, like the ABA Model Act, have the aim of catalyzing statewide change in criminal-justice systems.

129. *See infra* notes 131–36 and accompanying text.



5. *Information clearinghouse*: Serving as a central repository of information about RJ/RP-related plans, practices, data collection, and evaluation in communities throughout the state.
6. *Funding*: Working with the state's legislature and governor to ensure that restorative justice and practices within criminal-justice systems in the state are adequately funded. Serving as the state entity that dispenses state funding to communities.
7. *Public education*: Informing the public about restorative justice and practices, the restorative-justice statute and its purposes, and the statute's implementation and impact in the state.
8. *Quality assurance*: Instituting a quality-assurance process to promote the refinement and improvement of the state's implementation of the restorative-justice statute on an ongoing basis.<sup>130</sup>

## 2. A State-Local Partnership: The Community's Role

Another structure-related section of a state's restorative-justice statute would focus on the community component of the state-local partnership designed to bring restorative practices into the forefront of the criminal-justice system in the state. The American Bar Association's Model Adult Community Corrections Act (the "ABA Act") contains a provision from which some insights that bear on this statutory provision can be gleaned.<sup>131</sup> The ABA Act requires each city and county to establish a local Community Corrections Board, adding that a local jurisdiction can combine with other local jurisdictions, such as another city or the county, in meeting this obligation.<sup>132</sup> Because so much of the criminal-justice system into which restorative practices would be folded operates or is most impactful at the local level, a state's restorative-justice statute could follow this model, requiring that each community establish a local RJ/RP Coordinating Council. The restorative-justice statute, like the ABA Act, could also be crafted flexibly enough to allow local jurisdictions, if they choose, to collaborate in planning and implementing restorative justice and practices.

In order for the aims of the state's restorative-justice statute to be realized, this local planning body, like its state-level counterpart, would need to include key stakeholders and be diverse in terms of members' experiences, expertise, and roles within the criminal-justice system or community. The state's statute should therefore contain a list of the individuals who, at a minimum, would serve as members of the community-level coordinating council. Since this list would not be all-inclusive, communities would still have the prerogative to include

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130. See MODEL ADULT COMMUNITY CORRECTIONS ACT, *supra* note 128, at § III.D (vesting the statewide planning entity established under the Model Act with many parallel responsibilities).

131. *Id.* at § III.B.

132. *Id.* at §§ I.B.1., IV.A.

other members in order to augment the effectiveness of the local coordinating council in that particular community.

The following list provides a starting point for discussions about who the state's restorative-justice statute should identify as essential members of a Community RJ/RP Coordinating Council:

- A victim with restorative-justice experience.
- Two RJ/RP experts or practitioners.<sup>133</sup>
- The local prosecutor.
- The public defender or a criminal-defense attorney designated by the local bar association.
- A circuit judge who handles criminal cases.
- A judge assigned to a restorative court or, if one does not exist in the community, a drug court, mental-health court, or other problem-solving court.<sup>134</sup>
- The head of the local probation office.
- The court administrator.
- The sheriff.
- A police chief.
- The chairperson of the County Board or other member of the County Board who has criminal-justice-related oversight responsibilities.
- A local mayor.
- At least two representatives of the community, one of whom has a prior felony conviction.

This section of the restorative-justice statute would also define the principal responsibilities of the Community RJ/RP Coordinating Councils. Examples of these core duties include:

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133. When the Community RJ/RP Coordinating Council is first instituted, there may not be two RJ/RP experts or practitioners within the community. The state's RJ/RP statute and the state-level plan developed to implement that statute can outline ways, in that event, for RJ/RP experts or practitioners from outside the community to participate in the initial planning phase of the Community Coordinating Council's work.

134. The traditional focus of most courts is on the adjudication of a matter in controversy and, in the criminal-justice context, the imposition of punishment for a crime. Douglas B. Marlowe et al., *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Courts in the United States*, NAT'L DRUG COURT INST. 12 (2016), <https://www.ndci.org/wp-content/uploads/2016/05/Painting-the-Current-Picture-2016.pdf> [<https://perma.cc/ZCP3-DQLU>]. By contrast, problem-solving courts, as their name suggests, address problems, such as a behavioral-health disorder, that led to the commission of a crime. SUZANNE M. STRONG ET AL., U.S. DEP'T OF JUSTICE, CENSUS OF PROBLEM-SOLVING COURTS, 2012, at 1 (2016), <https://www.bjs.gov/content/pub/pdf/cpsc12.pdf> [<https://perma.cc/2TEG-6C5H>]. A judge assigned to a problem-solving court therefore has extensive experience working in a milieu that, like a restorative court, focuses on needs beyond those that are legal.

1. *Community-level planning*: Developing a comprehensive plan for the community that accords with the state's restorative-justice statute and the statewide plan developed by the State RJ/RP Council. A community plan would, for example, identify the steps and timetable to bring a broad range of restorative practices (recommended statutory provision #5<sup>135</sup>) into all stages of the community's criminal-justice system (recommended statutory provision #6<sup>136</sup>).
2. *Monitoring and evaluation*: Overseeing the implementation of the community-level plan, ensuring that it is being implemented in accordance with the RJ/RP state-level and community-level plans, and evaluating the effects of the plan's implementation.
3. *Training*: Ensuring that judges, criminal-justice officials, and others involved in RJ/RP-related planning or the incorporation of restorative practices into the criminal-justice system are well trained to perform their RJ/RP-related functions.
4. *Funding*: Working, in concert with the State RJ/RP Council, to ensure that the amount of funds allocated for restorative justice and practices is adequate to achieve their purposes.
5. *Public Education*: Informing members of the community about restorative justice and practices, the restorative-justice statute and its purposes, the community-level plan developed pursuant to that statute, and the implementation and impact of the community-level plan.
6. *Quality assurance*: Instituting a quality-assurance process to promote the refinement and improvement of the community-level plan on an ongoing basis.

### 3. Funding

As discussed earlier,<sup>137</sup> grants and user fees are primary funding sources for the importation of restorative practices into criminal justice. Such transitory funding is a hindrance both to the development and permanency of restorative responses to crime. Those drafting a state's restorative-justice act will therefore need to tackle the subject of funding for restorative justice and practices if restorative criminal-justice systems statewide and nationwide are to become a reality, not just a pipe dream. Two recommendations to be considered when drafting the funding section of a state's restorative-justice statute are briefly spotlighted below.

First, the state's statute should direct that state and local funds be earmarked for restorative justice and practices in a way and amount that promote their permanency as core features of criminal justice. The state's restorative-justice

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135. See *supra* notes 119–21 and accompanying text.

136. See *supra* notes 122–24 and accompanying text.

137. See *supra* notes 82–85 and accompanying text.

statute should then outline specifics about how the mechanisms for funding restorative practices will be contoured to realize this aim, as well as ensure that restorative practices permeate all stages of a criminal-justice system. One possible option is to specify in the restorative-justice statute that a defined percentage of the state or local funds allocated for a particular stage of the criminal-justice process, such as law enforcement or prosecution, be reserved for the implementation of restorative practices during that stage.

Second, a state's restorative-justice statute should require that restorative-justice conferences and other restorative practices be provided to participants without cost. Statutes in Delaware and Tennessee already contain an analogous provision (though one only mentioning victim-offender mediation), conditioning eligibility for state funding of victim-offender mediation programs on making the mediation available "without cost to the participants."<sup>138</sup> Such a statutory ban on the imposition of user fees would help ensure constancy in the availability of funding for restorative practices. This ban would also avert other concerns that have been raised about imposing fees on people within the criminal-justice system to defray the costs of that system.<sup>139</sup> One example of these concerns is that the financial burden of fees is an impediment to the efforts of low-income people to rebuild their lives following a criminal conviction.<sup>140</sup>

### III. CONCLUSION

This study's examination of the restorative-justice laws that have thus far been enacted in the United States has revealed that they not only fail to support restorative practices in a way that will enable them to become rooted in the culture of criminal-justice systems but that they are commonly drafted in contravention of basic restorative precepts, such as the tenet that participation in

138. DEL. CODE ANN. tit. 11, § 9502(b)(4) (2019); TENN. CODE ANN. § 16-20-102(b)(3) (2009).

139. For a canvassing of these concerns, see, for example, Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and The Barriers to Re-Entry They Create*, NAT'L INST. OF JUST. (2017), <https://www.ncjrs.gov/pdffiles1/nij/249976.pdf> [<https://perma.cc/F6WP-GTT6>]; Arthur W. Pepin, *The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations*, CONFERENCE OF STATE COURT ADM'RS (2016), <https://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx> [<https://perma.cc/68HW-PPD6>]; COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [<https://perma.cc/V75F-RFSN>]; *In for a Penny: The Rise of America's New Debtors' Prisons*, ACLU (2010), [https://www.aclu.org/sites/default/files/field\\_document/InForAPenny\\_web.pdf](https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf) [<https://perma.cc/A5E8-VYSG>]; and Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUSTICE (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf) [<https://perma.cc/D9CW-YXV4>].

140. See, e.g., Bannon et al., *supra* note 139, at 2, 27–29.

restorative practices must be voluntary. This Article provides guidance to aid in the much-needed revamping and enactment of restorative-justice laws to redress these problems. The recommended statutory provisions previewed in this Article would:

- Require that participation in a restorative practice be voluntary and affirm that consent to participate can be withheld or withdrawn at any point without penalty.
- Require that consent to participate in a restorative practice be informed and spell out information that must be relayed for consent to be considered informed.
- Treat statements and records from a restorative process as confidential and privileged, subject to several limited exceptions.
- Require that restorative practices be available for all types of crimes.
- Provide for the implementation of a wide array of restorative practices throughout the criminal-justice system.
- Provide access to restorative justice and practices at every stage of the criminal-justice process.
- Establish a state-level RJ/RP planning body and define the state's responsibilities in the planning, implementation, evaluation, and funding of criminal-justice-related restorative practices.
- Require the establishment of community-level RJ/RP planning bodies and define their responsibilities in the planning, implementation, evaluation, and funding of criminal-justice-related restorative practices.

The careful honing of these and other provisions in states' restorative-justice laws would help suffuse restorative practices throughout criminal-justice systems and communities' responses to crime. These laws would bring us one step closer to a "new reality"<sup>141</sup> marked by a societal commitment to the prevention and repair of harm, promotion of civil and constructive dialogue, and fostering of strengthened and repaired relationships—a reality for which hurting individuals, fractured communities, and a divided country yearn.

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141. TED WACHTEL, *DREAMING OF A NEW REALITY: HOW RESTORATIVE PRACTICES REDUCE CRIMES AND VIOLENCE, IMPROVE RELATIONSHIPS AND STRENGTHEN CIVIL SOCIETY* 3 (2013).