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Taking Restorative Justice Seriously

Adriaan Lanni
Harvard Law School

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Taking Restorative Justice Seriously

ADRIAAN LANNI†

Those seeking to reduce mass incarceration have increasingly pointed to restorative justice—an approach that typically brings those affected by a criminal offense together in an attempt to address the harm caused by the offense rather than to mete out punishment. This Article is an attempt to think seriously about incorporating restorative justice throughout the criminal legal system. For restorative justice proponents, expanding these practices raises a host of questions: Does the opportunity to alleviate mass incarceration justify collaboration with a deeply flawed criminal legal system? Will the threat of criminal prosecution destroy the voluntariness and sincerity that is essential for a successful restorative process? Can restorative justice be successfully used in cases where the victim cannot participate or there is no identifiable victim, as in drug offenses? Will the process be coopted by bureaucratic impulses? Restorative justice skeptics may ask whether applying a restorative approach to the most serious crimes will jeopardize the deterrent value of criminal law and lead to outcomes that are vastly disproportionate. Those both inside and outside the movement will ask whether restorative justice can be implemented in a way that protects defendants' procedural rights and is racially equitable. I explore the choices and trade-offs that would be involved in expanding restorative justice to significantly reduce incarceration. I argue that

† Touroff-Glueck Professor of Law, Harvard Law School; Volunteer Case Coordinator with Communities for Restorative Justice. All opinions expressed in this piece are mine alone. I am grateful to Glenn Cohen, Richard Fallon, John Goldberg, David Harris, Gerry Johnstone, Erin Kelly, Wes Kelman, Sharyn Lowenstein, Eric Miller, Martha Minow, Daniel Richman, Carol Steiker, Matthew Stephenson, and the members of the Harvard Law School Faculty Workshop for comments and suggestions. Lily Cohen, Alyx Darenbourg, Michael Gioia, Allison Miller, Alex Ropes, and Abbie Starker provided excellent research assistance.

restorative justice can be expanded without significant adverse impacts on due process, racial equity, and proportionality. At the same time, vastly expanding restorative justice entails compromising some key features of restorative justice. I suggest that the disadvantages of expansion are significant, but are outweighed by the moral imperative to experiment with alternatives to mass incarceration.

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In recent years, there has been growing bipartisan support for reforming a criminal legal system that is widely regarded as racially discriminatory, overly punitive, and ineffective. Public opinion studies show growing dissatisfaction with this system, and support for rehabilitative and non-custodial approaches.¹ But most reform proposals offer little hope of significantly alleviating mass incarceration because they tend to be limited to non-violent offenders or to drug offenders.² Any reform that seeks to have a meaningful impact on incarceration will need to include violent offenses: the majority of the nation's state prisoners were convicted of violent offenses,³ and one-quarter of violent offenders are serving a life sentence.⁴

Can restorative justice offer a way forward? Restorative justice takes many forms, but in the criminal context it typically involves a meeting between the victim,⁵ the offender, and other members of the community. In this meeting, the offender expresses remorse for the harm caused and the group agrees on actions the offender can take to repair the harm and prevent re-offending. Restorative programs can be used as a form of diversion from the criminal process, as an alternative form of sentencing, or, in more serious cases, as a way to reduce the criminal sentence. Proponents argue that restorative processes offer victims more satisfaction than the criminal process and do a better job of holding the offender accountable while promoting reintegration and avoiding or reducing incarceration.

Most restorative justice programs in the United States are diversion programs for minor or juvenile offenders.⁶ But restorative justice need

1. David R. Karp & Olivia Frank, *Anxiously Awaiting the Future of Restorative Justice in the United States*, 11 *VICTIMS & OFFENDERS* 50, 51–52 (citing studies); see Heather Strang & Lawrence Sherman, *Repairing the Harm: Victims and Restorative Justice* 2003 UTAH L. REV. 15, 19–20 (2003).

2. JAMES FORMAN, *LOCKING UP OUR OWN* 220–21, 230–31 (2017).

3. *Id.* at 220–21, 230.

4. NAZGOL GHANDNOOSH, *THE SENTENCING PROJECT, THE NEXT STEP: ENDING EXCESSIVE PUNISHMENT FOR VIOLENT CRIMES* 8 (2019).

5. Many restorative justice practitioners avoid using the term “victim” and “offender” because the two categories are often not as distinct as these labels suggest, and because both “victim” and “offender” can be stigmatizing labels. “Responsible party” and “impacted party” are often used as replacements. I support this approach and use these terms in my practice but use victims and offenders in this Article to avoid confusion for readers who are unfamiliar with the field.

6. See William Wood, *Why Restorative Justice Will Not Reduce Incarceration*, 55 *BRIT. J. CRIMINOLOGY* 883, 887 (2015).

not be limited to minors or to non-violent offenses. In New Zealand, all cases must be evaluated prior to sentencing for referral to a restorative process; the results of that process must be taken into account in the judge's sentencing decision.⁷ Moreover, restorative justice is mandatory for all serious youth offenses in New Zealand, except murder and manslaughter.⁸ Restorative theory predicts that a restorative encounter will be more meaningful in cases of violence, precisely because hearing about the impacts of a violent crime directly from the victim is apt to make a stronger impression on offenders. And empirical studies of existing programs find that restorative programs are more effective at reducing recidivism when the case involves violent crimes rather than property crimes, and are slightly more effective for adult serious offenders than for juveniles.⁹

In recent years, restorative justice has been increasingly discussed as part of criminal justice reform. Between 2010 and 2015, fifteen states passed laws supporting restorative justice, though this legislation did little to change its focus on minor offenses.¹⁰ But reform advocates are increasingly looking to restorative justice as part of the answer to mass incarceration. Michelle Alexander, the author of *The New Jim Crow*, has endorsed the use of restorative justice for violent crime in a recent New York Times editorial.¹¹ And the George Floyd protests revealed broad-ranging support for a significant rethinking of policing and the criminal process.

This Article is an attempt to think seriously about whether and how to incorporate restorative justice throughout our criminal legal system. I explore the choices and trade-offs that would be involved in expanding restorative justice to significantly reduce incarceration. For those in the

7. Sentencing Act 2002, s 24A (N.Z.).

8. ALLAN MACRAE & HOWARD ZEHR, *THE LITTLE BOOK OF FAMILY GROUP CONFERENCES* 14 (2004).

9. HEATHER STRANG, *RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-TO-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION* 2627 (2013); see discussion *infra* Part II.A.

10. Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 893 (2019). For an exhaustive study of the incorporation of restorative justice into state law, see generally Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027 (2019).

11. Michelle Alexander, *Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html>.

restorative justice community, using these practices throughout the criminal legal system raises a host of questions: Does the opportunity to alleviate mass incarceration justify collaboration with a deeply flawed system? Will the threat of criminal prosecution destroy the voluntariness and sincerity that is essential for a successful restorative process? Can restorative justice be successfully used in cases where the victim cannot participate or there is no identifiable victim, as in drug offenses? Will the process be coopted by court officials and bureaucratic impulses? And at the other end of the spectrum, skeptics of restorative justice may ask whether applying a restorative approach to the most serious crimes will jeopardize the deterrent value of criminal law and lead to outcomes that are vastly disproportionate. Those both inside and outside the movement will ask whether restorative justice can be implemented in a way that protects defendants' procedural rights and is racially and socioeconomically equitable.

The answers to many of these questions involve a series of trade-offs. Pre-charge restorative diversion programs are less coercive than programs that require defendants to plead guilty to participate, yet they also operate without judicial oversight and may be completed before a defense attorney is appointed to represent the offender. Using surrogate victims—that is, victims of similar crimes rather than the offender's actual victim—makes it possible to vastly expand the use of restorative justice in criminal cases, but also risks turning the process into a form of offender rehabilitation without any benefit to the actual victim. Ensuring equal access to restorative justice may require large-scale implementation of restorative justice programs that may compromise quality and attention to local community concerns. Perhaps most significantly, garnering sufficient support for applying restorative justice to serious, violent crimes may require supplementing restorative outcomes with traditional punishments, including incarceration—even though a key feature of restorative justice has always been its emphasis on healing and reintegration rather than punishment. In short, proposing to expand restorative justice is to invite attack from all sides—from the proponents of preserving “pure” restorative justice as well as from the defenders of traditional criminal adjudication.

This Article seeks to map out the choices and tradeoffs involved in trying to use restorative justice to significantly reduce incarceration. Moving farther away from a purist approach to restorative justice often yields more opportunities to expand restorative justice's impact on mass incarceration. While I do not offer a view on how every tradeoff should

be resolved, I do draw some tentative conclusions. I argue that restorative justice can be expanded without significant adverse impacts on due process, racial equity, and proportionality. If restorative justice is vastly expanded, the greatest challenge may be maintaining quality and attentiveness to local community concerns and avoiding bureaucratization. And the biggest unknown is the effect replacing incarceration with restorative justice will have on deterrence and community safety. Yet overall, the risks and disadvantages of expansion are outweighed in my mind by the moral imperative to take a hard look at alternatives to mass incarceration. Potential reform approaches should be compared not to an ideal system but to the deeply-flawed status quo. And we should not insist on certainty or perfect evidence before experimenting with alternatives, at least on a modest scale.

Part I briefly introduces the theory and practice of restorative justice. Part II examines the tradeoffs involved in incorporating restorative justice into the criminal legal system. Part III examines the prospects for using restorative justice where the victim cannot participate or where there is no readily identifiable victim, as in drug offenses. Part IV explores how to expand restorative justice in a way that is racially and socioeconomically equitable. Part V responds to skeptics' concerns that replacing our punitive approach with a restorative one will fail to deter crime and will produce outcomes that are disproportionately lenient, particularly in the case of serious violence.

I. RESTORATIVE JUSTICE: THEORY AND PRACTICE

The modern restorative justice movement stems from a variety of practices developed in very different contexts.¹² For this reason, there is no authoritative theory or agreed-upon definition of restorative justice. Restorative approaches share the view that the proper response to an offense should focus not on punishment, but on meeting the needs of the victim, holding the offender accountable for the harm caused, taking steps to repair as much as possible the harm suffered by the victim and the community, and addressing the offender's needs to prevent reoffending and promote reintegration.¹³ Some proponents also seek to incorporate

12. Carolyn Boyes-Watson, *Looking at the Past of Restorative Justice: Normative Reflections on its Future*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF RESTORATIVE JUSTICE 7, 7–14 (Theo Gavrielides ed., 2019) (discussing the development of the modern restorative justice movement and its indigenous roots).

13. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 25 (2002).

aspects of “transformative justice”¹⁴ by seeking community as well as individual accountability and attempting to repair as much as possible the harms revealed by the offense, including structural injustices that contribute to crime.¹⁵

Theorists disagree about whether restorative justice should be characterized primarily as a process or as an outcome and set of values that are being pursued. Process-based theorists view an encounter between the victim and the offender as central, while outcome-based theorists focus on the goal of repairing the harm resulting from the offense and pursuing restorative values of healing and reintegration rather than punishment.¹⁶ This distinction is important for us, because purists who emphasize process might exclude practices that do not involve an encounter with the direct victim or that address “victimless” crimes.¹⁷ Conversely, some proponents with a strong values-based approach might balk at the use of restorative justice in conjunction with sentences of incarceration.

While some purists may insist on particular features, many theorists view restorative justice as a continuum, with most programs exhibiting varying degrees of restorative process and values.¹⁸ We will see that a relatively broad and flexible conception of restorative justice would be necessary if these programs are to be scaled up to have a meaningful impact on incarceration. For our purposes, Zehr’s flexible definition is perhaps the most useful: “Restorative justice is an approach to achieving

14. Ruth Morris offers one definition of transformative justice: “[T]ransformative processes enable the wider community to participate in denouncing crime, supporting victims, and building true solutions. They also enable the wider community to take responsibility for the underlying causes of crime: poverty, abused children, unemployment, and other deep social problems.” RUTH MORRIS, *STORIES OF TRANSFORMATIVE JUSTICE* 254 (2000).

15. On restorative justice as a form of transformative justice, see M. Kay Harris, *Transformative Justice: The Transformation of Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE* 555, 563–65 (Dennis Sullivan & Larry Tifft eds., 2006). On how restorative justice can incorporate transformative elements, see discussion *infra* Part IV.B.

16. Heather Strang & John Braithwaite, *Introduction*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 1,1 (Heather Strang & John Braithwaite ed., 2001); see ROSS LONDON, *CRIME, PUNISHMENT, AND RESTORATIVE JUSTICE* 23–24 (2011).

17. Margarita Zernova & Martin Wright, *Alternative Visions of Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE* 91, 91–92 (Gerry Johnstone & Daniel W. Van Ness ed., 2007) (describing purist and maximalist definitions of restorative justice).

18. *Id.* at 91–92; Daniel W. Van Ness, *Creating Restorative Systems*, in *RESTORATIVE JUSTICE AND THE LAW* 130, 131–35 (Lode Walgrave, ed., 2002); Strang & Braithwaite, *supra* note 16, at 1–3.

justice that involves, to the extent possible, those who have a stake in the specific offense or harm to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”¹⁹

A. *The Case for Restorative Justice*

Let me begin with a personal story—one that may help illustrate some of the advantages of restorative justice compared to the criminal process. For the past few years I have worked as a volunteer case coordinator with Communities for Restorative Justice, a Massachusetts non-profit that takes referrals from police departments and prosecutors. One of the first cases I worked on involved a teenager (let’s call him “James”) who was smoking pot with friends late at night when they decided to stick someone up as a prank. They confronted a man (“Michael”) as he was walking home. When Michael refused to give them money, James pulled out a BB gun. Michael ran away and contacted the police, who arrested James soon after. James thought Michael should have realized it was a prank since he and his friends were laughing and it was a BB gun. For his part, Michael was afraid that he might be shot in the back at any moment as he ran away and continued to experience fear and symptoms of post-traumatic stress disorder months after the incident.

At the restorative justice circle James explained that he had himself been traumatized after having a gun pulled on him, and he said he was sorry that he had caused another person to suffer in that way. Michael said afterward that meeting James made him feel less afraid when he thought about the incident. After hearing about the economic and other challenges James and his mother had faced, he came away from the circle with empathy for James rather than anger. I can’t explain exactly why or how—maybe it was the way James’s mom wrapped Michael up in a hug at the end—but James’s case inspired me. I walked into that room with curiosity and hope, but also with the skepticism of an academic; I walked out with a firm belief in the transformative potential of restorative justice.

James’s case illustrates some of the key claims made by restorative justice proponents: that restorative justice better meets the needs of victims and does a better job of holding offenders accountable than the criminal process while promoting reintegration and avoiding incarceration and other criminal punishments.²⁰

19. ZEHR, *supra* note 13, at 37.

20. GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 2 (2002);

The circle gave Michael the opportunity to ask James questions about the incident, to express his feelings about the crime and have those feelings recognized and validated, and to have a meaningful impact on the resolution of the case. Restorative justice proponents contend that these aspects of the restorative process assist in recovery by helping victims overcome a feeling of powerlessness and regain a sense of control, and by helping to restore victims' faith in society by acknowledging the wrong that has been committed.²¹

By contrast, a traditional court process would not have provided these benefits to Michael, and might have even made things worse.²² Cases that are resolved by guilty plea offer little to victims, particularly where the plea deal involves a lesser charge that does not describe the full extent of the harm committed.²³ And trials can be psychologically harmful, particularly for victims who testify.²⁴ Moreover, restorative justice proponents point out that victims' desire for safety and justice does not necessarily mean that they want offenders to suffer long terms of incarceration.²⁵ In fact, surveys of crime victims indicate that many victims prefer a justice system focused on rehabilitation over punishment, favor non-custodial forms of accountability, and believe that prison is more likely to make people commit crimes than to rehabilitate them.²⁶

HOWARD ZEHR, *CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES* 19–50 (2015); DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND THE ROAD TO REPAIR* 17–49, 91–128 (2019).

21. SERED, *supra* note 20, at 23–31; ZEHR, *supra* note 20, at 31–35; DAVID O'MAHONEY & JONATHAN DOAK, *REIMAGINING RESTORATIVE JUSTICE* 44 (2017). For a discussion of scientific literature suggesting that the passive role assigned to victims in the criminal process can be harmful, while a more active role that promotes a sense of control fosters victim recovery, see Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 *HASTINGS L.J.* 457, 462–63 (2006).

22. On the potential for the criminal process to revictimize crime survivors, see ZEHR, *supra* note 20, at 36; SERED, *supra* note 20, at 30–33.

23. See Strang & Sherman, *supra* note 1, at 21; SERED, *supra* note 20, at 30–33.

24. SERED, *supra* note 20, at 31; Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 *J. TRAUMATIC STRESS* 182, 184 (2010); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 *SOC. JUST. RSCH.* 313, 314 (2002); Patricia A. Resick, *Psychological Effects of Victimization: Implications for the Criminal Justice System*, 33 *CRIME & DELINQ.* 468, 475 (1987).

25. SERED, *supra* note 20, at 29; Strang & Sherman, *supra* note 1, at 17–18; ZEHR, *supra* note 20, at 195; see also T. Van Camp & J.A. Wemmers, *Victim Satisfaction with Restorative Justice: More than Simply Procedural Justice*, 19 *INT'L REV. VICTIMOLOGY* 117, 126–27 (2013) (noting that victims most commonly seek validation rather than retribution).

26. ALL. FOR SAFETY & JUST., *CRIME SURVIVORS SPEAK* 14, 15, 16, 20 (2016).

Empirical research supports the claim that restorative justice offers more to victims than the criminal process. Multiple randomized control studies have found that restorative justice outperformed the criminal process on a variety of metrics related to victims' psychological well-being and sense of fairness.²⁷ For example, a multi-year randomized study from Australia of cases involving personal property crime and mid-level violent offenses found significant psychological benefits for victims who participated in restorative justice: victims of violent crimes who went to court were five times more likely to believe they would be revictimized by the offender than victims whose cases were referred to restorative justice.²⁸ Similarly, this study found that victims who participated in a restorative conference felt more secure, less anxious, less afraid of the offender, and had a greater sense of closure than those whose cases were resolved in the criminal process.²⁹

The restorative circle also provided a better way of ensuring accountability and reintegration for James than the criminal process. After hearing how seriously the incident had affected Michael, James could not rationalize or minimize the incident as a harmless prank.³⁰ The process helped him understand the full impact of his actions, accept responsibility, express sincere remorse for the harm caused, and take steps to try to repair the harm and avoid reoffending.

When talking about offenders taking responsibility, it is important to note that restorative justice requires abandoning a narrow individualistic conception of blame. These traditional notions of blame

27. Strang & Sherman, *supra* note 1, at 25–33; Caroline Angel et al., *Short Term Effects of Restorative Justice Conferences on Post-Traumatic Stress Symptoms Among Robbery and Burglary Victims: A Randomized Control Trial*, 10 J. EXPERIMENTAL CRIMINOLOGY 291, 292 (2014) (finding that symptoms of post-traumatic stress disorder were significantly lower in victims of burglary and robbery who were randomly assigned to a restorative process); Barton Poulson, *A Third Voice: A Review of Empirical Research on Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 172, 179, 181, 188 (2003) (discussing randomized control study of family conferencing program which found that victims who experienced the restorative process were more satisfied than those whose cases were assigned to court (ninety-six percent vs. seventy-six percent), were more likely to think their case was handled fairly (ninety-six percent vs. eighty percent), and were more likely to think the offender was adequately held accountable for the offense (ninety-three percent vs. seventy-five percent)).

28. Strang & Sherman, *supra* note 1, at 25–29.

29. *Id.* at 29–33.

30. For a discussion of how hearing from victims can help cut through the natural tendency to minimize or rationalize harm, see ZEHR, *supra* note 20, at 61; JOHNSTONE, *supra* note 20, at 96–100; SERED, *supra* note 20, at 92.

are too far removed from offenders' own understanding of their conduct to promote sincere remorse.³¹ Restorative justice aims to have offenders accept responsibility for the choices they make, while recognizing that those choices may be constrained by social and economic conditions and influenced by the offender's own experience of trauma and victimization. As Danielle Sered explains,

[a]t its best, restorative justice challenges and allows us to hold seemingly contradictory truths at the same time. Restorative justice allows us to acknowledge that the context in which harm takes place is almost never right or fair, and still, even within that context, each one of us is responsible for carving out the most ethical, most righteous lives we can. It honors each person's dynamism and self-determination while never pretending we exist independent of our context or our (often unjust) constraints.³²

Minow's concept of the use of "concentric circles" of responsibility in restorative justice is instructive: circles widen the focus beyond the wrongdoer "not to excuse the person immediately responsible but to clarify the interconnections between people, forces, and structures that contributed to the wrong, as well as who can make a difference in the future."³³ In this sense, restorative justice can be viewed as furthering the aims of transformative justice by seeking community accountability for structural injustices that contribute to crime as well as individual accountability.³⁴

In contrast to the restorative approach's focus on accountability, the adversarial criminal process encourages offenders like James to deny responsibility.³⁵ Except in the few cases that go to trial, defendants never hear an account of the impact their actions have had on the victims.³⁶ Offenders often feel, with some justice, that the way they have been treated in the criminal process and/or the sentence they have received is unfair. Preoccupation with their own mistreatment distracts offenders from accepting responsibility for their actions and experiencing remorse

31. ZEHR, *supra* note 20, at 74–77; JOHNSTONE, *supra* note 20, at 90.

32. SERED, *supra* note 20, at 154.

33. MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 153–54 (2019).

34. On restorative justice as a form of transformative justice, see Harris, *supra* note 15, at 563–65. On how restorative justice can incorporate transformative elements, see discussion *infra* Part IV.B.

35. ZEHR, *supra* note 20, at 45–47; SERED, *supra* note 20, at 92–94.

36. ZEHR, *supra* note 20, at 47; SERED, *supra* note 20, at 93–94.

for the harm they have caused.³⁷ As far as I could tell, James didn't feel the kind of bitterness that many defendants feel about how the "system" treated them unfairly and mischaracterized what they did and who they are.

The restorative process also offered James an opportunity to move on from the offense and be reintegrated into the community—a sharp contrast with the punishment and alienation that typically accompanies a criminal conviction. In the weeks following the circle, James wrote an apology letter to Michael and to his own mother, did community service, and worked with program facilitators on cognitive reflective exercises to make better decisions in the future.³⁸ Although returning to high school was not part of his restorative agreement, in the course of the program James identified this as a goal and re-enrolled, a far different outcome from what he might have experienced in the criminal process, where he was facing charges that could have resulted in significant prison time.

How can a restorative process satisfy the natural human instinct for justice in the face of criminal wrongdoing, an instinct that has traditionally been addressed by imposing punishment on offenders? What distinguishes criminal harm from other types of physical and material harm is the moral or expressive injury that accompanies it: the offender has shown contempt for the rights of the victim and for society's rules.³⁹ Traditional punishment is one way for society to correct this false message by expressing condemnation for the offender's actions.⁴⁰ But another, arguably more direct and more satisfying, approach to correcting this expressive harm is for the offender himself to acknowledge the harm caused and the wrong done; to "even the score" by apologizing to the victim, expressing remorse, and voluntarily trying to repair the harm; and

37. ZEHR, *supra* note 20, at 46–47.

38. Restorative agreements vary with each case, but typically involve symbolic reparation in the form of an apology, community service, and material restitution if the victim has suffered financial losses. Agreements often also include items aimed at addressing the underlying causes for the offending such as mental health or drug treatment, counseling, education, job training, and reflective exercises that may promote individual skills like decision-making, goal-setting, recognizing multiple perspectives, and upstanding, as well as reflection on bias, systemic injustice and their historical roots. For an example of an extensive restorative agreement in an assault case, see SERED, *supra* note 20, at 144.

39. Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 1 UTAH L. REV. 303, 306–07 (2003).

40. *Id.* at 308.

to reaffirm society's rules by agreeing to abide by them in the future.⁴¹ Recognizing that the process of acknowledging responsibility and repairing harm can be onerous, some theorists contend that restorative justice does effectively involve punishment, albeit in a very different form from incarceration.⁴² For those who consider a restorative approach insufficient to satisfy the desire for justice for the most serious crimes, I consider the possibility of using restorative justice to reduce, but not eliminate, traditional punishments like incarceration in cases of serious violence in Part V.C.

How do restorative encounters reform offenders? There are two primary theories. Braithwaite's reintegrative shaming theory⁴³ argues that restorative justice works because it emphasizes the wrongfulness of the offense while still maintaining respect for the offender. The participation of family members and other people the offender respects and trusts in a non-stigmatizing atmosphere can help the offender accept responsibility and feel remorse for the harm caused. Offenders who express remorse and work to repair the harm are forgiven and reintegrated into the community of law-abiding citizens. According to this theory, both the moral lessons learned in the restorative process and the feeling of being welcomed back into the community rather than stigmatized reduce the likelihood of reoffending. A related and complementary theory for why restorative justice works is procedural justice theory, which holds that citizens are more likely to comply with the law when they believe they are treated fairly in the criminal process.⁴⁴ Under this theory, offenders' voice, participation, and meaningful input in a restorative process that

41. See, e.g., ZHR *supra* note 20, at 238 (describing how restorative and retributive justice use different means to achieve the same goal of vindicating the victim).

42. Jim Dignan, *Towards a Systemic Model of Restorative Justice: Reflections on the Concept, its Context, and the Need for Clear Constraints*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 135, 135–36 (Andrew von Hirsch et al. eds., 2003). Some theorists argue that true restoration requires retributive punishment in the form of being censured for wrongdoing and making reparation; under this view, restorative processes are not “alternatives to punishment” but “alternative punishments.” R. A. Duff, *Alternatives to Punishment or Alternative Punishments?*, in *RETRIBUTIVISM AND ITS CRITICS* 43 (Wesley Cragg, ed. 1992); see also R.A. Duff, *Restorative Punishment and Punitive Restoration*, in *RESTORATIVE JUSTICE AND THE LAW* 82, 96–97 (Lode Walgrave, ed., 2002). See generally Garvey, *supra* note 39.

43. JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 74–78 (2002).

44. See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990); TOM TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002).

they perceive to be fair will improve their respect for and compliance with the law.⁴⁵

Does restorative justice reduce recidivism? While reducing recidivism is not a primary goal of restorative justice, restorative programs are often promoted as a better way to reduce repeat offending than the criminal legal system.⁴⁶ Proponents point out that the criminal legal system has not been very effective at preventing reoffending.⁴⁷ As discussed in more detail in Part V.A, rigorous studies of restorative processes involving encounters between victims and offenders tend to show a reduction in reoffending compared to typical court processes.⁴⁸ Interestingly, restorative encounters seem to be more effective at reducing recidivism in cases involving violent crimes than property crimes, and slightly more effective for adult serious offenders than for juveniles.⁴⁹ The case for restorative justice is not that it promises to radically reduce recidivism, but that it offers a better way to do justice while doing no worse, and likely at least modestly better, than the criminal legal system at reducing recidivism.

B. *How Is Restorative Justice Currently Used in the Criminal Legal System?*

Restorative practices regularly operate in schools, workplaces, and communities to respond to conflict, to promote healing, and to build community. I focus here on restorative programs that operate within or in conjunction with the criminal legal system. Most of these programs are

45. Braithwaite, *supra* note 43, at 78–79. For discussion of a randomized study that found that offenders who experienced restorative justice experienced a greater sense of procedural justice than those whose cases were processed in court, see Poulson, *supra* note 27, at 179, 185, 186.

46. ZEHR, *supra* note 13, at 9–10.

47. E.g., Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48, 51 (2011); BUREAU OF JUSTICE STATISTICS, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) 1 (2018) (finding a one-year recidivism rate of forty-four percent and a three-year recidivism rate of sixty-eight percent).

48. E.g., Lawrence Sherman et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending?* 31 J. QUANTITATIVE CRIMINOLOGY 1, 1 (2014). By “rigorous” I mean randomized control studies and studies that use the “PICO” (population, intervention, comparison, and outcome) principle used by the UK National Institute of Health and Clinical Excellence to assess the effectiveness of medical treatments. For an in-depth discussion of recidivism and restorative justice, see discussion *infra* Part V.A.

49. STRANG ET AL., *supra* note 9, at 27, 48.

modelled on one of two major restorative practices, which are broadly similar to one another.⁵⁰ The first type is the family group conference, which was developed in New Zealand and draws in part on Maori traditions. Family group conferences are often facilitated by professional social workers and typically include the offender and their family, the victim and their supporters, a police representative, and sometimes a specially-trained lawyer called a youth advocate.⁵¹ The second type is the circle process, which has its roots in First Nations peacemaking practices. In addition to the victim, the offender, and their supporters, circles (unlike the New Zealand model) often include volunteers drawn from interested members of the community who serve as facilitators and participants.⁵² Most restorative justice programs are fairly small and operate through discretionary referrals from police, prosecutors, or judges. But a few countries, like New Zealand, have passed legislation making restorative justice nearly mandatory for some subset of offenses.⁵³

Restorative justice can be used at the pre-trial, sentencing, and post-sentencing stages of the criminal process. Restorative justice is very commonly used in pre-trial diversion programs for minor offenses.⁵⁴ Police may refer cases before or after an arrest; prosecutors may refer cases before or after a formal complaint has been filed; and juvenile court judges may refer cases after charges have been filed. Some of these programs require the defendant to plead guilty; others do not. Completion of the restorative agreement typically ends the matter (after review and approval by the court in cases where a complaint has been filed). The case is returned to the police or prosecutor if the restorative process is not successful for any reason.

50. Victim-Offender Dialogues are also used to address criminal offenses, but typically occur on an ad hoc basis after the criminal process is complete, and for this reason are beyond the scope of this Article.

51. JOHNSTONE, *supra* note 20, at 3; ZEHR, *supra* note 13, at 47–50.

52. See generally KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES* (2015).

53. MACRAE & ZEHR, *supra* note 8, at 13–17 (describing 1989 legislation providing for family group conferences for all serious juvenile non-homicide crimes in New Zealand); Carolyn Hoyle, *The Case for Restorative Justice*, in *DEBATING RESTORATIVE JUSTICE* 1, 29 (Chris Cunneen & Carolyn Hoyle eds., 2010) (describing 2002 legislation in Northern Ireland providing for restorative youth conferencing for nearly all juvenile offenses except those that would carry a life sentence if committed by an adult).

54. For a description of a typical juvenile diversion program, the Fresno county community justice conference program, see Mary Louise Frampton, *Finding Common Ground in Restorative Justice: Transforming our Juvenile Justice Systems*, 22 U.C. DAVIS J. JUV. L. & POL'Y 101, 104–105 (2018).

Restorative justice can also be used after a defendant has pled or been found guilty to inform the sentence imposed by the court.⁵⁵ Violent and other serious offenses are more commonly addressed in restorative processes at the sentencing phase than in diversion programs.⁵⁶ In Canada, sentencing circles are sometimes used to propose restorative agreement terms for the court to ratify or modify in its sentence.⁵⁷ In New Zealand, the Sentencing Act of 2002 mandates that criminal cases be adjourned prior to sentencing to be considered for a restorative process where the defendant pleads guilty and both the defendant and victim are willing to participate.⁵⁸ Under the Act, the sentencing judge must consider the defendant's participation in a restorative process and any agreements made during the process when formulating a sentence.⁵⁹ To give just one example, the High Court of New Zealand recently upheld a ten percent reduction in the length of imprisonment for participation in a restorative process in a case involving intentional infliction of grievous bodily harm, and suggested that a reduction of up to twenty percent for participation in restorative justice was reasonable.⁶⁰

A variety of restorative processes are also used in prisons. Depending on the program, participation may or may not influence early release decisions.⁶¹ The most common form of restorative justice found in prisons is programming designed to help offenders understand the impact of their crimes, typically by bringing offenders together with surrogate victims in a restorative dialogue and encouraging symbolic

55. The RISE program of the US District Court in Massachusetts offers one example. Defendants who have pled guilty and are on pre-trial release can apply to have their sentencing delayed for one year while they complete a probation program that includes restorative justice programming. Successful completion of the probation program is taken into account at sentencing. U.S. DISTRICT COURT, DISTRICT OF MASSACHUSETTS, RISE PROGRAM STATEMENT (2017); Telephone interview with Maria D'Addieco, RISE Probation Officer, (D. Mass) (Jan. 30, 2019).

56. Sara Sun Beale, *Still Tough on Crime: Prospects for Restorative Justice in the United States*, 1 UTAH L. REV. 413, 419 (2003) (noting that sentencing circles in Canada have addressed serious offenses, including sexual offenses).

57. JOHNSTONE, *supra* note 20, at 3.

58. Sentencing Act 2002 s 24A (N.Z.).

59. Sentencing Act 2002 s 10 (N.Z.).

60. *SG v. Heta*, [2018] NZHC 2453, at [65] (N.Z.).

61. See O'MAHONEY & DOAK, *supra* note 21, at 123–26, 148. See also generally Diane Crocker, *Implementing Restorative Justice Projects in Prison*, 28 CRIM. JUST. POL'Y REV. 45 (2015).

reparation like apologies.⁶² Mediated dialogues between offenders and their actual victims in homicide and other serious crimes is sometimes also done on an ad hoc basis in prisons.⁶³ Apology banks offer an option for indirect interaction between offenders and their victims: offenders can deposit apology letters that will only be sent to victims who request it. Finally, peacemaking circles and other restorative approaches are sometimes used to respond to conflicts that occur within the prison and to promote healing and rehabilitation.⁶⁴

II. RESTORATIVE JUSTICE WITHIN THE CRIMINAL LEGAL SYSTEM?

Should restorative justice programs operate as part of the criminal legal system, and, if so, how? Many early restorative justice proponents viewed restorative justice as a new paradigm that might replace the existing criminal legal system.⁶⁵ But as the idea of restorative justice has gained momentum, early abolitionist ideas have been increasingly joined by more pragmatic and incremental approaches that seek to expand the reach of restorative justice by integrating restorative processes into the existing criminal system.⁶⁶

Incorporating restorative justice into the criminal process raises a host of concerns. Restorative justice purists worry that restorative processes cannot be truly voluntary when the results may affect a criminal disposition, that the process may be co-opted by court officials and bureaucratic impulses, and that the punitive nature of our current system is antithetical to restorative values.⁶⁷ For their part, restorative justice

62. For a discussion of several of these programs, including the widely-used Sycamore Tree Project, see O'MAHONEY & DOAK, *supra* note 21, at 123–26.

63. Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 265 (2005).

64. O'MAHONEY & DOAK, *supra* note 21, at 128.

65. ZEHR, *supra* note 20, at 215–16; Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIM. 1 (1977).

66. Theo Gavrielides, *Restorative Justice -The Perplexing Concept: Conceptual Fault-Lines and Power Battles within the Restorative Justice Movement*, 8 CRIMINOLOGY & CRIM. JUST. 165, 167–68 (2008).

67. E.g., M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation* 46 NEW MEX. L. REV. 123 (2016); William Wood & Masahiro Suzuki, *Four Challenges Facing Restorative Justice*, 11 VICTIMS & OFFENDERS 149 (2016); Paul McCold, *Toward a Mid-Range Theory of Restorative Criminal Justice: A Reply*

skeptics worry that using restorative processes in criminal cases will unduly burden criminal defendants' procedural rights.⁶⁸

One response to these concerns is to support only restorative justice programs that operate outside the criminal legal system. But other restorative justice proponents have decided that making restorative justice part of the traditional system is the only way to have a meaningful impact on mass incarceration in the near term.⁶⁹ I evaluate both these options below.

A. *Avoiding the Criminal Legal System Altogether*

Restorative justice proponents face an initial fork in the road. One approach is to “start small and ‘pure’” and use restorative justice only as an alternative to the criminal process, with the hope that restorative approaches will expand and eventually become the primary response to crime.⁷⁰ This approach sacrifices the ability to affect pending criminal cases but avoids collaboration with a deeply flawed system. The bulk of this Article explores the other fork: an incremental approach that seeks to expand the use of restorative justice to reduce incarceration in the existing criminal legal system.

But first, it is important to briefly examine the option of promoting only programs that operate outside the criminal legal system. Some examples include restorative justice programs in schools and community settings that may indirectly reduce incarceration by steering at-risk individuals away from criminal behavior. The adoption of a restorative approach to school discipline may interrupt the school-to-prison pipeline by reducing suspensions, expulsions, and ultimately involvement with the criminal legal system.⁷¹ Community peacemaking circles organized by non-profit organizations or community groups offer another example.

to the Maximalist Model, 3 CONTEMP. JUST. REV. 357 (2000); Zernova & Wright, *supra* note 17, at 92.

68. See, e.g., Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751 (2000).

69. E.g., BRAITHWAITE, *supra* note 43; Lode Walgrave, *Integrating Criminal Justice and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 17, at 559, 574; Van Ness, *supra* note 18.

70. Zernova & Wright, *supra* note 17, at 92.

71. Mara Schiff, *Can Restorative Justice Disrupt the ‘School-to-Prison Pipeline?’*, 21 CONTEMP. JUST. REV. 121, 123–28 (2018); Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 298–321 (2012).

Community members are typically invited to participate in a series of guided conversations on themes such as manhood, violence, how to leave gangs, relationships with women, and goal setting.⁷² A qualitative sociological study of one such group suggests that circles may have averted gang violence or helped gang-involved individuals make the transition to stable employment.⁷³

A more radical and abolitionist approach is to operate restorative processes as an alternative to the criminal legal process without resort to the police or the courts. There are a number of small community-based collectives, many led by women of color, that try to respond to intimate partner violence and sexual violence without involvement of the police.⁷⁴ While these interventions are often referred to as examples of transformative justice, they tend to include traditional restorative elements such as facilitated dialogues between victims and offenders and restorative agreements.⁷⁵ Until recently, community responses to crime have been limited mostly to intimate partner and sexual violence. But these ideas have earned more attention recently. For example, in the wake of the George Floyd protests, there has been a wave of interest in police abolition, the use of alternative first responders, and even the short-lived creation of autonomous zones.⁷⁶ These developments suggest that, at least in some neighborhoods, there may be growing support for non-state responses to crime, including responses that involve restorative techniques.

School and community-based restorative and transformative justice programs offer the potential to indirectly reduce incarceration while

72. CAROL BOYES-WATSON, *PEACEMAKING CIRCLES AND URBAN YOUTH: BRINGING JUSTICE HOME* (2008) (describing ROCA); CIRCLES AND CIPHERS, <http://www.circlesandciphers.org> (weekly young men's circle at Circles and Ciphers in Chicago).

73. See BOYES-WATSON, *supra* note 72.

74. Donna Coker & Ahjané Macquoid, *Alternative U.S. Responses to Intimate Partner Violence*, in *COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE: LESSONS FROM EFFORTS WORLDWIDE* 169 (Rashmi Goel & Leigh Goodmark eds., 2015); Mimi Kim, *Moving Beyond Critique: Creative Interventions and Reconstructions of Community Accountability*, 37 *SOC. JUST.* 14 (2011); Esteban Lance Kelly, *Philly Stands Up: Inside the Politics and Poetics of Transformative Justice and Community Accountability in Sexual Assault Situations*, 37 *SOC. JUST.* 44 (2011).

75. Coker & Macquoid, *supra* note 74, at 175–76.

76. Caitlin Dickerson, *A Minneapolis Neighborhood Vowed to Check its Privilege. It's Already Being Tested.*, *N.Y. TIMES*, June 24, 2020; Ezra Marcus, *In the Autonomous Zones*, *N.Y. TIMES*, July 1, 2020; Gregory Scruggs, *This Seattle Protest Zone is Police-free. So Volunteers are Stepping Up to Provide Security*, *WASH. POST.*, June 16, 2020.

avoiding involvement with the system of mass incarceration. Of course, by design these programs can have no impact on the outcome of criminal cases that have been brought to the criminal legal system. As promising as these programs may be, the choice to exclude the use of restorative justice in pending criminal cases vastly reduces the impact this approach can have on mass incarceration in the near term. The remainder of this Part explores the tradeoffs involved in trying to reduce incarceration more directly by integrating restorative justice into the criminal legal system.

B. *Restorative Justice within the System: Protecting Defendants' Rights*

If restorative justice is to be expanded within the traditional criminal legal system, one important initial issue is whether restorative justice programs are likely to undermine defendants' procedural rights. Restorative processes typically require the offender to accept responsibility and describe their actions and motivations. And these admissions typically occur outside the presence of a lawyer. How can these practices be squared with the presumption of innocence, the right against self-incrimination, the right to counsel, and the right to a jury?⁷⁷

Because participation in a restorative justice program is usually not mandatory, defendants who choose to participate are typically deemed to have voluntarily waived many constitutional rights.⁷⁸ For this reason, the issues raised are less a matter of constitutional doctrine than policy questions about ensuring fairness. In this section I argue that restorative justice can be integrated into the criminal legal system in a way that alleviates the most serious concerns about protecting defendants' rights. At the same time, integration also inevitably involves some compromises to the restorative justice ideal of fully voluntary participation.

Restorative justice proponents generally agree that any incriminating statements made during a restorative process should be barred from being used in current or subsequent investigations and prosecutions.⁷⁹ It is not difficult to imagine a legislative scheme giving

77. For discussion of how restorative justice may endanger defendants' rights, see Delgado, *supra* note 68, at 760–61; Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L. J. 1247, 1288–90 (1994); Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J. L. & POL'Y 301, 311–17 (2007).

78. Ann Skelton, *Human Rights and Restorative Justice*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 12, at 32, 35–36.

79. *E.g., id.* at 32, 37 (citing the UN Commission on Crime Prevention and Criminal

such an understanding the force of law. For example, Massachusetts law prohibits using participation in a restorative justice program as evidence or an admission of guilt, and provides that any statement made during the process is not subject to disclosure in any judicial proceeding and cannot be used in any stage of a criminal investigation or prosecution.⁸⁰

A related (and knottier) problem is coercion. The defendant may feel coerced into participating in a restorative process to avoid criminal prosecution or more severe punishment. This pressure may put the defendant on an unequal footing within the restorative negotiation process because a successful repair agreement is required to receive a more favorable disposition in the criminal case. Coercion may also pose a more fundamental threat to the integrity of the process, because free and voluntary participation would seem to be required to ensure that any apology and expression of remorse offered by the offender is sincere. And voluntariness is also critical for those who rely on waivers to justify the absence of counsel and informality of restorative processes.

How problematic is it that defendants may feel pressure to participate in a restorative process to receive more lenient treatment? Some scholars argue that restorative processes that have any impact on a criminal disposition (for example by preventing prosecution or reducing a sentence) are unduly coercive, and support only processes that are independent of the criminal process or occur after sentencing.⁸¹ The decision to participate in restorative justice in return for more lenient treatment in the criminal process bears some similarities to plea bargaining and might be viewed as legally voluntary and non-coercive based on this analogy.⁸² Legal or not, these programs raise many of the

Justice, Canada, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters).

80. MASS. GEN. LAWS ch. 276b, § 4 (2018).

81. Brown, *supra* note 77, at 1251–53; Hanan, *supra* note 67, at 132. For a discussion of the relationship between voluntariness and restorative justice theory and practice, see Gerry Johnstone, *Voluntariness, Coercion, and Restorative Justice: Questioning the Orthodoxy*, 3(2) INT’L J. RESTORATIVE JUST. 157 (2020). A few scholars have questioned the necessity of voluntariness in restorative justice, arguing, for example, that the dramatic expansion of the use of restorative justice that followed the introduction of automatic (and thereby near-mandatory) sentencing referrals in England outweighs the accompanying loss in voluntariness, Adam Crawford, *Institutionalizing Restorative Justice in a Cold, Punitive Climate*, in INSTITUTIONALIZING RESTORATIVE JUSTICE 120, 130 (Ivo Aertson, Tom Daems, & Luc Robert eds., 2006), or that non-voluntary sentencing to a restorative process is justified because offenders cannot opt out of other court-imposed sentences, Hoyle, *supra* note 53, at 58.

82. See, e.g., Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An*

same policy concerns about true voluntariness commonly levelled against plea bargaining. Ironically, the more effective a restorative justice program is in avoiding traditional criminal punishments, the greater the pressure on defendants to participate and to agree to proposed repair requirements in the process.

At the same time, pre-arraignment restorative diversion and plea bargaining differ in one important respect: where the defendant retains the ability to return to the criminal process without prejudice, these programs offer a potential benefit without requiring the defendant to plead guilty or give up the right to a jury trial. For this reason, restorative diversion programs seem to be less coercive than programs that require a guilty plea.⁸³ On the other hand, pre-charge diversion programs can raise other questions about voluntariness: early diversion may require defendants to agree to participate before the right to counsel has attached, provide little or no opportunity to explore potential defenses, and operate without the oversight of a judge.⁸⁴

What about legal representation in the restorative process itself? Most programs do not permit lawyers to participate in circles or conferences, though specially-trained youth advocates who are familiar with the goals of restorative justice are used in New Zealand family group conferences,⁸⁵ and some have suggested permitting lawyers to observe the conference or circle but to speak only where necessary to prevent a violation of the defendant's rights.⁸⁶ Because restorative processes are not designed to find facts or adjudicate guilt, we shouldn't assume that all the procedural rights that have developed in the context of a criminal trial should apply *within* a restorative process.⁸⁷ In any case, it may be more important for the offender to have a supporter who is not necessarily a

Alternate Paradigm for Justice 20 CUNY L. REV. 323, 338 (2017).

83. E.g., Hoyle, *supra* note 53, at 58; Agnihotri & Veach, *supra* note 82, at 342; *see also* Zernova & Wright, *supra* note 17, at 97 (noting that some proponents make this argument).

84. This tradeoff between pre-charge informality and uncertainty and post-charge pressure to plead guilty arises in a variety of diversion contexts. For a discussion in the context of drug courts, see Daniel C. Richman, *Professional Identity: Comment on Simon*, 40 AM. CRIM. L. REV. 1609, 1609–10 (2003).

85. Christopher D. Lee, *They All Laughed at Christopher Columbus When He Said the World was Round: The Not-So-Radical and Reasonable Need for a Restorative Justice Model Statute*, 30 ST. LOUIS U. PUB. L. REV. 523, 546 (2011).

86. BRAITHWAITE, *supra* note 43, at 249.

87. Ann Skelton & Makubetse Sekhonyane, *Human Rights and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 17, at 580, 593.

lawyer—i.e. someone who can insure that the offender's perspective is represented and understood and that the agreement items are fair and reasonable. Legal representation in the restorative conference seems far less important to safeguarding the defendant's criminal procedure rights than legal advice about whether to participate in a restorative program and representation at hearings where the court will decide what effect a restorative process will have on the disposition of the defendant's case.

The previous discussion alludes to some of the different tradeoffs that accompany incorporating restorative justice at various stages of the criminal process. Pre-charge diversion programs may help defendants avoid a criminal record and are less coercive. But they also raise concerns about whether the defendant will have enough information about the case to make an informed decision about participation, particularly since the right to counsel typically has not yet attached. Post-charge referrals offer a different trade-off: defendants are entitled to counsel in serious cases, but they may feel pressure to accept responsibility to avoid prosecution or punishment, especially if the program requires a guilty plea to participate. Using restorative justice as an alternative to or adjunct to sentencing presents fewer concerns about burdening the defendants' rights since guilt is not an issue, the defendant has counsel, and the restorative process is subject to judicial oversight. At the same time, in cases that are not resolved by a guilty plea, restorative sentencing exposes victims to the trauma of a trial.

How should we navigate the tradeoffs associated with restorative justice programs that operate at different stages of the criminal process? Where a prosecutor is satisfied that a successful restorative process would resolve the case, defendants should be given the option to participate in restorative justice without being required to plead guilty or jeopardize their ability to contest the charges in the criminal process if the restorative process fails. In the case of felonies, where restorative agreements are likely to be more onerous, restorative diversion should probably only be used after a charge has been filed (again, without a requirement of a guilty plea) to ensure that the defendant has access to counsel and that the restorative agreement is subject to judicial oversight. And both defendants who exercise their right to trial and those who agree to plead guilty should have the opportunity to participate in a restorative encounter that would factor into the judge's sentencing decision. While this approach would not completely eliminate pressure to participate in

restorative justice,⁸⁸ it would avoid forcing defendants to choose between exercising their criminal procedural rights and a restorative process that would eliminate or significantly reduce a prison sentence. In this way, restorative justice programs can be implemented in a way that is less coercive and more protective of defendants' procedural rights than the current system of plea bargaining.

C. *The Implications of Institutionalizing Restorative Justice*

To have a meaningful impact on incarceration rates, restorative justice would have to be expanded enormously—which raises the vital question of whether these programs can be scaled up without losing their effectiveness. Existing restorative justice programs in the United States typically handle only a tiny fraction of the criminal docket. Common Justice's highly-regarded diversion program for violent felony cases from Brooklyn and the Bronx, for example, serves fewer than fifty offenders a year.⁸⁹

Because of their informality, the effectiveness of restorative justice processes is very sensitive to the quality of the program and the skill of the individual facilitators. Effective encounters are time-consuming and highly individualized, requiring extensive preparation and improvisation to win the trust of the participants and meet the needs of the parties. Well-trained, experienced, and highly-motivated facilitators are critical. Maintaining high quality while expanding restorative justice to a large volume of cases presents several challenges, including recruiting and training scores of facilitators, resisting the pressure to emphasize speed and efficiency in processing cases, and securing sufficient funding to give

88. Most notably, pressure would remain to participate in a restorative process to reduce the sentence post-conviction.

89. Bruce A Green & Lara Bazelon, *Restorative Justice from a Prosecutor's Perspective*, 88 FORDHAM L. REV. 2287, 2289 (2020). Similarly, in 2020 Massachusetts' largest restorative diversion program served under 100 offenders despite taking referrals from 32 police departments and three county district attorney's offices, including the office that serves Boston. Communities for Restorative Justice, 2020 Annual Report, <https://drive.google.com/file/d/1Z0esSx0xN7VQn0I-b-sCmu3hKRu7pReL/view>. Even larger programs, like Restorative Response Baltimore, divert fewer than 1000 of the tens of thousands of criminal cases filed in Baltimore's circuit and district court. See RESTORATIVE RESPONSE BALTIMORE, <https://www.guidestar.org/profile/52-2337316> (stating that Restorative Response Baltimore handles over 600 diversion cases per year); MARYLAND JUDICIARY, STATISTICAL ABSTRACT 32, 40 (2017) (reporting approximately 30,000 criminal filings in the circuit and district courts of Baltimore city).

due attention to each case.⁹⁰

A large-scale shift toward a restorative approach is likely to change the structure of restorative justice programs. Scaling up restorative justice would likely require the use of professional facilitators rather than volunteers. Even assuming that a less punitive approach would result in decriminalizing many current low-level offenses, the caseload would be far too large for unpaid volunteers to handle. Some restorative justice proponents resist any move toward professionalism,⁹¹ and would view the use of paid facilitators as a serious drawback. But there may be some advantages to abandoning a volunteer model, particularly if local community members are paid to serve as facilitators in a part-time or full-time capacity. Recruiting and training paid facilitators from the local community would promote diversity,⁹² continuity, experience, and quality in the facilitator pool, and encourage consistent treatment of cases without sacrificing attention to local circumstances.

Scaling up restorative justice might also create pressure to replace the current network of local independent non-profits with state-run programs, perhaps through probation services or other government agencies. New Zealand's restorative youth justice system, for example, uses professional social workers employed by the state to coordinate and facilitate cases.⁹³ Despite the obvious efficiencies of such an approach, there is a danger that programs run by government employees may dilute the sense that the process is a community response to harm, thereby jeopardizing a program's support and legitimacy within the community.⁹⁴ Community support is crucial to encourage victim and offender participation and referrals from prosecutors and judges. Using locally-recruited facilitators may reduce, but not eliminate, this dynamic. My own view is that it would be preferable to scale up restorative justice

90. Karp & Frank, *supra* note 1, at 9, 13.

91. See Susan M. Olsen & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 59 (2003) (noting that deprofessionalization of criminal justice is a central theme of restorative justice).

92. On the difficulty of recruiting volunteers who are representative of the community, see Adam Crawford, *The State, Community, and Restorative Justice: Heresy, Nostalgia, and Butterfly Collecting*, in RESTORATIVE JUSTICE AND THE LAW 101, 121 (Lode Walgrave ed., 2002).

93. MACRAE & ZEHR, *supra* note 8, at 216.

94. See Carolyn Boyes-Watson, *What Are the Implications of the Growing State Involvement in Restorative Justice*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 216 (Howard Zehr & Barb Toews eds., 2004); see also Crawford, *supra* note 92, at 121–22.

through independent community organizations rather than creating state-run restorative justice programs.⁹⁵

Even if non-profits continue to administer restorative programs, public funding would likely be necessary to support the large increase in paid facilitators that would be required to handle the increased caseload. Some of the resources currently devoted to court services and incarceration would have to be diverted to state personnel who refer cases, and to contracts with restorative justice programs. Some restorative justice proponents argue that a shift to a restorative approach can be cost-effective over the long term,⁹⁶ but of course much depends on the details of both the restorative program budget and the extent to which the program reduces incarceration costs. Because savings from reduced incarceration do not directly affect prosecutors' budgets, individual jurisdictions would likely require funding from the state or some other source to support large restorative justice programs.⁹⁷ In other words, even strong support from prosecutors and citizens in one jurisdiction is likely not sufficient on its own to significantly expand the use of restorative justice in that jurisdiction.⁹⁸ Perhaps just as important as funding is the necessity of shifting the mindset of police, prosecutors, defense attorneys, and judges to embrace non-adversarial, non-punitive responses to crime.⁹⁹ Beginning with small, state-funded pilot programs in jurisdictions with enthusiastic prosecutors would likely help provide evidence of effectiveness and gradually build support for expansion.

If referrals to restorative justice become a routine part of the criminal legal process, there will also be a natural tendency toward centralization and bureaucratization. Centralized standards and guidelines for restorative justice providers can help protect defendants' rights, provide some consistency in how similar cases are treated, and ensure that restorative justice providers are well-trained and meet minimum standards.¹⁰⁰ But the adoption of anything beyond minimum standards

95. For a discussion of restorative justice programs run by the state and by community organizations in Europe, see Theo Gavrielides, *Repositioning Restorative Justice in Europe*, 11 VICTIMS & OFFENDERS 71, 77–81 (2016).

96. O'MAHONEY & DOAK, *supra* note 21, at 13 (citing studies).

97. Green & Bazelon, *supra* note 89, at 2297, 2297 n.64 (noting funding challenges).

98. *See id.*

99. *See* O'MAHONEY & DOAK, *supra* note 21, at 13.

100. Ann Skelton & Cheryl Frank, *How Does Restorative Justice Address Human Rights and Due Process Issues?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 204, 208 (Howard Zehr

would likely negatively affect quality. Standardized policies may interfere with individual programs' ability to adapt their procedures and practices to fit the needs of their local communities.¹⁰¹ Standardization would also hinder experimentation with different approaches and models as we attempt to determine whether and how to expand restorative justice to a wide variety of crimes. Finally, the routinization of restorative justice may encourage facilitators to approach cases with a fixed menu of agreement items in mind rather than treating each case individually and allowing a more meaningful agreement to emerge from the needs of the parties. In short, it is going to be hard to strike the balance between having some centralized standards and training and ensuring that facilitators have the flexibility they need to make these programs effective in their communities.

Can restorative justice be scaled up enough to make a difference in mass incarceration? It is a difficult, but not insurmountable task. It probably *will* be impossible to continue to rely on volunteers, but this is not necessarily a bad thing: it might well result ultimately in a more experienced, diverse body of facilitators. And these paid facilitators will have to be housed in state bureaucracies or in non-profit organizations. My own view is that relying on NGOs as state contractors is likely to work out better, but either way, scaling up will require massive increases in funding, probably at the state rather than the local level. And somehow this expansion has to strike the right balance between centralized quality control and preserving a personal touch, local knowledge, and high morale and motivation among facilitators. All this is a tall order. But New Zealand's juvenile justice system provides an example of a relatively successful approach to mainstreaming restorative justice,¹⁰² with enormous benefits to society—particularly when compared to the United States, where the existing criminal legal system provides such a bleak

& Barb Toews eds., 2004).

101. See JOHNSTONE, *supra* note 20, at 17 (noting that the rise of a restorative justice bureaucracy may “spoil the flexibility and informality that is crucial to the success of restorative justice initiatives”); Gavrielides, *supra* note 95, at 85. For a discussion of the importance of adapting restorative processes to local community needs, see *infra* Part IV.B.

102. To be sure, the New Zealand juvenile system is far from perfect. An early evaluation found high levels of success in diversion from court and decarceration and generally high satisfaction among parents and offenders, though the study also found a lower satisfaction rate among victims than in other programs and a tendency among professional facilitators to take over and undermine consensus decision-making in the restorative conference. GABRIELLE MAXWELL & ALLISON MORRIS, FAMILY, VICTIM, AND CULTURE: YOUTH JUSTICE IN NEW ZEALAND xviii, 127–28, 191 (1993).

alternative. Yet we should be realistic that implementing this expansion is going to involve trade-offs and setbacks, and is most likely to be successful if the expansion (however it is carried out) does not outrun the rate at which new and high-quality facilitators can be hired and trained. I firmly believe that expanding restorative justice should play an important role in our path out of our current crisis, but for this to work the expansion cannot be done overnight.

I turn now from examining the implications of incorporating restorative justice into the criminal legal system to exploring some of the questions that would arise in the process of vastly expanding the use of restorative responses to crime.

III. RESTORATIVE JUSTICE WITHOUT THE VICTIM?

We have seen that the interaction between victim and offender plays a central role in restorative justice. But in practice, many restorative justice programs have difficulty ensuring direct victim participation: participation rates at or below fifty percent are not uncommon, and victim participation levels rarely exceed eighty percent.¹⁰³ Victims who decline to participate often cite the time and effort involved.¹⁰⁴ Expanding restorative justice to more serious crimes may raise additional obstacles to victim participation if victims are not emotionally ready to participate within the compressed time frame of a criminal case. There is evidence that victims' willingness to participate in an encounter with the offender tends to increase over time after more harmful offenses, presumably because victims may be too angry and fearful immediately after a serious crime to consider meeting with the offender.¹⁰⁵ Successful victim-offender encounters in very serious cases such as homicide tend to occur years after the offense.¹⁰⁶

103. See O'MAHONEY & DOAK, *supra* note 21, at 78 (citing successful programs with roughly seventy-to-eighty percent victim participation); MAXWELL & MORRIS, *supra* note 102, at 118 (finding victim participation in fifty-one percent of cases where the victim was known in the New Zealand Family Group Conference program); Loreen Walker, *Restorative Justice without Offender Participation: A Pilot Program for Victims*, RESTORATIVE PRACS. F. 2 (Feb. 10, 2004) (data from eight programs revealed an average of forty-seven percent of victims declined to participate).

104. See O'MAHONEY & DOAK, *supra* note 21, at 78–79.

105. See Sven Zebel, Wendy Schreurs & Elze G. Ufkes, *Crime Seriousness and Participation in Restorative Justice: The Role of Time Elapsed Since the Offense*, 41 LAW & HUM. BEHAV. 385 (2017).

106. See Janine Geske, *Achieving the Goals of Criminal Justice: A Role for Restorative*

Any proposal to significantly expand the use of restorative justice in the criminal process must address how to handle cases in which the victim is unwilling to participate during the criminal case. Moreover, many crimes harm the community at large but do not have a readily identifiable victim—such as many drug, firearms, and motor vehicle offenses, as well as fraud and other types of white-collar crime.

This Part describes the use of surrogate victims and other alternatives to direct victim participation, and explores the tradeoffs involved in expanding restorative justice beyond cases that include the involvement of the direct victim. I argue that surrogate victim programs offer a promising way to expand the use of restorative justice to more cases. At the same time, surrogate victim programs represent a significant departure from traditional restorative practices, and present a risk that the rehabilitation of offenders will take precedence over meeting victims' needs. Providing services to direct victims who do not want to participate in a restorative encounter may help alleviate these concerns.

A. *Surrogate Victims and Other Alternative Models*

Restorative justice programs use a variety of approaches when direct participation by an identifiable victim is not an option. When the victim of a crime does not want to be present at the conference or circle, many programs seek to have their experiences and views represented indirectly. A victim might write or record a statement to be read out or played during the circle, or might submit questions to be asked of the offender.¹⁰⁷ When the victim does not want to be involved in the process at all, community members may attempt to represent the victim's perspective, or an empty chair may be used to signify the absent victim.¹⁰⁸

Restorative justice theory would predict that a face-to-face encounter in which the offender sees the effect the crime has had on the victim and the victim sees the offender expressing remorse would have the greatest impact on both parties.¹⁰⁹ The limited studies of restorative processes in which victims participate indirectly or do not participate at

Justice, 30 QUINNIPIAC L. REV. 527, 540 (2012) (noting that victim-offender mediation in serious crimes often happen ten or more years after the offense).

107. *E.g.*, SERED, *supra* note 20, at 138.

108. *See* O'MAHONEY & DOAK, *supra* note 21, at 80–82.

109. For a discussion of why victim participation is considered essential both for offender rehabilitation and victim healing, see Gerry Johnstone, *Restorative Justice for Victims: Inherent Limits?*, 5 RESTORATIVE JUST. 382 (2017).

all lend some support to this hypothesis. One study found that victims who directly participated in a restorative process were most satisfied, while those who participated indirectly (for example through a written statement) showed only moderate benefits, and victims who did not participate at all rarely reported a positive impact.¹¹⁰ Moreover, the study found that victims who did not participate were less likely to view an apology letter as sincere or to be satisfied with purely symbolic reparation.¹¹¹ Studies have also shown that offenders are less likely to feel accountable for their actions and are less likely to carry through with the reparation agreement when a victim is not present at the encounter.¹¹²

Surrogate victims offer another alternative. A surrogate victim who has suffered a similar offense may participate when the direct victim is unavailable. Surrogate victims may also be used to provide insight into the harm caused by offenses that do not involve readily identifiable victims. For example, parents of victims of gun violence might serve as surrogate victims in firearms cases; individuals who have suffered from drug addiction or drug violence and their family members might serve as surrogate victims in narcotics cases; and victims of drunk-driving or reckless driving accidents might participate in motor vehicle cases that did not result in injuries. In these cases, these surrogate victims can help offenders understand the potential harm that can result from their “victimless” crimes. But where the harm is abstract or diffuse, it may be difficult to generate the type of emotional encounter required for restorative justice to work. Offenses that harm corporations or that cause minor harm to a large number of people may be particularly difficult to fit into a restorative model. Yet even if we assume that many fraud and white collar crime cases will not lend themselves to a meaningful restorative encounter, these cases represent only a small portion of the incarcerated population.¹¹³ Adopting a restorative approach to violent offenses, burglaries and other theft-related offenses, and “victimless”

110. See Carolyn Hoyle, *Securing Restorative Justice for the 'Non-participating Victim in NEW VISIONS OF CRIME VICTIMS*, 97, 107–10 (Carolyn Hoyle & Richard Young eds., 2002). It is important to note, however, that this study could not determine if there was a selection effect.

111. See *id.* at 113–15.

112. See O'MAHONEY & DOAK, *supra* note 21, at 80–81 (citing studies).

113. See PRISON POLICY INITIATIVE, *MASS INCARCERATION: THE WHOLE PIE* (2020) (showing that only 26,000 of 1,291,000 state prisoners have been convicted of fraud offenses, and that even if we count all federal property offenses as potentially fraud, only 10,000 of 166,000 federal prisoners were convicted for property offenses).

crimes like drunk driving, drug dealing/trafficking and firearms offenses that lend themselves to a restorative encounter with a surrogate victim would have a major impact on mass incarceration.¹¹⁴

Initially, surrogate victims were used primarily in victim impact panels, which are less interactive than conferences or circles: in this model surrogate victims typically speak about their experience to a group of offenders, who may ask questions but generally do not discuss their own offenses.¹¹⁵ Surrogate victims have increasingly been used in a more interactive format, participating in circles with offenders much as a direct victim would.¹¹⁶ Proponents contend that the circle process may be cathartic for surrogate victims and, by fostering empathy, may even foster forgiveness for the surrogate's own offender.¹¹⁷ On the other hand, many programs use the same surrogate victims over and over again,¹¹⁸ which may dampen the beneficial effects of participation for the surrogates.

Circle programs involving surrogate victims have not been extensively studied; the few quantitative results that do exist are mixed.¹¹⁹ Descriptions by participants and qualitative evaluations are often extremely positive, indicating that surrogate victims benefit from being able to tell their stories and that offenders come to a deeper understanding of the impact of their offenses on victims and on their own families.¹²⁰ My own anecdotal experience of talking to surrogate victims and offenders who have participated in the restorative justice program run at the prison in Norfolk, Massachusetts suggests that this program has been life-changing for both inmates and surrogate victims. The findings of an experimental study suggest that surrogate victims may even have some advantages over direct victims: in the experiment, apologies offered to surrogate victims were found to convey more remorse than apologies

114. *See id.* (showing that 1,160,000 of 1,291,000 state prisoners have been convicted of offenses that fall into these categories, and that 91,000 of 166,000 federal prisoners were convicted of violent or drug offenses).

115. *Lee, supra* note 85, at 551–52.

116. *See* IAIN BRENNAN & GERRY JOHNSTONE, *BUILDING BRIDGES: PRISONERS, CRIME, AND RESTORATIVE JUSTICE* 16–17 (2018) (describing the Building Bridges Program).

117. *See id.* at 21–22.

118. *See, e.g., Geske, supra* note 106, at 532.

119. A small study of prison programs that did not have a control group found benefits for surrogate victims but no statistically significant change in offenders. *See* BRENNAN & JOHNSTONE, *supra* note 116, at 34–43; a study with a larger sample size on similar programs did find positive offender effects: *Id.* at 40.

120. *E.g., Geske, supra* note 106, at 532–34; Crocker, *supra* note 61, at 51–52.

offered to the direct victim, perhaps because apologizers felt less threatened by contact with the surrogate victim, allowing for a more constructive interaction.¹²¹ Overall, using surrogate victims seems like a promising alternative where there is no direct victim available, but more research is necessary to fully understand the effectiveness of this approach.

B. *Tradeoffs Involved in Restorative Justice Without the Victim*

How should we think about restorative justice programs that use surrogate victims or do not typically involve participation by the direct victim of the offense? These programs offer the potential to expand the use of restorative justice to more cases, particularly serious offenses that would currently result in lengthy incarceration. At the same time, these offender-oriented programs stretch the traditional conception of restorative justice, and may weaken the appeal of restorative justice among victim advocates. I argue that despite these trade-offs, the use of surrogate victims should be pursued, particularly if it is combined with services to direct victims who do not want to participate in a restorative encounter with the offender.

Any attempt to apply restorative justice widely enough to have a meaningful impact on incarceration rates must incorporate programs that do not include participation by direct victims. Where participation in a restorative process typically leads to dismissal of the case or a significant reduction in the sentence, limiting these benefits only to defendants whose victims are willing to participate also raises serious fairness concerns. In New Zealand, for example, up to a twenty percent reduction in sentence is considered standard for successful participation in a restorative process.¹²² Denying this opportunity for a sentence reduction to defendants who are willing to participate merely because their victim is unwilling seems unfair, and may unintentionally allow victim biases to affect the defendant's sentence. At the same time, reducing the sentence of defendants who were willing to participate but ultimately did not accept responsibility and express remorse in a restorative encounter

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

122. *See Solic. Gen. v. Heta* [2018] NZHC 2453, at [65 & n.48] (N.Z.) (noting that up to a twenty percent discount for positive engagement in a restorative justice process "would not have been out of range," and citing an example of a case in which a fifty percent reduction was upheld).

because of an unwilling victim is also problematic.

The surrogate victim appears to surmount these problems by ensuring that all willing offenders have the opportunity to participate in restorative justice. The existence of surrogate programs may also alleviate any pressure victims might feel to take on the logistical and emotional burden involved in participating in a restorative encounter. Moreover, surrogates permit restorative justice to be expanded to offenses that do not involve a readily identifiable victim, such as firearms and narcotics offenses.

Despite these obvious benefits, restorative justice programs that operate without direct victim participation raise theoretical and practical concerns. Some restorative justice purists contend that processes that do not involve an encounter between the main stakeholders expand the concept of restorative justice so widely that it is “potentially meaningless.”¹²³ In a related vein, there is a worry that even where surrogate victims are used, the primary focus of these programs is on offender rehabilitation rather than healing and restoring victims.¹²⁴ For some, these types of “offender-oriented” restorative justice programs have lost sight of one of the major goals of the movement—to offer an alternative that meets victims’ needs better than the offender-focused criminal legal system.¹²⁵ Programs that do not involve direct victims may also dilute political support for restorative justice by alienating victim advocates and threatening the possibility of a coalition that includes those who are attracted to restorative justice’s victim-centered approach as well as those who prefer offender reintegration to harsh punishment.

How one reacts to the purists’ theoretical objection to surrogate and non-victim programs depends in large part on whether one thinks that the defining features of restorative justice are the restorative values of healing, reintegration and rejection of punishment, or the restorative processes of victim-offender encounters. But even proponents who are not troubled by the absence of an encounter with the direct victim may still worry that surrogate victim programs place too much emphasis on offender rehabilitation rather than victim needs.

It may be possible to address these concerns in several ways. Restorative processes can be made available for victims who decide that

123. *See* Wood & Suzuki, *supra* note 67, at 4–5, 7–8.

124. *See id.*

125. *Id.* at 5.

they are ready for a restorative encounter after the criminal process is complete. Offenders can also submit apology letters to an apology bank, which their victim can read if and when they are ready to do so. And a separate restorative process could be created for victims unconnected to their offender's criminal process, similar to that used by the Restorative Justice Without Offender Participation Project in Honolulu.¹²⁶ This process might include healing circles that give victims an opportunity to discuss the impact of the crime and other victim services, and could be available to victims in cases where the crime has not been solved or where the offender does not want to take responsibility as well as in cases where the victim does not want to participate in a restorative encounter with their offender. The availability of a parallel system of justice for victims might go a long way towards reassuring those who worry that restorative programs that operate without victims or with surrogate victims are too offender-oriented.¹²⁷

But offender and victim needs cannot always be reconciled. This is particularly likely where a victim seeks to veto their offender's participation in a restorative justice program that will result in a more lenient penalty than the traditional criminal process. Current restorative justice programs typically do not take cases where the victim is strongly opposed to the offender's participation. But if restorative justice is expanded and is offered in some form to most criminal defendants, in my view it would be unfair to deny defendants this opportunity based on an individual victim's wishes.

In sum, surrogate victim programs are worth pursuing as a way to expand the use of restorative justice, particularly if they are combined with healing circles and other services for the direct victim. While this approach might not satisfy all restorative justice purists, it is important to remember that it is still far more victim-centered than the traditional criminal process.

IV. DISCRETION AND EQUITY IN RESTORATIVE JUSTICE

The call to adopt a restorative approach stems in part from a desire to alleviate the racially discriminatory and overly punitive aspects of the criminal legal system. It is therefore vital that restorative justice be

126. See Walker, *supra* note 103.

127. On proposals for parallel systems of justice for victims, see Johnstone, *supra* note 109.

expanded in a way that ensures equal access and fair treatment, particularly for communities of color and poor communities. Because restorative justice often involves discretion by many actors, expanding restorative justice has the potential to re-create existing racial and class biases in the administration of criminal justice. Wealthier communities may be in a better position to provide restorative programs with funding and volunteer support. Discretionary decisions by police, prosecutors, and restorative justice providers to refer certain offenders to restorative justice may be affected by explicit and implicit biases. The informality of restorative processes may allow differences in socioeconomic status and education among participants to influence outcomes. And the process may not fully acknowledge underlying social and economic conditions that may reduce the offender's individual responsibility.

In this Part I explore methods for ensuring equal access to restorative justice. I also explore ways to incorporate approaches from the transformative justice movement that have the potential to make the restorative process more equitable. We will see that the mechanisms for enhancing access and ensuring equitable outcomes are in some tension with each other, but are not irreconcilable.

A. *Ensuring Equal Access to Restorative Programs*

Expanding restorative justice without focusing on who is included does not merely unfairly deny the benefits of a restorative approach to some. It may make things worse by providing a more lenient penal response for privileged communities and individuals, thereby reducing awareness of the need for criminal justice reform. There is very little research on racial disparities in access to restorative justice, but the few studies that have been done are troubling. An obvious remedy (though politically and practically difficult to implement) would be to establish restorative justice as the default approach in all communities in a jurisdiction for certain types of offense.

Access to restorative justice in the United States is currently haphazard and highly dependent on whether a particular police department or district attorney's office has a program to refer cases to restorative justice and access to a non-profit restorative justice provider.¹²⁸ If restorative justice is expanded, a key challenge will be to

128. For example, in Chicago the Restorative Court's diversion program is only available to defendants from North Lawndale, see ILLINOIS COURT ADR SOURCEBOOK, <https://www.aboutrsi.org/court-adr-across-illinois/programs/restorative-justice-community->

ensure that the expansion reaches less privileged communities. There are certainly many successful restorative justice programs that focus on low-income communities or communities of color.¹²⁹ But prosperous communities have some distinct advantages in supporting a restorative justice program: they may have access to more funds; they may have an easier time finding volunteers with leisure time to donate; and they may have a lighter caseload if their crime rate is relatively low.

Restorative justice programs are not currently widespread enough in the United States to draw any conclusions about the demographics of jurisdictions that adopt restorative justice. But the disparate pattern of adoption of restorative justice in schools, where these programs have spread rapidly in recent years, is worrying: one study found that restorative practices are less likely to be used in schools with a higher percentage of black students.¹³⁰ We cannot assume that a gradual and organic expansion of local restorative justice programs would result in equal access for disadvantaged communities. Ensuring equal access to restorative justice for all communities might require large-scale implementation through legislation or centralized, state-funded programs. Yet more universal approaches have their own disadvantages: in addition to the obvious difficulty of generating political support for such a broad-ranging reform, a centralized approach has the potential to make these programs more bureaucratic and less responsive to local concerns, as discussed in Part II.C.

The broad discretion currently given to police and prosecutors' offices to determine who gets a referral in most restorative justice programs is another concern. Police departments and prosecutors' offices that refer cases to restorative justice programs typically have policies that list factors to be considered in deciding whether or not to refer an offender who has committed an eligible offense.¹³¹ Some of these factors may be

court-cook-county-north-lawndale (last visited Apr. 6, 2021); in Massachusetts, Communities for Restorative Justice has partnerships with many police departments and prosecutor's offices, but not others. See COMMUNITIES FOR RESTORATIVE JUSTICE, <https://www.c4rj.org/> (last visited Apr. 6, 2021).

129. Baltimore's Restorative Responses, Oakland's Restorative Community Conferencing, and New York's Common Justice are among the most well-known. See FANIA DAVIS, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE* 69–70 (2019).

130. See Alison Ann Payne & Kelly Welch, *Restorative Justice in Schools: The Influence of Race on Restorative Discipline*, 47 *YOUTH & SOC'Y* 539 (2015).

131. For an example of a referral policy from a Nova Scotia police referral program, see Diane Crocker, *The Effects of Regulated Discretion on Police Referrals to Restorative Justice*, 36 *DALHOUSIE L.J.* 393, 397–99 (2013).

open to interpretation. One program in Nova Scotia even includes as a discretionary factor: “the offender’s apparent ability to learn from a restorative [justice] experience and follow through with an agreement.”¹³² Critics worry that explicit and implicit bias may lead to fewer referrals for poor offenders and people of color. Where the victim’s wishes are considered, victim biases about which offenders should be given leniency may also affect the referral decision.

The few existing studies of referral practices lend some support to the worry that bias may affect these discretionary decisions. A study of a juvenile restorative justice diversion program in Maricopa County, Arizona, found that both black and Latino offenders were less likely than white offenders to be selected by probation officers and the prosecutor’s office for placement in a restorative justice program.¹³³ And a survey of police in a Nova Scotia restorative justice program, which used vignettes to examine police attitudes about cases suitable for referral, found that police were reluctant to refer offenders with prior criminal justice contact, and were more likely to refer a “polite, private school youth” than an “argumentative, public school youth.”¹³⁴

The easiest solution to the bias problem in referrals is to create rules for the automatic referral of cases involving eligible offenses, which would significantly reduce police and prosecutors’ discretion. New Zealand uses a similar practice in adult cases, requiring automatic referral of all cases before sentencing to determine if a restorative process is appropriate in the particular case.¹³⁵ It is probably not possible to eliminate discretion entirely: the restorative program would still need to have the power to reject cases in certain circumstances; for example, where a victim is too hostile or punitive, or where an offender is not willing to accept responsibility for his actions in a meaningful way. Despite its obvious advantages, an automatic referral system might have

132. *Id.* at 399.

133. Nancy Rodriguez, *Restorative Justice, Communities, and Delinquency: Whom Do We Reintegrate?* 4 *CRIMINOLOGY & PUB. POL’Y* 103, 109, 119 (2005). The raw statistics of referrals in South Australia (according to a 1999 report, fifty-four percent of non-aboriginal youth vs. thirty-one percent of aboriginal youth were diverted from court) also raise the possibility of discrimination in referral decisions, but the report does not eliminate other potential reasons for the differences in referrals, such as the criminal history of offenders. For discussion, see Kathleen Daly, *Restorative Justice in Diverse and Unequal Societies*, 17 *LAW IN CONTEXT* 167, 181 (2000).

134. Crocker, *supra* note 131, at 406.

135. Sentencing Act 2002, § 24A (N.Z.).

its own drawbacks to the extent that it may result in a more centralized approach. While rules for automatic referral might be standardized and centralized, it would be important to maintain flexibility and local responsiveness in the restorative justice programs themselves.¹³⁶

B. *Incorporating Transformative Approaches*

Critics like Ruth Morris have argued that restorative justice as it is traditionally practiced does not adequately consider the root causes of crime, including systemic racism and other forms of structural injustice.¹³⁷ These critics argue for “transformative justice,” which attempts not only to address specific harms, but to “enable the wider community to take responsibility for the underlying causes of crime: poverty, abused children, unemployment, discrimination, and other deep social problems.”¹³⁸ While some theorists see this broader transformative justice movement as distinct from restorative justice, proponents of restorative justice have increasingly argued that restorative justice can and should incorporate transformative approaches.¹³⁹

A transformative approach would affect the restorative process in at least three ways. First, care would be taken to prevent the informality of the process from reinforcing existing power and status differences.¹⁴⁰ Through careful advance preparation of the participants and reflective listening (paraphrasing the parties’ positions when necessary), the facilitator can help alleviate power imbalances between the participants during the restorative encounter. There is also a worry that professional facilitators or middle-class volunteer facilitators may more easily relate to or have unconscious biases in favor of participants who are more like themselves. The obvious remedy is to recruit and train representative members of the local community to facilitate and participate in restorative processes.

Second, the restorative encounter should include discussion of the social and economic disadvantages that may have contributed to the

136. For discussion of the tension between widespread institutionalization of restorative justice and local responsiveness, see *supra* Part II.C.

137. See Harris, *supra* note 15, at 555–59.

138. MORRIS, *supra* note 14, at 254.

139. Harris, *supra* note 15, at 58–63; ZEHR, *supra* note 20, at 240; DAVIS, *supra* note 129, at 14.

140. For this critique of restorative justice, see Delgado, *supra* note 68, at 767–68; Skelton & Frank, *supra* note 100, at 207.

offense. Unlike the criminal process, restorative encounters naturally lend themselves to examining the offense in a broader context, including the prior relationship between the parties and the motivations of both the responsible and impacted parties. A transformative approach would go deeper. It would encourage a discussion of other factors that have affected the responsible party, such as trauma, economic disadvantage, family disruption due to incarceration or addiction, and poor educational and health services. And repair agreements would incorporate treatment and other social services to help address the harms experienced by the responsible party. Though restorative processes do not attempt to directly change structural injustice and broader systemic causes of crime, it may promote transformative change by challenging the assumptions of participants about criminal “offenders,” fostering empathy, and generating support among participants for broader reforms.

The acknowledgement of exculpating systemic racism and socioeconomic factors is consistent with the acceptance of individual responsibility that restorative justice traditionally requires. In a restorative process, the offender can accept responsibility for his choices even while acknowledging that those choices were made within the context of relative deprivation and systemic disadvantage.¹⁴¹ In fact, viewing the offender’s responsibility in its full social context can be critical to generating sincere remorse; if a defendant believes that the discussion of his responsibility has been unfair or failed to acknowledge mitigating factors, then it will be harder for that defendant to overcome any rationalizations about his behavior.¹⁴² Restorative justice also promotes transformative justice: interventions promoted by transformative justice collectives typically seek to address both community accountability and the accountability of individuals who cause harm.¹⁴³

Such a transformative approach to restorative justice explores the “concentric circles”¹⁴⁴ of responsibility to recognize individual responsibility within the context of systemic disadvantage. Here again it

141. See SERED, *supra* note 20, at 154.

142. See ZEHR, *supra* note 20, at 75–76; JOHNSTONE, *supra* note 20, at 90.

143. E.g., Creative Interventions, *Creative Interventions Toolkit: A Practical Guide to Stopping Interpersonal Violence*, Sec. 4F, at 9 (2012), <https://www.creative-interventions.org/wp-content/uploads/2020/10/CI-Toolkit-Final-ENTIRE-Aug-2020-new-cover.pdf>.

144. MINOW, *supra* note 33, at 153–54.

is important to recruit facilitators and other participants who come from the same community as the offender. These local participants are familiar with the local socioeconomic context, and they may share some of the same experiences of trauma and disadvantage. In particular, whenever possible, it is helpful to recruit as facilitators and participants “credible messengers”—individuals who

[B]elong to the communities where violence is occurring, have survived and/or committed violence themselves, are familiar with and often have been a part of the street culture, and have authority rooted in their experience in that culture, their subsequent cessation from violence, and their role as leaders in their neighborhoods.¹⁴⁵

Third, a transformative approach would consider the social context in formulating the terms of the restorative agreement, *i.e.*, the acts the offender must undertake to complete the restorative program. In particular, it is important to recognize the way in which economic and social disadvantages might affect particular offenders’ ability to complete onerous and time-consuming restorative agreement items. For example, extensive community service may be unrealistic for an offender who works long hours and has limited access to childcare. A restitution payment that may be reasonable for some offenders may create a crushing burden for others. And, ideally, the restorative program should provide referrals to mental health, addiction services, and other social services where needed. At the same time, when considering referrals to social services programs, restorative justice practitioners must avoid setting offenders up to fail by imposing unrealistic burdens on offenders who already face difficult circumstances. Once again, the inclusion of members of the local community in the restorative process will go a long way toward ensuring that agreement items are realistic given the offender’s situation.

It is important to note that the local discretion required by this transformative approach may be in some tension with the more egalitarian expansion of restorative justice described above. Equal access to restorative justice is most easily provided through a centralized, government-funded system of automatic referrals and restorative justice programming. But promoting transformative justice within the restorative process points toward more flexible, locally-responsive programs led by local community members. The best approach may be to limit centralization to referral systems, funding, and minimum practice

145. SERED, *supra* note 20, at 182.

and training standards while preserving the use of independent, local restorative justice providers.¹⁴⁶

V. SATISFYING RESTORATIVE JUSTICE SKEPTICS: DETERRENCE, PROPORTIONALITY, AND SERIOUS CRIMES

So far, we have focused on the choices and concerns restorative justice proponents would face in expanding the use of restorative justice to reduce incarceration. But first it is worth asking whether it is possible to expand restorative justice in a way that will satisfy restorative justice skeptics who worry that a shift from a punitive to a restorative approach will fail to deter crime and be too lenient, particularly in the case of serious violence. These concerns stem from the traditional penal theories of deterrence and retribution. Restorative justice does not count these traditional penal purposes among its explicit goals, though it does aim to prevent reoffending and to insure victim and community safety. In this Part, I will argue that restorative justice can be implemented in a way that is attentive to both community safety and proportionate outcomes, even in the most serious cases.

A. *Recidivism and Community Safety*

Will expanding restorative justice and reducing the use of incarceration result in more crime? Studies of recidivism rates following restorative processes are encouraging, particularly for violent offenses. Nevertheless, even the most enthusiastic restorative justice proponents recognize that restorative justice will not work for all offenders.

Rigorous studies consistently find that restorative justice generally does no worse, and typically does modestly better, on measures of recidivism than the court system.¹⁴⁷ One meta-analysis of ten randomized control studies of face-to-face restorative encounters found that the studies overall produced a statistically significant but modest reduction

146. For a more in-depth discussion of the implications of mainstreaming restorative justice, see *supra* Part II.C.

147. See Ellie Piggott & William Wood, *Does Restorative Justice Reduce Recidivism?*, in *ROUTLEDGE INTERNATIONAL HANDBOOK OF RESTORATIVE JUSTICE*, 359, 359–76 (Theo Gavrielides ed., 2019); O'MAHONEY & DOAK, *supra* note 21, at 175–95. Early studies of restorative programs tended to find impressively high reductions in recidivism, but many of these studies suffered from selection bias. I focus here on randomized control studies and studies that follow the PICO principle used to assess medical treatments.

in recidivism compared to the ordinary court process.¹⁴⁸ This effect was most pronounced for violent offenses, and was somewhat larger for adult as opposed to juvenile offenders.¹⁴⁹ Another study provided detailed individual analyses of twenty-five studies of repeat offending, including several randomized trials and studies satisfying the “PICO” principle used to assess medical treatments.¹⁵⁰ While the results for property crime were somewhat mixed, the use of restorative justice for violent crime did not result in an increase in reoffending in any of the studies and reduced reoffending in the majority of studies, in some cases quite substantially.¹⁵¹

But most studies involve juveniles and first-time offenders, so there are few rigorous studies comparing restorative outcomes to incarceration specifically. The one relevant study in the meta-analysis is encouraging: the recidivism rate two years after release for property offenders who were incarcerated was three times higher than the rate for those who participated in restorative justice rather than serve a prison sentence.¹⁵² The experience of the handful of small U.S. programs that focus on offenders facing incarceration is similarly positive. Some programs report extremely low recidivism rates,¹⁵³ though without a randomized study it is difficult to know what role selection bias may have played in these results. More research comparing recidivism rates for those receiving a restorative process as opposed incarceration is needed to predict the effects of replacing incarceration with restorative justice.

Overall, the data on recidivism is incomplete, but encouraging. And it is worth emphasizing that the empirical evidence thus far supports

148. See Lawrence W. Sherman, Heather Strang, Evan Mayo-Wilson, Daniel J. Woods & Barak Ariel, *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings From a Campbell Systematic Review*, 31 J. QUANTITATIVE CRIMINOLOGY 1, 10–11 (2015).

149. See *id.* at 12–13.

150. LAWRENCE SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 9 (2007). The “PICO” (population, intervention, comparison, and outcome) principle is used by the UK National Institute of Health and Clinical Excellence to assess the effectiveness of medical treatments.

151. Five of the property studies found a reduction in recidivism, while two found an increase. *Id.* at 68–69.

152. *Id.* at 69–70.

153. See DAVIS, *supra* note 129, at 70 (graduates of Restorative Response Baltimore, a diversion program for youth of color facing incarceration for felony charges, reoffend sixty percent less than those going through the court system); SERED, *supra* note 20, at 134 (between 2012-2018, only one participant in the Common Justice program was terminated from the program because of a new crime).

expanding the use of restorative justice well beyond its current primary use in minor and juvenile offenses. The evidence that restorative justice is particularly effective in violent crimes is especially significant for reducing incarceration, since more than half of state prisoners were convicted of violent crimes.

But even the most enthusiastic proponents of restorative justice concede that this approach cannot work in every case and will not replace incarceration completely.¹⁵⁴ Restorative justice is inappropriate for offenders who do not accept responsibility or who persist in wrongdoing and cannot be deterred through restorative processes. Offenders who pose a continuing and serious danger to others may need to be incapacitated for some period.¹⁵⁵ One restorative theorist proposes a pyramid model in which most cases at the base of the pyramid are addressed using restorative justice, but the traditional process is available when necessary for specific deterrence or incapacitation.¹⁵⁶ Under this approach, incarceration should be used sparingly, typically not in the case of first offenders, and the prisons that do remain should be reformed to promote restorative outcomes and a restorative prison culture.¹⁵⁷

B. *General Deterrence and Community Safety*

Recidivism data and the acknowledgment that some incarceration will remain necessary may go a long way in reassuring critics. What about restorative justice's effect on serious criminal behavior more broadly? No existing criminal justice system is sufficiently restorative to provide empirical insight into the effects of largely replacing incarceration with restorative justice. But any reduction in general deterrence due to a decrease in punishment severity can be at least partially offset by gains in compliance generated by enhanced legitimacy and transformative approaches to community safety.

Classical deterrence theory would predict that expanding restorative justice would reduce general deterrence because restorative agreements

154. See SERED, *supra* note 20, at 133; Jim Dignan, *Restorative Justice and the Law: The Case for an Integrated, Systemic Approach*, in RESTORATIVE JUSTICE AND THE LAW, *supra* note 18, at 168, 186; BRAITHWAITE, *supra* note 43, at 32–33.

155. Of course, determining which offenders fall in this category is difficult and contentious, but no more so than similar determinations that are routinely made in our current system regarding pretrial preventive detention and sentencing of repeat offenders.

156. BRAITHWAITE, *supra* note 43, at 32–33.

157. See Dignan, *supra* note 154, at 186–87.

are generally much less severe than traditional criminal punishments. But several factors may at least partially offset this effect.

First, if used broadly enough, advocates contend that restorative justice may contribute to compliance with the law by enhancing the community's perception of procedural justice and the legitimacy of the criminal legal system.¹⁵⁸ Proponents also argue that increased community trust would lead to higher rates of reporting crime and cooperation with law enforcement, thus strengthening deterrence.¹⁵⁹ The potential effects of increasing reporting rates on deterrence should not be underestimated: a recent national study found that fifty-two percent of violent victimizations, and forty-two percent of cases involving a weapon, went unreported.¹⁶⁰

Pairing restorative justice with transformative approaches to community safety may also help prevent crime.¹⁶¹ The availability of alternative first responders and community-based responses to crime might further reduce the number of crimes that are not addressed because of reluctance to involve the police. A variety of community-based transformative interventions may also help prevent crime, such as teams of "violence interrupters," de-escalation training for residents, community peacemaking circles, and youth mentorship programs, as well as broader social, political, and economic reforms aimed at the systemic causes of crime.¹⁶² While it is impossible to predict the effect a turn from a punitive to a restorative approach would have on crime rates, skeptics' fears that such a move would be tantamount to encouraging crime are overblown, in part because they do not take into account the potential for increased legitimacy across the whole system.

C. *Proportionality and Serious Crimes*

What about skeptics' concern that replacing incarceration with restorative justice would result in outcomes that are significantly more

158. SHERMAN & STRANG, *supra* note 150, at 78–79.

159. See Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2327 (2013); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 60 (1999).

160. DEP'T OF JUST., SPECIAL REPORT: VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 4–8 (2012), <https://www.bjs.gov/content/pub/pdf/vnvp0610.pdf>.

161. For discussion, see *supra* Part II.A.

162. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1628–1630 (2019).

lenient than what retributivists would consider proportionate, particularly in the case of very serious crimes?¹⁶³ One response would be to simply acknowledge that rejecting a punitive model is a feature, not a bug, of restorative justice and to forsake support from those who insist on proportionate punishment. Expectations about what level of punishment is “deserved” for a given offense is influenced by the anchoring effect of the existing system of mass incarceration. In an ideal world, a restorative approach to crime would itself become constitutive and reset expectations that long and dehumanizing prison terms are the proper response to serious harm. At the same time, this approach would almost certainly make it impossible to gather support for using restorative justice for the most serious crimes in the near term and would likely diminish support for restorative responses to crime more generally. Moreover, there is a concern that the system’s legitimacy and any resulting compliance will be undermined if restorative responses are perceived to be significantly disproportionate.¹⁶⁴

Another option is to implement restorative justice in a way that is compatible with a notion of proportionality. This approach could be rooted in retributivism, but need not be: the restorative repair agreement may become more onerous for more serious crimes in order to reflect the severity of the harm caused and to express sufficient community moral condemnation for the act, rather than to impose deserved punishment on the offender.¹⁶⁵ Some restorative justice theorists have suggested that restorative outcomes should be subject to broad upper and lower limits based on the offense,¹⁶⁶ or that additional punishments should be available where needed to insure proportionality in serious cases.¹⁶⁷

163. *E.g.*, Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice”*, 1 UTAH L. REV. 375, 381 (2003).

164. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 478 (1997) (noting that deterrence can be reduced if criminal punishments are too far removed from popular notions of retributive desert).

165. Some theorists, like Braithwaite, view restorative justice as incompatible with retributivism, while others, like Duff, argue that true restoration requires the imposition of retributive punishment. *Compare* John Braithwaite, *Holism, Justice, and Atonement*, 1 UTAH L. REV. 389, 391 (2003), *with* R.A. Duff, *Restorative Punishment and Punitive Restoration*, in *RESTORATIVE JUSTICE AND THE LAW*, *supra* note 18, at 82, 96–97. Others recognize that restorative justice does effectively involve punishment, even if there is no intent to impose harsh treatment on the offender. *See* Dignan, *supra* note 42, at 135–36.

166. Hoyle, *supra* note 53, at 64.

167. *See* Michael Cavadino & Jim Dignan, *Reparation, Retribution, and Rights*, 4 INT’L REV. VICTIMOLOGY 233 (1997).

Where a restorative process takes place after a charge has been filed, proportionality constraints can easily be enforced through court review of restorative agreements or by using a restorative agreement as a factor that can inform a court's sentencing decision rather than the presumptive sentence. Indeed, jurisdictions in New Zealand and Canada where restorative justice is widely used have adopted precisely this approach. Courts in these jurisdictions often have the option of reviewing restorative agreements; studies have shown that in the roughly twenty percent of cases where courts refuse to ratify an agreement, they are much more likely to increase the punitiveness of the order than to decrease it.¹⁶⁸ And we have already seen that in New Zealand, participation in a restorative justice process will typically reduce rather than eliminate the prison sentence in serious cases.

Of course, this attempt to accommodate retributivist or proportionality concerns comes with serious disadvantages. The narrower the proportionality bounds imposed by the courts reviewing restorative agreements and the more the restorative process is viewed as simply a supplement to rather than a substitute for a traditional sentence, the less restorative the criminal disposition becomes both in terms of process and outcome. More fundamentally, the routine and punitive use of incarceration even after an offender has completed a restorative process may strike some proponents as wholly incompatible with restorative values of healing and reintegration. Whether and how to include traditional punishments alongside restorative approaches is not an objective calculation; it is a balance that will vary in different communities. I would prefer a restorative approach that does not seek to satisfy retributive aims and employs incarceration only where necessary for incapacitation or deterrence. But the important point for our purposes is that, if desired, restorative justice can be expanded to serious crimes without necessarily abandoning retribution altogether.

CONCLUSION

In this Article I've tried to think seriously about whether and how we might expand the use of restorative justice throughout our criminal

168. John Braithwaite, *In Search of Restorative Jurisprudence*, in RESTORATIVE JUSTICE AND THE LAW, *supra* note 18, at 150–151 (citing studies finding that in New Zealand courts ratified eighty-one percent of conference decisions and when they did change them were eight times more likely to reduce the order, and that courts in Manitoba ratified eighty-three percent of restorative plans and were five times as likely to modify by addition of requirements as deletions).

legal system. I hope my discussion will put some skeptics at ease by showing that restorative justice can be expanded without abandoning a commitment to due process, community safety, racial equity, and, if desired, proportionality. Nevertheless, there is likely too much uncertainty at this point for all but the most committed proponents to support wide-scale adoption of restorative justice on the order seen in New Zealand. So where do we go from here? As a first step, we should support a variety of pilot programs run by community-based organizations, and provide funding to ensure that restorative programs serve low-income communities. At least some of these programs should experiment with providing restorative justice for more serious and violent crimes. We should rigorously study both objective and subjective measures of success for these programs and try to determine if there are models of restorative justice that can eliminate or significantly reduce the use of incarceration while maintaining community safety and responsiveness to crime victims.

We are at a key moment in the history of American crime and punishment: widespread dissatisfaction with our racially discriminatory and heavily carceral system has at least created an opening for reform. Expanding restorative justice is a tantalizing option because it offers a way to bypass this flawed system altogether, and to use a process that has a little something for everyone—more mercy for offenders, but also more empowerment for crime victims. This Article has emphasized the risks and tradeoffs that are likely to come with any expansion of restorative justice, and the need to proceed thoughtfully and gradually. At the same time, it remains the case that the primary alternative to expansion of restorative justice is a deeply flawed status quo. As we consider expanding restorative justice, we would do well to remember this basic fact: the perfect should not be the enemy of the good.