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## ACCOUNTABILITY AND REPAIR: The Prosecutor's Case for Restorative Justice

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MIRIAM KRINSKY AND TAYLOR PHARES

## ACCOUNTABILITY AND REPAIR: The Prosecutor's Case for Restorative Justice

64 N.Y.L. SCH. L. REV. 31 (2019–2020)

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I. INTRODUCTION

*The job of a District Attorney—a prosecutor—is to promote community safety. This means more than simply punishing people who commit crimes. It requires engaging with communities to determine what safety and justice mean for them, identifying the most effective ways to hold accountable those who do harm, giving victims a sense of justice and healing, and promoting strong, healthy communities.*

–Brooklyn District Attorney Eric Gonzalez<sup>1</sup>

Beginning in the 1960s and 1970s, the U.S. government has increasingly addressed crime through punishment and incarceration.<sup>2</sup> Politicians in past decades have campaigned for office by fueling fear of those who commit crimes—and voters have historically rewarded these politicians for doing so.<sup>3</sup> As a result, state and federal legislatures have ratcheted up sentences and expanded the scope of criminal codes. In turn, some prosecutors have sought and implemented increasingly punitive charges and sentences—touting these choices in elections as being “tough on crime.”<sup>4</sup> The outcome has been escalating incarceration that has eroded communities’ trust in the criminal justice system, especially in over-policed communities of color, and has left the United States as an international outlier in incarceration rates.<sup>5</sup>

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1. Eric Gonzalez, *Justice 2020: An Action Plan for Brooklyn*, BROOKLYN DISTRICT ATT’Y 5, <http://www.brooklynnda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf> (last visited Nov. 10, 2019).
  2. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 3 (Jeremy Travis et al. eds., 2014) [hereinafter NAT’L RESEARCH].
  3. Inimai M. Chettiar & Udi Ofer, *The ‘Tough on Crime’ Wave is Finally Cresting*, BRENNAN CTR. FOR JUST. (Jan. 16, 2018), <https://www.brennancenter.org/blog/tough-crime-wave-finally-cresting>.
  4. See NAT’L RESEARCH, *supra* note 2, at 320, 336. “Public and professional discourses moved from a focus on rehabilitation as the predominant purpose of punishment to just deserts, or retribution, as the primary goal. Stated in colloquial terms, ‘tough on crime,’ ‘do the crime, do the time,’ and ‘adult time for adult crime’ became public narrative.” *Id.* at 320.
  5. See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1287 (2004) (“Social scientists have theorized, based on social control research, that people who live in neighborhoods with high prison rates tend to feel a strong distrust of formal sanctions, less obligation to obey the law, and less confidence in the capacity of informal social control in their communities.”); *Criminal Justice Facts*, THE SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> (last visited Nov. 12, 2019) (“The United States is the world’s leader in incarceration.”); *Final Report of the President’s Task Force on 21st Century Policing*, OFF. OF COMMUNITY ORIENTED POLICING SERVS. 9 (May 2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) (“Gallup polls show the public’s confidence in police work has remained flat, and among some populations of color, confidence has declined.”); *United States World Prison Brief Data*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/united-states-america> (last visited Nov. 12, 2019) (calculating that over two million individuals are currently detained in U.S. prisons).

As of 2019, the United States incarcerates over 2.3 million people—more people per capita than any other nation in the world.<sup>6</sup> This expansive criminal justice engagement has fallen disproportionately on communities of color.<sup>7</sup> Across the United States, black adults are 5.9 times more likely and Hispanics are 3.1 times more likely to be incarcerated than white people.<sup>8</sup> One in four black children will have their father incarcerated before they turn fourteen.<sup>9</sup> As a result, the most vulnerable communities are struggling with intergenerational cycles of poverty and trauma.<sup>10</sup>

Our carceral and punitive approach to accountability has not worked, and despite campaign promises and political claims, society is not safer for it.<sup>11</sup> Spending on policing, prosecuting, and incarcerating large numbers of people has put an enormous financial strain on public budgets.<sup>12</sup> Significantly, this flawed approach does little to heal victims or meaningfully prevent crime through rehabilitation or other responses that attend to the underlying causes and drivers of criminal behavior.<sup>13</sup> Rather than continue down this ineffective and troubling path, we need to embrace new approaches to accountability that repair the harm caused to victims, hold people who commit harm accountable, incorporate evidence on reducing recidivism, and end cycles of over-policing and over-incarcerating marginalized communities.

Elected prosecutors play a vital role in this re-envisioning of criminal justice. They have enormous power and discretion at every stage of the criminal process—

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6. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.
  7. See Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof*, WASH. POST (Sept. 18, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/>. Studies show that racial disparities impact every aspect of the justice system. *Id.*
  8. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 6–7 (2018).
  9. Shaila Dewan, *Family Separation: It's a Problem for U.S. Citizens, Too*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html>.
  10. See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.
  11. Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. 2 (July 2017), [https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf) (“Research consistently shows that higher incarceration rates are not associated with lower violent crime rates.”).
  12. See Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.
  13. Stemen, *supra* note 11, at 1–3. See generally *Crime Survivors Speak: The First-Ever National Survey of Victims' Views of Safety and Justice*, ALLIANCE FOR SAFETY & JUST. (2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [hereinafter *Crime Survivors Speak*] (detailing the levels of dissatisfaction victims have with the criminal justice system's response to their needs).

from charging to pre-trial detention to plea bargaining to sentence recommendations.<sup>14</sup> A new generation of elected prosecutors has recognized that its role in charting a new pathway forward is a broad one; these new leaders seek to repair the harm and distrust caused by decades of racially disparate policing and prosecution and, in doing so, they are embracing new approaches to accountability.<sup>15</sup>

This article discusses one established alternative approach to accountability—restorative justice<sup>16</sup>—with a focus on how it can fit into a prosecutor-led shift away from mass incarceration and punitive responses to misconduct. First, this article examines the ways that carceral approaches have failed both victims and their communities and how restorative justice has shown promise in addressing these failures. Next, this article offers examples of restorative justice models and shares the outcomes of different restorative justice programs. Finally, this article discusses ways that prosecutors can further these efforts, thereby expanding the reach of these programs and the number of individuals served.

#### *A. Traditional Prosecution Approaches Often Fail Victims and Communities*

Prosecutors have an ethical obligation to act as “minister[s] of justice,”<sup>17</sup> a duty to “seek justice within the bounds of the law, not merely to convict,” and to “act with integrity and balanced judgment to increase public safety.”<sup>18</sup> Despite these obligations, many prosecutors have adopted a narrow approach to addressing crime by primarily embracing punitive responses that often result in sending those who have engaged in misconduct away for lengthy terms of incarceration.<sup>19</sup> Yet there is little evidence that our jails and prisons promote effective rehabilitation or reductions in recidivism.<sup>20</sup> Instead, the effects of this carceral “tough-on-crime” approach to accountability—

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14. See Emily Bazelon & Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

15. *Id.* See also *21 Principles for the 21<sup>st</sup> Century Prosecutor*, FAIR & JUST PROSECUTION (2018), [https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP\\_21Principles\\_Interactive-w-destinations.pdf](https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf).

16. See *Building Community Trust: Restorative Justice Strategies, Principles and Promising Practices*, FAIR & JUST PROSECUTION 1–9 (2017), [https://fairandjustprosecution.org/wp-content/uploads/2017/12/FJP\\_Brief\\_RestorativeJustice.pdf](https://fairandjustprosecution.org/wp-content/uploads/2017/12/FJP_Brief_RestorativeJustice.pdf) [hereinafter *Building Community Trust*]. “Parallel justice” is another alternative approach to accountability. See CRITICAL ISSUES IN RESTORATIVE JUSTICE 4–5 (Howard Zehr & Barb Towes, eds., 2004). While the intersections between restorative justice and parallel justice are beyond the scope of this article, they have the potential to be complementary.

17. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2018).

18. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2018).

19. See NAT'L RESEARCH, *supra* note 2, at 70 (explaining that historically accepted views of crime and criminal behavior contributed directly toward an increase in the use and severity of prison sentences by prosecutorial, judicial, and correctional officials). Such prosecutorial actions at the charging and plea-bargaining phases have also contributed to the racial disparities in the system. See *id.* at 97–98.

20. See Sri Sri Ravi Shankar, *We Must Do More to Rehabilitate US Inmates*, THE HILL (Jan. 26, 2018), <https://thehill.com/opinion/international/370908-we-must-do-more-to-rehabilitate-us-inmates>.

motivated by goals of retribution, incapacitation, and deterrence<sup>21</sup>—include growing mistrust of law enforcement, the fraying of family and social ties in communities affected by high rates of incarceration, the absence of mechanisms that ensure victims are healed or made whole, and a persistent failure to address the underlying causes of criminal conduct.<sup>22</sup>

Prosecutors who have chosen this approach often invoke the perceived desires of crime victims as justification for punitive responses that include lengthy sentences.<sup>23</sup> However, surveys of victims often suggest a contrary perspective. One recent survey of crime victims revealed, by a margin of three to one, that they preferred people be held accountable through options other than incarceration, such as rehabilitation or community service.<sup>24</sup> Further, six out of ten crime victims reported that they would prefer more government spending on rehabilitation and crime prevention than on lengthy prison sentences.<sup>25</sup> Moreover, victims and their families have not been well served by incarceration-driven approaches. The real needs of victims and their families, such as compensation, medical and mental health care, or the desire to have a meaningful voice in the criminal process, are often absent from traditional methods of prosecution and punishment.

The needs and voices of victims and their families tend to be peripheral to the primary goal and focus of criminal proceedings—to hold individuals accountable for their crimes. Indeed, some victims are further traumatized and harmed by the criminal justice system, as they can be blamed for the crimes they experienced,<sup>26</sup> retraumatized by inadequately trained interviewers,<sup>27</sup> compelled to repeatedly miss

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21. Retribution focuses on ensuring a person who commits harm is punished proportionally for that harm. See WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 1.5(a)(1)–(6) (3d ed. 2018). Incapacitation focuses on ensuring a person is unable to commit harm to a general population by isolating and supervising them. See *id.* Deterrence is the belief that individuals, either those who are punished themselves or others in the public, will be deterred from committing crime, either in the first place or as a recidivist, based on the knowledge that they will be punished for the offense. *Id.*
  22. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 57–59 (1998).
  23. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 47–48 (2019) (noting that a district attorney displayed a bumper sticker with the slogan “Victims Say: Catch & Release Is For Fish—Not Felons”); see also Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 *OKLA. L. REV.* 887, 909 (2018).
  24. *Crime Survivors Speak*, *supra* note 13, at 5.
  25. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 *UTAH L. REV.* 15, 18 (2003) (discussing reasons that contribute to victim dissatisfaction with criminal justice system).
  26. See Jerald Monahan & Sheila Polk, *The Effect of Cultural Bias on the Investigation and Prosecution of Sexual Assault*, *THE POLICE CHIEF*, <https://www.policchiefmagazine.org/the-effect-of-cultural-bias-on-the-investigation/> (last visited Nov. 9, 2019) (discussing the vulnerability of sexual assault victims in the criminal justice system and calling for the improvement of training among police officers and prosecutors).
  27. See *Implementing a Trauma-Informed Approach*, U.S. DEP’T OF ST. (June 28, 2018), <https://www.state.gov/wp-content/uploads/2019/02/283795.pdf> (discussing the importance of taking a trauma-informed

work and arrange costly childcare in order to advance the government's case, or even coerced into testifying or cooperating under threat of facing prosecution themselves.<sup>28</sup> Despite claims that criminal prosecutions are undertaken with the needs of victims in mind, victims as a group have not expressed satisfaction with the traditional criminal justice system.<sup>29</sup>

The overreliance on the traditional model of punishment fails not only those charged with offenses and the victims of those offenses, but also families and communities. Children of incarcerated parents often endure numerous psychological, social, economic, and educational setbacks.<sup>30</sup> Moreover, evidence suggests that incarceration does not meaningfully improve community safety. Jails and prisons in the United States, as they currently operate, have, at best, a marginal effect on reducing crime.<sup>31</sup> In some cases, incarceration has been shown to be criminogenic—meaning that serving time in jail or prison increases one's likelihood of committing another crime.<sup>32</sup> Incarceration fails to address, and can exacerbate, many of the underlying causes of crime—such as poverty, mental health or substance use disorders, lack of economic opportunity, or weakened social bonds.<sup>33</sup> Therefore, it

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approach when working with victims, specifically human trafficking victims, so that criminal justice professionals “do not miss important cues and unintentionally retraumatize the individual”).

28. Alan Blinder, *New Orleans Prosecutors Accused in Using Fake Subpoenas*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/17/us/new-orleans-subpoenas.html> (detailing attempts of local prosecutors to coerce witnesses into testifying by using fraudulent subpoenas containing threats of fines and imprisonment).
29. *Crime Survivors Speak*, *supra* note 13, at 11 (reporting two out of three crime survivors surveyed received no help from the criminal justice system following their incident); *see also* Heather Warnken, *Untold Stories of California Crime Victims: Research and Recommendations on Repeat Victimization and Rebuilding Lives*, THE CHIEF JUST. EARL WARREN INST. ON L. & SOC. POL'Y 14–15 (2014), <https://safeandjust.org/wp-content/uploads/Untold-stories-of-California-crime-victims-3-31-14-1.pdf> (reporting some crime survivors do not even report due to a perceived lack of empathy within law enforcement). Some victims may decline to report their victimization altogether or may want their case to go through the traditional criminal justice system—to see their offender prosecuted and sentenced to the harshest extent possible. *See Crime Survivors Speak*, *supra* note 13, at 11 (“The number one and two reasons for not reporting cited by respondents, respectively, were feeling that the police wouldn’t do anything and prosecution and courts wouldn’t do anything.”). The ethical duties of prosecutors—to “seek justice” and act with “balanced judgment to increase public safety”—require them to consider many factors and viewpoints when deciding whether to prosecute. *See generally id.* While this should require respecting victims through the process, prosecutors cannot blindly accept a victim’s desire for a particular outcome. *Id.*
30. *See* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT’L INST. OF JUST. J. 10, 11–12 (2017). Facilities should encourage visitation to protect the parent-child bond during the parent’s incarceration and programs should be in place to provide support for children of incarcerated parents, which would likely reduce the deleterious effects of incarceration. *See id.* at 12–15.
31. *See* Stemen, *supra* note 11, at 1.
32. *Id.* Although more research is needed, potential reasons include: the possibility that incarcerated people pick up criminal habits or build a criminal network while incarcerated, and the destabilizing collateral consequences of incarceration, including loss of employment and difficulty obtaining future employment, loss of housing, and fraying of social ties. *Id.*
33. *See* SERED, *supra* note 23, at 67–79.

should not be surprising that recidivism rates for our current punishment-driven justice system are as high as 80 percent.<sup>34</sup>

By prosecutors' own metrics—the pursuit of justice, victim representation, and public well-being<sup>35</sup>—the traditional criminal justice responses are failing. It is clear that there must be a course correction in how we address accountability and harm caused by criminal behavior. Because prosecutors have had a significant role in driving mass incarceration, they have a duty to lead the charge toward new paradigms aimed at promoting a more just system.

*B. Restorative Justice: Accountability for Individuals, a Voice for Victims, and Improved Outcomes for Public Safety*

Practiced in numerous societies dating back centuries,<sup>36</sup> restorative justice aims to bring together victims of harm, those who committed the harm, and community members in an effort to repair—to the extent possible—the harm caused by an offense.<sup>37</sup> Retribution is replaced by accountability and reparation, and deterrence is replaced by a more holistic inquiry into how the crime can be prevented in the future.<sup>38</sup> This shift in framework offers a meaningful opportunity to address the underlying causes of criminal behavior and provides a robust path to preventing future harm, while also holding the defendant accountable and factoring in—and

34. Mariel Alper et al., *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005–2014)*, BUREAU OF JUST. STAT. 1 (May 2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>.

35. The Criminal Justice Standards for the Prosecution Function state that:

The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional legal rights of all persons, including suspects and defendants.

CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2018).

36. For example, many indigenous tribes in North America, such as the Navajo Nation, the Suislaw, and the Muscogee have employed peacemaking practices that focus on healing and repairing damaged relationships in response to harm. *See, e.g.*, CONFEDERATED TRIBES OF COOS, LOWER UMPQUA AND SIUSLAW INDIANS TRIBAL CODE, tit. 2, ch. 14 (2005); Marianne O. Nielsen, *Navajo Nation Courts, Peacemaking and Restorative Justice Issues*, 31 J. OF LEGAL PLURALISM & UNOFFICIAL L. 105, 106–08 (1999); *Muscogee Creek Nation Reintegration Program*, THE HARV. PROJECT ON AM. INDIAN ECON. DEV., <https://hpaied.org/sites/default/files/publications/Muscogee%20Creek%20Nation%20Reintegration%20Program.pdf> (last visited Nov. 9, 2019). These approaches to justice, which vary among tribes, served as important models for the development of a peacemaking program within the state court system at the Red Hook Community Justice Center in Brooklyn, New York. *See Peacemaking Program*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/peacemaking-program/more-info> (last visited Nov. 9, 2019).

37. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 21 (2d ed. 2015).

38. *See What is Restorative Justice?*, RESTORATIVE JUST. PROJECT, <https://rjdtoolkit.impactjustice.org/establish-a-foundation/restorative-justice/> (last visited Nov. 12, 2019).



listening to—victims' needs.<sup>39</sup> Rather than incarcerating an individual for committing harm against another and their community, restorative justice seeks to provide support and craft responses tailored to the reasons the harm was committed, the needs of the victim, and the needs of the individual who committed the harm.

Some may presume that the traditional model of prosecution and its related punitive aspects<sup>40</sup> are the gold standard of “accountability.”<sup>41</sup> However, as Danielle Sered explains in her book *Until We Reckon*, punishment in the form of social isolation requires only that the punished individuals experience the punishment.<sup>42</sup> It does not call on them to engage with the damage their actions have caused others, nor to do the work necessary to repair the harm they caused. The punished individuals need not delve deep to determine what led them to their destructive conduct, and they are not required to take action to ensure they will not engage in the conduct again.<sup>43</sup>

Conversely, in a restorative justice process, individuals are generally placed in direct conversation with those they harmed, their families, and other community members.<sup>44</sup> A trained facilitator guides the conversation—after extensive preparation through one-on-one work with the victim and those who caused the harm—in a manner that centers around the victim and the harm they suffered. The individual who caused harm must hear directly from the victims about the harm they suffered and the consequences they endured.

The facilitator will help the victim and the individual who caused the harm to work toward creating a plan that repairs the harm as much as possible. These plans go by a variety of titles and shorthand, including “healing steps,”<sup>45</sup> and “doing sorry.”<sup>46</sup> True and full repair may not always be possible, but the process of seeking

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39. *Building Community Trust*, *supra* note 16, at 2.

40. Punitive aspects of the criminal justice system include lengthy sentences and severe collateral consequences. *See generally* Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 Nw. U. L. Rev. 843, 850–52 (2002) (discussing the methodology of punishment in the U.S. court system).

41. Accountability is defined as “the state or quality of being answerable to someone for something; responsibility.” *Accountability*, BLACK’S LAW DICTIONARY (11th ed. 2019).

42. Danielle Sered is a national leader in restorative justice and Executive Director of Common Justice, the first alternative to incarceration restorative justice program in the U.S. for violent felonies. *See Biography of Danielle Sered*, COMMON JUST., [http://www.commonjustice.org/danielle\\_sared\\_staff](http://www.commonjustice.org/danielle_sared_staff) (last visited Nov. 12, 2019); SERED, *supra* note 23, at 92 (“[T]he criminal justice system is like kryptonite to accountability.”).

43. SERED, *supra* note 23, at 92–96.

44. Although most programs involve the victim and person who caused the harm coming together in a facilitated conversation, restorative justice can be completed with only the person who caused harm and a facilitator or with community members. *See, e.g., Common Justice Model*, COMMON JUST., [https://www.commonjustice.org/common\\_justice\\_model](https://www.commonjustice.org/common_justice_model) (last visited Nov. 10, 2019); Suvi Hynynen Lambson, *Peacemaking Circles: Evaluating a Native American Restorative Justice Practice in a State Criminal Court Setting in Brooklyn*, CTR. FOR CT. INNOVATION iii (2015), <https://www.courtinnovation.org/sites/default/files/documents/Peacemaking%20Circles%20Final.pdf>.

45. Lambson, *supra* note 44, at 8.

46. “Doing sorry” is a colloquial phrase Danielle Sered uses to juxtapose the concepts of saying you are sorry and doing work to show that. SERED, *supra* note 23, at 112.

the repair and the actions the individual takes to make repair are substantial steps in the process. While incarceration attempts to force wrongdoers to accept accountability through confinement, with mixed results, restorative justice requires that those who do harm accept responsibility and attempt to rectify the harm they caused. Take as an example a case Sered describes from her experience at Common Justice:

One man who participated in a circle at Common Justice had had to walk daily past the place where the responsible party stabbed him. Every time, he was overcome with fear, which subsided only into anger. As part of the circle, he asked the responsible party to meet him a handful of times at the place where the stabbing occurred and to greet him respectfully and shake his hand. It seemed simple enough, but for the harmed party, this allowed him to overwrite the experience of trauma—which was situated for him in a specific place—with an experience of reconciliation, safety, and respect.<sup>47</sup>

This story illustrates restorative justice's ability to encourage true accountability and to provide victims with what many desperately want: a say in the outcome of their case and the ability to heal and move forward.

Perhaps the most promising aspect of moving toward a restorative justice model is the opportunity to divert an individual from the criminal justice system entirely. Even brief contact with the criminal justice system can “have negative psychosocial and employment effects, and often fail to address the underlying cause of criminal behavior.”<sup>48</sup> Therefore, whenever possible, prosecutors should promote models that avoid or limit contact with the criminal justice system.<sup>49</sup>

Restorative justice shows promise in better addressing the root causes of crime and reducing recidivism than our traditional system—critical factors for prosecutors to consider. For example, the Restorative Community Conferencing (RCC) program in Alameda County, California, a restorative justice diversion program focused on youth who otherwise would have been charged with crimes, resulted in a 44 percent decrease in recidivism for participating youth compared to similarly situated youth on probation.<sup>50</sup> Through RCC, youth who are apprehended by police or school authorities are diverted from the judicial system and instead referred to a community based nonprofit trained in restorative principles.<sup>51</sup> If the case is deemed appropriate,<sup>52</sup> the harmed person and the youth will enter into several facilitated conversations

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47. *Id.*

48. *Promising Practices in Prosecutor-Led Diversion*, FAIR & JUST PROSECUTION 2 (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Diversion.9.26.pdf>.

49. *See generally id.* (offering more in-depth information about diversion models for prosecutors).

50. sujatha baliga et al., *Restorative Community Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County*, IMPACT JUST. 7 (2017), [https://impactjustice.org/wp-content/uploads/CWW\\_RJreport.pdf](https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf).

51. *Id.* at 2.

52. A case is deemed appropriate for RCC after it has been accepted by a facilitating organization, placed into a holding pattern, and there have been at least two meetings held with both parties for the organization to determine amenability and safety. *See generally id.* at 2.

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where “all parties engage in self-reflection, firm yet supportive accountability, and apologies, all culminating in a commitment to help a young person overcome obstacles and mend social ties.”<sup>53</sup> A plan is then created that includes concrete steps the youth is required to take, called “do rights,” to mend relationships with various parties.<sup>54</sup> The youth’s progress is monitored, and if the steps are completed, the case is closed and no charges are filed.<sup>55</sup>

If the goal of our criminal justice system is to promote safer and healthier communities, it is time for prosecutors to embrace restorative justice models that can advance these objectives. Restorative justice is not a new response to harm, but rather, one that prosecutors have traditionally bypassed. Restorative justice provides prosecutors an opportunity to embrace a less punitive framework while still protecting communities and supporting victims.

### II. RESTORATIVE JUSTICE IN PRACTICE: AN OVERVIEW

#### *A. Models of Restorative Justice*

Restorative justice is not one-size-fits-all. The principles underlying restorative justice can be applied in a variety of ways, at different steps in the criminal justice process, by multiple entities. This is encouraging for prosecutors who serve over 2,300 distinct jurisdictions in the United States.<sup>56</sup> A selection of models are summarized below, but these are just a sample of the programs, both formal and informal, that communities have adopted. They should not serve as a prescription, but rather, a starting point for jurisdictions that are considering moving toward a restorative justice model.

##### *1. Pre-Charge Diversion through Community Courts*

The Neighborhood Courts system is a restorative justice model in San Francisco, California, that launched in 2012.<sup>57</sup> The program allows the San Francisco District Attorney’s Office the opportunity to divert non-violent cases pre-charge<sup>58</sup> to one of ten Neighborhood Courts, spread over the city’s ten police districts. These Neighborhood Courts are facilitated by community-based volunteer “adjudicators” who have been trained in restorative justice principles and facilitate hearings where individuals who caused harm accept responsibility for, and discuss the impact of,

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53. *Id.* at 3.

54. *Id.*

55. *Id.*

56. *Prosecutors Offices*, BUREAU OF JUST. STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=27> (last visited Nov. 10, 2019).

57. *Neighborhood Courts*, CITY & COUNTY OF S.F. DISTRICT ATT’Y, <https://sfdistrictattorney.org/neighborhood-courts#hide1> (last visited Nov. 9, 2019).

58. *See id.* Pre-charge diversion is an excellent method of lessening the collateral consequences that attach after an individual has been charged with a crime. *Id.*

their actions.<sup>59</sup> The victim can choose to attend the hearings but also has the option to meet separately with the adjudicator. Adjudicators then create “directives” based on the facts of each case and needs of each party. Sample directives have included cognitive therapy, writing letters of apology, and community service.<sup>60</sup>

The success of this program is evident on many levels. First, the program highlights the importance of involving the community in restorative justice—130 community members have served as voluntary adjudicators in the seven years the program has been operational.<sup>61</sup> Over four thousand cases have been heard since the program began in 2012.<sup>62</sup> Of those cases, 95 percent were successfully resolved, meaning the referred individual completed the assigned directives and was not prosecuted.<sup>63</sup> Compared to the costs of pursuing the cases through the traditional criminal justice system, Neighborhood Courts saved San Francisco taxpayers over \$3,500 per case.<sup>64</sup> Similar programs in California also exist in Los Angeles and Yolo County.<sup>65</sup>

## 2. *Restorative Justice Response to Violence and Serious Crimes*

Common Justice, a Brooklyn, New York-based alternative to incarceration program, operates the first restorative justice program in the United States that focuses on violent felonies in adult courts, including aggravated assaults and robberies involving weapons.<sup>66</sup> Like other programs, Common Justice employs a restorative justice “circle” to facilitate conversation between the harmed and responsible parties, aiming to “address the underlying causes of violence and help foster a long-term process of transformation for individuals and communities.”<sup>67</sup> With the consent of each party, cases are referred to Common Justice by either the Brooklyn or Bronx District Attorney’s Office. Trained facilitators extensively prepare with both the harmed parties and those accused of causing the harm before the circles occur. This preparation is centered in a victim-focused approach in order to determine how the circle can best achieve healing for the victim and accountability for the responsible party.

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59. *Id.*

60. See Michael Rempel et al., *NIJ’s Multisite Evaluation of Prosecutor Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness*, CTR. FOR CT. INNOVATION 20 (April 2018), <https://www.ncjrs.gov/pdffiles1/nij/grants/251665.pdf>.

61. *Neighborhood Courts*, *supra* note 57.

62. *Id.*

63. *Id.* Those cases in which the participant does not attend or does not successfully complete the directives are referred back to the San Francisco District Attorney’s office for prosecution. *Id.*

64. See Rempel et al., *supra* note 60, at 31.

65. *Building Community Trust*, *supra* note 16, at 3 (discussing the Los Angeles County program); *Neighborhood Courts*, *supra* note 57 (discussing the Yolo County program).

66. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 57 (2019).

67. *Common Justice Model*, *supra* note 44.

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During the circles, participants move toward an agreement on the steps an individual can take to “make things as right as possible,” including attending school, paying restitution, and performing community service.<sup>68</sup> Additionally, while Common Justice staff monitor compliance with the circle agreement, responsible parties must also complete an intensive twelve to fifteen month violence intervention program.<sup>69</sup> Responsible parties who successfully complete both their commitments to those they harmed and the violence intervention program do not serve the jail or prison sentences they would have otherwise faced.<sup>70</sup>

Despite serving victims of more serious crimes than most other programs, Common Justice has shown tremendous promise. Between 2012 and 2018, only one participant was terminated from the program for committing a new crime.<sup>71</sup>

### 3. *Court-Embedded Restorative Justice*

The Red Hook Community Justice Center (“Justice Center”) is a multijurisdictional Community Court in Brooklyn, New York, that was established in 2000 to lessen the reliance on incarceration for lower-level criminal offenses.<sup>72</sup> In 2013, the Justice Center introduced peacemaking circles as a pilot program to determine whether Native American tribal approaches to justice could be replicated in urban court settings.<sup>73</sup> After intensive planning, informed by multiple site visits to Native American peacemaking circles and technical assistance from the Navajo Nation, the Justice Center began its Peacemaking Program with four key goals: to heal relationships, give victims a voice, hold participants accountable, and empower the community.<sup>74</sup>

The Peacemaking Program at the Justice Center is operated by the Center for Court Innovation and accepts referrals from local judges, prosecutors, defense counsel, and community members—even when no criminal charges are pending.<sup>75</sup> A variety of low-level offenses are eligible for the program, including truancy, shoplifting, and minor assault.<sup>76</sup> An important factor in eligibility is the participant’s willingness to “mend the relationships that were harmed by dispute, crime, or

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68. *Id.*

69. *Id.* (indicating the violence intervention program “include[s] restitution, extensive community service, and commitments to attend school and work”).

70. *21 Principles for the 21<sup>st</sup> Century Prosecutor*, *supra* note 15, at 12–13.

71. SERED, *supra* note 23, at 134.

72. Lambson, *supra* note 44, at 2, 19.

73. Erika Sasson & Nora Sydow, *Inspired by Peacemaking, Creating Community-Based Restorative Programs in State Courts; An Implementation Guide*, CTR. FOR CT. INNOVATION 9 (2017), [https://www.courtinnovation.org/sites/default/files/documents/Inspired\\_by\\_Peacemaking.pdf](https://www.courtinnovation.org/sites/default/files/documents/Inspired_by_Peacemaking.pdf).

74. Greg Berman & Aubrey Fox, *Justice in Red Hook*, 26 JUST. SYS. J. 77, 77–87 (2005).

75. *See Peacemaking Program*, *supra* note 36, at 1.

76. *Id.*

wrongful behavior.”<sup>77</sup> Officially, the program is open to all levels of offenses, but prosecutors have been hesitant to recommend peacemaking in more serious cases.<sup>78</sup>

Volunteer facilitators from the community are trained in traditional peacemaking practices through a curriculum influenced and advised on by Navajo peacemakers.<sup>79</sup> Victims are typically invited to participate but are not required to do so. The goal of the process is to achieve a consensus for a peaceful resolution through a “peacemaking circle.” Participants take turns speaking without interruption and facilitators guide the conversation through a lens of addressing trauma and speak to how the event affected the community at large.<sup>80</sup> The group comes together to determine “healing steps” the participants can take.<sup>81</sup> Generally, this process spans more than one peacemaking session to achieve resolution.<sup>82</sup> Participation is, of course, voluntary.<sup>83</sup>

As with other restorative programs, the Justice Center Peacemaking Program has witnessed success. Nearly 80 percent of the thirty-nine cases completed through the Justice Center process completed peacemaking successfully. Of those participants that completed peacemaking successfully, 90 percent received a straight dismissal of their case, while 10 percent received an adjournment in contemplation of dismissal.<sup>84</sup>

#### 4. *In-House Prosecutorial Restorative Justice*

In 2016, the Washington, D.C. Office of the Attorney General, led by Attorney General Karl Racine, introduced an in-house restorative justice program.<sup>85</sup> Run by restorative justice specialists rather than prosecutors, the program focuses on juveniles who otherwise would have been charged with crimes and young adults—between

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77. Lambson, *supra* note 44, at 14. Cases involving intimate partner violence, child abuse, elder abuse, sexual assault, or defendants suffering from severe mental illness or substance addiction, are excluded from the program. *Id.* at 13–14.

78. *Id.* at 18–19.

79. *Id.* at 2.

80. *Id.* at 8–9.

81. *Id.* at vi.

82. *See generally Peacemaking Program, supra* note 36.

83. A 2015 evaluation identified various stated reasons that individuals charged with offenses chose to participate—after the program and its requirements were explained to them: “[I] wanted peace in my household and felt it was easier with peacemaking than through the traditional court setting;” “It’s an opportunity to do the right thing;” “[I] wanted an opportunity to apologize;” and “It was offered and seemed like a quick way to get through this.” Lambson, *supra* note 44, at 22.

84. *Id.* at 5. These adjournments typically led to a dismissal after six months. *Id.* Only 13 percent of the participants did not complete peacemaking due to noncompliance and 8 percent did not complete peacemaking because the staff found them to be inappropriate candidates for the program after the first session. *Id.*

85. *See* Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y.L. SCH. L. REV. 69, 78 (2019).

the ages of eighteen and twenty-four—charged with misdemeanors.<sup>86</sup> Prosecutors in the office's Juvenile Section can refer youth to the program, or victims can request to participate.<sup>87</sup>

Importantly, the program has established a rule against accepting a case unless a prosecutor is planning to bring a charge.<sup>88</sup> This deters “net widening,” in which a larger than necessary group is brought into contact with the criminal justice system.<sup>89</sup> This is essential for prosecutors' offices contemplating an in-house program, as sweeping people into the criminal justice system unnecessarily is antithetical to the restorative justice philosophy.<sup>90</sup> Instead, the goal of restorative justice should be to reduce the footprint of the criminal system in people's lives.

Once an individual is admitted to the program, a trained facilitator is assigned to the case. The facilitator makes contact with the respondent—the person accused of causing harm—and the complaining witness separately to ensure each party wants to participate. After preparation, the facilitator holds a pre-conference with each party, including their supporters (such as family members or mentors). After pre-conferences have been held with each party, a restorative community conference takes place in which the parties and their supporters come together with the facilitator to participate in mediation. The parties explain what happened from their respective viewpoints, and the victim also describes the impact the harm has had on his or her life.<sup>91</sup>

At the conclusion of the conference, the parties agree on the actions the respondent will take to repair the harm caused, to the extent possible. These actions are then incorporated into a written agreement, and the completion of the agreement is monitored by the facilitator.<sup>92</sup> If the respondent satisfies the agreement's requirements, the program is deemed complete and the charges are dismissed. If the individual fails to comply, the case is referred back for prosecution. Of the ninety-five mediations the Office of the Attorney General has facilitated since its founding, only five have been referred back for prosecution for noncompliance.<sup>93</sup>

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86. See *Restorative Justice Program*, OFF. OF THE ATT'Y GEN. FOR D.C., <http://www.njcn.org/uploads/digital-library/DC%20OAG%20slides.pdf> (last visited Nov. 12, 2019). As is common in most current iterations of formal restorative justice programs, the D.C. Office of the Attorney General does not accept sex crimes, gun offenses, homicides, or domestic violence cases into the restorative justice program. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* See also Christopher Bright, *Net Widening or Diversion*, CTR. FOR JUST. & RECONCILIATION, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-5-implementation-issues/diversion-or-net-widening/#sthash.INN7qSsk.Odhlux3V.dpbs> (last visited Nov. 12, 2019) (discussing that restorative justice may widen the net of cases that may not have otherwise been received by the formal court system).

90. *Promising Practices in Prosecutor-Led Diversion*, *supra* note 48, at 2.

91. *Addressing the Root Problems of Crime and Conflict*, OFF. OF THE ATT'Y GEN. FOR D.C. (May 7, 2019), <https://oag.dc.gov/blog/addressing-root-problems-crime-and-conflict>.

92. *Id.*

93. *Id.*

*B. Outcomes of Restorative Justice*

“In practice, restorative justice has been shown to improve victim satisfaction, increase a defendant’s compliance with restitution mandates, and decrease recidivism when compared to more traditional criminal justice responses.”<sup>94</sup> Additionally, restorative justice approaches, especially when implemented before an individual is charged with a crime, save significant financial resources by avoiding trial preparation and incarceration costs.<sup>95</sup> All of these benefits are achieved without any related drop in public safety.<sup>96</sup>

*1. Reduction in Recidivism*

As illustrated by the success of the programs described above, restorative justice programs tend to produce lower rates of reoffense among participants than the traditional criminal justice model.<sup>97</sup> While success rates among programs vary, some have seen reoffense rates within a year of completing a restorative justice program as low as 10 percent, compared with estimated recidivism rates in the traditional criminal justice system of up to 80 percent.<sup>98</sup> Many factors likely account for these successes. First, restorative justice requires individuals to accept responsibility for the harm they caused and to examine how their conduct has harmed other people or their community, thereby strengthening the ties they may feel with their community. Stronger community ties tend to reduce crime.<sup>99</sup> Second, most programs require individuals to take concrete steps toward restoration and behavior change. The hope is that, on a personal level, those who have committed harm implement changes in their lives to prevent similar behavior in the future. Finally, restorative justice programs often connect individuals to benefits, such as job training and social support groups, that may also reduce their likelihood of engaging in future criminal behavior.<sup>100</sup>

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94. *Building Community Trust*, *supra* note 16, at 2.

95. See Rempel et al., *supra* note 60, at 31 (discussing that the Neighborhood Courts program in San Francisco resulted in savings of up to 82 percent compared to traditional prosecution).

96. Danielle Sered, *Accounting for Violence: How to Increase Safety and Break our Failed Reliance on Mass Incarceration*, VERA INST. OF JUST. 24 (2017), <https://www.vera.org/downloads/publications/accounting-for-violence.pdf> [hereinafter *Accounting for Violence*] (describing how a fall in the crime rate in New York City coincided with a reduction in incarceration).

97. *Id.* at 16 (discussing how the restorative justice processes “substantially reduce recidivism among the people who committed harm”).

98. Christi Yoder, *Restorative Justice: Reintegrating Offenders and Healing the Community*, LONGMONT OBSERVER (July 15, 2017), <https://longmontobserver.org/city/non-profits/restorative-justice-reintegrating-offenders-healing-community/>.

99. See Barbara D. Warner et al., *Linking Informal Social Control and Restorative Justice: Moving Social Disorganization Theory Beyond Community Policing*, 13 CONTEMP. JUST. REV. 355, 366 (2010).

100. Michael Feuer & Victor E. Chavez, *Let’s Try Restorative Justice*, L.A. TIMES (Dec. 4, 2000), <https://www.latimes.com/archives/la-xpm-2000-dec-04-me-60964-story.html>; Elizabeth Wagele, *Restorative Justice or Punitive Justice?*, PSYCHOL. TODAY (Aug. 5, 2014), <https://www.psychologytoday.com/us/blog/the-career-within-you/201408/restorative-justice-or-punitive-justice>.



## 2. *Increased Victim Satisfaction*

Restorative justice programs center the victim's voice in the healing process.<sup>101</sup> Victims are given a level of control over the process that they are not granted in the traditional criminal justice system. For example, while some prosecutors have threatened victims with jail time for refusing to participate in a case,<sup>102</sup> most restorative justice programs require that a victim consent to the process from the outset and give the victim agency in deciding the level of participation. When presented with a restorative justice alternative and given an explanation of what the program entails, harmed parties have overwhelmingly chosen to participate.<sup>103</sup> Additionally, part of the process includes an apology from the person who harmed them—something victims rarely receive in the traditional court process.

Given this victim-centric focus, it is unsurprising that victims consistently report higher satisfaction with restorative justice programs than traditional prosecutions. In fact, “[a]mong victims of crime in the United States who have taken part in restorative processes, 80 to 90 percent have reported being satisfied with the process and its results.”<sup>104</sup>

## 3. *Avoidance of Familial and Community Harm from Incarceration*

One often overlooked consequence of our punitive and incarceration-focused responses to criminal conduct is the downstream effect on families and children of incarcerated individuals. Families lose time with a loved one that can never be replaced and may also lose a significant source of income, which can lead to loss of housing or childcare.<sup>105</sup> Scrambling to fill the gap, many people look to government assistance or other alternatives for financial support, which are often inadequate to sustain the quality of life experienced before the familial disruption of incarceration.<sup>106</sup> Children may be displaced to new school districts, disrupting their educational progress. As a result, children of incarcerated parents may suffer the same level of trauma as children who are abused.<sup>107</sup> Conversely, under restorative justice, the

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101. See *Common Justice Model*, *supra* note 44.

102. See WASH. STATE ADMIN. OFFICE OF THE COURT, DV MANUAL FOR JUDGES ch. 5, 1–3 (2015) (listing reasons why victims may not want to participate in criminal cases). Some reasons a victim may not want to participate in a criminal case against the person who harmed them include fear of losing employment for taking time off to testify and fear for their, or their children's, safety if the case involves domestic violence. *Id.*

103. See *Vera Institute of Justice — Common Justice*, OPEN PHILANTHROPY PROJECT (Apr. 2019), <https://www.openphilanthropy.org/focus/us-policy/criminal-justice-reform/vera-institute-justice-common-justice>. Ninety percent of harmed parties approached to participate in Common Justice chose to engage in the program. *Id.*

104. *Accounting for Violence*, *supra* note 96, at 16.

105. *A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities*, THE ANNIE E. CASEY FOUND. 3 (Apr. 2016), <https://www.aecf.org/resources/a-shared-sentence/>.

106. *Id.*

107. *Id.*

individual is free to remain home with their family. Restorative justice approaches allow for continuation of employment and housing, and there is no disruption of parental and familial responsibilities.<sup>108</sup> Additionally, individuals are working to repair not only the harm they inflicted on others, but also to address the underlying reasons of why they did so. This process can be powerful for family members—including children—and may also help the individual become a more stable family member by, for example, adopting better methods of coping or anger management and gaining job skills.<sup>109</sup>

### III. LOOKING FORWARD: THE FUTURE OF RESTORATIVE JUSTICE

As an increasing number of communities make clear, in both opinion polls and through the electoral process, that they want a more measured and less punitive criminal system,<sup>110</sup> restorative justice should be part of any effort to address mass incarceration. Prosecutors, in particular, are beginning to seek out solutions to harms committed in their jurisdictions that respect victims and promote public safety, without inflicting the damage of incarceration and its collateral consequences on individuals and their families. As jurisdictions continue to experiment with restorative justice approaches, there are three areas in which these approaches can be expanded and improved.

#### *A. Geographic Expansion of Restorative Justice Programs*

Ideally, every jurisdiction in this country would incorporate restorative justice into its criminal justice system.<sup>111</sup> Because they hold significant discretion to steer

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108. *What is Restorative Justice?*, RESTORATIVE PARTNERS (Nov. 1, 2017), <https://www.restorativepartners.org/blog/benefits-of-restorative-justice-programs.php> (assuming there are no other barriers, such as housing limitations based on arrest or a period of pre-trial detention leading to job loss, when determining the success of the restorative justice approach).

109. *See Promoting Restorative Justice for Children*, U.N. SPEC. REP. OF THE SECRETARY-GEN. ON VIOLENCE AGAINST CHILD. 27 (2011), [https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/document\\_files/promoting\\_restorative\\_justice\\_for\\_children.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/document_files/promoting_restorative_justice_for_children.pdf) (“Parents who have assisted their child through a restorative justice conference show less inclination to resort to violence as a form of discipline.”).

110. *See, e.g.*, Steve Koczela & Rich Parr, *Public Opinion on Criminal Justice Reform in Massachusetts*, MASSINC 1 (June 2017), <https://massinc.org/wp-content/uploads/2017/06/Public-Opinion-on-Criminal-Justice-Reform-in-Massachusetts.pdf> (illustrating support for crime prevention and rehabilitation over punishment and enforcement in Massachusetts); Brian Nienaber & Ed Goeas, *Key Findings from Statewide Surveys in Florida, North Carolina, Nevada, Kentucky, Missouri, and Wisconsin*, U.S. JUST. ACTION NETWORK (Apr. 2016), <http://www.justiceactionnetwork.org/wp-content/uploads/2016/02/Analysis-memo-All-states.pdf> (finding that over 70 percent of voters in Florida, North Carolina, Nevada, Kentucky, Missouri, and West Virginia agree with the statement “[t]he main goal of our criminal justice system should be rehabilitating criminals to become productive, law-abiding citizens”); Bazelon & Krinsky, *supra* note 14 (“In the past two years, a wave of prosecutors promising less incarceration and more fairness have been elected across the country.”); *Crime Survivors Speak*, *supra* note 13, at 5 (referencing a study that suggests “by a margin of three to one crime victims prefer holding people accountable through options beyond prison”).

111. *See* Rebecca Beitsch, *States Consider Restorative Justice as Alternative to Mass Incarceration*, PBS NEWSHOUR (July 20, 2016), <https://www.pbs.org/newshour/nation/states-consider-restorative-justice->

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cases at the beginning of the process, prosecutors can and should promote restorative justice programs and support funding for community partners to implement these models. Expanding these alternatives will offer prosecutors a streamlined way to divert cases from traditional prosecution to a non-punitive restorative approach. In fact, the recent *21 Principles for 21<sup>st</sup> Century Prosecutors*<sup>112</sup> provides a “new and bold 21<sup>st</sup> Century vision for meting out mercy and justice,” and includes a recommendation that each prosecutor’s office “refer cases to [restorative justice programs in the community] and treat the outcome as the resolution of the charges.”<sup>113</sup> The federal government has also recognized the benefits of expanding restorative justice, listing it as a crime prevention innovation eligible for grant funding under the Bureau of Justice Assistance’s 2017 Smart Prosecution program.<sup>114</sup>

The flexibility of restorative justice principles makes geographic expansion attainable. Restorative justice can be incorporated into various steps within the criminal justice system and administered by community members outside of formal institutions.<sup>115</sup> For jurisdictions that face resistance to implementing and expanding of restorative justice programs, evidence of financial savings may provide the political leverage needed to convince skeptics. For example, various law enforcement, justice, and corrections agencies in Vermont argued for increased use of restorative justice at more points in the criminal justice system, in part, by noting that the services save public resources.<sup>116</sup>

### *B. Substantive Expansion of Restorative Justice*

In addition to expanding the geographic footprint of restorative justice, it is important that more programs offer—and prosecutors recommend—entry for the widest range of offenses possible. Many programs focus only on low-level, nonviolent, or juvenile offenses. Programs that are open to more serious crimes have faced resistance from prosecutors’ offices in referring these types of cases.<sup>117</sup>

“Individuals with moderate to high needs tend to impose the greatest burdens on correctional systems, and if diverted with appropriate programming, can offer the

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alternative-mass-incarceration. States appear to agree with incorporating restorative justice into their current system, as of 2016 thirty-five had laws approving of restorative justice. *Id.*

112. *21 Principles for the 21<sup>st</sup> Century Prosecutor*, *supra* note 15, at 3.

113. *Id.* at 3–12.

114. *See Smart Prosecution Initiative: FY 2017 Competitive Grant Announcement*, U.S. DEP’T OF JUST. 4 (2017), <https://www.bja.gov/funding/SmartProsecution17.pdf> (stating that “Smart Prosecution seeks to encourage exploration of new solutions,” including within restorative justice).

115. *National Institute of Justice Restorative Justice Symposia Summary*, U.S. DEP’T OF JUST. 15 (1998), <https://www.ncjrs.gov/pdffiles1/nij248890.pdf>.

116. *See Strengthening Restorative Justice: A Progress Report for the Joint Committee on Corrections Oversight*, VT. AGENCY OF HUM. SERVS. 1 (Mar. 12, 2014), <http://humanservices.vermont.gov/boards-committees/cfcpp/meeting-packets/2014-meetings-agendas-and-minutes/mar-2014/strengthening-restorative-justice-report/view>.

117. *See supra* Part II § A(3).

greatest reductions in recidivism and costs.”<sup>118</sup> There is an opportunity to divert a greater number of people from the standard criminal justice system by allowing for more serious offenses to be included in restorative justice programs, especially in jurisdictions where conserving public resources drives support for restorative justice.<sup>119</sup> The success of Common Justice underscores that this class of crimes is amenable to the restorative justice process, and similar evidence may be what is necessary to convince prosecutors who are hesitant to expand restorative justice programs to serious crimes.

*C. Incorporating Restorative Justice Throughout the Criminal Justice System*

Restorative justice programs are particularly effective before charges are filed in that diversion from the justice system entirely avoids many adverse collateral consequences, including loss of employment, government assistance, housing, and parental rights, and saves governments money. However, restorative justice principles should also be taught to all prosecutors—whether or not part of a restorative justice unit—and incorporated into the culture of prosecutors’ offices. For example, prosecutors should think about how their policies regarding victim assistance can be improved to encourage the same type of respect for victims seen in restorative justice approaches. The restorative justice program at the D.C. Office of the Attorney General exemplifies this shift in thinking by encouraging all prosecutors to observe the restorative justice process.<sup>120</sup> This allows all prosecutors in the office to understand the process and its successes, ideally encouraging increased case referrals, while also changing the thinking of prosecutors and deepening their understanding of the causes of criminal behavior and the need for holistic responses to address these underlying challenges.<sup>121</sup>

Prosecutors can also facilitate conversations between individuals and their victims after sentencing. Acknowledging the harm caused by an individual’s actions to the victim is an integral part of the restorative justice model, but that acknowledgment need not be confined to the period before a trial. For example, in Jacksonville, Florida, State Attorney Melissa Nelson was faced with a murder that had taken place over forty years earlier.<sup>122</sup> Fingerprints identified the culprit, but eyewitnesses who could connect him to the scene had passed away.<sup>123</sup> Because of the difficulty in proving the case years after the murder had taken place, Nelson spoke with the victim’s family to see if they would accept a plea from the suspect for the time he had

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118. *Promising Practices in Prosecutor-Led Diversion*, *supra* note 48, at 2.

119. *Id.* at 1.

120. *See Restorative Justice Program*, *supra* note 86.

121. Seema Gajwani, *Transforming Prosecutorial Culture Through In-House Restorative Justice Programs*, OBAMA FOUND., <https://www.obama.org/fellowship/2019-fellows/seema-gajwani/> (last visited Nov. 9, 2019).

122. *See BAZELON*, *supra* note 66, at 170.

123. *Id.*

served while under arrest in exchange for the ability to meet with him.<sup>124</sup> All of the parties agreed, and the conference allowed for the family to ask questions and receive answers about the murder.<sup>125</sup> The individual apologized to the family, and, even though he served less than one year in jail, the victim's son reported, "I'd rather him answer my questions and give me the answers that I have been looking for all my life than to have him sitting in jail without anything."<sup>126</sup>

#### IV. CONCLUSION

As jurisdictions across the country are proving, restorative justice delivers on what failed punitive and carceral approaches had promised—a process that holds individuals accountable, gives victims a voice, and provides people the opportunity and guidance to try to make things right. In the process, communities are rendered safer, victims' needs are considered, and prosecutors can begin to undo the legacy of harm caused by decades of racially disparate over-incarceration. For prosecutors who seek to promote safer and healthier communities, restorative justice is a vital tool for creating a more humane and effective justice system.

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124. *See id.* at 171.

125. *Id.*

126. *Id.*