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RESTORATIVE JUSTICE: AN ALTERNATIVE DISPUTE RESOLUTION APPROACH TO CRIMINAL BEHAVIOR

Kayla Welch¹

I. INTRODUCTION

Beginning with the end of the Mass Prison Era in the late 1800s,² Americans have looked for a better way to respond to crime and those who commit it. Since the Reformatory Era, the United States has swayed between punitive models based on either the Reformatory or Retributive theories.³ Despite the changes we have made, our criminal justice system suffers from long waiting periods for a trial,⁴ overburdened public defenders,⁵ overcrowded jails and prisons that often lead to unsafe conditions for the inmates and corrections officers,⁶ and many other problems.⁷

In recent years, a trend has emerged suggesting that society is ready to implement yet another reform to our criminal justice system, but there has yet to be a consensus regarding the best steps to reach reform.⁸ Among the many ideas circulating to change our current system, one has yet to be widely implemented in the United States. A small but growing group of advocates argue that one part of a solution to the problems ingrained in our criminal justice system is integrating an alternative dispute resolution method to handling some crimes and offenders. Those advocates argue for approaching additional crimes much like we currently divert some cases and offenders to Drug Courts, Mental Health Courts, and

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² FRANK SCHMALLEGGER, *CRIMINAL JUSTICE TODAY: AN INTRODUCTORY TEXT FOR THE 21ST CENTURY* 411 (Vernon R. Anthony et al. eds., 12th ed. 2013).

³ *Id.* at 413.

⁴ Robert Lewis, *Waiting For Justice: Defendants Locked Up For Years Awaiting Trials*, *Sentencing*, KPBS PUBLIC MEDIA (Mar. 31, 2021, 9:45 AM), <https://www.kpbs.org/news/2021/mar/31/waiting-justice-defendants-locked-years-awaiting-t/>.

⁵ Matt Ford, *A 'Constitutional Crisis' in Missouri*, *THE ATLANTIC*, (Mar. 14, 2017), <https://www.theatlantic.com/politics/archive/2017/03/missouri-public-defender-crisis/519444/>.

⁶ Bryan Pietsch, *Oklahoma Jail, Site of Deadly Standoff, Had Substandard Conditions, Report Found*, *N.Y. TIMES* (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/us/oklahoma-county-jail-hostage-inspection.html>; Anagha Srikanth, *Inmates are Rising up in US Jails and Prisons over Lethal COVID-19 Conditions*, *THE HILL* (Apr. 15, 2021), <https://thehill.com/changing-america/respect/equality/548450-inmates-are-rising-up-in-us-jails-and-prisons-over-lethal>; Rod Boshart, *Another Anamosa Prison Officer Assaulted*, *THE GAZETTE* (Apr. 24, 2021, 4:55 PM), <https://www.thegazette.com/government-politics/another-anamosa-prison-officer-assaulted/>.

⁷ See Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 *CRIME & JUST.* 273 (2010).

⁸ See, e.g., Caroline J. Heller, Nikki Lewis Simon & Karen M. Kennard, *Good in Practice | Episode 12: Courageous Conversations - Taking Action on Criminal Justice Reform*, *NAT'L L. REV.* (Apr. 13, 2021), <https://www.natlawreview.com/article/good-practice-episode-12-courageous-conversations-taking-action-criminal-justice>; Gregory Svirnovskiy, *9 Ideas to Solve the Broken Institution of Policing*, *VOX* (Apr. 25, 2021, 9:30 AM), <https://www.vox.com/22396400/defunding-abolishing-police-among-ideas-derek-chauvin-verdict>.

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other alternative courts.⁹ In the countries that have already implemented such reforms, the process is called Restorative Justice.¹⁰

This Comment compiles the various ways that alternative dispute resolution (“ADR”) processes already exist in criminal justice systems, examines the outcomes of those systems, and explores the possibility of implementing similar procedures in American criminal courts. First, this Comment will lay out the underlying principles of several restorative justice models and a broad overview of the various categories those models generally comprise. Next, this Comment will turn to specific examples of implementations of those models in countries such as New Zealand, Australia, and the United States. Third, this Comment will examine the research conducted based on those various implementations to provide a neutral look at whether restorative justice has been a successful or an unsuccessful experiment thus far. Finally, this Comment will give a brief analysis showing that while it is unlikely that the integration of ADR processes through restorative justice will solve all of the problems facing the United States’ current criminal justice system, restorative justice is a viable part of a broader reform plan.

II. DEFINING RESTORATIVE JUSTICE

The concept of restorative justice is not new. It was first discussed in literature as early as the late 1970s as a part of a larger conversation about restitution.¹¹ However, it wasn’t until the 1990s that the idea of restorative justice made its way from an idea on paper to an idea implemented in various juvenile and adult criminal systems around the world.¹² As its application expanded, it has appeared under numerous names including community justice and transformative justice, among others.¹³ Perhaps unsurprisingly, it has also taken many different forms, each with its own procedures and outcomes. Despite the many differences, restorative justice has several main principles that form the foundations of the developed programs over the years.

First, the entire concept of restorative justice relies on the theory that criminal behavior is, first and foremost, a violation of other people and the relationship between the offender and their victim.¹⁴ Under this theory, the offender’s violation of a law of the jurisdiction is a secondary consideration.¹⁵ With this differing theory of criminology at the forefront, it follows that a restorative approach focuses on all persons impacted by the crime,

⁹ See Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127, 128 (2005) (“[T]he criminal justice system should provide those most closely affected by the crime (the victim, the offender, and the community) an opportunity to come together to discuss the event and attempt to arrive at some type of understanding about what can be done to provide appropriate reparation . . . [T]he main elements of the restorative process involve voluntariness, truth telling, and a face-to-face encounter. Consequently, the process should be completely voluntary for all participants; the offender needs to accept responsibility for the harm and be willing to openly and honestly discuss the criminal behaviour; and the participants should meet in a safe and organized setting to collectively agree on an appropriate method of repairing the harm.”).

¹⁰ *Id.* at 127–28.

¹¹ *Id.* at 127.

¹² *See id.*

¹³ *Id.* at 128.

¹⁴ Latimer et al., *supra* note 9, at 128.

¹⁵ *See id.* (“[R]ather than merely a violation of law.”).

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including the greater community, rather than a strong focus on the criminal, and an intent that the victim will feel as though they received justice as a side effect. As a result, a restorative approach brings the criminal, the victim, and the community together to confront the crime.¹⁶ Hopefully, they will reach a mutual agreement about what the offender can do to repair the victim and prevent the offender from committing another crime in the future.¹⁷

Once the door opens for such a conversation, there are generally similar expectations that come with the program. First, most programs require that all participants be there voluntarily, including both the victim and the offender.¹⁸ Similarly, all participants, but especially the offender, have to be willing to tell the truth and openly discuss the offense with the other group members.¹⁹ Both of these expectations underlie the larger expectation that the offender is willing to accept responsibility for their actions and genuinely participate in the conversation about how the offender can repair the harm caused by their actions.²⁰ Finally, restorative programs generally require participants to meet face-to-face in a safe and organized setting to have their discussions.²¹ Tony Marshall's definition best summarizes the above hallmarks of a restorative justice program: "Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."²²

These principles led to the formation of three broader categories of programs: circles, conferences, victim-offender mediation, and forum sentencing.²³ Circle sentencing is a model predominantly used in Aboriginal communities that completely removes the process from the court system and places it into the community's hands.²⁴ Under this model, a team consists of the offender; a judge; and various community members such as local law enforcement, the victim and their support team, and attorneys.²⁵ Together, the Team deliberates about the crime and creates a sentence specific to that offender and their behavior.²⁶

Similarly, a slightly smaller community group conducts conferences. These teams consist of a juvenile offender and their support team, the victim and their supporters, local law enforcement, and a neutral third-party facilitator.²⁷ Together, the parties and law enforcement create a plan for the offender to repair the harm they caused, leaving the victim whole and the offender with a sense of accountability.²⁸ If the parties cannot reach an agreement with a

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Latimer et al., *supra* note 9, at 128.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*; see Shirli Kirschner, *Criminal Justice and ADR*, MEDIATE.COM (Jan. 2018), <https://www.mediate.com/articles/kirschnersbl20180126.cfm>.

²⁴ Kirschner, *supra* note 23.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

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mediator, the offense is returned to either law enforcement or the judge to proceed in the appropriate criminal system.²⁹

Victim-Offender Mediation is a similar process, except it applies to adult offenders and is limited to those directly involved with the offense and their support teams.³⁰ Unlike a Conferencing model, a Victim-Offender Mediation format will generally not include wider members of the community.³¹ As the name implies, this type of restorative justice requires a victim willing to participate in the mediation.³² Under this model, the victim, offender, and support teams meet with a mediator to engage in a conversation about how the offender can repair the harm he or she caused and develop a plan for moving forward with reparations and preventing the offender from re-offending.³³ Unlike standard mediations, mediation in the context of restorative justice focuses less on “settlement” and more on the events that lead to the necessity of mediation to begin with.³⁴ Ideally, a mediator in this situation does not intervene during the discussion, instead letting the victim and offender interact with each other in a safe space.³⁵ Despite this shifted focus, the vast majority of victim-offender mediations result in creating a restitution agreement.³⁶ At the close of the discussion, the mediator prepares a report for the judge to consider while creating a sentence for the offender.³⁷

Finally, forum sentencing is a form of restorative justice like American probation and does not require the victim’s participation.³⁸ However, it generally supplements a pre-existing court system by diverting an offender from prison but not from the adjudication process as a whole.³⁹ Following a finding or plea of guilt in the criminal courts, a conferencing group creates an intervention plan for that specific offender and presents it to the judge for approval.⁴⁰ The Team informs the court when, or if, the offender completes the intervention plan and considers that while developing a further sentence or declaring the offender’s sentence complete.⁴¹

Regardless of what type of model the jurisdiction chooses to employ, there are five points in the criminal justice process at which an authority figure can divert an offender to an alternative dispute resolution program or where a program can supplement a pre-existing court system.⁴² First, law enforcement can divert the offender instead of pressing criminal charges.⁴³ Second, the prosecuting attorney can also divert the offender if the police refer the

²⁹ Kirschner, *supra* note 23.

³⁰ DANIEL VAN NESS ET AL., *RESTORATIVE JUSTICE FOR JUVENILES CONFERENCING, MEDIATION AND CIRCLES 124* (Allison Morris & Gabrielle Maxwell eds., 2001).

³¹ *Id.*

³² Kirschner, *supra* note 23.

³³ *Id.*

³⁴ VAN NESS ET AL., *supra* note 30, at 125.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Kirschner, *supra* note 23.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Latimer et al., *supra* note 9, at 128–29.

⁴³ *Id.*

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offense for prosecution.⁴⁴ Third, the court system can decide to divert the offender in the same way alternative courts already help offenders with specific underlying causes, such as mental health concerns or drug addiction, instead of traditional convictions.⁴⁵ Alternatively, a court can supplement probation by choosing to use an intervention plan developed for the offender.⁴⁶ Finally, either the corrections or parole agencies can divert offenders from remaining in or returning to the correctional facility using restorative justice.⁴⁷

III. PRE-EXISTING IMPLEMENTATIONS OF RESTORATIVE JUSTICE

Worldwide, a small group of countries, including Canada, Australia, New Zealand, and Norway, implement some version of restorative justice.⁴⁸ Even the United States has implemented some restorative justice models in a limited capacity, primarily within the juvenile justice system.⁴⁹ With a grasp of the general themes underlying a restorative justice system, we now turn to some countries that have already implemented restorative justice models and explore the specific uses of those diversions or supplements.

A. New Zealand

New Zealand was one of the first countries to implement a restorative justice program. In addition to the standard Victim-Offender Mediation and conferencing programs, the New Zealand government, together with non-profits, worked to implement programs in various locations, including prisons and schools.⁵⁰

i. Conferencing and its Origins

Although the indigenous Maori people of New Zealand were using a conferencing-type restorative justice technique for generations, it took hold within the New Zealand government in the late 1980s.⁵¹ The Children and Young Persons Act of 1989 introduced the concept of family group conferencing.⁵² In those earliest stages, the conferences focused on the juvenile offender rather than the victim.⁵³ However, once participants realized the benefits

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Kirschner, *supra* note 23.

⁴⁷ Latimer et al., *supra* note 9, at 129, 137–38.

⁴⁸ *Id.* at 128.

⁴⁹ *Id.* at 129.

⁵⁰ See VAN NESS ET AL., *supra* note 30; see also Yvette Tinsley & Warren Young, *Overuse in the Criminal Justice System in New Zealand*, Int'l Penal and Penitentiary Found. Series, p. 16 (Sep. 7, 2017) (discussing the use of Community Justice panels, or Iwi panels among the Maori, as a pre-charge alternative to prosecution, during which they impose conditions for the offenders much like an American probation.).

⁵¹ Lorenn Walker, *Conferencing - A New Approach for Juvenile Justice in Honolulu*, 66 FED. PROBATION 38 (2002); see also Hennessey Hayes & Kathleen Daly, *Youth Justice Conferencing and Reoffending*, 20 JUST. Q. 725, 730 (2003).

⁵² Kim Workman, *Restorative Justice in New Zealand Prisons: Lessons from the Past*, 228 PRISON SERVICE J. 21 (2016).

⁵³ *Id.*

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of having a victim-centered focus, the conferencing approach evolved to focus on the offense's impact on the victim.⁵⁴ By 1994, New Zealand utilized similar restorative conferences in the pre-sentencing stages of an adult criminal prosecution.⁵⁵

As the programs gained traction, the government granted increased funding between 1999 and 2004.⁵⁶ The popularity of the programs also promoted a cooperative relationship between the New Zealand government, the Courts, and various volunteer organizations.⁵⁷ The Sentencing Act of 2002 officially solidified the position of restorative justice moving forward through the mandatory promotion of the programs.⁵⁸ Through the Act, the New Zealand government ensured that the various restorative justice programs had a real impact on criminal sentencing. Those who agreed to participate were guaranteed some results.⁵⁹ Additionally, the Act mandated that officials encourage the victims and offenders to meet whenever appropriate.⁶⁰

The sheer simplicity is perhaps the reason why the conferencing program gained so much traction within their own New Zealand government and later within other countries interested in their own programs. The New Zealand conferencing model is based closely on the conflict resolution approach used by the Maori people.⁶¹ The Maori people believed that the juvenile offender's family group should have a stronger voice and greater control than outside professionals.⁶² The Maori partly based their belief on the desire to protect their children from the discrimination they experienced as a minority group in the juvenile system.⁶³ Second, the belief has roots in the common-sense basis that the offender's social group will render more appropriate decisions than a detached professional and that an offender will be more likely to follow a plan created by his or her own social group.⁶⁴

During a typical conference under the New Zealand approach, an offender, their guardians, the victim, and the victim's supporters meet with a police officer and facilitator.⁶⁵ The Conference begins with the facilitator introducing each party and laying out ground rules and goals for the Conference.⁶⁶ Next, a law enforcement officer will provide the official account of the offense, after which the victim is allowed to provide their version of events.⁶⁷ In the same phase, the victim and offender can speak to each other about why the offense took place and whether it will occur again in the future.⁶⁸ The goal of this second phase, and a common outcome, is for the offender to apologize to the victim.⁶⁹ Ideally, there will be

⁵⁴ *Id.*

⁵⁵ *Id.* at 22.

⁵⁶ *Id.*

⁵⁷ Workman, *supra* note 52, at 22.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Walker, *supra* note 51, at 39; Hayes & Daly, *supra* note 51, at 730.

⁶² Hayes & Daly, *supra* note 51, at 730.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 726.

⁶⁶ *Id.* at 727.

⁶⁷ Hayes & Daly, *supra* note 51, at 727.

⁶⁸ *Id.*

⁶⁹ *Id.*

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reassurances to the victim that they are not in any future danger from this offender.⁷⁰ Once the parties feel satisfied with their discussion of the offense, they will move into the third and final phase: determining a plan of action for the offender to make restitution.⁷¹ Although the facilitator will lead this discussion, the parties are in control of the outcome.⁷² The law enforcement officer will ensure that an agreement is not excessive in comparison to the crime and provide a realistic outlook on the consequences of any future crimes.⁷³ The range of agreements made at conferences is varied and specific to the facts of each offender and offense.⁷⁴

ii. Post-sentencing Prison Approach

Even though New Zealand embraced restorative justice approaches earlier than other countries, the country continued to overlook offenders already sentenced to a prison term until the early 2000s.⁷⁵ In 2003, Prison Fellowship New Zealand, a faith-based non-profit organization with the Department of Corrections, began facilitating in-prison conferences based on the larger conferencing scheme that New Zealand was using at earlier stages.⁷⁶ The leaders immediately realized that the program would require modifications to succeed in such a different environment with an extremely specific population group.⁷⁷ First, the program excluded some groups of offenders, such as sex offenders and those who were psychologically unstable.⁷⁸ Second, the organization found that the usual facilitators involved with pre-sentencing models were much less likely to participate in the prison model.⁷⁹ Ultimately, the organization turned to one facilitator with a criminal record and who served some time in prison.⁸⁰ This approach turned out to be successful since studies show that involving a reformed offender can help promote rehabilitation.⁸¹

With these necessary changes in place, the remainder of the conferencing model looked much the same as that used at the pre-sentencing stage. The victim or, when appropriate, the family of the victim, had an opportunity to share how the inmate's crime affected them personally.⁸² Another common theme in the conferences is closure, and the victim can learn why the crime happened or why the offender targeted them.⁸³ In some cases, the inmate wanted to share what was going on in his or her own life at the time of the offense and how it prompted him or her to commit the offense.⁸⁴ In many cases, the inmates

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² Hayes & Daly, *supra* note 51, at 727–28.

⁷³ *Id.* at 727.

⁷⁴ *Id.*; *see also* Walker, *supra* note 51, at 41.

⁷⁵ Workman, *supra* note 52, at 21.

⁷⁶ *Id.*

⁷⁷ *Id.* at 25.

⁷⁸ *Id.*

⁷⁹ *Id.* at 24.

⁸⁰ Workman, *supra* note 52, at 22.

⁸¹ *Id.* at 23.

⁸² *Id.* at 26.

⁸³ *Id.*

⁸⁴ *Id.*

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apologized for their transgressions, and some were met with a challenge to do better in the future.⁸⁵ Many of the conferences ended with discussions about what the inmate should do before being released, such as furthering their education, and what they should do after being released back into the community.⁸⁶ Some victims even offered to help the offenders get back on their feet and find work after the offender's release.⁸⁷

Despite the program's apparent success, a reflection after six years showed problems that demanded further evolution if the program were to survive. An inherent problem of combining a restorative approach with the prison world is that prison staff have an understandably strong commitment to risk avoidance, while restorative justice seeks to put the parties in neutral, semi-equal territory to facilitate open discussions.⁸⁸ One issue that arose during the selection of inmate participants was that prison staff excluded some prisoners based on prior incidents, what they "deserved," and overall risk assessment.⁸⁹ However, those coming from a restorative justice background preferred to utilize one-on-one interviews to assess the likelihood of success and are more likely to realize that a prisoner's guilt and remorse may be the driving root of the prior behavioral incidents.⁹⁰ The other issue that organizers hope to address in the future is the balancing act of risk avoidance and maintaining confidentiality.⁹¹ Restorative justice facilitators wish to protect confidentiality to encourage an open conversation, but prison staff may refuse to allow the inmate to be alone in the Conference if they are considered a high risk.⁹² In this approach, New Zealand continues to promote novel ways to incorporate additional forms of restorative justice into its criminal justice system. However, they still have policies to reassess and correct if this approach is to be successful and lasting.

iii. School-level approaches

In addition to their attempts at a prison-level intervention, some parts of New Zealand have attempted to incorporate a restorative justice approach to juvenile offenses at the school level.⁹³ This approach is heavily based on the Maori approach to dispute resolution and focuses on restoring harmony between the offender, victim, and overall collective.⁹⁴ The method approaches school disputes as a problem that needs to be solved for the future, rather

⁸⁵ Workman, *supra* note 52, at 25–26.

⁸⁶ *Id.* at 26–27.

⁸⁷ *Id.* at 27.

⁸⁸ *Id.* at 27–28.

⁸⁹ *Id.* at 28.

⁹⁰ See Workman, *supra* note 52, at 28 ("Experienced RJ Facilitators are able to assess the suitability of prisoners and victims following one-to-one interviews, to participate in a restorative justice conference. . . [I]n many cases prisoners carried a heavy load of guilt and remorse, and that RJ Conferences often resulted in behaviour improvement.").

⁹¹ See *id.* ("In other cases, they considered prisoners to be 'high risk', and insisted that a prison officer accompany the prisoner at the conference. This was unacceptable to PFNZ as there is a need to protect and respect the confidentiality of the process to the greatest extent possible. Considering that prisoners live in such close quarters, information sharing about inmates can lead to undesirable outcomes.").

⁹² *Id.*

⁹³ See, e.g., Janice Wearmouth, Rawiri Mckinney & Ted Glynn, *Restorative Justice in Schools: A New Zealand Example*, 49 EDUC. RES. 37 (2007).

⁹⁴ *Id.* at 39; see also Hayes & Daly, *supra* note 51, at 730; see also Walker, *supra* note 51, at 39.

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than blaming the offender for what they already did.⁹⁵ In school settings, the method attempts to encourage understanding of the impact of the offense on all involved individuals and the overall school.⁹⁶ It also invites each person to take on some responsibility, not solely the offender, while avoiding creating shame or blame.⁹⁷ Next, the system works to create possibilities for redress, restore relationships, and include everyone, rather than making it an exclusionary process.⁹⁸

A case study regarding a 15-year-old boy given the name “Wiremu” provides the best example of how such an approach works within the school system.⁹⁹ Wiremu’s teachers and family became concerned and initiated a conference after a spree of delinquency and antisocial behavior.¹⁰⁰ The Team held the Conference at the rugby club Wiremu commonly played at, a location significant to him.¹⁰¹ Several people were present at the Conference, including his extended family, friends, teachers, and classmates.¹⁰² The Conference begins with various people speaking of Wiremu’s talents and positive attributes.¹⁰³ Then, each person Wiremu wronged speaks about how Wiremu’s actions harmed them.¹⁰⁴ Next, Wiremu has a chance to talk to his victims and apologize to them.¹⁰⁵ Finally, the Conference addresses restoration and ensures that the wrongdoer carries out the appropriate restitution.¹⁰⁶ In Wiremu’s case, he repaired the property damage he had created, stopped stealing cars, and improved his behaviors at school.¹⁰⁷

Supporters of a school-level intervention to juvenile delinquency point to issues that require a whole-school approach to supporting individual students.¹⁰⁸ In some cases, school-wide practices that affect all students can correct the challenging behaviors of individual students.¹⁰⁹ The school conferences should generally include the school administrators and the “community of care” surrounding the offender.¹¹⁰ Scholars promote this approach because it can, when implemented correctly, give students and families power to address problematic behaviors and decisions of the school staff members that may be a part of the student’s offense. Overall, supporters of this approach to juvenile delinquency point to the necessity of feeling included in social situations.¹¹¹ Schools are an integral part of forming students’

⁹⁵ Wearmouth et al., *supra* note 93, at 39.

⁹⁶ *Id.* at 40.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 41–44.

¹⁰⁰ Wearmouth et al., *supra* note 93, at 41.

¹⁰¹ *Id.*

¹⁰² *Id.* at 42.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 43.

¹⁰⁵ Wearmouth et al., *supra* note 93, at 43.

¹⁰⁶ *Id.* at 43–44.

¹⁰⁷ *Id.* at 43.

¹⁰⁸ *See id.* at 44.

¹⁰⁹ *Id.*

¹¹⁰ *See* Wearmouth et al., *supra* note 93, at 44.

¹¹¹ *See id.* at 47. (“The sense of belonging to, or marginalization from, the school community affects every aspect of participation, and therefore learning within it, and necessarily affects a student’s behavior and self-perception. Failing to support the development of student’s understanding and ability to act in a social context risks marginalizing and alienating young people and rendering them incompetent.”).

feelings about their self-efficacy and abilities.¹¹² If a student does not feel they belong within the school community, they may be less likely to participate and therefore less likely to learn.¹¹³ Such a disconnect will ultimately affect their behavior and even their self-perception.¹¹⁴ A restorative approach to delinquent behavior can correct the behaviors while also limiting the risk of isolating the student even further from their school community, ending the cycle.

B. Australia

When reviewing restorative justice models around the world, Australia is a necessary inclusion. First, all jurisdictions in Australia except two have statutory-based schemes for restorative justice.¹¹⁵ Additionally, Australia implements each of the four restorative justice models in some form; however, conferencing is the most widely implemented restorative justice model.¹¹⁶ Conferencing was introduced in Australia as early as 1991 and was initially a police-run program based on the model already used in New Zealand.¹¹⁷ Following widespread debate regarding whether a police-run model was best, Australia formed parliamentary inquiries to investigate the increase in juvenile offenses and how best to address them.¹¹⁸ By 1993, restorative justice approaches were used to either entirely replace a formal caution (much like an American juvenile who is found delinquent), or as a diversion from judicial prosecution.¹¹⁹ The Australian approach, known as the Wagga Model, diverged from the New Zealand model that served as its foundation in one notable way: law enforcement runs the program and focuses on reintegrative shaming.¹²⁰ Reintegrative shaming is a theory put forth by John Braithwaite as early as 1989.¹²¹ Despite what the name suggests, the focus is expressly not on creating a stigma against the offender in the wider public, as modern-day activists are often concerned about.¹²² Rather, Braithwaite suggests, and Australia's leaders agreed, the offender must be shamed within the context of respect by those close to him or her.¹²³ Under Reintegrative Shaming Theory, society's disapproval of the crime, through shame, is respectful of the offender, avoids a negative legal or social status, and ends with forgiveness.¹²⁴

¹¹² *Id.*

¹¹³ *See id.* (“Inclusion, per se, tends to be perceived in terms of increasing educational opportunity and removing barriers to progress. If a student does not feel they belong within the school.”).

¹¹⁴ *Id.*

¹¹⁵ VAN NESS ET AL., *supra* note 30, at 59.

¹¹⁶ Kirschner, *supra* note 23.

¹¹⁷ Kathleen Daly & Hennessey Hayes, *Restorative Justice and Conferencing in Australia*, 186 AUSTL. INST. OF CRIMINOLOGY 1, 5 (2001).

¹¹⁸ *Id.* at 2.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Nathan Harris, *Reintegrative Shaming, Shame, and Criminal Justice*, 62 J. OF SOC. ISSUES 327, 328 (May 2006).

¹²³ *Id.* at 332.

¹²⁴ *Id.*

i. Youth Conferencing

Following this theory, Australia's conferencing model brings together the juvenile offender, supported by their parents or guardians, the victim, a victim support team, a police officer, and a neutral third party, known as a conference convenor.¹²⁵ However, the victim is not required to participate for the referring party to divert the juvenile offender to a conferencing scheme.¹²⁶ Together, the Team discusses the offense, framed within an outlook of compassion and a desire to understand.¹²⁷ The program expects the juvenile offender to talk openly about the crime and the circumstances and reasons underlying their choices.¹²⁸ Both the offender's parents or guardians and the victim will likely explain how the offense impacted them.¹²⁹ In the same conversation, the police officer is present to explain what might happen to the offender should they continue along the same path of delinquency.¹³⁰ Once each member is allowed to provide their input, the conference convenor turns the discussion to developing a plan for the offender to complete as their sanction or reparation.¹³¹ Common examples include apologizing to those impacted by the offense, paying off any financial damages caused, mandated counseling for problems specific to that offender, or community service.¹³²

Specific procedures surround juvenile conferencing and its application in adult criminal courts varies amongst the Australian jurisdictions.¹³³ For example, jurisdictions disagree on which offenses and crimes are not eligible for referral to a conferencing program and the time frame in which the offender must complete any plan developed for him or her.¹³⁴ The jurisdictions also disagree on which point in the criminal or juvenile justice system is best for diverting the offender to a conferencing program.¹³⁵ For example, the Northern Territory of Australia allows Courts to divert an offender after a conviction.¹³⁶ On the other hand, South Australia provides for offenders to shift to conferencing as early as the police stage of the adjudication process.¹³⁷ The jurisdictions also disagree on who is entitled to attend and who must agree for the plan to be approved.¹³⁸ Some states require only that the police and offender agree, while others require the offender and victim to agree, and others still need a majority to agree for the plan to be accepted by the court as a sentence.¹³⁹

¹²⁵ Daly & Hayes, *supra* note 117, at 2.

¹²⁶ Kirschner, *supra* note 23.

¹²⁷ Daly & Hayes, *supra* note 117, at 2.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Daly & Hayes, *supra* note 117, at 2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 3.

¹³⁶ *Id.* at 3–4.

¹³⁷ Daly & Hayes, *supra* note 117, at 3.

¹³⁸ *Id.*

¹³⁹ *Id.* at 3–4.

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ii. Forum Sentencing

Forum sentencing is a form of restorative justice used in New South Wales, Australia, and is, in many ways, similar to the conferencing approach taken with juvenile offenders.¹⁴⁰ It was introduced as recently as 2005 and limited itself to a subset of offenders and offenses.¹⁴¹ As opposed to youth conferencing, forum sentencing targets young adult offenders who either plead or are found guilty and are likely to be sentenced to time in prison.¹⁴² Additionally, the program lays out certain crimes that cannot be the present crime or present in the offender's criminal history, including a range of violent crimes, firearm offenses, and sexual crimes.¹⁴³ Finally, the offender must be willing to participate in the program, as it requires a voluntary choice.¹⁴⁴ Once referred to this program, the matter proceeds much in the same way as youth conferencing. The offender meets the victim, their supporters, and community members to acknowledge and discuss the offense and its harm to those involved.¹⁴⁵ Following the discussion, an intervention plan is created for the offender by the participants, recorded by the appointed mediator, and referred back to the court.¹⁴⁶ The court has discretion in accepting or rejecting the suggested intervention plan, but if the judge chooses to approve the plan, he or she will give the offender a specific time frame in which to complete it.¹⁴⁷ If the offender completes their plan, the judge is notified and may either consider that completion in sentencing the offender or incorporate the plan as the sentence.¹⁴⁸ If the offender does not complete their plan within the prescribed time period, the judge is notified and may sentence the offender as if the offender was never referred to forum sentencing.¹⁴⁹

iii. Victim-Offender Mediation

Australia's Victim-Offender Mediation program incorporates portions of both youth conferencing and forum sentencing. In victim-offender mediation, unlike youth conferencing, the victim's willing participation is necessary for an adult offender's diversion to mediation.¹⁵⁰ Apart from the victim's willing participation, the process is much the same as youth conferencing. A team forms including the victim and offender, their respective support persons, and a neutral third-party mediator to guide the discussion.¹⁵¹ In most Australian jurisdictions that incorporate mediation, either the victim or offender can initiate the

¹⁴⁰ Suzanne Poynton, *Rates of Recidivism Among Offenders Referred to Forum Sentencing*, CRIME & JUST. BULL.: CONTEMP. ISSUES IN CRIM. JUST., NO. 172 (N.S.W. Bureau of Crime Stat. and Res.), July 2013, at 1.

¹⁴¹ *Id.*

¹⁴² *Id.* at 2.

¹⁴³ *Id.*

¹⁴⁴ *See id.* at 2.

¹⁴⁵ *See* Poynton, *supra* note 140, at 2.

¹⁴⁶ *Id.*

¹⁴⁷ Kirschner, *supra* note 23.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

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process.¹⁵² In some jurisdictions, the presiding judge, prosecutor, or even an official from the corrections department can initiate the process so long as the victim is open to mediation.¹⁵³ Regardless of how the process began, the mediator prepares a report to present to the judge following the mediation.¹⁵⁴ However, the impact of a successful mediation on the offender's ultimate criminal disposition varies by jurisdiction. Some jurisdictions, such as New South Wales, do not allow the mediation report to impact the ultimate sentencing decision.¹⁵⁵ In these jurisdictions, the mediation is seen merely as part of a restorative process, not an alternative to traditional criminal sentencing.¹⁵⁶ However, in other jurisdictions, such as Tasmania, the judge is free to consider the mediator's report at the time of sentencing.¹⁵⁷

C. Limited Use within the United States

Although restorative justice models have not gained much traction yet within the United States, some models can be found within various locales, predominantly within the juvenile justice systems. One such example comes from Honolulu, Hawaii.

As the result of a 1999 grant to the Honolulu Police Department, the Department diverted 102 first-time juvenile offenders to restorative conferences.¹⁵⁸ Since some of the juveniles were co-defendants, teams held eighty-five conferences.¹⁵⁹ The "Real Justice" Conference model follows the overall conferencing procedures used in both New Zealand and Australia, based on the practices of the Maori people and indigenous Hawaiians.¹⁶⁰ However, this approach retains slightly more of the indigenous culture. First, the offender admits to their offense, explains why they committed the offense, and sheds some light on their thoughts of their actions since committing the offense.¹⁶¹ They are also asked to list the people they believe were affected by the offense. Next, the other participants in the Conference discuss how they were affected.¹⁶² The third phase addresses how the juvenile will repair the harm they have caused through their actions.¹⁶³ Then, the written agreement is drafted and signed by all participants.¹⁶⁴ In Hawaii, the Conference ends with all participants coming together for a meal, a "ceremonial breaking of bread."¹⁶⁵

Ultimately, the program produced 83 agreements out of the 85 conferences conducted.¹⁶⁶ Of those agreements, most ended with a symbolic gesture, such as an apology,

¹⁵² Kirschner, *supra* note 23.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Kirschner, *supra* note 23.

¹⁵⁸ Walker, *supra* note 51, at 39.

¹⁵⁹ *Id.* at 38.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 39.

¹⁶² *Id.*

¹⁶³ Walker, *supra* note 51, at 39.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 40–41.

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or a combination of a symbolic remedy and a service reparation.¹⁶⁷ In some cases, service reparations included counseling for the juvenile offender, and in others, it required the offender to repair the damage they had caused. In a minority of cases, the agreement required the juveniles to make monetary restitution to the victim.¹⁶⁸ The Honolulu participants had an overwhelming majority come away with a positive view of the Conference and the agreement.¹⁶⁹ However, on average, Hawaiian offenders and their supporters had a slightly more positive view than the victims and their supporters.¹⁷⁰

The study revealed some potential pitfalls of a purely restorative approach. Police arrested the 102 juveniles after committing various crimes, but the program facilitators excluded juveniles involved in runaways and shoplifting cases.¹⁷¹ Program facilitators excluded shoplifting offenses because a large local retailer refused to participate in conferencing.¹⁷² The researchers excluded runaways because they realize that runaway cases are often surrounded by complicated family issues and not simply a specific wrongdoing that can be corrected.¹⁷³ The Real Justice model used by Honolulu is better suited for clear cases of wrongdoing.¹⁷⁴ The possibility of victims refusing to participate or issues founded on overly complex issues are potential problem areas for all restorative justice approaches, not just the Real Justice conferencing model.

IV. ANALYSIS

A. Restorative Justice's Strengths and Weaknesses

The increased implementation of such a relatively non-traditional approach above came accompanied by a host of studies reviewing the effectiveness of restorative justice alternatives to the traditional punitive system. Over the years, researchers have collected data to examine the impact of restorative justice on critical issues such as offender recidivism rates, offender satisfaction, and victim satisfaction.

i. Participants' Views of the Restorative Process

Although there are many questions about the effects of restorative justice, perhaps one of the most common questions is how the participants feel after the process is complete. Specifically, how satisfied are the offenders and victims with the alternative approach to criminal justice? The studies that attempt to answer this question overwhelmingly suggest

¹⁶⁷ *Id.* at 40.

¹⁶⁸ Walker, *supra* note 51, at 41.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 41. (This study also reviewed surveys given in different parts of the world following conferences. The positivity rate was consistently positive in each of the 5 locations. The second largest sample was produced in Bethlehem, and showed that 97% of victims were pleased with the process, compared to 96% of offenders.)

¹⁷¹ *Id.* at 39.

¹⁷² *Id.* at 40.

¹⁷³ Lorenn Walker, *Conferencing - A New Approach for Juvenile Justice in Honolulu*, 66 FED. PROBATION 38, 39 (2002).

¹⁷⁴ *Id.* at 40.

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that both victims and offenders come away with a positive experience.¹⁷⁵ Studies of the conferencing model in Australia suggest that participants, offenders and victims alike, believe that the process is fair and produces satisfactory results.¹⁷⁶ In one study, more than 98% of participants agreed that the process was fair, and more than 98% were satisfied with the agreement the group reached.¹⁷⁷ The results reflected the same conclusions in a second, much more extensive study of almost a thousand participants.¹⁷⁸ Even with such a large sample size, more than 92% of participants said that the Conference they took part in was at least “somewhat fair” or even “very fair.”¹⁷⁹ Reviews of the Victim-Offender Mediation model produces similar results. Significantly more victims interviewed about the Victim-Offender mediation program felt it was fair compared to victims interviewed about the traditional criminal court system.¹⁸⁰

Some restorative justice opponents expressed concerns that victims would not want to participate in a form of criminal justice that forces them to face the person who harmed them. Although this is undoubtedly true for some victims, it does not appear to be true for all, or even most, victims.¹⁸¹ In reviewing their participating conference groups’ demographics, the studies suggest that victims are willing to participate in conferencing.¹⁸² Unlike a Victim-Offender Mediation model, offenders can participate in a conferencing model without the victim’s participation. However, despite this difference, the victim attended 74% of the conferences included in the study.¹⁸³ Approximately half of the conferences revolved around victims and offenders who didn’t know each other before the crime, further suggesting that crime victims are open to such an approach.¹⁸⁴ Additionally, this appears to be true even when the offender is not someone the victim would naturally strive to protect, such as a friend or family member.¹⁸⁵ One American study found that four in five Minnesotans would willingly participate in a Victim-Offender Mediation program if they were the victim of a property crime.¹⁸⁶

Still, opponents express concern that a restorative approach to criminal justice could unnecessarily subject victims to essentially being re-traumatized by their perpetrators. This does not appear to be the case. Thus far, studies suggest that a restorative approach reduces the victim’s anger and fear regarding the offender, both initially and continuing over the

¹⁷⁵ See generally Kathleen Daly, *Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects*, in RESTORATIVE JUSTICE FOR JUVENILES CONFERENCING, MEDIATION AND CIRCLES, 70–78 (Allison Morris & Gabrielle Maxwell eds., 2001).

¹⁷⁶ *Id.* at 71.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Mark S. Umbreit et al., *Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation Practice and Research*, in RESTORATIVE JUSTICE FOR JUVENILES CONFERENCING, MEDIATION AND CIRCLES 137 (Allison Morris & Gabrielle Maxwell eds., 2001) (“Eighty per cent of those victims participating in the victim offender mediation program indicated that they experienced the criminal justice system as fair compared with 38 per cent of those victims going through the traditional criminal justice process.”).

¹⁸¹ See Daly, *supra* note 175, at 75.

¹⁸² See *id.* at 75.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Umbreit et al., *supra* note 180, at 126.

years.¹⁸⁷ More than 75% of the victims interviewed before the Conference took place reported being angry at the offender, but after the Conference, the number dropped more than 30%.¹⁸⁸ In the converse, researchers asked victim participants to rate their positive feelings towards the offender, with only 8% expressing positive feelings toward the offender before the Conference.¹⁸⁹ Afterward, that number increased to 38%.¹⁹⁰ The vast majority of the victims interviewed reported that they felt it was worthwhile to participate in the Conference. Although offenders do report higher satisfaction levels with the process, three in four victims still report being satisfied with the conference results.¹⁹¹ A qualitative study conducted in the late 1990s sought out victim participants to interview regarding their thoughts and opinions of the process.¹⁹² The researchers noted a common theme amongst the various statements was that the victims gained closure, even when the crime was personal and violent.¹⁹³

An additional concern raised by opponents of the Restorative Justice model as a supplement or replacement of the traditional court approach is that the offenders are at risk of being coerced and controlled in a less formal setting than the more formal setting provided in the courtroom setting.¹⁹⁴ At first glance, this argument seems as though it might carry some weight. Rules of procedure, evidence, ethics, and even traditional expectations of participants in the legal system bind courts in the traditional criminal system. Mediations are, by their nature, a much more informal process. Despite these differences, the evidence gleaned from studies of the conferencing programs does not support this argument. Significantly, few conferencing participants reported encountering “angry or aggressive remarks” or even arguments among the people present, with even fewer reporting any intimidation.¹⁹⁵ Similarly, an overwhelming number of participants reported feeling comfortable that their sex, race, or ethnicity did not disadvantage them in the outcome of the Conference.¹⁹⁶ In general, approximately 90% of the reviewed conferences appear to have been overwhelmingly civil.¹⁹⁷

ii. Compliance with Intervention Programs

Regardless of what kind of alternative program the offender participates in, the end result is generally the creation of a report prepared by the third-party facilitator, such as a mediator. That report typically contains the plan developed by the conference participants, mediation, or forum sentencing program.¹⁹⁸ Depending on the jurisdiction, the judge may implement that plan as the punishment for the offender, incorporate it into a broader sentence that includes traditional sentencing characteristics, or simply consider the offender’s

¹⁸⁷ See Daly, *supra* note 175, at 78.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Umbreit et al., *supra* note 180, at 126.

¹⁹³ *Id.*

¹⁹⁴ Daly, *supra* note 175, at 78.

¹⁹⁵ *Id.* at 77.

¹⁹⁶ *Id.* at 78.

¹⁹⁷ *Id.* at 77–78.

¹⁹⁸ Kirschner, *supra* note 37.

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completion when creating a traditional sentence.¹⁹⁹ Some researchers have explored the completion rates of the intervention plans created by the teams.²⁰⁰ Some programs reported Restitution Agreement completion rates of more than 79%, with some programs even reporting a 98% completion rate.²⁰¹ Overall, significantly more offenders involved in one of the restorative justice models complete their plan compared to offenders given other forms of sentences, such as standard probation.²⁰²

iii. Reduced Use of Traditional Court Systems and Prison Sentencing

One of the more common complaints surrounding the traditional criminal justice system is the overuse of court systems and detentions as punishment.²⁰³ In recent years, one approach to this issue is introducing alternative courts to address the root cause of crime. Commonly, these courts address problems such as mental health, drug use, alcoholism, or struggles specific to military veterans.²⁰⁴ However, even these intensive alternatives to traditional sentencing generally place a heavy burden on the court systems.

The best example of this additional burden on court systems is the program utilized in Driving While Intoxicated (“DWI”) Courts. Once admitted to the program, the judge gives each offender conditions that they must follow for a minimum of twelve months.²⁰⁵ Generally, these conditions are not drinking any amount of alcohol, attending counseling sessions, participating in a program such as Alcoholics Anonymous, and submitting to regular monitoring for alcohol consumption.²⁰⁶ Although there is a team of professionals, including social workers, attorneys (both defense and prosecution), and medical professionals, supervising the overall program and offenders, the responsibility of ensuring compliance ultimately falls to the probation and parole office or their counterparts.²⁰⁷ In addition to the

¹⁹⁹ *Id.* at 29.

²⁰⁰ Latimer et al., *supra* note 9.

²⁰¹ Mark S. Umbreit, *Restorative Justice Through Victim Offender Mediation: A Multi-Site Assessment*, 1 THE WESTERN CRIMINOLOGY REV. 1 (1998).

²⁰² Latimer et al., *supra* note 9; *see also* Umbreit, *supra* note 201 (“81 percent of offenders in mediation successfully completed their restitution obligation compared to 58 percent who were referred to a court administered restitution program without mediation.”).

²⁰³ *See* Daniel Laberge & Daphne Morin, *The Overuse of Criminal Justice Dispositions: Failure of Diversionary Policies in the Management of Mental Health Problems*, 18(4) INT’L J. OF L. AND PSYCHIATRY 389 (1995) (addressing the failure of courts to assess whether offenders are competent to stand trial and imprisoning those with mental health problems rather than treating those problems.); *See also* Tinsley & Young, *supra* note 50 (discussing the impact of reduced prosecution has led to longer sentences being imposed due to policy and public opinion.).

²⁰⁴ Tinsley & Young, *supra* note 50, at 14 (discussing New Zealand’s ‘Prevention First’ approach to alternatives to prosecution); *see also* Missouri Sentencing Advisory Commission, *Alternative Courts* (Mar. 24, 2021), https://www.courts.mo.gov/hosted/JUDEDintra/MOSAC/Alternative_Courts.html; Kaitlyn Shive, *Fayette County Mental Health Court Sees Success in First Two Years*, ABC-36 (Mar. 9, 2021), <https://www.wtvq.com/2021/03/09/fayette-county-mental-health-courtsees-success-in-first-two-years/>; Tony Brown, *DWI Court Offers Hope to Offenders Willing to Change*, THE MARYVILLE FORUM (Oct. 6, 2016) (DWI Court offers a 12-month-minimum staged program to DWI offenders that have been found guilty and placed on probation.).

²⁰⁵ Brown, *supra* note 204.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

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added burden on the probation office, the offenders must regularly come to court.²⁰⁸ In Missouri's 4th Circuit, each offender is in court twice a month.²⁰⁹ In other areas, such as Cole County, Missouri, the court appearances are more frequent in the early stages, beginning with once a week and decreasing to once a month as the offenders "graduate" through the stages. Although the minimum time for an offender to graduate from DWI Court is twelve months or more depending on the jurisdiction, it often takes longer to graduate due to relapses.²¹⁰ While alternative courts are showing promise in their early applications, they are undeniably an added burden on a docket-based system not designed to accommodate intensive, treatment-based probationary periods.

Restorative approaches, such as conferencing, do not utilize a courtroom to conduct the process and develop an agreement for the offender beyond entering the initial guilty plea. A review of the New Zealand Court systems following the introduction of conferencing showed a 75% immediate decrease in the number of juveniles appearing in Court.²¹¹ While review of the reduced impact on the court system is limited thus far, this is a promising indicator that restorative approaches to criminal offenses could be part of an answer to reducing the overuse of the traditional court system and prison sentencing.

iv. Recidivism Rates

While the studies surrounding participants' opinions drastically approve of an alternative dispute approach to criminal justice, studies are less conclusive regarding the recidivism rates of offenders who go through the programs rather than those processed through the traditional court approach. Some studies of juvenile offenders diverted to a Victim-Offender Mediation program suggest that there may be little to no impact on the offender's future likelihood to commit a crime.²¹² However, other studies indicate that juvenile offenders may be as much as 32% less likely to commit a future crime.²¹³ Furthermore, those who commit a future crime commit crimes that are less serious than their original offense.²¹⁴ In the United States, studies regarding juvenile restorative justice programs provided researchers with similar results. Juveniles diverted to a restorative program were slightly less likely to re-offend than those adjudicated through a traditional program.²¹⁵

Similarly, studies focused on adult offenders are inconclusive. This is less surprising, since the expansion of ADR approaches to adult criminal offenders is still relatively new. The New South Wales government released a study of their Forum Sentencing

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Brown, *supra* note 204 ("Some allowances will be made for slips and setbacks, he said, but those who continue to come up short will ultimately have to leave the program and serve out their full driving suspension.")

²¹¹ See Judge FMW McElrea, *The New Zealand Model of Family Group Conferences* at 6 (Mar. 15-18, 1998).

²¹² Umbreit et al., *supra* note 180, at 136.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Umbreit, *supra* note 201.

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program, during which the offender and victim develop an alternative to a prison sentence.²¹⁶ Their study examined 1,000 criminal offenders, half of which served a traditional prison sentence and half of which participated in the Forum Sentencing program.²¹⁷ The results did not uncover a significant difference between the recidivism rates of the two groups.²¹⁸ The State-Attorney General of New South Wales commented that the Forum Sentencing program is more beneficial to victims than offenders.²¹⁹ While the Bureau of Crime Statistics and Research officials note that the benefit to victims is a worthwhile objective, the New South Wales program fails to address the crimes' root causes.²²⁰ Without focusing on those "risk factors," such as substance abuse and mental illnesses that can lead a person to commit crimes, the recidivism rates will be unchanged, even if the victims benefit from the program.²²¹ Despite this apparent fault, New South Wales officials chose to continue the Forum Sentencing programs.²²² They simultaneously committed to increasing the focus on risk factors to reduce the offenders' recidivism rates.²²³

However, other studies suggest that there is, in fact, a positive impact on recidivism rates for offenders involved in restorative justice programs rather than other, more traditional, punitive approaches.²²⁴ Although the initial results favoring restorative justice approaches are not greatly surpassing non-restorative recidivism rates, the effects of a restorative approach appear to be longer-lasting based on follow-up studies.²²⁵ Some have pointed out that if restorative approaches were modified to address underlying root causes of crime, they could decrease recidivism rates even further and in a more cohesive way than traditional courts.²²⁶

B. Limited Demographic Exposure

Of the various countries and locales that have extensively employed some form of restorative justice, including Australia, New Zealand, and Honolulu, one similarity is readily apparent apart from their use of similar conferencing approaches: they are all small islands with strong indigenous or aboriginal roots.²²⁷

²¹⁶ *NSW Forum Sentencing Overhaul After Study Finds it Does Not Deter Offenders*, ABC NEWS (Sep. 1, 2013, 11:46 PM), <https://www.abc.net.au/news/2013-09-02/meeting-victims-does-not-detercriminals3a-study/4929362>.

²¹⁷ *Id.*

²¹⁸ *Id.*; see also Poynton, *supra* note 140, at 10 (While offenders diverted to a Forum Sentencing program took slightly longer to re-offend, the differences were not statistically significant. There was only a 1.4% difference in favor of the Forum Sentencing offenders in recidivism rates six months from their finalization date. The Forum Sentencing offenders also reoffended only a week after the offenders punished through a traditional court system.)

²¹⁹ ABC NEWS, *supra* note 216.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Latimer et al., *supra* note 9.

²²⁵ *Id.* at 137.

²²⁶ See generally *id.*

²²⁷ See Walker, *supra* note 51. (discussing the indigenous roots of the conferencing model used in Hawaii); see also Hayes & Daly, *supra* note 51, at 730. (explaining the origins of Conferencing model and the desire of the

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As previously discussed, many of the models of restorative justice used today are heavily based on those developed in New Zealand as early as the 1980s.²²⁸ However, even those early models had their roots in the indigenous Maori culture, as the Maori people looked for ways to divert their juveniles from the traditional, predominantly white juvenile justice system in New Zealand.²²⁹ New Zealand is a small country, with approximately 3.48 million people living across approximately 103,483 square miles of land, comparable to the size of Colorado, but with about 1.2 million fewer people.²³⁰ There are only approximately forty-seven people living within a square mile in the country.²³¹ New Zealand is also unique in that its indigenous people, the Maori, continue to make up a significant minority of their population and continue to grow.²³² Although most New Zealanders speak English, the Maori have retained some status in that New Zealand recognized the Maori language as an official language of the country in 1987.²³³ It is still recognized as an official language of the country today.²³⁴ The New Zealand government also established some courts and legal systems for the Maori people.²³⁵

Given the dedication of the New Zealand government to preserving the Maori culture pursuant to their agreement via the Treaty of Waitangi, it is not abnormal that the culture would also be preserved through the Juvenile Court system by implementing the Maori practices of conferencing.²³⁶ Giving additional weight to the indigenous influence on New Zealand's restorative justice programs are the cultural identities of those participating in the programs. Although the diversion programs are offered to all eligible New Zealanders, regardless of cultural identity, statistics show that approximately 80% of the offenders seeking restorative justice diversions are Maori.²³⁷ However, only 54% of prisoners in New

Maori people to protect their juveniles from the traditional, predominantly white, juvenile justice system in New Zealand).

²²⁸ Walker, *supra* note 51.; *see also* Hayes & Daly, *supra* note 51.

²²⁹ Walker, *supra* note 51.; *see also* Hayes & Daly, *supra* note 51.

²³⁰ Judge FMW McElrea, *The New Zealand Model of Family Group Conferences* (1998); *see also*, *How Big is New Zealand Compared to USA*, ABOUT NEW ZEALAND (Mar. 23, 2021), <https://www.aboutnewzealand.com/how-big-is-new-zealandcompared-to-usa/>; For more information about New Zealand, *see generally* Encyc. Britannica, NEW ZEALAND (Adam Augustyn et al. eds., 11th ed. 2019).

²³¹ Encyc. Britannica, NEW ZEALAND (Adam Augustyn et al. eds., 11th ed. 2019).

²³² *See* Judge FMW McElrea, *supra* note 230, at 2 (noting that 15% of the population at the time was comprised of the Maori people); *see also* *Māori population estimates: At 30 June 2020*, STATS NZ (Nov. 16, 2020, 3:45 PM), <https://www.stats.govt.nz/information-releases/maoripopulation-estimates-at-30-june-2020#:~:text=New%20Zealand's%20estimated%20M%C4%81ori%20ethnic,males%20and%20426%2C800%20M%C4%81ori%20females.>

²³³ *English and the Official Languages of New Zealand*, NEW ZEALAND IMMIGR. CONCEPTS (Mar. 23, 2020), <https://www.newzealand-immigration.com/blogs/english-and-theofficial-languages-of-new-zealand.>

²³⁴ *Id.*

²³⁵ Encyc. Britannica, NEW ZEALAND (Adam Augustyn et al. eds., 11th ed. 2019) (As a portion of the hierarchy of courts below the Supreme Court, there is a Maori Land Court, a Maori Appellate Court, as well as some tribunals, including the Waitangi Tribunal. The Tribunal exists to address Maori claims of breaches of the Treaty of Waitangi by the New Zealand government.); *see generally* EVELYN STOKES, APPLIED GEOGRAPHY, 176–91 (1992) (providing information regarding the Treaty of Waitangi between New Zealand and the Maori people, as well as the Maori courts).

²³⁶ *See generally* STOKES, *supra* note 235.

²³⁷ Workman, *supra* note 52, at 25.

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Zealand are Maori.²³⁸ These numbers suggest that while the restorative justice programs are increasingly popular and supported by the government, the interest remains primarily with the indigenous significant minority of the population.

Similarly, Australia's indigenous culture substantially impacted the emergence of restorative justice programs in the mainstream criminal justice system. Like New Zealand, restorative justice practices in Australia were introduced, in part, as a response to the over-representation of indigenous people in the criminal justice system and prison populations.²³⁹ It was apparent that the traditional justice system is incompatible with the indigenous culture of Australia. The indigenous people focus on reintegrative shaming, force the offender to take responsibility, play a role in their sentencing, and face their community members.²⁴⁰ The one size fits all (or at least most, with the introduction of alternative courts) approach of traditional justice is a sharp contrast to the reintegrative shaming model used among the Maori and Torres Strait Islander communities. Acknowledging the contrast, Australia introduced limited forms of restorative justice to the juvenile courts in 1993 and allowed courts to consider rehabilitation in sentencing in 1988.²⁴¹ However, the restorative approach remained clearly directed at the indigenous populations, creating additional protections for them in the 1988 Criminal Law (Sentencing) Act and forming Indigenous Sentencing Courts Courts, known as Nunga Courts.²⁴² The limited information thus far regarding the participants in Australian restorative justice programs suggests that greater numbers of Maori and Pacific Islanders are participating in the program, and fewer are incarcerated as a result.

Indigenous and aboriginal backgrounds are also prevalent in many areas utilizing restorative justice approaches not discussed in depth throughout the earlier portion of this Comment, such as twenty-one African countries, twenty Asian countries, and fourteen South American Countries.²⁴³ Restorative justice programs can also be found in parts of Europe, North American (including Canada), and portions of the Pacific region.²⁴⁴ Although the individual cultures of the indigenous and aboriginal people in each country differ, the overwhelming impact they, especially the Maori people in New Zealand and Australia, have had on both the application of restorative justice programs and the actual participation in those programs is clear.

²³⁸ *Id.* (These numbers indicate a higher level of interest in, and comfort with, restorative justice as a process to restoring relationships and balance within the whānau and community.).

²³⁹ Alexandra Smith, *Mainstreaming Restorative Justice in South Australia's Criminal Justice System: A Response to the Over-Representation of Indigenous Offenders*, 5 THE ANU UNDERGRADUATE RES. J. 169, 171 (2014); see generally Sarah Xin Yi Chua & Tony Foley, *Implementing Restorative Justice to Address Indigenous Youth Recidivism and Over-Incarceration in the Act: Navigating Law Reform Dynamics*, 18 AUSTL. INDIGENOUS L. R. 138 (2014–15).

²⁴⁰ Smith, *supra* note 239, at 173.

²⁴¹ *Id.* at 174.

²⁴² *Id.*

²⁴³ Centre for Justice & Reconciliation, *About Restorative Justice: RJ Around the World*, <http://restorativejustice.org/restorativejustice/about-restorative-justice/around-the-world/#sthash.oof3VPAQ.jr9v007S.dpbs> (last visited Oct. 6, 2021).

²⁴⁴ *Id.*

C. Possible Expansion within the United States

By now, even before reaching the hurdles specific to the United States and even individual states within the country, it is apparent that the current models of restorative justice are not perfect. First, not all victims or offenders will want to participate in a restorative alternative to traditional justice.²⁴⁵ Additionally, for some larger corporations or retail companies, many of which are the victims in shoplifting cases, it may not be worth the time or money to engage in a restorative process that a traditional system would otherwise handle.²⁴⁶ Finally, reviews suggest that the models currently used are more likely to be sought out by indigenous people.²⁴⁷

However, there are also already recognizable benefits to this approach. It can reduce the strain on overburdened court systems by shifting some cases to involved individuals who know the offense and parties more intimately.²⁴⁸ Additionally, juveniles diverted to the restorative programs are less likely to re-offend than those who go through the traditional program.²⁴⁹ Due to the limited number of adult restorative justice programs implemented thus far, there is little data on recidivism. However, some small studies have suggested that adult recidivism rates are comparable between restorative and traditional approaches.²⁵⁰

Still, the traditional model used in the United States has its own faults. At the forefront, offenders may wait long periods for a trial,²⁵¹ and the Court might ultimately assign them to an overburdened public defender.²⁵² Once a sentence is handed down, the offender may be looking at serving time in an overcrowded jail or prison at great cost to both the Government and the inmate.²⁵³ Yet, despite the time and financial resources incurred in investigating, prosecuting, trying, and likely incarcerating an offender, the outlook for the offender is grim. In 2018, a report released by the Department of Justice showed that five out of six state prisoners were arrested for a new crime within nine years of being

²⁴⁵ Daly, *supra* note 175, at 71. (26% of victims did not participate).

²⁴⁶ Walker, *supra* note 51, at 39.

²⁴⁷ Workman, *supra* note 52, at 25.

²⁴⁸ See generally Judge FMW McElrea, *supra* note 211.

²⁴⁹ But see *NSW Forum Sentencing Overhaul After Study Finds it Does Not Deter Offenders*, ABC NEWS (Sep. 1, 2012, 11:46 PM), <https://www.abc.net.au/news/2013-09-02/meeting-victims-does-notdeter-criminals3a-study/4929362>.

²⁵⁰ See *id.*

²⁵¹ See, e.g., Robert Lewis, *Waiting for Justice: Defendants Locked Up for Years Awaiting Trials*, Sentencing, KPBS (Mar. 21, 2021, 9:45 AM), <https://www.kpbs.org/news/2021/mar/31/waiting-justicedefendants-locked-years-awaiting-t/>.

²⁵² Ford, *supra* note 5.

²⁵³ See Emily Widra, *Since You Asked: Just How Overcrowded Were Prisons Before the Pandemic, and at This Time of Social Distancing, How Overcrowded Are They Now?*, PRISON POL'Y INITIATIVE (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/> (Even throughout the COVID-19 pandemic, most prisons maintained 75% or more of their capacity.); see also Missouri Department of Corrections, *Financial Summary*, MO. OFF. OF ADMIN., https://oa.mo.gov/sites/default/files/FY_2018_EB_Corrections.pdf (In 2018, Missouri's Department of Corrections budget was \$725.5 million.); see also Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> (Per the Bureau of Justice Statistics, the United States spends more than \$80 billion annually to fund prisons.).

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released.²⁵⁴ Although recidivism rates vary a little from state to state, the consensus is that most released inmates will re-offend in the relatively near future. Together, these faults support the calls for a reform of our current criminal system. With some modifications, patience, and time, expanding the limited use of restorative justice within the United States could be one viable part of a larger answer to those calls.

i. Proposed Modifications

Recognizing the potential benefits of expanding the restorative approach to criminal justice beyond the limited use in juvenile courts, this Comment suggests that individual counties in the United States add a diversion path to a model of Conferencing or Victim-Offender Mediation. A county-level implementation of such hands-on approaches would likely be the most successful based on what we know about the demographics of the indigenous people seeking participation in ADR-type forms of restorative justice. These approaches rely heavily on the existence of a community bond and the risk of reintegrative shaming.²⁵⁵ Realistically, these approaches may be more likely to be successful in rural areas where community members know each other and are more invested in the offender's success. However, even cities should be able to find willing participants despite the less communal characteristics, as seen in some of the more extensive studies discussed earlier.

At the county level, the diversion of offenders could occur at either the law enforcement referral stage or the prosecution stage. Both entities are in semi-regular contact with the victims and can inquire about his or her willingness to participate in a non-traditional approach to resolving criminal behavior. Additionally, law enforcement and prosecutors are also in an ideal position to be familiar with the offender and their criminal history to determine whether the offender would be an ideal candidate for diversion and a restorative approach and, if so, whether conferencing or mediation would be more appropriate.

Victim-Offender Mediation appears to be best suited for lower-level crimes, where the offense was rooted in mistake rather than driven by some underlying cause.²⁵⁶ However, Conferencing opens a door of possibilities due to the involvement of several different types of community members, including both the victim and offender's supporters, law enforcement, and a facilitator.²⁵⁷ In response to the concerns about restorative justice approaches not addressing the underlying cause of the offense²⁵⁸ and thus having lower recidivism rates, this paper suggests adding professionals, such as counselors or nurses, to the Team when appropriate. This approach utilizes the effective portions of Alternative Court teams, such as Drug, DWI, and Mental Health Courts. Ideally, with the appropriate professional present at the Conference, the Written Agreement can include conditions that underly the offense, whether drug use, alcoholism, or some other concern. Such professionals would not have to be limited to those utilized by the Alternative Courts, however. They could include staff from organizations that assist with poverty, homelessness, or other common causes of criminal

²⁵⁴ Mariel Alper, Matthew R. Durose & Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*, U.S. DEPARTMENT OF JUSTICE 1 (May 2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>.

²⁵⁵ See Daly & Hayes, *supra* note 117, at 2, 6.

²⁵⁶ Walker, *supra* note 51, at 39.

²⁵⁷ Hayes & Daly, *supra* note 51, at 726.

²⁵⁸ See Latimer et al., *supra* note 9, at 139; ABC NEWS, *supra* note 216.

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behaviors. With a greater focus on the underlying causes, not only could this approach help the offenders more effectively than the largely one-size-fits-most traditional system, but it could also reduce recidivism rates and prevent future harm to the community.²⁵⁹

Once the Written Agreement is developed by the Conferencing or Victim-Offender Mediation participants, supervision should ideally fall to the Probation & Parole Office. Although this creates an increased strain on their offices, it reduces the strain on both the courthouse dockets, and the local jails. Furthermore, if the program does succeed in reducing recidivism, it will lighten the burden on the Probation Officers over the long term. Given the high value placed on offender-responsibility in the approach of both Victim-Offender Mediation and Conferencing, responsibility can also be shared with the offender himself or herself to regularly check in and confirm that they are adhering to their Written Agreement. Participants could accomplish this by submitting completion letters to an online portal for whatever programs they were required to complete or any community service hours mandated to them. Once an offender meets their Written Agreement's conditions, they should be released from their probationary period just as offenders are released from a standard probation.

VI. CONCLUSION

Despite decades of reforms of the United States criminal justice system, citizens who face a criminal proceeding continue to be plagued with many of the same problems. Victims commonly report feeling dissatisfied with the process.²⁶⁰ Some victims feel the offender never really took responsibility for his actions, while others wanted the courts to consider the offender's individual characteristics and lower or drop the charges or grant a probationary sentence. On the other hand, offenders face a prolonged disruption of their lives due to an overburdened court docket and may have their hearing dates pushed out months until a public defender is available. In that time, many offenders take a plea deal for the sole purpose of ending the chaos. Assuming the offender is not chosen to enter an Alternative Court, he or she will likely receive a standard sentence guided by statutory requirements which allow little consideration of the offender's remorse or any underlying struggles that may have played a role in the commission of the crime. If the court sentences the offender to detention, they can likely expect an overcrowded facility.²⁶¹

Alternative Courts, such as DWI and Drug Courts, are beginning to relieve some of these issues. They provide a more individualized approach to an offender's sentence, prevent incarceration, and aim to reduce recidivism by addressing the underlying cause. However, they ultimately create a more significant burden on the court system due to the intensive nature of the treatment programs and necessary supervision. As a result, they generally limit how many offenders can be diverted to the program and are restrained by small budgets. Alternative dispute resolution approaches to restorative justice, such as Conferencing and Victim-Offender Mediation, can be used to bridge the gap where both the victim and offender are willing, and the referring agency feels it is an appropriate decision.

²⁵⁹ See Latimer et al., *supra* note 9 (addressing the fact that it could have a greater impact on recidivism if it focused on the root causes of crime).

²⁶⁰ Umbreit et al, *supra* note 180, at 137.

²⁶¹ Pietsch, *supra* note 6; Boshart, *supra* note 6.

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County courts wishing to implement these programs will have to garner public support. Although Conferencing can occur without the involvement of a victim, their participation will strengthen the outcome of the Conference. However, with the community's support, implicating alternative dispute resolution approaches to restorative justice should ultimately reap several benefits, including lower recidivism rates, reduced stress on the court and prison systems, increased victim satisfaction, and greater overall community trust in the criminal justice system. Although this Comment suggests implementing Conferencing and Victim-Offender Mediation programs at a county level, as public support grows, states should consider legislative support similar to that of New Zealand and Australia. An implementation of alternative dispute resolution approaches to criminal behavior with robust government support could have a drastic impact on the problems facing the current criminal justice model and might provide some of the criminal justice reform Americans have been looking for since the late 1800s.