

AMERICAN JOURNAL
of LAW and EQUALITY

COMMUNITY-BASED AND RESTORATIVE-JUSTICE INTERVENTIONS TO REDUCE OVER-POLICING

Adriaan Lanni*

Residents of marginalized communities suffer simultaneously from “over-policing and underprotection.”¹ The various forms of over-policing are well-documented. Socioeconomically disadvantaged neighborhoods are subject to harsh police tactics, such as order-maintenance policing and aggressive investigatory traffic and pedestrian stops not typically experienced in predominantly white and middle-class neighborhoods.² Intense police surveillance combined with harsh sentencing policies have led to high incarceration rates that have devastating social and economic effects on these communities.³ Over-policing and harsh criminal policies tend to erode trust in the police and the criminal justice system more generally.⁴ One survey of residents in six low-income communities found that a majority of respondents viewed police as racially and ethnically biased, while fewer than half thought the police acted in a procedurally just way, agreed that their police department met various measures of legitimacy, or agreed that “the laws of our system are

*Touroff-Glueck Professor of Law, Harvard Law School. Kevin Bendesky, Ava Cilia and Riley Doyle Evans, and Nicole Fintel provided excellent research assistance. I am indebted to Randall Kennedy, Martha Minow, Carol Steiker, and Matthew Stephenson for helpful comments.

- 1 Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2117 (2017); see also Daanika Gordon, *The Police as Place-Consolidators: The Organizational Amplification of Urban Inequality*, 45 L. & SOC. INQ. 1, 17–23 (2020) (providing case study in which inner city neighborhood was simultaneously over-policed and underserved); Anthony A. Braga et al., *Race, Place, and Effective Policing*, 45 ANN. REV. SOCIOLOGY 535, 542 (2019).
- 2 Gordon, *supra* note 1 (comparing policing tactics in middle-class and inner-city neighborhoods); Bell, *supra* note 1, at 2114–18; Braga et al., *supra* note 1, at 540–42.
- 3 Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 201–11 (1998).
- 4 Bell, *supra* note 1, at 2059, 2100; Braga et al., *supra* note 1, at 540.

© 2022 Adriaan Lanni. Published under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International license (CC BY-NC-ND).
https://doi.org/10.1162/ajle_a_00040

generally consistent with the views of the people in your community about what is just and right.”⁵

At the same time, disadvantaged communities tend to receive inferior service and protection from police.⁶ In many cities, police take much longer to respond to 911 calls in disadvantaged communities, if they come at all;⁷ in Buffalo, for example, the median response times in the predominantly Black East Side district was almost 125% longer than in South Buffalo neighborhoods.⁸ The chair of the Buffalo Police Advisory Board summarized the experience of being over-policed and underserved in low-income communities of color: “On the one hand, you have patrol cars driving up and down the street. . . . There’s this almost communal trauma from just this overbearing presence . . . always there, always sort of watching you, but not ever there to help. Not ever there to make you feel safe.”⁹

Is there a way to make marginalized communities safer without intense police surveillance and harsh punishments? I propose relying more on two alternatives to traditional policing and punishment. First, communities should consider non-police alternatives to preventing and responding to harm whenever possible, including alternative first responders, civilian traffic enforcement, community violence interrupters, and school and community restorative-justice programs. Second, communities should be given the option to develop restorative-justice programs as an alternative to the traditional criminal process for some crimes.

I. PROMOTING COMMUNITY SAFETY THROUGH NON-POLICE ALTERNATIVES

Many communities have begun to experiment with programs to reduce the role of the police. Small civilian alternative first-responder programs addressing behavioral health crises have existed for some time; proposals to use civilians to respond to quality-of-life and other low-level complaints and to conduct traffic enforcement are just beginning to get traction. Communities have also developed violence-interruption programs and school and community restorative-justice programs. This section briefly reviews some of these

5 NANCY LA VIGNE ET AL., HOW DO PEOPLE IN HIGH-CRIME, LOW-INCOME COMMUNITIES VIEW THE POLICE? 8–11 (Feb. 2007), https://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf.

6 Bell, *supra* note 1, at 2114–16; Gordon, *supra* note 1, at 17–23.

7 Gordon, *supra* note 1, at 21; Bell, *supra* note 1, at 2116; Steve Neavling, *Police Response Times Are Slowest in Detroit’s Poorest Neighborhoods*, MOTOR CITY MUCKRAKER (Jan. 25, 2019), <https://motorcitymuckraker.com/2019/01/25/part-4-police-response-times-are-slowest-in-detroits-poorest-neighborhoods/>; Geoff Kelly, *Where’s a Cop When You Need One?*, INVESTIGATIVE POST (Dec. 7, 2021), <https://www.investigativepost.org/2021/12/07/wheres-a-cop-when-you-need-one/>

8 Kelly, *supra* note 7.

9 *Id.*

programs to provide an idea of how they work and what data there is about their effectiveness. These types of programs may be one way for disadvantaged communities to improve service and promote community safety while reducing the burdens of over-policing.

One of the most promising ideas is to use alternative first responders whenever possible. The Crisis Assistance Helping Out on the Streets (CAHOOTS) program in Eugene, Oregon, is one of the largest and best-known alternative-responder programs; several cities have recently introduced smaller programs based on this model.¹⁰ In the CAHOOTS model, two-person teams—a mental health crisis worker and an emergency medical technician—respond to 911¹¹ and nonemergency calls involving mental health crises, intoxication or substance abuse, and homelessness.¹² The CAHOOTS team provides voluntary services, including crisis intervention, counseling, and referral and transportation to social services.¹³ These teams can offer a more appropriate and less intimidating and distressing response to behavioral health crises than the police. They also reduce the danger of a mental health crisis escalating into police violence. The risk of violence is significant: twenty-three percent of the more than six thousand people fatally shot by police officers between 2015 and March 2021 were experiencing a mental health crisis.¹⁴ Alternative first-responder programs also have the potential to significantly reduce potentially volatile police-citizen interactions in disadvantaged communities while providing a relatively cost-effective way to offer emergency services. The Eugene and Springfield CAHOOTS program budget is minuscule compared to that of the police department, yet in 2019 it responded to nearly twenty percent of the calls coming through the Eugene public safety communications center and required police backup in only about one percent of its calls.¹⁵

Responding to behavioral health crises may not be the only job that civilians can do better than traditional police officers. The Center for American Progress and Law Enforcement Action Partnership have proposed that civilian community responders should

10 Jackson Beck et al., *Behavioral Health Crisis Alternatives*, VERA INST. OF JUST. (2020), <https://www.vera.org/behavioral-health-crisis-alternatives>.

11 One of the challenges in implementing this model is training 911 operators to recognize which calls can safely be diverted to alternative first responders. Some programs, such as the Crisis Response Unit in Olympia, Washington, use police radios so that staff can send a mobile team without relying on referrals from 911 dispatchers. *Id.*

12 Whitebird Clinic, *CAHOOTS Eugene and Springfield, Oregon Brochure*, https://whitebirdclinic.org/wp-content/uploads/2020/06/11x8.5_trifold_brochure_CAHOOTS.pdf; see also Beck et al., *supra* note 10.

13 Beck et al., *supra* note 10.

14 VERA INST. OF JUST., *INVESTING IN EVIDENCE-BASED ALTERNATIVES TO POLICING: CIVILIAN CRISIS RESPONSE*, 4 n.5 & accompanying text (2021) (relying on Washington Post Police Shootings Database), <https://www.vera.org/downloads/publications/alternatives-to-policing-civilian-crisis-response-fact-sheet.pdf>.

15 Beck et al., *supra* note 10 (noting that the CAHOOTS program in Eugene and Springfield has a \$2 million dollar budget, about two percent of their police departments' budgets; that of the estimated 24,000 calls responded to in 2019, only 311 required police backup, and that in Eugene CAHOOTS resolved almost twenty percent of all calls).

respond to minor complaints, such as those involving disturbances/disorderly conduct, suspicious persons, trespassing, noise complaints, and other quality-of-life concerns.¹⁶ These sorts of complaints make up a significant share of calls for service—approximately twenty percent of calls in Detroit between 2016 and 2020, for example.¹⁷ Traditional police responses to these quality-of-life complaints erode trust in the police in marginalized communities because of the perception (and reality) that police handling of quality-of-life issues often involves the use of harsh and racially discriminatory methods to respond to behavior that does not threaten community safety.¹⁸ Paid community members trained in de-escalation and mediation may be able to resolve many of these complaints peacefully without police involvement. While the idea of having community members respond to 911 calls involving quality-of-life complaints is new, engaging trained community members (“violence interrupters”) to mediate conflicts has been done successfully for some time.¹⁹ Given the negative impact of harsh order-maintenance policing on marginalized communities of color, these communities might consider creating programs to refer quality-of-life and other low-level calls to civilian community responders. The success of alternative behavioral health responder models such as CAHOOTS suggests that civilian community responder programs could offer the possibility of more reliable service at a fraction of the cost of police responses to quality-of-life complaints.

In a related vein, some cities are exploring the possibility of having unarmed civilians housed in the department of transportation enforce minor traffic violations.²⁰ The burdens of over-policing in disadvantaged communities are perhaps most obvious in traffic enforcement. Many studies have found that Black and Latino drivers are more likely to be stopped, searched, cited, and arrested than white drivers.²¹ Minor traffic violations can be used as a pretext for abusive investigatory stops.²² And a significant percentage of fatal

16 Amos Irwin & Betsy Pearl, *The Community Responder Model*, CTR. FOR AM. PROGRESS (2020), <https://www.americanprogress.org/article/community-responder-model/>.

17 *Id.*

18 To cite just one egregious example, the DOJ found that from 2011 to 2013, African Americans accounted for ninety-five percent of Manner of Walking in Roadway charges and ninety-four percent of Failure to Comply charges in Ferguson, Missouri. U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

19 For discussion, see below.

20 Meg O’Connor, *What Traffic Enforcement Without Police Could Look Like*, APPEAL (Jan. 13, 2021), <https://theappeal.org/traffic-enforcement-without-police/> (noting that the City of Berkeley passed a proposal in 2021 to shift traffic enforcement from the police to the department of transportation, and listing other municipalities that have debated similar proposals). In some states, these proposals would require changing state law to permit civilians to enforce traffic laws. See Emilie Raguso, *Plans Firm Up to Remove Police from Traffic Stops, but It’s a Long Road Ahead*, BERKELEYSIDE (May 25, 2021), <https://berkeley-rps.org/wp-content/uploads/2021/05/Berkeley-pushes-ahead-with-plans-for-civilian-traffic-stops.pdf> (describing the reform efforts in Berkeley, California).

21 Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1475 (2021) (citing studies).

22 *Id.*

police shootings occur during traffic stops.²³ One detailed proposal for civilian traffic enforcement argues that unarmed traffic monitors should be given authority to issue citations for minor traffic violations but should not be permitted to run background checks or otherwise engage in criminal investigation.²⁴ This approach would significantly reduce the frequency of one of the most common and fraught forms of police-civilian encounter, easing the effects of over-policing in marginalized communities.

Other promising initiatives include community violence-interruption programs. The Cure Violence (formerly Ceasefire) model developed in Chicago in 2000 and replicated in several cities in the United States and abroad offers one example.²⁵ Cure Violence programs train and pay members of the community to work as outreach workers and violence interrupters.²⁶ Because these workers have backgrounds similar to those of the at-risk youth they work with, and in some cases have themselves been involved in gangs or other illegal activity, they are “credible messengers” who are able to talk with more credibility to young men who are at risk of criminal involvement.²⁷ In this model, outreach workers try to build long-term relationships with these young people to persuade them to make better choices and to help them access services, such as education and job training. Violence interrupters seek to intervene in potentially violent conflicts using de-escalation and mediation techniques.²⁸ Violence interrupters might, for example, learn from community members about a brewing feud and help parties establish mutually acceptable boundaries for territory or broker a ceasefire or truce,²⁹ or they might learn from program partners in a hospital about a shooting and engage survivors to try to de-escalate the situation and prevent retaliation.³⁰ Cure Violence programs seem to be effective at reducing violence. One recent study in Philadelphia found that shootings in crime hot spots decreased

23 Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, WASH. POST, Dec. 24, 2015 (finding that eleven percent of fatal police shootings in 2015 occurred during traffic stops).

24 Woods, *supra* note 21. Under this proposal, civilian traffic monitors would not be expected to pursue fleeing cars whose drivers refused to stop for them; a photo of the license plate would be sufficient to issue a citation for traffic violations. Police could continue to make traffic stops to enforce warrants or in a narrow set of serious traffic offenses such as reckless driving. *Id.*

25 Jennifer M. Whitehill et al., *Interrupting Violence: How the CeaseFire Program Prevents Imminent Gun Violence Through Conflict Mediation*, 91 J. URB. HEALTH 84, 85 (2013); JOHN JAY COLL. RSCH. ADVISORY GRP. ON PREVENTING & REDUCING VIOLENCE, REDUCING VIOLENCE WITHOUT POLICE 8–11 (2020, revised 2021), https://johnjayrec.nyc/wp-content/uploads/2020/11/AV20201109_rev.pdf.

26 Whitehill et al., *supra* note 25, at 85; JOHN JAY COLL. RSCH. ADVISORY GRP. ON PREVENTING & REDUCING VIOLENCE, *supra* note 25, at 9.

27 Whitehill et al., *supra* note 25, at 85.

28 JOHN JAY COLL. RSCH. ADVISORY GRP. ON PREVENTING & REDUCING VIOLENCE, *supra* note 25, at 2; Whitehill et al., *supra* note 25, at 90–91.

29 Whitehill et al., *supra* note 25, at 90–91.

30 JOHN JAY COLL. RSCH. ADVISORY GRP. ON PREVENTING & REDUCING VIOLENCE, *supra* note 25, at 11.

significantly compared with matched comparison areas.³¹ Studies of several violence intervention programs that engage young hospital patients who have sustained violent injuries have found that these programs decrease the likelihood of arrest, re-injury, or both.³² Chicago's Safe Passage program is another example of a community-based alternative to policing. Safe Passage, which hires civilians trained in de-escalation strategies to patrol routes near schools at arrival and dismissal times, appeared to reduce violent crime by fourteen percent in those areas, with little displacement.³³ Because violence-interruption programs rely on well-trained individuals with local community ties and, often, backgrounds similar to those of the youth they work with, scaling up these programs is not a simple process.³⁴ But the strong evidence that violence-interruption programs can be effective suggests that this approach is worth pursuing.

School and community restorative-justice programs are another promising approach to preventing crime without police involvement. School restorative-justice programs that replace criminal and punitive disciplinary procedures with restorative approaches may alleviate police surveillance in schools and reduce the burdens of high incarceration rates in marginalized communities by disrupting the school-to-prison pipeline. It has been well-documented that zero-tolerance policies that emphasize the use of suspension and expulsion put students at increased risk of dropping out, risky and illegal behaviors, and involvement with the criminal justice system.³⁵ And this punitive school discipline has a disparate impact on students of color. For example, studies have shown that Black students are more likely to be suspended, expelled, and arrested at school than white students and that "black students are more harshly sanctioned for comparable or lesser infractions than white students."³⁶ Restorative-justice circles may offer an alternative. Restorative-justice circles bring together affected students and teachers to discuss and cooperatively address conflicts and problematic behaviors; schools also use ongoing community-building circles to promote a positive school culture.³⁷ Rigorous academic studies of the effects of

31 *Id.* at 9–11 (discussing studies); Catarina Roman et al., *Quasi-experimental Designs for Community-Level Public Health Violence Reduction Interventions: A Case Study in the Challenges of Selecting the Counterfactual*, 14 J. EXPERIMENTAL CRIMINOLOGY 155–85 (2018) (discussing Philadelphia program).

32 JOHN JAY COLL. RSCH. ADVISORY GRP. ON PREVENTING & REDUCING VIOLENCE, *supra* note 25, at 11 (citing studies).

33 *Id.*

34 *Id.* at 9 (noting that identifying and retaining appropriate staff can be challenging in violence-interruption programs).

35 Mara Schiff, *Can Restorative Justice Disrupt the 'School-to-Prison Pipeline?'* 21 CONTEMP. JUST. REV. 121, 123–24 (2018).

36 *Id.* at 124.

37 Thalia Gonzalez, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 298–321 (2012) (describing the use of restorative justice in various school systems).

restorative-justice practices in schools are limited, but schools and school systems adopting restorative-justice practices report a decrease in suspensions, expulsions, and police referrals, an improvement in graduation rates and academic achievement, and a reduction in racial disparity in discipline.³⁸

Restorative practices can also be used in the community to steer at-risk individuals away from criminal behavior. In these programs, nonprofit organizations or community groups organize peacemaking circles in which community members are invited to participate in a series of guided conversations on themes such as manhood, violence, how to leave gangs, healthy relationships with women, and goal setting.³⁹ These programs sometimes also hold conflict circles, which respond to tensions between gangs or individuals by bringing the antagonists together to make an agreement not to instigate conflict.⁴⁰ A qualitative sociological study of one such group suggests that circles may have averted gang violence and helped gang-involved individuals make the transition to stable employment.⁴¹

Of course, none of these programs eliminates the need for police to respond to violent crime. But, taken together, they may reduce violence and promote safety while reducing negative police-civilian interactions.

II. RESTORATIVE ALTERNATIVES TO THE CRIMINAL ADJUDICATION PROCESS

My second suggestion is to develop restorative-justice programs as alternatives to the traditional criminal process.⁴² Restorative justice is not just a way to reduce the effects of harsh punishments on marginalized communities. Restorative justice is more responsive to the needs of crime victims and promotes community safety by reducing recidivism rates and helping offenders become reintegrated in the community. This part first describes how restorative justice is used in the criminal context and suggests why it offers a better response to crime than the traditional criminal process, particularly for disadvantaged communities. I then review various options in designing restorative-justice programs, including personnel, referral procedures, and eligibility criteria.

38 Schiff, *supra* note 35, at 126–28; FANIA DAVIS, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 48–52 (2019).

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

40 BOYES-WATSON, *supra* note 39.

41 *Id.*

42 For a detailed analysis of the tradeoffs involved in incorporating restorative justice throughout the criminal legal system, see Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 *BUFF. L. REV.* 635 (2021).

A. *Restorative justice in the criminal context*

Restorative justice takes many forms, but in the criminal context it typically involves a meeting between the victim,⁴³ the offender, and other members of the community. In this meeting, the offender expresses remorse for the harm caused and the group agrees on actions the offender can take to repair the harm and prevent re-offending. Police or prosecutors typically refer cases at their discretion to independent nonprofit organizations to conduct these restorative processes, often with the help of community volunteers. Generally, cases will not be referred to restorative justice without the victim's consent; surrogate victims (community members who have experienced a similar harm) can be used when the victim does not want to participate in the process. Defendants can be offered the option to participate in restorative justice at various stages in the criminal process. Restorative programs can be used as a form of diversion from the criminal process, as an alternative form of sentencing, or, in more serious cases, as a way to reduce the criminal sentence.

As described in more detail below, restorative processes offer victims more satisfaction than the criminal process and do a better job of holding the offender accountable and reducing recidivism while avoiding or reducing incarceration. The advantages of restorative justice are particularly acute for marginalized communities, for three reasons. First, restorative justice offers a meaningful response to harm that reduces the burden over-policing and harsh crime control policies place on these communities. Second, the localization and community involvement in restorative-justice programs allow communities that are disproportionately affected by both crime and harsh criminal policies to make their own assessment of the extent to which they want to moderate criminal punishments with restorative alternatives.⁴⁴ Third, incorporating restorative-justice programs may enhance legitimacy and community trust in the criminal process.

Restorative justice is not just a way for communities to avoid harsh criminal policies. As many proponents have pointed out, restorative approaches do a better job of meeting the needs of victims than the traditional criminal process. By giving victims a voice and role in the resolution of the case, restorative processes can help victims overcome a feeling

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

44 Referral policies are typically determined by individual police departments and district attorneys' offices. Restorative-justice providers can further localize the process by involving volunteers or paid members of a smaller community, such as a neighborhood or zip code, if desired.

of powerlessness and regain a sense of control.⁴⁵ By contrast, traditional criminal processes do little to promote victim healing and restore a sense of safety and can in many cases be psychologically harmful.⁴⁶ Moreover, restorative-justice proponents point out that victims' desire for safety and justice does not necessarily mean they want offenders to receive long terms of incarceration.⁴⁷ In fact, surveys of crime victims indicate that many victims prefer a justice system focused on rehabilitation over punishment, favor noncustodial forms of accountability, and believe that prison is more likely to make people commit crimes than to rehabilitate them.⁴⁸

Empirical research supports the claim that restorative justice offers more to victims than the criminal process. Multiple randomized control studies have found that restorative justice outperformed the criminal process on a variety of metrics related to victims' psychological well-being and sense of fairness.⁴⁹ For example, a multiyear randomized study from Australia of cases involving personal property crime and mid-level violent offenses found significant psychological benefits for victims who participated in restorative justice: victims of violent crimes who went to court were five times more likely to believe they would be revictimized by the offender than victims whose cases were referred to restorative justice.⁵⁰ Similarly, this study found that victims who participated in a restorative

45 DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND THE ROAD TO REPAIR* 23–31 (2019); HOWARD ZEHR, *CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES* 31–35 (2015). For a discussion of scientific literature suggesting that the passive role assigned to victims in the criminal process can be harmful, while a more active role that promotes a sense of control fosters victim recovery, see Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 462–63 (2006).

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

47 SERED, *supra* note 45, at 29; Heather Strang & Lawrence Sherman, *Repairing the Harm: Victims and Restorative Justice*, 1 UTAH L. REV. 15, 19–20 (2003); ZEHR, *supra* note 45, at 195; see also Tinneke Van Camp & Jo-Anne Wemmers, *Victim Satisfaction with Restorative Justice: More Than Simply Procedural Justice*, 19 INT'L REV. VICTIMOLOGY 117 (2013) (noting that victims most commonly seek validation rather than retribution).

48 ALLIANCE FOR SAFETY AND JUSTICE, *CRIME SURVIVORS SPEAK* 14, 15, 16, 20 (2016).

49 Strang & Sherman, *supra* note 47, at 25–33; Caroline Angel et al., *Short Term Effects of Restorative Justice Conferences on Post-Traumatic Stress Symptoms Among Robbery and Burglary Victims: A Randomized Control Trial*, 10 J. EXPERIMENTAL CRIMINOLOGY 291 (2014) (finding that symptoms of post-traumatic stress disorder were significantly lower in victims of burglary and robbery who were randomly assigned to a restorative process); Barton Poulson, *A Third Voice: A Review of Empirical Research on Psychological Outcomes of Restorative Justice*, 1 UTAH L. REV. 167, 172, 179, 181, 188 (2003) (discussing randomized control study of family conferencing program that found that victims who experienced the restorative process were more satisfied than those whose cases were assigned to court (96% vs. 76%), were more likely to think their case was handled fairly (96% vs. 80%), and were more likely to think the offender was adequately held accountable for the offense (93% vs. 75%).

50 Strang & Sherman, *supra* note 47, at 25–29.

conference felt more secure, less anxious, and less afraid of the offender and had a greater sense of closure than those whose cases were resolved in the criminal process.⁵¹

Restorative processes can also hold offenders accountable in a more meaningful way than criminal punishment. What distinguishes criminal harm from other types of physical and material harm is the moral or expressive injury that accompanies it: the offender has shown contempt for the rights of the victim and for society's rules.⁵² Traditional punishment is one way for society to correct this false message by expressing condemnation for the offender's actions.⁵³ But another approach—one that is arguably more direct and more satisfying—to correcting this expressive harm is for the offender himself to acknowledge the harm caused and the wrong done; to “even the score” by apologizing to the victim, expressing remorse, and voluntarily trying to repair the harm; and to reaffirm society's rules by agreeing to abide by them in the future.⁵⁴

In contrast to the restorative approach's focus on accountability, the adversarial criminal process encourages offenders to deny responsibility.⁵⁵ Except in the few cases that go to trial, defendants never hear an account of the effect their actions have had on the victims.⁵⁶ Offenders often feel, with some justice, that the way they have been treated in the criminal process and/or the sentence they have received is unfair. Preoccupation with their own mistreatment distracts offenders from accepting responsibility for their actions and experiencing remorse for the harm they have caused.⁵⁷

Restorative processes also do a better job at rehabilitating and reintegrating the offenders. Restorative agreements vary with each case but typically involve symbolic reparation in the form of an apology, community service, material restitution if the victim has suffered financial losses, and education about the impact of the relevant offense, such as readings or videos about the community effects of gun violence. Agreements may also include items aimed at addressing the underlying causes of the offending, such as mental health or drug treatment, counseling, education, job training, and reflective exercises that may promote individual skills like decision-making, goal-setting, and recognizing multiple perspectives, as well as reflection on bias and systemic injustice and their historical roots.⁵⁸ Studies suggest that restorative processes do a better job of reducing

51 *Id.* at 29–33.

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

53 *Id.* at 308.

54 *See, e.g.*, ZEHR *supra* note 45, at 238.

55 *Id.*, at 45–47; SERED, *supra* note 45, at 92–94.

56 ZEHR, *supra* note 45, at 45; SERED, *supra* note 45, at 93–94.

57 ZEHR, *supra* note 45, at 46–47.

58 For an example of particularly extensive restorative agreement in an assault case, see SERED, *supra* note 45, at 144.

recidivism than the criminal process.⁵⁹ Interestingly, some studies suggest that this effect is most pronounced for violent offenses and somewhat larger for adult as opposed to juvenile offenders.⁶⁰

Perhaps most important for disadvantaged communities, restorative justice can achieve these positive results while minimizing the harsh criminal punishments that have had devastating effects on individuals and communities. For all these reasons, these communities should have access to community-based restorative-justice programs.

B. Options in designing restorative-justice programs

Restorative-justice programs vary widely in terms of their personnel, scope, and design. In fact, one of the virtues of restorative justice is the opportunity it gives local communities to determine for themselves what types of offenses might merit a restorative rather than a punitive response. While individual restorative-justice programs should be tailored to local needs, it may be helpful to think through some of the major choices in designing restorative-justice programs in over-policed communities.

An initial question is who should run and participate in restorative processes. Local community involvement in a restorative-justice program is critical in over-policed communities. This involvement ensures that the program is viewed as legitimate and responsive to the community's needs. Restorative-circle processes sometimes include community members as well as those most directly involved in the incident (the victim, offender, and their supporters).⁶¹ For marginalized communities, input from community members would be vital in ensuring that the types of cases taken by the program and the agreements reached in restorative processes align with community members' assessment of how to address particular incidents given the burdens of both crime and harsh criminal punishment. Many restorative-justice programs rely on trained volunteers from the community to facilitate restorative processes. But communities that choose a restorative approach for a wide range of offenses would likely find the caseload too large for unpaid volunteer facilitators to handle. Some restorative-justice proponents resist any move toward professionalization⁶² and would view the use of paid facilitators as a serious drawback. But there may be some advantages to abandoning a volunteer model, particularly if local community

59 E.g., Lawrence Sherman et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending?* 31 J. QUANT. CRIMINOLOGY 1 (2015); DAVID O'MAHONEY & JONATHAN DOAK, REIMAGINING RESTORATIVE JUSTICE 175–95 (2017).

60 HEATHER STRANG ET AL., RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-TO-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION 26–27 (2013).

61 HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2015).

62 Susan M. Olsen & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 1 UTAH L. REV. 57, 59 (2003).

members are paid to serve as facilitators in a part-time or full-time capacity. Recruiting and training paid facilitators from the local community would promote diversity,⁶³ continuity, experience, and quality in the facilitator pool and encourage consistent treatment of cases without sacrificing attention to local circumstances.

Another critical question is who decides which offenders are diverted from the traditional system into restorative-justice programs. The broad discretion currently given to police and prosecutors' offices to determine who gets a referral may amplify racially and ethnically disparate criminal-justice outcomes in disadvantaged communities. Police departments and prosecutors' offices typically have policies that list factors to be considered in deciding whether or not to refer an offender who has committed an eligible offense, but these policies often leave a great deal of discretion to the referring agency.⁶⁴ Critics worry that explicit and implicit bias may lead to fewer referrals for poor offenders and people of color, and the few (though now somewhat dated) existing studies of referral practices lend some support to the worry that bias may affect these discretionary decisions.⁶⁵ The easiest solution to the bias problem in referrals is to create rules for the automatic referral of cases involving eligible offenses, which would significantly reduce police and prosecutors' discretion. New Zealand uses a similar practice in adult cases, requiring automatic referral of all cases before sentencing to determine if a restorative process is appropriate in the particular case.⁶⁶

Perhaps the most important choice for communities introducing restorative justice involves the eligibility criteria for referral. Will the program be limited to juveniles or first offenders? Will it include misdemeanors, felonies, serious violent crimes? While each community should determine its own referral criteria, there may be good reasons for marginalized communities to support referral policies quite different from the current practice in

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

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

65 For example, a study of a juvenile restorative justice diversion program in Maricopa County, Arizona, found that both Black and Latino offenders were less likely than white offenders to be selected by probation officers and the prosecutor's office for placement in a restorative-justice program. Nancy Rodriguez, *Restorative Justice, Communities, and Delinquency: Whom Do We Reintegrate*, 4 *CRIMINOLOGY & PUB. POL'Y* 103, 119 (2005). The raw statistics of referrals in South Australia (according to a 1999 report, fifty-four percent of non-aboriginal youth versus thirty-one percent of aboriginal youth were diverted from court) also raise the possibility of discrimination in referral decisions, but the report does not eliminate other potential reasons for the differences in referrals, such as the criminal history of offenders. For discussion, see Kathleen Daly, *Restorative Justice in Diverse and Unequal Societies*, 17 *LAW IN CONTEXT* 167, 179 (2000).

66 2002 Sentencing Act s. 24A (N.Z.).

the United States, which tends to focus on juvenile and minor offenses and avoid referrals for more serious crimes.⁶⁷

Disadvantaged communities already subject to excessive police surveillance and control will likely want to be careful to avoid introducing restorative-justice programs that will expand residents' involvement with the criminal legal system. There is a danger that programs intended to divert offenders from the criminal justice system may result in "widening the net" of state control.⁶⁸ For example, criminal justice actors may refer offenders, especially juveniles, whom they think might benefit from a restorative process for minor offenses that would ordinarily not be pursued in court at all, or that would ordinarily result in less onerous requirements under a conditional discharge or an adjournment in contemplation of dismissal. An offender who fails to complete a restorative agreement might find himself returned to the criminal process to face punishments that he would never have faced absent the referral.⁶⁹ Marginalized communities will want to write referral policies with an eye toward avoiding net-widening. In particular, referrals from school resource officers to restorative-diversion programs embedded in the criminal legal system should be avoided in favor of restorative responses that operate within schools.

Restorative justice need not be limited to minors or to nonviolent offenses. In New Zealand, all cases must be evaluated prior to sentencing for referral to a restorative process.⁷⁰ Moreover, restorative justice is mandatory for all serious youth offenses in New Zealand except murder and manslaughter.⁷¹ Restorative theory predicts that a restorative encounter will be more meaningful in cases of violence, precisely because hearing about the impacts of a violent crime directly from the victim is apt to make a stronger impression on offenders. And empirical studies of existing programs find that restorative programs are more effective at reducing recidivism when the case involves violent crimes rather than property crimes and are slightly more effective for adult serious offenders than for juveniles.⁷²

Restorative justice can be implemented in a way that is compatible with a notion of proportionality for communities that worry that restorative approaches will be too lenient a response to serious crime. Some restorative-justice theorists have suggested that

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

68 E.g., M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 133 (2016); Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 761–62 (2000).

69 Crawford, *supra* note 63, at 139.

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

71 ALLAN MACRAE & HOWARD ZEHR, *THE LITTLE BOOK OF FAMILY GROUP CONFERENCES* 218 (2015).

72 STRANG ET AL., *supra* note 60, at 26–27.

restorative outcomes should be subject to broad upper and lower limits based on the offense,⁷³ or that additional punishments should be available where needed to insure proportionality in serious cases.⁷⁴ Where a restorative process takes place after a charge has been filed, proportionality constraints can easily be enforced through court review of restorative agreements or by using a restorative agreement as a factor that can inform a court's sentencing decision rather than the presumptive sentence. Jurisdictions in New Zealand and Canada, where restorative justice is widely used, have adopted precisely these approaches. Courts in these jurisdictions often have the option of reviewing restorative agreements; studies have shown that courts ratify these agreements in roughly eighty percent of cases.⁷⁵ In New Zealand, participation in a restorative-justice process will typically reduce rather than eliminate the prison sentence in very serious cases. To give just one example, the High Court of New Zealand recently upheld a ten percent reduction in the length of imprisonment for participation in a restorative process in a case involving intentional infliction of grievous bodily harm and suggested that a reduction of up to twenty percent for participation in restorative justice was reasonable in most cases.⁷⁶

Some communities might choose a gradual approach to using restorative justice for serious crimes—perhaps beginning with small pilot programs and/or using restorative justice to reduce but not eliminate incarceration for serious offenses. And even the most enthusiastic restorative-justice proponents recognize that restorative justice will not work for all offenders and cases and will not replace incarceration completely.⁷⁷ But if pilot programs are successful at reducing recidivism, over time communities may become more and more comfortable with restorative rather than punitive approaches to serious crime. Expectations about what level of punishment is “deserved” for a given offense are influenced by the anchoring effect of the existing system of mass incarceration. In an ideal world, a restorative approach to crime would itself become constitutive and reset expectations that long and dehumanizing prison terms are the proper response to serious harm.

73 Carolyn Hoyle, *The Case for Restorative Justice*, in *DEBATING RESTORATIVE JUSTICE* 1, 64 (Chris Cunneen & Carolyn Hoyle eds., 2010).

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

75 John Braithwaite, *In Search of Restorative Jurisprudence*, in *RESTORATIVE JUSTICE AND THE LAW*, *supra* note 63, at 150–51 (citing studies finding that in New Zealand, courts ratified eighty-one percent of conference decisions and when they did change them were eight times more likely to reduce the order, and that courts in Manitoba ratified eighty-three percent of restorative plans and were five times as likely to modify by addition of requirements as deletions).

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

77 SERED, *supra* note 45, at 133; Jim Dignan, *Restorative Justice and the Law: The Case for an Integrated, Systemic Approach*, in *RESTORATIVE JUSTICE AND THE LAW*, *supra* note 63, at 168; JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 32–33 (2002).

Another question relates to deterrence. Would the adoption of restorative approaches encourage crime by eliminating or reducing the deterrent effect of harsh penalties? It's impossible to say for sure, but any reduction in general deterrence due to a decrease in punishment severity can be at least partially offset by gains in compliance generated by enhanced legitimacy and transformative approaches to community safety. If used broadly enough, restorative justice may contribute to compliance with the law by enhancing the community's perception of procedural justice and the legitimacy of the criminal legal system.⁷⁸ Increased community trust might also lead to higher rates of reporting crime and cooperation with law enforcement, thus strengthening deterrence.⁷⁹ The potential effects of increasing reporting rates on deterrence should not be underestimated: a recent national study found that fifty-two percent of violent victimizations and forty-two percent of cases involving a weapon went unreported.⁸⁰ Moreover, pairing restorative processes with the transformative approaches to community safety and harm prevention, such as violence interrupters and alternative first responders, discussed earlier may also help lower crime rates without over-policing and harsh criminal punishments.

III. CONCLUSION

In this paper I have tried to describe some alternatives to traditional policing and the criminal process that would both reduce the negative impacts of over-policing and harsh punishment and promote safety and protection for underserved communities. In some instances, hard evidence supports these alternatives. For example, we have seen that violence-intervention programs can reduce violence and that restorative-justice programs have produced better outcomes for both the offender and the victim. In other instances, common sense alone suggests the value of alternative approaches. There seems to be no good reason to suppose that armed police officers should spend so much time in disadvantaged communities responding to mental health emergencies, particularly when civilians can provide better-trained and more reliable service at a lower cost.

To be sure, there are difficult questions about how to expand these alternative programs in over-policed communities—for example, whether violence-prevention programs can be expanded and copied in new settings and whether restorative justice would work if scaled up to address more serious crimes.⁸¹ This concern about getting it right is

78 LAWRENCE SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 78–81 (2007).

79 Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 *CARDOZO L. REV.* 2313, 2334 (2013); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *CRIME AND JUST.* 1, 60 (1999).

80 LYNN LANGTON ET AL., U.S. DEPT. JUST., *VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010*, at 5–8 (2012).

81 For an in-depth discussion of the prospects for scaling up restorative justice, see Lanni, *supra* note 42.

appropriate; painful experience suggests that missteps create real blowback. Yet there is another fundamental truth, which is that the status quo is profoundly dysfunctional. Traditional policing and criminal adjudication do not enjoy even modest levels of legitimacy in marginalized communities. Striking the proper balance between prudence and ambition is beyond the scope of this paper. What I hope I have shown is that there are promising alternatives to over-policing. After decades of living under a broken system, the residents of our most vulnerable communities are entitled to try something new.