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## Restorative Justice from Prosecutors' Perspective

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# RESTORATIVE JUSTICE FROM PROSECUTORS' PERSPECTIVE

*Bruce A. Green\* & Lara Bazelon\*\**

*Restorative justice processes have been promoted as an alternative to criminal adjudication for many years outside the United States and, in recent years, in the United States as well. In the United States, restorative justice processes are used in some jurisdictions in cases involving juvenile offenders or low-level, nonviolent offenses by adults, but they have rarely been used in cases of adult felony offenders charged with serious violent crimes. Whether restorative justice processes will be used more broadly depends largely on whether prosecutors become receptive to their use. A handful of newly elected “progressive prosecutors” have expressed interest in applying restorative justice processes in these and other kinds of felony cases involving adult defendants. But conventional prosecutors generally remain uninterested in or hostile to restorative justice, even though most accept problem-solving courts and other alternatives to prosecution and incarceration. This Article explores why mainstream U.S. prosecutors are disposed against restorative justice and suggests how their concerns might best be addressed by restorative justice proponents.*

## INTRODUCTION

On November 9, 2019, Chesa Boudin, a public defender and the son of incarcerated parents, was elected district attorney (DA) of San Francisco, California.<sup>1</sup> Boudin ran on a progressive platform that included a promise that “[e]very victim who wants to participate in restorative justice will have the right to do so.”<sup>2</sup> During the campaign, he spoke about the role that

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\*\* Professor of Law and Director of the Criminal Juvenile Justice Clinic and the Racial Justice Clinic at the University of San Francisco School of Law. This Article was prepared for the Symposium entitled *Achieving Access to Justice Through ADR: Fact or Fiction?*, hosted by the *Fordham Law Review*, Fordham Law School’s Conflict Resolution and ADR Program, and the National Center for Access to Justice on November 1, 2019, at Fordham University School of Law.

1. Derek Hawkins, *Progressive Lawyer Wins San Francisco District Attorney’s Race, Continuing National Reform Trend*, WASH. POST (Nov. 10, 2019, 2:51 AM), <https://www.washingtonpost.com/nation/2019/11/10/progressive-lawyer-wins-san-francisco-district-attorney-race-continuing-national-reform-trend/> [https://perma.cc/L77D-RLXB].

2. See *Chesa Boudin’s Plan for a Survivor-Centered Approach to Harm, Using a Restorative Justice Program to End the Cycle of Incarceration Through Healing and*

restorative justice had played in his own life.<sup>3</sup> Noting that his parents' crimes claimed many victims—two police officers and an armed guard were killed<sup>4</sup>—Boudin also pointed out that he, as their fourteen-month-old son, suffered from their sudden, prolonged absence from his life.<sup>5</sup> His mother was not released until 2003, when Boudin was finishing college; his father remains in prison.<sup>6</sup> “But restorative justice saved me,” he wrote, “and did more to rehabilitate my parents than any number of years in prison ever could.”<sup>7</sup>

Boudin's commitment to offer restorative justice to any victim who wants it, without placing limitations on the type of crime involved, builds on and broadens pledges made by other progressive prosecutors. Eric Gonzalez was elected in 2017 to serve as the DA of Kings County, New York—which encompasses Brooklyn.<sup>8</sup> His office has formed a partnership with Common Justice, a nonprofit that offers restorative justice as an alternative to jail and prison for young people ages sixteen to twenty-six charged with serious violent felonies that include robbery, assault, and attempted murder.<sup>9</sup> Danielle Sered, the executive director of Common Justice, stated that acceptance into the program is conditioned on the wishes of the victim.<sup>10</sup> Offenders enter a guilty plea at the outset of the case to an underlying misdemeanor.<sup>11</sup> On successful completion of an intensive fifteen-month-long program that includes facilitator-mediated dialogues with the victims or

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*Accountability*, CHESA BOUDIN, [https://www.chesaboudin.com/restorative\\_justice](https://www.chesaboudin.com/restorative_justice) [<https://perma.cc/PNW3-5SEH>] (last visited Apr. 12, 2020).

3. John Nichols, *Chesa Boudin Wants to Bring Restorative Justice to San Francisco*, NATION (Oct. 22, 2019), <https://www.thenation.com/podcast/politics/chesa-boudin-san-francisco/> [<https://perma.cc/B4KU-QKUB>].

4. Dana Goodyear, *How Far Will California Take Criminal-Justice Reform*, NEW YORKER (Oct. 5, 2019), <https://www.newyorker.com/news/california-chronicles/how-far-will-california-take-criminal-justice-reform> [<https://perma.cc/W2Y4-W2ZL>]. In 1981, Boudin's parents, Kathy Boudin and David Gilbert, drove the getaway car in a robbery planned by members of the Black Liberation Army (BLA)—a black power organization. *Id.* A guard was killed in the course of the robbery. *Id.* When the vehicle Gilbert was driving was subsequently stopped by police, BLA members shot and killed two police officers. *Id.* Both Boudin and Gilbert were convicted under New York's felony murder rule. *Id.* Boudin received a sentence of twenty years to life and was paroled in 2003. *See id.* Gilbert, who received a sentence of seventy-five years to life, is still in prison. *See id.*

5. Chesa Boudin, *San Francisco Deserves Restorative Justice*, APPEAL (Aug. 30, 2019), <https://theappeal.org/san-francisco-restorative-justice/> [<https://perma.cc/XW7E-Q5LH>].

6. *See* Goodyear, *supra* note 4.

7. *See* Boudin, *supra* note 5.

8. *Gonzalez Cruises to Landslide Win in DA Race*, KINGS COUNTY POL. (Sept. 13, 2017), <https://www.kingscountypolitics.com/gonzalez-cruises-landslide-win-da-race/> [<https://perma.cc/N6FY-78GW>].

9. Adam Wisniewski, *Offender Meets Victim: A “Survivor-Centered” Approach to Violent Crime*, CRIME REP. (Apr. 12, 2017), <https://thecrimereport.org/2017/04/12/offender-meets-victim-a-survivor-centered-approach-to-violent-crime/> [<https://perma.cc/Q7SG-5FMX>].

10. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 42–43 (2019).

11. Telephone Interview with Danielle Sered, Exec. Dir., Common Justice (Nov. 27, 2019).

surrogate victims, the felony charge is dismissed.<sup>12</sup> Common Justice serves approximately twenty-five offenders each year and is expected to expand to reach forty to fifty people in 2020.<sup>13</sup>

Restorative justice is also gaining traction in rural jurisdictions that are less racially and ethnically diverse. In 2019, Natasha Irving, a criminal defense lawyer, was elected to serve as DA of Maine's District Six.<sup>14</sup> As DA, she oversees four counties with a combined population of less than 150,000 people, and she won after pledging to broaden the use of restorative justice.<sup>15</sup> Prior to Irving's election, restorative practices were employed in District Six principally in cases involving juveniles and young adults.<sup>16</sup> She promised to "implement a system of community-based restorative justice for [adults'] nonviolent misdemeanor offenses."<sup>17</sup> Irving explained:

Community-based restorative justice, it holds the offender accountable, makes the victim whole, keeps our community safe, and it costs less in taxpayer dollars than the system we are using now, which is "lock em' up." Lock them up for any nonviolent offense that we can get jail time for.<sup>18</sup>

In the past few years, other candidates who are part of the progressive prosecution movement<sup>19</sup> have taken a page from a guidebook for twenty-first-century prosecutors, which lists restorative justice among its twenty-one principles.<sup>20</sup>

Although restorative justice processes vary and are employed in varying contexts, the basic aims are (1) to promote a mediated discussion between an offender and victim; (2) to give the victim an opportunity to explain the impact of the offense; (3) to give the offender a chance to apologize and

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12. *Id.*

13. *Id.* In Cook County, Illinois, Kim Foxx, who ran and won on a progressive platform, offers a program called Balanced and Restorative Justice, which offers restorative justice alternatives to juveniles at varying stages of the process, including pre- and postcharging or following a guilty plea but prior to sentencing. *Putting Balanced and Restorative Justice into Practice*, COOK COUNTY STATE'S ATT'Y, <https://www.cookcountystatesattorney.org/outreach/putting-balanced-and-restorative-justice-practice> [https://perma.cc/P8C3-NXLH] (last visited Apr. 12, 2020).

14. Beth Brogan, *How a New District Attorney Is Shaking Up the Justice System in Midcoast Maine*, BANGOR DAILY NEWS (May 28, 2019, 1:03 AM), <https://bangordailynews.com/2019/05/28/news/midcoast/how-a-new-district-attorney-is-shaking-up-the-justice-system-in-midcoast-maine/> [https://perma.cc/PTB6-SCYB].

15. *See id.*

16. Abigail Curtis, *What Separates Candidates Running for District Attorney in Four Coastal Maine Counties*, BANGOR DAILY NEWS (Nov. 1, 2018, 11:07 AM), <https://bangordailynews.com/2018/11/01/politics/what-separates-candidates-running-for-district-attorney-in-four-coastal-maine-counties/> [https://perma.cc/3VRK-5YEJ].

17. Jessica Picard, *DA Candidate Focuses on Restorative Justice*, LINCOLN COUNTY NEWS (Sept. 10, 2018, 8:00 AM), <https://lcnm.com/currentnews/da-candidate-focuses-on-restorative-justice/> [https://perma.cc/9UN2-BMXN] (quoting Natasha Irving).

18. *Id.* (quoting Natasha Irving).

19. *See generally* Jeffrey Bellin, *Defending Progressive Prosecution*, 39 YALE L. & POL'Y REV. (forthcoming 2020); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019).

20. FAIR & JUST PROSECUTION ET AL., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 12–13 (2018), [https://www.brennancenter.org/sites/default/files/publications/FJP\\_21\\_Principles\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/FJP_21_Principles_FINAL.pdf) [https://perma.cc/R626-D4WC].

reckon with the root causes of the offending behavior; and (4) to develop and then implement a plan to repair the harm and make amends.<sup>21</sup> The process aims to be restorative in two respects—both to restore the offender to the community and to restore the victim’s well-being. Restorative justice, which has deep historical roots in indigenous cultures,<sup>22</sup> has been increasingly employed in the United States in schools and juvenile justice proceedings.<sup>23</sup> Outside the United States, restorative justice processes have been used more widely as an alternative to criminal prosecution where the victim and offender are both amenable.<sup>24</sup> There is a substantial literature documenting its use with criminal offenders outside the United States,<sup>25</sup> and the prevailing view is that restorative justice programs lead to lower rates of recidivism and higher rates of victim satisfaction than criminal prosecutions and punishment.<sup>26</sup>

In the United States, however, restorative justice has gained much less traction outside the small circle of progressive prosecutors. Even then, its use is often limited to juvenile offenses or nonviolent, low-level felonies committed by adults. One substantial reason is that, in most U.S. jurisdictions, restorative justice processes cannot be employed as an alternative to criminal prosecution without the assent of the prosecutor, and conventional U.S. prosecutors, unlike their few progressive counterparts, are generally skeptical, if not hostile, to restorative justice. This Article asks why. As background, Part I describes the role that restorative justice

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21. HOWARD ZEHR, *CHANGING LENS: A NEW FOCUS FOR CRIME AND JUSTICE* 21 (5th ed. 1990); Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternative Paradigm for Justice*, 20 CUNY L. REV. 323, 326–29 (2017).

22. Restorative justice practices are said to originate in Native American peace circles and in indigenous Maori practices. Patrick Glen Drake, Comment, *Victim-Offender Mediation in Texas: When “Eye for Eye” Becomes “Eye to Eye,”* 47 S. TEX. L. REV. 647, 656 (2006); see also Barton Poulson, *A Third Voice: A Review of Empirical Research on Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 167–68. For an overview of how restorative justice practices developed in the United States from the 1970s to the 2000s, see Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 895–931 (2019).

23. Sara S. Beale, *Still Tough on Crime?: Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 421.

24. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 18. See generally Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, FED. PROB., Dec. 2001, at 29.

25. See, e.g., ROSS LONDON, *CRIME, PUNISHMENT, AND RESTORATIVE JUSTICE: FROM THE MARGINS TO THE MAINSTREAM* (2011 ed.); RESTORATIVE JUSTICE AND CRIMINAL JUSTICE (Linda Gröning & Jørn Jacobsen eds., 2012); HEATHER STRANG, *REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE* (2002).

26. See Telephone Interview with Sujatha Baliga, Dir., Restorative Justice Project, and Alex Busansky, President & Founder, Impact Justice (Nov. 26, 2019) (describing a small restorative justice project for juvenile offenders undertaken by their organization, Impact Justice, the nonprofit Community Works, and the San Francisco DA’s office and stating that juveniles who participated in the program had a 13 percent recidivism rate as opposed to a 53 percent recidivism rate for individuals placed in the control group); see also SERED, *supra* note 10, at 134 (stating that the recidivism rate for participants in the Common Justice program is less than 6 percent).

processes serve in some jurisdictions as an alternative to criminal prosecution and punishment, as well as prosecutors' crucial role in determining whether to divert cases to restorative justice processes. Part II identifies and comments on various reasons why conventional prosecutors might be skeptical of, if not hostile to, restorative justice processes. Finally, Part III argues that prosecutors' skepticism is unwarranted and that prosecutors should be open to the use of restorative justice processes as an alternative that, in many cases, will better serve the public interest in reducing recidivism and, as the authors have argued previously, better serve the interests of the crime victim.<sup>27</sup>

### I. BACKGROUND

The ordinary work of U.S. prosecutors involves criminal prosecutions. The Constitution prescribes trial as the process for adjudicating guilt or innocence, although, as the U.S. Supreme Court has recognized, plea bargaining has become the customary way in which criminal cases are resolved.<sup>28</sup> In the adjudicative process, prosecutors make the initial decision whether to initiate criminal charges against individuals who are suspected of having committed a crime. After filing charges, prosecutors take a small number of cases to trial and obtain guilty pleas in most of the rest, often as a result of a plea bargain. Some small number of prosecutions are dropped, dismissed, or end in acquittals. Successful prosecutions culminate in criminal convictions and the imposition of punishment, which often involves incarceration. The objectives of criminal punishment include incapacitating dangerous offenders,<sup>29</sup> deterring future wrongdoers,<sup>30</sup> securing retribution,<sup>31</sup> reinforcing the societal norms expressed in the criminal law,<sup>32</sup> and rehabilitating offenders, although, in practice, prosecution and imprisonment do little to rehabilitate offenders and may be counterproductive.<sup>33</sup>

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27. Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. (forthcoming 2020).

28. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

29. *See, e.g.*, *United States v. Melendez-Carrion*, 790 F.2d 984, 999 (2d Cir. 1986) (observing that "incarceration to protect society from a person's future criminal conduct . . . achieves one of the classic purposes of punishment—incapacitation").

30. *See, e.g.*, *United States v. Barker*, 771 F.2d 1362, 1368 (9th Cir. 1985) (observing that "perhaps paramount among the purposes of punishment is the desire to deter similar misconduct by others" and that "[t]his doctrine, commonly called 'general deterrence,' boasts an impressive lineage, was long-recognized at common law, and continues to command 'near unanimity . . . among state and federal jurists'" (footnotes omitted) (quoting *United States v. Bergman*, 416 F. Supp. 496, 499 (S.D.N.Y. 1976))).

31. *See, e.g.*, Leo Zaibert, *The Instruments of Abolition, or Why Retributivism Is the Only Real Justification of Punishment*, 32 LAW & PHIL. 33 (2013).

32. *See, e.g.*, *Graham v. State*, 440 P.3d 309, 324 (Alaska Ct. App. 2019) (stating that under the state constitution, retribution is not a legitimate purpose of punishment but the legitimate aims of sentencing include "uphold[ing] legal and moral standards by ensuring that people who commit serious crimes will normally receive substantial sentences").

33. A recent article on the parole process in New York eloquently observed how criminal adjudication and incarceration do not facilitate offenders' rehabilitation and restoration but, if anything, undermine it:

It is prosecutors' work processing criminal cases in judicial proceedings that defines our expectations of them. In particular, it gives rise to our understanding of their distinctive professional role and responsibilities, which are encapsulated in the concept of a duty to "seek justice."<sup>34</sup> Courts, bar associations, and academics have elaborated on the expectations implicit in, or arising from, the duty to seek justice.<sup>35</sup> At minimum, prosecutors are expected to "convict the guilty"—or, at least, some percentage of the guilty—but to avoid prosecuting or punishing the innocent,<sup>36</sup> and they are expected to avoid bringing excessively severe charges<sup>37</sup> and to promote the fairness of the process in which charges are pursued.<sup>38</sup> Prosecutors in the United States are expected to "exercis[e] discretion to not pursue criminal charges in appropriate circumstances,"<sup>39</sup> including in some circumstances where the prosecutor is certain of the offender's guilt and of the ability to obtain a conviction but believes that a criminal prosecution would be an unwise or unnecessary expenditure of resources or that a criminal conviction would be disproportionately harsh.<sup>40</sup>

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There is no official mechanism to require people confined in New York's prisons to confront their guilt, to grapple with questions of remorse and responsibility, to think about how they might make amends to a victim's family. At times, the legal system even seems to work against these goals; at trial, defense attorneys typically downplay the defendant's culpability—or deny his guilt altogether—in an effort to minimize his punishment. Often, a defendant, long after he is convicted, will cling to the narrative of his crime that his lawyer told in court.

Jennifer Gonnerman, *Prepping for Parole*, NEW YORKER (Nov. 15, 2019), <https://www.newyorker.com/magazine/2019/12/02/prepping-for-parole> [https://perma.cc/2DPP-YKYB].

34. Russell M. Gold, "Clientless" Lawyers, 92 WASH. L. REV. 87, 95–96 (2017) ("The duty to do justice entails 'specific obligations to see that the defendant is accorded procedural justice' and that the defendant is treated fairly. It requires prosecutors to 'think about the delivery of criminal justice on a systemic level' rather than focusing only on seeking individual convictions." (footnotes omitted) (first quoting MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983); then quoting R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 983 (2014))).

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

36. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 50 (1991) (stating that "the heart of the codes' mandate to do justice seems clear: the prosecutor should exercise discretion so as to prosecute only persons she truly considers guilty").

37. Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 444 (2009) (suggesting performance reviews as a way of mitigating against the potential for prosecutors to behave unethically by pursuing "excessive charges").

38. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1098 (1988) (stating that the onus is on the lawyer to "take reasonable actions" to rectify procedural defects in the adversarial system).

39. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017).

40. See, e.g., Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 591 (2019) (observing that "[f]ifty years ago, . . . prosecutors only selectively prosecuted 'bad check' cases," because creditors principally sought restitution and were unwilling to assist in prosecutions even if restitution was not made). In cases involving regulatory offenses that could be successfully prosecuted, because they involve willful misconduct, white-collar prosecutors often defer to civil regulatory

Conventionally, the prosecutor's choice was between triggering the criminal trial process by filing charges or doing nothing. Over time, however, prosecutors' options expanded. First, it became increasingly common for prosecutors to divert low-level offenses out of the "charge-conviction-sentence" pipeline.<sup>41</sup> Diversion programs vary in their particulars, but the outcome is an agreement not to prosecute or a dismissal of filed charges on the condition that the offender fulfill specified terms of an agreement.<sup>42</sup> Typical terms in diversion cases include those that a court might itself impose as conditions of probation, such as that the offender, while staying clean, get vocational training, complete his or her high school or college education, and/or successfully complete a drug rehabilitation program. But because the terms were a matter of contract, they were not limited to conditions that a court could impose, which gave both sides flexibility.<sup>43</sup>

The alternatives to a prosecution, conviction, and judicial sentencing expanded in the past two decades with the development of specialized or problem-solving courts. Most widespread and well accepted of the specialized courts are drug courts, in which judges offer drug offenders the option of drug treatment as an alternative to a conviction and/or a sentence of incarceration.<sup>44</sup> Others include community courts, young adult courts, mental health courts, and veterans' courts.<sup>45</sup> They function as an alternative

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authorities. For example, the overwhelming majority of tax crimes are not prosecuted; rather, prosecutors leave it to civil tax authorities to decide whether to bring civil proceedings. Increasingly, rather than making no-prosecution decisions on an ad hoc basis or based exclusively on nonpublic policies, prosecutors have begun publicly to announce policies not to prosecute certain low-level crimes. For a discussion of possible legal challenges to such policies, see John E. Foster, Note, *Charges to Be Declined: Legal Challenges and Policy Debates Surrounding Non-prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511 (2019).

41. Anthony V. Alfieri, *Community Prosecutors*, 90 CALIF. L. REV. 1465, 1473 (2002).

42. See generally Amanda Jacinto, *Redefining Wins and Losses: Further Enhancing the Prosecutor Playbook*, PROSECUTOR, Apr. 2018, at 10.

43. Curtis E. A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 26 (2008) ("Prosecutors have enormous flexibility in amending charges to enable a wide variety of enticing plea bargains, by, for example, offering a pretrial diversion program or probation where it might not have been otherwise available, or allowing the defendant to avoid some mandatory sentence or condition of probation.").

44. Drug courts are widespread and well accepted. They began as an innovation in Miami and, by 2010, there were more than 2500 drug court programs in the United States.

Such treatment courts give offenders incentive to succeed in addiction treatment to avoid prison and cast judges in the rehabilitative role, as providers of 'tough love' and cheerleaders toward success. . . . [P]rosecutors and defense counsel occupy a less adversarial and reduced role as part of a team working toward the subject's recovery.

Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 179 (2013). Studies show lower rates of drug relapse and reoffending for those participating in drug courts and that, factoring in the lower recidivism rate and the cost of prison, they cost the public less than the traditional process. *Id.* at 179–80. But see generally Erin R. Collins, *The Problem of Problem-Solving Courts* (Nov. 22, 2019) (unpublished manuscript) (questioning the empirical data supporting the efficacy of drug courts and noting the paucity of data to support the efficacy of other problem-solving courts).

45. Collins, *supra* note 44 (manuscript at 1) (listing and defining problem-solving courts).

to criminal adjudicatory proceedings or to incarceration after conviction. Designed for low-level offenders, these courts typically involve treatment, counseling, or education, not punishment.<sup>46</sup> Practices vary. Successful completion of a problem-solving court program may involve a decision not to bring criminal charges, the dismissal of charges, or the expungement of a conviction.<sup>47</sup> In some jurisdictions, though not all, an offender's eligibility to be processed in a problem-solving or specialized court, or to enter a diversion program, requires the prosecutor's agreement.<sup>48</sup>

Restorative justice processes may be employed at any point in the course of a criminal prosecution—for example, following a conviction but before sentencing,<sup>49</sup> as part of a criminal sentence,<sup>50</sup> or after a defendant is convicted and imprisoned<sup>51</sup>—but our focus is on their use as a diversion program.<sup>52</sup> In Vermont, restorative justice as an alternative or adjunct to prosecution has been part of state policy for the past two decades.<sup>53</sup> In 2018, after finding that restorative justice processes were being used successfully

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46. Jami Vigil, *Building a Culturally Competent Problem-Solving Court*, COLO. LAW., Apr. 2016, at 51, 51 (“While no two problem-solving court programs are identical, all rest on a foundation of therapeutic jurisprudence, which is the premise that law is a social force that can have either a therapeutic or an anti-therapeutic impact within the lives of individuals, families, and communities. Through its use of individualized treatment, community-based incentives, creative or therapeutic sanctions, trauma-informed practices, and the judicial officer as an educator, the highly trained and multidisciplinary treatment team works together to further recovery and rehabilitation for program participants.”).

47. See generally SUZANNE M. STRONG ET AL., U.S. DEP’T OF JUSTICE, CENSUS OF PROBLEM-SOLVING COURTS, 2012 (2016), <https://www.bjs.gov/content/pub/pdf/cpsc12.pdf> [<https://perma.cc/T2WW-N34P>].

48. *Id.*

49. A program run by a federal district court in Boston called RISE has offered a diversion program for serious, nonviolent felonies since 2015. The sentencing judge takes the offender’s successful completion of the RISE program into account at sentencing. Many defendants who have been through RISE and who were facing prison were sentenced to probation instead. Allyson Lorimer Crews & Maria V. D’Addieco, U.S. Dist. Court Dist. of Mass., *Repair, Invest, Succeed, Emerge*, INT’L INST. FOR RESTORATIVE PRACTICES, [https://www.iirp.edu/images/HTHfGh\\_IIRP\\_Presentation.pdf](https://www.iirp.edu/images/HTHfGh_IIRP_Presentation.pdf) [<https://perma.cc/5U7W-G4Y5>] (last visited Apr. 12, 2020).

50. See, e.g., MO. REV. STAT. § 558.019(8) (2020) (“Courts shall retain discretion to lower or exceed the sentence recommended by the commission as otherwise allowable by law, and to order restorative justice methods, when applicable.”).

51. *The Redemption Project with Van Jones*, CNN, <https://www.cnn.com/shows/redemption-project-van-jones> [<https://perma.cc/6V6A-HG6U>]. (last visited Apr. 12, 2020). For an account of how restorative justice processes are being used to bring crime victims together with individuals who have been convicted and incarcerated but eventually exonerated and released, see LARA BAZELON, RECTIFY: THE POWER OF RESTORATIVE JUSTICE AFTER WRONGFUL CONVICTION 156–208 (2018).

52. NEB. REV. STAT. § 43-274(3)(a) (2020) (declaring that, for specified juvenile offenders, “the county attorney or city attorney may utilize restorative justice practices or services as a form of, or condition of, diversion or plea bargaining or as a recommendation as a condition of disposition, through a referral to a restorative justice facilitator”).

53. VT. STAT. ANN. tit. 28, § 2a(a) (2020) (“It is the policy of this State that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses.”).

in various other cases,<sup>54</sup> Vermont established a study committee to examine whether restorative justice could be used “in domestic and sexual violence and stalking cases.”<sup>55</sup> In various other jurisdictions, independently of state legislation, prosecutors have voluntarily collaborated with social service agencies to divert some cases to restorative justice processes. In 2019, Danielle Sered published a book describing a number of serious violent felony cases in Brooklyn, New York, that were successfully resolved using a restorative justice program offered by her nonprofit, Common Justice, in partnership with the Kings County DA.<sup>56</sup> Proponents of restorative justice in the United States point to Sered’s program and others as examples of the ways in which restorative justice has the potential to obtain better outcomes—such as reduced recidivism, increased public safety, and higher rates of victim satisfaction—than the traditional adversarial approach.<sup>57</sup> But nationally, restorative justice processes remain little known to the public and are not prominent in discussions of criminal justice policy.

In general, U.S. prosecutors control the charging process, and therefore restorative justice cannot be used as an alternative to the adjudicative process without prosecutors’ assent. In other words, the decision whether to divert a case to an agency that administers a restorative justice process, like the charging decision generally, is ordinarily a matter of prosecutorial discretion. When candidates pledge to employ restorative justice, they are almost always promising to exercise discretion not to charge and/or not to incarcerate offenders who, with the victim’s willing participation, successfully undergo this process. It remains to be seen how effectively recently elected progressive prosecutors will implement their pledges.

Needless to say, a promise to pursue restorative justice as an alternative to prosecution and imprisonment is a stark departure from the “tough on crime” rhetorical stance that dominated prosecutors’ discourse for more than a quarter century and that continues to be exemplified by U.S. Attorney General William Barr, among others.<sup>58</sup> As an advocate for restorative

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54. 2018 Vt. Acts & Resolves 2555 (“Restorative justice has proven to be very helpful in reducing offender recidivism, and, in many cases, has resulted in positive outcomes for victims. . . . Victims thrive when they have options. Because the criminal justice system does not always meet victims’ needs, restorative justice may provide options to improve victims’ outcomes.”).

55. *Id.*

56. SERED, *supra* note 10, at 17–49.

57. *See, e.g.*, FAIR & JUST PROSECUTION ET AL., *supra* note 20, at 12 (“Research shows that crime victims often do not feel that prosecution and sentencing serve them well; restorative justice can help address their concerns. These programs also have a consistent track record of achieving lower rates of recidivism than traditional penalties, including for serious offenses.”).

58. For example, in a speech before the Fraternal Order of Police on August 12, 2019, Barr attacked progressive prosecutors, asserting without any evidence in support:

Once in office, they have been announcing their refusal to enforce broad swaths of the criminal law. Some are refusing to prosecute various theft cases and drug cases. And when they do deign to charge a criminal suspect, they are frequently seeking sentences that are pathetically lenient. So, these cities are headed back to the days

justice, Danielle Sered acknowledges the importance of electing progressive prosecutors who are exercising discretion less punitively than their predecessors.<sup>59</sup> But her focus, and that of other restorative justice advocates, is on trying to win over communities and, ultimately, state legislatures<sup>60</sup> on the apparent assumption that the overwhelming majority of prosecutors can never be convinced to support restorative justice processes.

In the next Part of this Article, we turn to the possible reasons for conventional prosecutors' skepticism, of which there are many.

## II. CONVENTIONAL PROSECUTORS' PREDISPOSITION AGAINST RESTORATIVE JUSTICE

Although restorative justice has become a campaign plank for a handful of would-be progressive prosecutors, it has not caught on among more traditional prosecutors as a potential diversionary strategy, especially not as a strategy for dealing with serious wrongdoing.<sup>61</sup> One can posit various reasons for this, not all of which reflect prosecutors' hostility. Even for the most progressive prosecutors, the office's bread and butter will be processing cases through the criminal adjudication process: few advocates outside the prison abolition movement<sup>62</sup> propose using restorative justice to replace prosecution, trials, and plea bargaining as the conventional processes for

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of revolving door justice. The results will be predictable. More crime; more victims.

William R. Kelly, *Attorney General Barr Got It Wrong*, PSYCHOL. TODAY (Aug. 13, 2019), <https://www.psychologytoday.com/us/blog/crime-and-punishment/201908/attorney-general-barr-got-it-wrong> [https://perma.cc/P9BH-FEX9] (quoting U.S. Attorney General Barr) (responding to Barr by indicating that progressive prosecutors' "primary goal is to enhance public safety by implementing smart, evidence-based policies for reducing crime, recidivism, and victimization" and that, "[t]o say that these prosecutors are anti-law enforcement and that their policies will result in more crime and more victimization simply shows how ill-informed Barr is regarding crime and criminal justice").

59. See SERED, *supra* note 10, at 162–66.

60. *Id.*

61. In a recent article showing how restorative justice may appeal in different ways to individuals and institutions with sharply divergent political and ideological visions, Amy Cohen observed that restorative justice "in the United States . . . has only ever limped along at the margins of the criminal justice system" but that, while originating "primarily . . . on the political left," it "is gaining supporters on the political right" and "is also increasingly promoted from within state institutions." Cohen, *supra* note 22, at 891–93. Cohen makes reference to a compilation of state laws showing that "between 2010 and 2015, fifteen states enacted or updated restorative justice statutes." *Id.* at 893 (citing SHANNON M. SLIVA, RESTORATIVE JUSTICE LEGISLATIVE TRENDS 1–2 (2015), [https://www.rjcolorado.org/literature/153668/Restorative\\_Justice\\_Legislation\\_Trends](https://www.rjcolorado.org/literature/153668/Restorative_Justice_Legislation_Trends) [https://perma.cc/PN6V-WBJF]). According to the compilation, during that six-year period, eight of the new laws supported restorative justice as a diversionary approach principally for juvenile offenders or nonviolent first-time offenders, eight laws established restorative justice as an "intermediate sanction" along with or in lieu of other penalties, four laws related to school discipline, three laws supported restorative justice as a postconviction or reentry strategy for convicted defendants, and two laws simply added to or updated the statutory definition of restorative justice.

62. See John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition/> [https://perma.cc/E2HE-6QF3].

addressing criminal offenses.<sup>63</sup> To go beyond the conventional role requires resources, and restorative justice is resource intensive: the prosecutor must team up with a social service agency capable of administering a restorative justice program and hire attorneys or other staff within the office to coordinate and help administer it, a process that involves everything from selection criteria to case monitoring to data collection to assessing outcomes.<sup>64</sup> It is far less costly to negotiate nonprosecution and deferred prosecution agreements containing other conditions and restrictions. Unless the prosecutor has received state or private funding to support a restorative justice program, as some have,<sup>65</sup> such a program may not seem feasible even if the prosecutor is enthusiastic.

Further, even prosecutors who are otherwise receptive to exploring alternatives to prosecution and incarceration may be hesitant because restorative justice processes are largely unproven; this is particularly true when it comes to measuring recidivism over the long term, which is of great import to ensuring public safety.<sup>66</sup> Although there is program-specific data indicating that restorative justice processes are generally more effective than the traditional adjudicative process in reducing recidivism and promoting victim satisfaction, the sample sizes are often small, the comparison groups are not uniform, and, because many of these programs are relatively new,

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63. See Mary E. Reimund, *The Law and Restorative Justice: Friend or Foe?: A Systemic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 671–72 (2005) (contrasting some advocates’ “dream” that criminal justice will become predominantly restorative with other advocates’ more realistic conception of restorative justice as “another tool in the toolbox of options”).

64. The tough-on-crime alternative is much less costly. See Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, *ATLANTIC* (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/> [<https://perma.cc/MWH2-G5RP>] (“District attorneys do, however, have an incentive to prosecute and send people to state prison—because state prisons do not spend local county resources, so district attorneys’ budgets stay intact.”).

65. In 2019, the California legislature passed Senate Bill 678, which mandates that the Board of State and Community Corrections establish a “restorative justice pilot program.” See S. 678, 2019 Leg., Reg. Sess. (Cal. 2019). Following appropriation of funds by the legislature, the board must award five-year multimillion-dollar grants to three counties to establish programs in which the offender’s sentence is held in abeyance for thirty-six months while the offender undergoes counseling and a restorative justice program. See *id.* The recipient counties are required to collect data on the effectiveness of the program and write a report documenting its findings. See *id.* California’s governor allocated \$25 million in the state’s budget for 2020 to fund these programs. *Gov. Newsom Releases May Budget Revise*, CAL. CATHOLIC CONF. (May 16, 2019), <https://www.cacatholic.org/gov-newsom-releases-may-budget-revise> [<https://perma.cc/YY6X-EH4P>]. The San Joaquin County DA’s office, headed by Tori Verber Salazar, was the first to receive a grant. Rich Ibarra, *State Funds Restorative Justice Pilot Program in San Joaquin County*, CAP. PUB. RADIO (July 10, 2019), <https://www.capradio.org/articles/2019/07/10/state-funds-restorative-justice-pilot-program-in-san-joaquin-county/> [<https://perma.cc/C2CL-GXR5>]; see also Reimund, *supra* note 63, at 674–75 (describing a program instituted by a Milwaukee prosecutor, with legislative funding, for nonviolent offenders who admitted wrongdoing).

66. Paul H. Robinson, *The Virtues of Restorative Justice Processes, the Vices of “Restorative Justice,”* 2003 *UTAH L. REV.* 375, 377–78 & n.7 (noting the “real risk” that the use of restorative justice in lieu of traditional prosecution “will not work” and expressing doubt that it will be sufficiently punitive to deter and to render “just deserts”).

longitudinal data is hard to come by.<sup>67</sup> Even in juvenile settings, where it is used more commonly, research into the efficacy of restorative justice is positive but perhaps not conclusive.<sup>68</sup> Precisely because restorative justice has not gained a foothold in the United States, there remains much to learn about how to run restorative justice programs most effectively, which programs are most effective in which circumstances, and whether, at their best, these programs achieve the proclaimed benefits.

The limited empirical data might be taken as a reason for experimentation and study rather than for rejecting restorative justice out of hand. But our intuition is that many of the country's more than 2300 elected prosecutors would reflexively reject restorative justice as a potential alternative to prosecution in general, and most especially in felony cases. In this Part, we identify two sets of reasons why traditional prosecutors might be skeptical, if not hostile, to restorative justice: Part II.A discusses philosophical preferences for resolving cases through adjudication and punishment; Part II.B discusses relevant issues of power and control, as well as political and practical considerations. Resistance from mainstream prosecutors is deeply ingrained and therefore may be hard to overcome even if more funding and more positive data emerge.

#### A. *Philosophical Preferences for Adjudication and Punishment*

Discussions of restorative justice take place in the context of a broader debate about criminal justice reform. Proponents of restorative justice tend to believe that the conventional "retributivist" or "carceral" process is deficient because it is overly punitive, criminogenic, and retraumatizing rather than healing for victims.<sup>69</sup> Restorative justice processes are thought to be better in some cases, especially when incapacitation is not necessary to

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67. See Poulson, *supra* note 22, at 169, 198–99 (documenting the results of seven studies using data from programs in the United States, Canada, England, and Australia and concluding that restorative justice outperformed traditional adjudicatory processes under every metric but noting that his analysis "relied exclusively on a limited number of quantitative indicators of success and failure in administering justice" and that consistent longitudinal data was lacking).

68. See, e.g., DAVID B. WILSON ET AL., NAT'L CRIMINAL JUSTICE REFERENCE SERV., EFFECTIVENESS OF RESTORATIVE JUSTICE PRINCIPLES IN JUVENILE JUSTICE: A META-ANALYSIS 2 (2017), <https://www.ncjrs.gov/pdffiles1/ojdp/grants/250872.pdf> [<https://perma.cc/LTL2-7S7W>] (concluding from a review of studies that "[o]verall, the results evaluating restorative justice programs and practices showed a moderate reduction in future delinquent behavior relative to more traditional juvenile court processing"); *id.* at 6 ("Victims have improved perceptions of fairness, greater satisfaction, improved attitudes toward the juvenile offender, are more willing to forgive the offender, and are more likely to feel that the outcome was just than victims of youth processed by the traditional juvenile justice system. Outcomes related to emotional well-being, however, did not indicate any consistent improvement for the restorative justice participants (youth or victims) relative to the traditional juvenile justice system processing.").

69. See, e.g., MELISSA LEWIS & LES MCCRIMMON, THE ROLE OF ADR PROCESSES IN THE CRIMINAL JUSTICE SYSTEM: A VIEW FROM AUSTRALIA 2 (2005), [https://www.justice.gov.za/alraesa/conferences/2005uganda/ent\\_s3\\_mccrimmon.pdf](https://www.justice.gov.za/alraesa/conferences/2005uganda/ent_s3_mccrimmon.pdf) [<https://perma.cc/QG2B-2V7L>]; Avila Stahlman, Note, *Restorative Justice in the Context of Intimate Partner Violence: Suggestions for Its Qualified Use as Supplementary to the Criminal Justice System*, 28 U. FLA. J.L. PUB. POL'Y 193, 197–98 (2017) (discussing the downfalls of a retributivist approach).

protect the public from a dangerous offender. But conventional prosecutors, especially those who have spent the better part of their legal careers trying cases in criminal court, are likely to be unconvinced either that the adjudicative process is generally deficient or that restorative justice is generally preferable.

To begin with, conventional prosecutors are likely to be philosophically committed to the concept of delivering justice via trial or plea followed by punishment—the constitutionally prescribed response to criminal offenses, once proven. Whether or not punishment involves incarceration, it is assumed to achieve objectives that restorative justice processes are not intended to achieve. This is true even in cases of offenders who are not dangerous to the public, so that there is no need for incapacitation in order to ensure public safety. But it is particularly true in cases of violent crime, which has traditionally called for a carceral response. While restorative justice claims other advantages, traditional prosecutors may not see them as adequate to compensate for its limitations.<sup>70</sup>

First, criminal punishment serves an expressive function; the court's public imposition of punishment, which at minimum, entails a moral stigma, publicly reaffirms the societal norms underlying the criminal law that the offender is sentenced for violating. Restorative justice processes do not achieve this because they do not occur in public proceedings. While the process may result in the offender's public acknowledgement of wrongdoing, that is not invariably the resolution.

Second, punishment is assumed to better serve the public interest in deterring future criminal wrongdoing precisely because it entails public shaming and the infliction of pain, typically through the loss of liberty. While restorative justice processes may culminate in undertakings and insights that better promote the particular offender's rehabilitation and therefore better protect the public from that one offender, no one plausibly claims that the fear of restorative justice effectively deters other wrongdoers.

Third, punishment serves retributivist interests, which restorative justice does not.<sup>71</sup> In part, the assumption is that retribution serves the victim. But that cannot be the principal reason to favor punishment over restorative justice, since, in cases where victims are offered the alternative and opt for a restorative justice process, the particular victims either do not want retribution at all, would prefer the outcome offered by restorative justice, or do not want to undergo the process of adjudication necessary to obtain

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70. See, e.g., Robinson, *supra* note 66, at 378 n.7 (discussing an example of a restorative justice response to a violent stabbing in New Zealand in which the outcome called for the offender to pay NZ\$15,000 for the victim's surgery and perform 200 hours of community service and characterizing it as "anti-justice" because "such a sanction hardly reflects the extent of punishment the offender deserves for so vicious an attack").

71. See generally Donald H. J. Herman, *Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice*, 16 SEATTLE J. SOC. JUST. 71, 101 (2017) (describing the traditional view that restorative justice is inconsistent with retributive justice but arguing that they can be reconciled if restorative justice is accompanied by punishment that is "humane and rehabilitative").

retribution by way of punishment. Rather, the public at large is thought to have an interest in retribution and prosecutors are charged with representing the larger community.<sup>72</sup> Regardless of what the victim wants or prefers, this interest may be thought to justify punishment but not restorative justice: the public sense of justice is served and its moral outrage at the violation of societal norms is mollified when offenders get their “just deserts,” but not when offenders undeservedly escape punishment. That may be true even if the only punishment is the moral stigma, or shaming, that accompanies a criminal conviction.<sup>73</sup>

One of the principal advantages of restorative justice is that, when victims voluntarily choose it, it better serves victims’ interests by respecting their agency, allowing them to avoid the burdens of the adjudicative process, and, most importantly, offering them a resolution that they believe will better serve their interests than criminal punishment of the offender.<sup>74</sup> But prosecutors may not acknowledge these advantages and, even if they do, prosecutors may not see serving victims as an adequate reason to forgo the benefits of punishment. Prosecutors regard their overarching responsibility as being to serve the public, not any private individual, not even the victim.<sup>75</sup> They may be concerned that, at least when the public’s interests are not perfectly aligned with those of the victim, diverting a case to a restorative justice process gives priority to the individual victim’s interests over those of the public.<sup>76</sup>

Wholly apart from their belief in the utility of punishment by incarceration, conventional prosecutors are also likely to be philosophically committed to the adjudicative process, which, like the concept of criminal punishment, has strong historical and constitutional roots and is woven into the fabric of our political and legal culture. Prosecutors may regard restorative justice, as compared with the adjudicatory process, as lacking necessary procedural

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72. Bazelon & Green, *supra* note 27, at 35–40.

73. See, e.g., James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1062 (1998) (describing shaming as “beautifully retributive”). But see generally Dan Markel, *Are Shaming Punishments Beautifully Retributive?: Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) (challenging the assertion that shaming punishments are retributive). Of course, a criminal conviction never entails only shaming. Even if there are no other direct consequences (such as incarceration or other restraints on liberty, a fine, or an order of restitution), a criminal conviction almost invariably gives rise to “collateral consequences,” such as the loss of access to government benefits or employment or housing restrictions, that function as indirect punishment—a subject on which there is extensive literature. See generally Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255 (2004).

74. See Bazelon & Green, *supra* note 27, at 4–7.

75. Robinson, *supra* note 66, at 383 (“Indeed, criminal law is unique in embodying norms against violation of societal, rather than personal, interests. All crimes have society as their victim, not merely a single person.”).

76. See, e.g., Jennifer G. Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1249–50 (1994) (arguing that victim-offender mediation disserves offenders, including “by using the leverage of pending criminal process to gain advantages for the victim, a private party”).

protections. Offenders may make undesirable concessions or damaging admissions<sup>77</sup> without the benefit of advice from counsel or other procedural protections afforded by the Constitution and statutes.<sup>78</sup> While the adjudicative process has an established legal structure, takes place in public and on the record, is implemented by professional stakeholders who can discern and correct procedural defects, and includes appeal rights and other mechanisms of accountability if they fail to do so, restorative justice processes vary, take place in a private space, and may lack mechanisms for transparency and legal oversight to ensure that they are fair to the offender and the victim.<sup>79</sup> Prosecutors may take the view that the legitimacy of the criminal process, and the public's respect for and confidence in the process, requires them to publicly implement constitutionally and legislatively prescribed procedures.<sup>80</sup>

To some extent, these objections abate if one views restorative justice as a form of diversion or as an alternative disposition of a criminal case rather than as an alternative to an adjudication—that is, if the analogy is to nonprosecution agreements that culminate in drug treatment or some other nonpunitive disposition. Like restorative justice programs, drug treatment programs vary, occur in private, and do not have the procedural regularity of adjudication, although most programs require participants to make regular court appearances to ensure compliance and accountability. The objective of drug treatment courts and other problem-solving courts, however, is not to adjudicate guilt or innocence but to reduce the likelihood that an acknowledged offender will repeat antisocial behavior, thereby making the public safer.

A related objection is that when an offender is diverted into a restorative justice program as an alternative to a criminal prosecution, the offender may feel coerced to agree to participate in the program to avoid criminal punishment. The prosecutor may regard the threat of prosecution as an abuse of power that denies the offender the constitutional protections afforded by the law. One might take this concern with a grain of salt, however, since precisely the same coercion is customarily used to induce offenders to plead guilty or to accept other dispositions, including participation in drug treatment and other diversion programs.

Some other philosophical concerns may be empirical concerns in disguise. For example, prosecutors may worry that the offender's participation in the

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77. See generally Mary E. Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401.

78. See, e.g., Brown, *supra* note 76, at 1250 (arguing that victim-offender mediation disserves offenders, including “by eliminating procedural protections such as the right to counsel or rules of evidence”).

79. See Zacharias, *supra* note 36, at 103–04 (discussing the ethical duty of prosecutors to ensure a fair outcome for all sides).

80. See, e.g., *United States v. Sun Myung Moon*, 718 F.2d 1210, 1217 (2d Cir. 1983) (upholding the prosecution's opposition to a bench trial based on the prosecution's view that “there was an overriding public interest in the appearance as well as the fact of a fair trial, which could be achieved only by a jury” and “that employing this normal and preferable mode of disposing of fact issues in a criminal trial would defuse . . . public criticism”).

restorative justice program will lack the voluntariness or sincerity presumed to be necessary to the program's success.<sup>81</sup> This is a question worth studying, but it is not a foregone conclusion that the success of restorative justice as a diversionary strategy is invariably undermined by the threat of a criminal prosecution. Just as coercion may promote an offender's successful participation in a drug treatment program (as judges in drug courts assume to be true), the possibility of a criminal prosecution if one does not participate satisfactorily in a restorative justice program may motivate offenders positively.

Likewise, prosecutors may question the legitimacy of restorative justice out of concern that victims are susceptible to pressure, whether from prosecutors or from offenders and their allies, to assent to a restorative justice process. Again, this raises an empirical question worth studying. It may be that prosecutors and agencies implementing restorative justice programs can ascertain whether victims' participation is voluntary or coerced. Presumably, success in avoiding coercion will factor into studies of victim satisfaction with restorative justice programs.

Ultimately, prosecutors may simply assume that prosecution and punishment are better at achieving restorative justice processes' two principal objectives. They may assume, first, that prosecution and punishment are more healing for victims because restorative justice does not assuage victims' anger and pain as effectively.<sup>82</sup> But, again, this is really an empirical claim; no one would claim that all victims prefer restorative justice, but the question is whether victims are generally more satisfied when allowed to choose between a prosecution process and a restorative justice process rather than forced to serve as victim-witnesses in the prosecution process. Second, prosecutors may assume that punishment is more successfully rehabilitative because, once having experienced the reality of punishment, offenders will be more strongly motivated to avoid being punished again. Of all the empirical assumptions underlying prosecutors' beliefs in adjudication and punishment, this is likely the most dubious, however.<sup>83</sup> More likely,

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81. See generally AM. BAR ASS'N, RESOLUTION WITH REPORT NO. 101B (1994), [https://www.americanbar.org/content/dam/aba/directories/policy/1994\\_am\\_101b.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/1994_am_101b.pdf) [<https://perma.cc/XGR4-EUAG>].

82. See, e.g., Brown, *supra* note 76, at 1249–50. Victim-offender mediation disserves the interests of victims by stressing forgiveness and reconciliation before victims have the vindication of a public finding that the offender is guilty. In addition, [victim-offender mediation] suppresses victims' outrage and loss by assuming that these negative feelings can be expressed and resolved in the course of a few hours spent meeting with the offender.

*Id.*

83. See *infra* note 137 and accompanying text; see also PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1–2, 11 (2009), [https://www.pewtrusts.org/-/media/assets/2009/03/02/pspp\\_1in31\\_report\\_final\\_web\\_32609.pdf](https://www.pewtrusts.org/-/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf) [<https://perma.cc/RBQ5-SCB8>] (noting that the “escalation” of imprisonment of offenders in the United States over the last twenty-five years is “astonishing” but “new national and state research shows that we are well past the point of diminishing returns”); Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY & PUB. POL'Y 245, 272 (2006) (“The findings developed here go beyond the claim . . . that this

traditional prosecutors who have embraced tough-on-crime policies will simply eschew rehabilitation as an objective.<sup>84</sup>

It seems natural for prosecutors to assume that the traditional criminal justice process achieves more important objectives, or better achieves its objectives, than restorative justice processes. Mainstream prosecutors tend to be traditionalists rather than innovators. The essential work of prosecutors—investigating and prosecuting crimes—has not changed over time. Those who become prosecutors are generally attracted to that adjudicatory work, not to using prosecutorial power to address broader social problems or to address individual offenders' personal challenges. Prosecutors are lawyers, not social workers; they were taught to navigate the adversarial system, and they regard themselves as trial lawyers, notwithstanding the relative infrequency of criminal trials. While some mainstream prosecutors have proceeded in a more experimental spirit, reimagining themselves as “community prosecutors”<sup>85</sup> or conceptualizing some criminal problems as mental health or other social problems,<sup>86</sup> the typical prosecutor is a lawyer trained in the litigation process who is rewarded—reputationally and for purposes of internal promotion—for winning at trial and assembling a track record of convictions. The typical prosecutor is not trained to view social problems as criminal problems and to look for innovative legal or criminal justice solutions.<sup>87</sup>

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continued prison expansion has reached a point of declining marginal returns. Instead, accelerating diminishing marginal returns were found.”); Susan M. Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 LAW & SOC'Y 139, 143 (2004) (stating that restorative justice proponents “believe that putting offenders in jails and prisons reinforces more than deters criminality”).

84. Starting in the 1970s, critics on the left and right attacked the rehabilitative model as a response to crime from differing perspectives. Left-leaning critics decried the model as enabling racial discrimination and arbitrariness because of the wide berth given to judges. Critics on the right regarded the response as coddling criminals and encouraging recidivism. By the 1990s, the rehabilitative model had been largely subsumed by tough-on-crime policies. Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 199–200 (2013). More recently, prominent advocates on both sides of the aisle have returned to the rehabilitative model with a significant revision: requiring its outcomes to be measured by “evidence-based programs and risk assessment tools.” *Id.* at 201–02. This “actuarial” model, also called “neorehabilitation,” has been critiqued by some scholars as a well-intentioned response that is nonetheless riven with implicit biases designed to create skewed outcomes because these so-called objective measuring tools are not in fact objective. *Id.* at 214–20; *see also* Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 425 (2009).

85. Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 326 (2002).

86. Christopher Connelly, *In Dallas County DA Race, Both Candidates Say They're Change Agents for Criminal Justice Reform*, KERA NEWS (Oct. 30, 2018), <https://www.keranews.org/post/dallas-county-da-race-both-candidates-say-theyre-change-agents-criminal-justice> [<https://perma.cc/4LKW-FQUV>] (noting that both the Democratic and Republican nominees supported diversion for drug offenders).

87. *See, e.g.*, Carrie Johnson, *D.C. Prosecutors, Once Dubious, Are Becoming Believers in Restorative Justice*, NPR (July 2, 2019, 5:00 AM), <https://www.npr.org/2019/07/02/735506637/d-c-prosecutors-once-dubious-are-becoming-believers-in-restorative-justice> [<https://perma.cc/HPL6-ENMU>] (quoting one prosecutor deriding the idea of restorative justice: “Oh, OK, so we're not going to prosecute you? We're going to sit around in a circle

Further, prosecutors are trained to embrace the common-law style of reasoning that justifies the traditional criminal process. The assumptions about the retributive and utilitarian effects of punishment, for example, are deeply rooted in our jurisprudence and appear to be matters of common sense and ordinary experience.<sup>88</sup> Restorative justice, in contrast, does not reflect prosecutors' everyday experiences and indeed may be an utterly foreign concept. The data that does exist to suggest that restorative justice is effective is too limited to be persuasive to most mainstream prosecutors. Even if the data were more robust, it is hard to let go of the old ways. In other aspects of their work, many prosecutors favor received wisdom over empirical evidence—for example, in assuming the reliability of eyewitness identifications and confessions despite decades of social science evidence establishing their inherent unreliability.<sup>89</sup> Assumptions about the utility of punishment are, if anything, even more deeply ingrained.

Finally, wholly apart from their own conviction about the utility of punishment, prosecutors are likely to be deferential to the evident legislative belief that criminal offenses should ordinarily be addressed through prosecution and punishment. In general, prosecutors understand that they are executive branch officials whose responsibility is to carry out the law. In some jurisdictions, such as California, Colorado, and Vermont, the legislature has endorsed restorative justice processes, at least in certain criminal cases.<sup>90</sup> Elsewhere, however, prosecutors may regard it as inconsistent with the legislative will or with legislative assumptions for prosecutors to unilaterally pursue restorative justice in place of conventional criminal justice strategies.

### *B. Issues of Power, Politics, and Fairness*

There is another set of reasons why prosecutors are likely to be unsympathetic to restorative justice processes—namely, that these processes take away power and discretion from prosecutors and give it to various other actors, including social workers, community members, victims, and offenders. Prosecutors are likely to find this problematic in three respects: first, prosecutors are reluctant to cede power and influence in the criminal process; second, they are reluctant to enhance others' power and influence;

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with, like, the hippies down the hallway, and we're going to have a talk and then you don't have any punishment?").

88. Mark R. Fondacaro & Megan J. O'Toole, *American Punitiveness and Mass Incarceration: Psychological Perspectives on Retributive and Consequentialist Responses to Crime*, 18 *NEW CRIM. L. REV.* 477, 482–86 (2015).

89. See, e.g., Jennifer Emily & Steve McGonigle, *Dallas Prosecutors Still Heavily Rely on Eyewitness Testimony Despite Questions About Its Reliability*, *DALL. MORNING NEWS* (June 6, 2018, 9:50 PM), <https://www.dallasnews.com/news/courts/2018/06/06/dallas-prosecutors-still-heavily-rely-on-eyewitness-testimony-despite-questions-about-its-reliability/> [https://perma.cc/7RDC-DD6E] (reporting that prosecutors continue to use unreliable eyewitness identifications to obtain convictions despite nineteen DNA exonerations in eyewitness identification cases).

90. See, e.g., VT. STAT. ANN. tit. 28, § 2a(a) (2020); S. 678, 2019 Leg., Reg. Sess. (Cal. 2019).

and, finally, practical and political considerations may dampen interest in restorative justice.

1. Prosecutors' Interest in Retaining Power and Control, and the Perceived Neutral Exercise of Discretion

Prosecutors are widely considered to be the most powerful actors in the criminal justice system, given their authority to decide whom to investigate, when to bring charges, which charges to bring, which plea bargains to offer, and which sentences to recommend.<sup>91</sup> When prosecutors bring charges that come with mandatory minimum sentences, the defense attorney's input is virtually irrelevant, and the judge's ultimate power to determine the offender's sentence is greatly, if not entirely, constrained.<sup>92</sup> Power is difficult to give up and embracing restorative justice practices requires ceding significant ground.<sup>93</sup> Because restorative justice processes are by their nature individualized, community-oriented, and victim-centered, and require participation by outside facilitators, prosecutors will perceive that they have limited involvement in the process and diminished influence over the outcome.<sup>94</sup>

Prosecutorial concern about ceding power is not necessarily ego-driven or self-interested. In the United States, nearly all prosecutors are elected and directly accountable to the voters who put them in office. Part of that accountability involves prosecutors taking responsibility for case outcomes—good and bad—that result from the exercise of their discretion. Prosecutors who adhere to traditional models of prosecution are conditioned to exercise their discretion in far more limited and traditionally acceptable ways than restorative justice contemplates. While the exercise of discretion may include diverting or referring cases to problem-solving courts, these decisions fall within a traditionally trained prosecutor's expertise, providing a level of confidence in the results.<sup>95</sup> Most prosecutors are not trained in

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91. See, e.g., Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1424, 1445 (2018) (describing the prosecutor's "unequal power" to "set the terms" of a case and any subsequent negotiation by using a variety of tools); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1126 (2005) ("Recent evidence suggests that the imperial role of the prosecutor has reached new heights in the past decade.").

92. Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 354 (2009).

93. For an argument in favor of prosecutors yielding power, see Jocelyn Simonson, Essay, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 296 (2019) ("[S]tate actors should take the bold step of ceding power, of deliberately facilitating power shifts down to the marginalized populations who traditionally have the least input into everyday justice.").

94. Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 62–63 (arguing that restorative justice "attacks the whole logic of the criminal justice system" with processes and outcomes that mean "[e]xperts in substantive criminal law are not needed").

95. Olson & Dzur, *supra* note 83, at 145–146 (contrasting the "professional expertise" and "specialization" required to address substantive and procedural legal issues with restorative justice theory, which "seems to imply little need for criminal justice professionals at all").

restorative justice or even familiar with it. Choosing to try out a restorative justice approach may feel as unnerving and unnatural to a prosecutor as performing daily tasks using only one's nondominant hand. Adding to the discomfort is outsourcing the case to restorative justice facilitators who are not attorneys or state actors. Prosecutors may be skeptical that these nonstate actors adequately understand the public safety risks and benefits of offering their programs.<sup>96</sup> Some prosecutors may be skeptical of restorative justice itself, seeing it as an easy way out for offenders who can forgo prison and feel free to reoffend by "basically singing Kumbaya."<sup>97</sup>

Compounding this skepticism is the fact that restorative justice processes are not transparent. Prosecutors are tasked with keeping the public safe. The traditional adjudicatory processes—from trials to drug courts—take place in open court, allowing the media to report on what transpires and for the public to judge for themselves whether prosecutors are fulfilling their promises. Restorative justice, by contrast, takes place behind closed doors to allow the participants a safe, private space required to do the hard work of confronting each other and grappling with the deeply personal nature of the harm inflicted by the crime. Some prosecutors may view this process as too secretive and impenetrable to be adequately assessed either by their own offices or by the public.

## 2. Prosecutors' Representation of the Public, Not the Victim

Much has been written about a prosecutor's mandate to be a minister of justice, and that, as a "clientless lawyer,"<sup>98</sup> the prosecutor must represent all constituencies rather than the interests of a single individual or interest group.<sup>99</sup> Restorative justice is victim-centered: it begins and ends with what the victim wants and needs to heal and move forward. But what a particular victim wants may be sharply at odds with what the community demands. Take, for example, a police officer's fatal shooting of a civilian without legal justification. Depending on the evidence, the traditional prosecutor will consider a range of alternatives ranging from initiating murder or negligent homicide charges to pursuing no charges at all. In the latter scenario, the prosecutor will be braced for a public outcry, armed with the traditional

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96. Cecelia Klingele et al., *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 981 ("In many ways, the prosecutor is the actor best positioned within the criminal justice system to act as a problem-solver and advocate for public safety.").

97. Lars Larson (@TheLarsLarsonShow), FACEBOOK (Mar. 1, 2018, 12:50 PM), <https://www.facebook.com/TheLarsLarsonShow/posts/restorative-justice-is-a-joke-the-parkland-florida-high-school-where-nick-cruz-m/2013656965329442/> [https://perma.cc/NVN8-F92Y]; see also Tovia Smith, *After Assault, Some Campuses Focus on Healing over Punishment*, NPR (July 25, 2017, 4:30 PM), <https://www.npr.org/2017/07/25/539334346/restorative-justice-an-alternative-to-the-process-campuses-use-for-sexual-assault> [https://perma.cc/V9DG-8XW8] (quoting a law professor as having "once dismissed restorative justice as 'too kumbaya'").

98. Gold, *supra* note 34, at 88–89.

99. Zacharias, *supra* note 36, at 57.

response: the evidence did not convince the prosecutor, or would not convince a jury, that the officer was guilty beyond a reasonable doubt.<sup>100</sup>

Now imagine a factual scenario in which the officer's criminal culpability seems clear, but the prosecutor chooses to exercise discretion by choosing restorative justice over filing charges because that is what the victim's family wants. Rather than a trial or a guilty plea, there is a dialogue between the victim's family and the officer, or one involving the family and other members of the community. The officer is not convicted, much less sentenced to jail or prison. Instead, the officer undertakes to repair the harm according to the family's wishes, whether that means resigning from the force, providing restitution, making a public apology accepting full responsibility, performing community service, some combination of these measures, or something else entirely.

Such a scenario is difficult to envision because of the public outrage that would ensue. Indeed, following the recent high-profile prosecution in Texas of Amber Guyger, a white police officer convicted of murdering Botham Jean, an unarmed black man, there was a national uproar when the victim's brother, Brandt Jean, offered words of comfort and healing to Guyger.<sup>101</sup> At her sentencing hearing, where Guyger received ten years in prison, Brandt told her, "I don't even want you to go to jail."<sup>102</sup> While few people criticized

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100. See, e.g., Tracy Connor et al., *Ferguson Cop Darren Wilson Not Indicted in Shooting of Michael Brown*, NBC NEWS (Nov. 25, 2014, 1:10 AM), <https://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-cop-darren-wilson-not-indicted-shooting-michael-brown-n255391> [<https://perma.cc/KM23-D2YP>] ("Bob McCulloch, the St. Louis County prosecutor, described Brown's death as a tragedy but said that the grand jury had found no probable cause for any of the charges it considered against [the police officer], which included first-degree murder and the lesser charge of manslaughter."); Jacey Fortin & Maya Salam, *No Charges for San Francisco Officers in Deaths of 2 Knife-Wielding Men*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/us/san-francisco-shooting-officer-charge.html> [<https://perma.cc/SKM6-HBP6>] ("Whether or not the officer could have used another tactic such as nonlethal force, or simply waiting, is not a factor we can even consider under current law," District Attorney George Gascón said in a statement.)

101. See, e.g., Natalie Gordon, *Understanding What Restorative Justice Is and Isn't*, LAW360 (Jan. 5, 2020, 8:02 PM), <https://www.law360.com/articles/1228012/understanding-what-restorative-justice-is-and-isn-t> [<https://perma.cc/PGW9-TB4W>] ("This was not a restorative justice conference in the traditional sense, but it embodied restorative principles, such as forgiveness, remorse and apologies, that are critical to the process of healing."); Michael Martin, *Barbershop: Botham Jean, Amber Guyger and Forgiveness*, NPR (Oct. 5, 2019, 5:02 PM), <https://www.npr.org/2019/10/05/767572862/barbershop-botham-jean-amber-guyger-and-forgiveness> [<https://perma.cc/V68X-BMMX>] (stating that "some were deeply pained and even affronted by what happened"); Tony Norman, *Radical Forgiveness as a Two-Edged Sword*, PITT. POST-GAZETTE (Oct. 4, 2019, 12:00 AM), <https://www.post-gazette.com/opinion/tony-norman/2019/10/04/Botham-Jean-Amber-Guyger-murder-verdict-forgiveness-restorative-justice/stories/201910040054> [<https://perma.cc/6JSN-7LFY>] ("Such forgiveness is often considered 'cheap grace' by its critics because it requires black people, even in the midst of their pain, to dispense forgiveness and other indulgences like we were medieval popes offering white people pardons paid for with black suffering sanctioned by the 'white Jesus' of American Christianity.").

102. Bill Hutchinson, *Extraordinary Act of Mercy: Brother of Botham Jean Hugs and Forgives Amber Guyger After 10-Year Sentence Imposed*, ABC NEWS (Oct. 2, 2019, 6:47 PM), <https://abcnews.go.com/US/jury-deciding-sentence-police-officer-amber-guyger-wrong/story?id=66002182> [<https://perma.cc/KWP2-PGL8>].

Brandt directly, many felt that it was wrong of him to offer her forgiveness, believing that Guyger was a killer with racist tendencies whose sentence had been insufficiently punitive.<sup>103</sup>

Prosecutors are trained to exercise their discretion in the broader public interest to avoid outcomes that seem arbitrary or unfair. In so doing, they foster a perception of neutrality by meting out consequences that are, at least in theory, consistent across the board.<sup>104</sup> Let us return again to the hypothetical case of the officer-involved shooting where the offender and the victim's family go through a restorative justice process rather than a criminal prosecution. Now imagine, one month later, that there is a similar shooting in the same jurisdiction. This time, the prosecutor files murder charges because that is what this particular victim's family wants. This kind of decision-making would appear arbitrary if not senseless. The prosecutor would not only incur the ire of many in the community, but she would lose credibility as an authority figure capable of exercising discretion fairly by treating like offenders alike and like victims alike. Concerns for fairness and standardized outcomes are at the heart of a prosecutor's decision-making process. Moreover, prosecutors, encouraged by the victims' rights movement, are often trained to equate fair outcomes with punitive outcomes and may believe that a restorative justice-seeking victim ill serves victims' interests as a whole.

### 3. Practical and Political Considerations

The progressive prosecutor movement is on the rise, but it is still confined to discrete pockets of the country, usually major cities with racially and ethnically diverse populations that are Democratic strongholds, such as Boston, Philadelphia, Chicago, San Francisco, and St. Louis.<sup>105</sup> The vast majority of elected prosecutors serve more centrist or conservative districts where the traditional approaches to criminal justice still hold sway.<sup>106</sup> These

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103. Mitch Mitchell, *Amber Guyger Sentenced to 10 Years in Prison for Murder of Botham Jean*, FORT WORTH STAR-TELEGRAM (Oct. 2, 2019, 4:05 PM), <https://www.star-telegram.com/news/local/crime/article235717477.html> [https://perma.cc/A3BJ-5E8M] (quoting one community member as saying “[i]t should have been 25 years to 99 years”).

104. See generally Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837. Some scholars have challenged the premise that prosecutors are truly neutral actors who can speak on behalf of “the People.” See, e.g., Simonson, *supra* note 93, at 254 (“To be ‘neutral’ is to side with the prosecution, not the defendant. . . . This false ideal of neutrality allows for the exclusion of members of the public attempting to participate in ways that align with defendants’ interests.”).

105. Del Quentin Wilber, *Once Tough-on-Crime Prosecutors Now Push Progressive Reforms*, L.A. TIMES (Aug. 5, 2019, 4:00 AM), <https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms> [https://perma.cc/6MXR-333H].

106. Indeed, progressive candidates have failed in districts that are considered liberal to moderate. See, e.g., Alan Greenblatt, *Progressives Find Political Success, and Pushback, as Prosecutors*, GOVERNING (May 30, 2019), <https://www.governing.com/topics/politics/gov-prosecutors-elections-district-attorney-races.html> [https://perma.cc/4J5R-VT3T] (listing races where progressive candidates have lost, including in Pittsburgh and San Diego).

prosecutors serve constituents who may share their skepticism of seemingly liberal approaches to crime.<sup>107</sup>

The current presidential administration's hostility to progressive prosecutors and their innovative methods further complicates the political calculus. Attorney General Barr castigated progressive prosecutors as a group in a widely reported public speech at a conference for the Fraternal Order of Police in August 2019, calling them "demoralizing to law enforcement and dangerous to public safety."<sup>108</sup> He continued, "[they] spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law."<sup>109</sup>

The attacks have become more pointed. William McSwain, who is the U.S. attorney for the Eastern District of Pennsylvania, blamed a high-profile progressive prosecutor for a shooting that left six Philadelphia police officers wounded.<sup>110</sup> In a press release, McSwain said the crime was due to "a new culture of disrespect for law enforcement in this City that is promoted and championed by District Attorney Larry Krasner—and I am fed up with it."<sup>111</sup> At a rally in Hershey, Pennsylvania, President Trump called Krasner "the worst district attorney," saying, "[h]e lets killers out almost immediately . . . get yourself a new prosecutor."<sup>112</sup> While Krasner has a strong liberal base of supporters, most prosecutors do not, and Trump's record of inciting voters to oust other elected officials with whom he disagrees is a sobering reminder that there is a high price to be paid for attracting his ire.<sup>113</sup> Trump, Barr, and

107. Abbie Vansickle & Maurice Chammah, *California Voters Reject Prosecutor "Reformers,"* MARSHALL PROJECT (June 6, 2018, 3:10 PM), <https://www.themarshallproject.org/2018/06/06/california-voters-reject-prosecutor-reformers> [<https://perma.cc/N3HN-7FHF>] ("For some prosecutors, the races were proof that liberals are too quick to assume that voters will choose their vision.")

108. Michael Balsamo, *Barr Defends Police Takes Swipe at Progressive Prosecutors,* PBS NEWSHOUR (Aug. 12, 2019, 1:48 PM), <https://www.pbs.org/newshour/nation/barr-defends-police-takes-swipe-at-progressive-prosecutors> [<https://perma.cc/TQE6-YDC4>].

109. *Id.* Barr, a long-time tough-on-crime crusader, also served as attorney general under President George H. W. Bush. While in office, he authored a report called "The Case for More Incarceration." German Lopez, *The Trump Justice Department's War on Progressive Prosecutors, Explained,* VOX (Aug. 16, 2019, 1:10 PM), <https://www.vox.com/policy-and-politics/2019/8/16/20807544/william-barr-larry-krasner-philadelphia-trump-justice-department> [<https://perma.cc/4JZU-F4NM>].

110. Bobby Allyn, *U.S. Attorney Slams Philadelphia DA over "Culture of Disrespect for Law Enforcement,"* NPR (Aug. 17, 2019, 4:26 PM), <https://www.npr.org/2019/08/17/752051788/u-s-attorney-slams-philadelphia-da-over-culture-of-disrespect-for-law-enforcement> [<https://perma.cc/KSR5-Z8Y8>].

111. Press Release, U.S. Dep't of Justice, Statement by United States Attorney William M. McSwain on the Shooting of Six Police Officers (Aug. 15, 2019), <https://www.justice.gov/usao-edpa/pr/statement-united-states-attorney-william-m-mcswain-shooting-six-philadelphia-police> [<https://perma.cc/JJ5V-YFBC>].

112. Virginia Streva, *Trump Calls Philly's Krasner "The Worst District Attorney" During Rally in Hershey,* PHILLY VOICE (Dec. 11, 2019), <https://www.phillyvoice.com/donald-trump-philadelphia-district-larry-krasner-worst-rally-hershey/> [<https://perma.cc/P43T-MS93>].

113. Tim Alberta, *Who Will Betray Trump?*, POLITICO MAG. (Nov. 8, 2019), <https://www.politico.com/magazine/story/2019/11/08/trump-impeachment-republicans-congress-229904> [<https://perma.cc/4QH9-ZJPK>] (documenting the demise of the political careers of politicians who have opposed Trump).

the attorneys general who are loyal to them exert great influence on how laws are enacted and enforced. While those loyalists have yet to attack restorative justice by name, they have created a culture war between law-and-order prosecutors and progressives, thus raising the stakes for centrist and conservative DAs who might otherwise consider restorative justice programs.

### III. WHY “SEEKING JUSTICE” SHOULD INCLUDE “RESTORATIVE JUSTICE”

Proponents of restorative justice in the United States, such as Danielle Sered, recognize that most prosecutors are likely to be resistant. Therefore, these proponents suggest that the best reform strategy is to bypass prosecutors and appeal to the community.<sup>114</sup> The problem with this approach is two-fold. First, prosecutors have considerable influence over the development of legislation bearing on criminal justice, both because of their own political clout as elected officials and because of their presumed expertise. And, second, prosecutors exert influence over how the community itself sees criminal justice policy.

This is not to say that all prosecutors must be won over. But for restorative justice to gain a foothold in counties across the United States, a sizeable number must be. Progressive prosecutors are undertaking a criminal justice experiment by embracing restorative justice as an alternative in juvenile cases and nonviolent crimes involving adults. Several are willing to extend restorative justice to cases involving serious, violent felonies. Though these progressive prosecutors are relatively few in number, they hold office in populous jurisdictions, collectively serving millions of people.<sup>115</sup> Data from their restorative justice programs will provide insight into whether victims and the community are well served by restorative justice procedures in these and other cases.

Assuming the results are positive, the expansion of restorative justice programs outside progressive prosecutors' jurisdictions will depend on traditional prosecutors' willingness and ability to look beyond their ingrained assumptions about crime and punishment. It will also depend on their willingness to cede control to nonstate actors—mainly community-based nonprofits. They will have to be convinced that it is worth the time and expenditure of funds and political capital. Empirical data, an individual prosecutor's openness to the ideas of progressives, and political considerations—which will be shaped by the results of the 2020 presidential election—are all crucial factors in the analysis. But a shift toward restorative justice has begun, and its continued expansion seems plausible. There is already a template, albeit inexact. Prosecutors on both sides of the aisle have increasingly accepted drug courts and other problem-solving courts and diversion programs, many instituted by judiciaries and state legislatures,<sup>116</sup>

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114. *See generally* SERED, *supra* note 10.

115. *See, e.g.*, Bellin, *supra* note 19 (identifying elected prosecutors from Baltimore, Chicago, Dallas, San Francisco, and Philadelphia as “progressive prosecutors”).

116. *See supra* note 90 and accompanying text.

and it is conceivable that restorative justice may eventually be added to mainstream prosecutors' lists of acceptable alternatives.

Proponents of restorative justice will have an easier time achieving reform, however, if they can make a case for this alternative that appeals to mainstream prosecutors. And this may not be easy. In general, proponents have not been able to describe and justify restorative justice as an alternative to prosecution and punishment in a manner that resonates with, or seems credible to, prosecutors. Too often, restorative justice arguments founder on skepticism that it lets criminals skate free by engaging in “kumbaya” talk therapy followed by insincere proclamations of remorse and redemption. The intensely personal and individualized nature of restorative justice methods—each case is unique because its outcome turns on the particulars of the victim and the offender—makes it vulnerable to this distorting and reductive rhetoric.

Even setting aside the inherent challenge of exporting this tailor-made alternative to stakeholders accustomed to a system of mass production, conventional rationales for restorative justice do not resonate with prosecutors, because proponents tend to portray restorative justice as a rejection of traditional criminal justice principles, objectives, and philosophy.<sup>117</sup> For example, David Vogt describes restorative justice as a “philosophy” that is “based on a different conception of justice from that of the criminal law.”<sup>118</sup> If so, prosecutors would be hard put to embrace restorative justice because their role as executive branch officials is to execute criminal laws that have a distinct philosophical premise. To the extent restorative justice advocacy relies on a radical alternative criminal justice philosophy, it will not win prosecutors over but rather reinforce their negative preconceptions.

The zero-sum argument that restorative justice must function as an alternative to criminal punishment, at least in cases of serious misconduct, will not convince skeptics. Indeed, such an argument runs counter to the central tenet that restorative justice is victim-centered and victim-chosen. But not all victims will want restorative justice, and some will seek traditional court remedies. Given this reality, advocacy and arguments for its use must change. Ross London, for example, conceptualizes restorative justice as a process directed at “the restoration of trust.”<sup>119</sup> This conception is unappealing to prosecutors both because, as he acknowledges, the concept “may seem too fuzzy and idealistic to be taken seriously”<sup>120</sup> and because the

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117. Cohen, *supra* note 22, at 893 (“Proponents agree that crime is often foundationally an interpersonal harm that requires intensely personalized and relational processes in response. . . . It invites policymakers to institutionalize spaces of ethical feeling and action where offenders can experience personal transformations through values such as responsibility, forgiveness, and grace.”).

118. See, e.g., David C. Vogt, *The Aims of Restorative Justice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE, *supra* note 25, at 21, 22.

119. LONDON, *supra* note 25, at ix.

120. ROSS D. LONDON, CRIME, PUNISHMENT, AND RESTORATIVE JUSTICE: A FRAMEWORK FOR RESTORING TRUST, at iii (2014 ed.).

multiple objectives said to be served by criminal punishment may take priority, in prosecutors' view, over the restoration of trust. Moreover, and as even London acknowledges, punishment has a role, because "[a]n offender's voluntary submission to a deserved punishment in cases of serious crime . . . is certainly one of the means by which trust in that offender and for society can be repaired."<sup>121</sup> He reasons that, while "the offender's apology and remorse [are] fundamental to the restoration of the victim's emotional well-being," these expressions seem more genuine when he pleads guilty and submits to punishment.<sup>122</sup>

We also doubt that mainstream prosecutors will be widely receptive to the argument that restorative justice will help to combat mass incarceration. First, some prosecutors may not acknowledge overincarceration as a problem. And even among those who do, the majority may be unwilling to use restorative justice in cases of serious violent crime without the additional sanction of prison, particularly in high-profile, politically fraught cases such as the example in Part II.B. More appealing to mainstream prosecutors will be using restorative justice as an alternative to incarceration for juvenile and low-level adult offenders, and using it as a means of shortening the sentences for serious offenders who will not be dangerous if released. These strategies are more appealing because they do not require undertaking a new procedural approach or seeming to adopt a new criminal justice philosophy.

One can debate whether these more conventional strategies will substantially reduce the large number of prisoners, which some attribute to the lengthy incarceration of violent offenders.<sup>123</sup> As a practical matter, however, mainstream prosecutors are unlikely to see restorative justice as an alternative to incarcerating violent, repeat, and presumptively dangerous offenders. But they may ultimately be willing to consider restorative justice for violent offenders whose crimes are less serious, whose criminal histories are less lengthy, and who show the capacity to change. The term "violent offender" encompasses a broad swath of conduct, including crimes such as burglary and purse-snatching that many would not consider "violent."<sup>124</sup> There is a distinction between these "low-level, nonviolent offenders," who

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121. *Id.* at iv.

122. LONDON, *supra* note 25, at 242.

123. See, e.g., John F. Pfaff, *A Second Step Act for the States (and Counties, and Cities)*, 41 CARDOZO L. REV. 151, 159 (2019) ("Over the 1990s and 2000s, as crime fell, total arrests fell as well—and fell sharply for serious violent and property crimes—yet prosecutors increased the *total number* of felony cases filed in state courts."); Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJECT (Mar. 4, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent> [<https://perma.cc/ZV8C-GE8C>] (stating that 54 percent of state prisoners are incarcerated for violent crimes and arguing that "violent offenders would have to be part of any serious attempt" to combat mass incarceration).

124. Eli Hager, *Many "Violent Offenders" Have Committed Nonviolent Crimes*, VICE (Apr. 5, 2019, 12:00 AM), [https://www.vice.com/en\\_us/article/zmapme/many-violent-offenders-have-committed-nonviolent-crimes](https://www.vice.com/en_us/article/zmapme/many-violent-offenders-have-committed-nonviolent-crimes) [<https://perma.cc/3GVR-X59T>].

include first-time offenders and those driven to commit crimes because of poverty and drug abuse,<sup>125</sup> and serial rapists or murderers.<sup>126</sup>

To allay mainstream prosecutors' skepticism toward using restorative justice—whether for juveniles, nonviolent offenders, or low-level violent offenders, an affirmative case must be made. It is not enough and, indeed unhelpful, to say, “the current system has failed so let's replace it with a radical new plan.” Instead, proponents must argue that restorative justice serves the public consistently with conventional criminal justice philosophies, policies, objectives, and principles. A starting point, in our view, is to acknowledge that the criminal justice process serves multiple objectives, many of which are in tension in any given case. No approach ideally serves all objectives. But, in some cases, on balance, restorative justice may be the preferable approach among the alternatives.

As we suggested in an earlier article, a strong argument in favor of restorative justice is that it better serves the needs and interests of crime victims who choose it.<sup>127</sup> Some victims will prefer, and find it more healing, to engage in a restorative justice process, where they are more personally involved than in an adjudicative process, where they can express their views and experiences with less constraint, where they have more influence over the outcomes, and where they may receive, rather than a more punitive result, an apology from the offender along with expressions of contrition, explanations, or material reparations.<sup>128</sup>

While a prosecutor's job is to serve the public, not individual crime victims, a legitimate conception of the public interest must call for giving considerable weight to victims' interests while stopping short of giving them veto power.<sup>129</sup> The law presumes that the public has an obligation to promote individual victims' well-being.<sup>130</sup> That understanding is reflected in various provisions of victims' rights law, such as those that call for prosecutors to consult with victims about proposed criminal charges and plea bargains, that allow victims to speak at sentencing proceedings, and that require prosecutors to seek monetary restitution for victims and for courts to award it.<sup>131</sup> While prosecutors cannot entirely abdicate decision-making responsibility to crime victims, in the exercise of prosecutorial discretion, there is nothing anomalous about giving substantial weight to victims' interests.<sup>132</sup>

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125. *Id.*

126. *See id.*

127. *See generally* Bazelon & Green, *supra* note 27.

128. *See* Eric Gonzalez, *Using the Power of Prosecutors to Drive Reform*, CRIM. JUST., Fall 2019, at 9, 12 (maintaining that “many victims find the restorative justice process much more meaningful and satisfying than sending the person who hurt them to prison because it provides victim-centered services and allows victims to get answers from those who caused them harm”). *See generally* STRANG, *supra* note 25.

129. Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 246–47 (2008).

130. *See* Gold, *supra* note 34, at 95–96.

131. *See* Bazelon & Green, *supra* note 27, at 2–3.

132. *See* Green, *supra* note 40, at 596.

Whether to defer to a victim's preference for a restorative justice process in a particular case or in a category of cases depends on the importance of other public interests and whether they point in a different direction. Taking deterrence as an important objective of the criminal justice process, one must consider whether diverting some cases of serious offenses to a restorative justice process will significantly undermine the criminal law's deterrent effect. Consider the earlier example of a police officer's unjustified shooting of an unarmed civilian. The DA may have concerns that, even if the police officer were to acknowledge culpability and be discharged from the police force, other officers would not be deterred from committing similar acts in the future unless more punitive consequences, including prosecution and incarceration, were to follow.

But it is not clear that punishment must be sought whenever possible in order to deter criminal offenses. The argument for deterrence by incarceration might be convincing if punishment for every serious violent offense were swift and sure, but that has never been true: many offenders go unpunished because, for example, the crime is not reported, the wrongdoer is not identified, or the proof is insufficient. There is little empirical evidence to suggest that many would-be offenders are significantly deterred by the risk of being caught and punished, much less under what circumstances they are deterred.<sup>133</sup> And under these circumstances, it is uncertain whether implementing restorative justice programs would decrease whatever deterrence the criminal law now achieves. Since restorative justice would not be implemented in all cases but, at most, in some cases where the victim was amenable, the risk of punishment would remain. Unless the criminal law's deterrent effect would significantly decrease with the adoption of restorative justice programs, the interest in deterrence will not be a strong countervailing consideration.

Likewise, the interest in preserving the criminal law's expressive role is not necessarily a significant counterweight. It is not a foregone conclusion that restorative justice processes would erode the expressive function of the criminal law. Criminal laws would remain on the books and violations would remain subject to punishment. Punishment is not inevitable even now, and in cases of some low-level offenses, it may not be the norm. Further reducing the rate of punishment may not be seen as a retreat from the societal commitment to the norms underlying the criminal law. This is particularly true if restorative justice is explained to the public not as an act of lenity but as an alternative way to achieve justice by vindicating the victim's interests.

To some extent, the ability of restorative justice to serve traditional criminal law objectives depends on how the process is implemented. The individual process itself is private, but a detailed, publicly available description of how the program operates and its empirical outcomes can and

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133. See, e.g., Adam Fine & Benjamin van Rooij, *For Whom Does Deterrence Affect Behavior?: Identifying Key Individual Differences*, 41 *LAW & HUM. BEHAV.* 354, 358-59 (2017) (finding that deterrence does not work for people who are not rule oriented and capable of exercising self-control).

should be public. Further, restorative justice need not always be in lieu of jail or prison. As London describes, the process can be employed in conjunction with the criminal process as a way to achieve an agreed, lesser sentence.<sup>134</sup> But even where the process is used as a diversion from the criminal process, the offender can agree to undertake a public act of contrition. Where the outcome of any individual restorative justice process is public and entails the acceptance of burdens by the offender, the process can serve traditional functions of criminal punishment—deterrence, affirmation of societal norms, and retribution. Unless one concludes that only the deprivation of liberty can serve these functions—an assumption that is inconsistent with our nation’s historical use of shaming punishments—the public resolution of the restorative justice process can promote traditional objectives in much the same way as carceral punishment does.<sup>135</sup>

To be sure, the victim will be promoting her own objectives, preferences, and interests, not the public interest in a resolution that best achieves the objectives of the criminal process. But there is no reason to assume that the victim’s objectives will be vastly misaligned with those of the public. On the contrary, prosecutors often assume, when they are making discretionary decisions, that the public interests and the victim’s interests are largely aligned. The same can be presumed true when victims make discretionary decisions in a restorative justice process.

That leaves the interest in promoting public safety through rehabilitation of the offender. Needless to say, this is where restorative justice, which aims to restore the offender no less than the victim, makes the strongest claim.<sup>136</sup> The empirical evidence that exists—albeit limited and lacking in longitudinal data—tends to show that the recidivism rate is lower for offenders who satisfactorily complete a restorative justice program, as compared with those who are sentenced in the criminal process. These results track programs where restorative justice processes typically result in an agreement to engage in education, receive counseling, maintain full-time employment, and/or engage in other activities that are assumed to be prosocial and rehabilitative. Restorative justice programs encourage offenders to agree on rehabilitative measures and rigorously supervise offenders to ensure they comply with their agreements. In contrast, no one would expect a prison sentence or other outcome of the criminal justice process to be particularly rehabilitative, and, on the contrary, one might expect incarceration generally to be criminogenic.<sup>137</sup>

The argument that will best appeal to conventional prosecutors is that restorative justice is not unlike other diversion programs in that it will sometimes be the best way to serve the mixture of public interests that

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134. LONDON, *supra* note 25, at 230–31.

135. *See supra* note 73 and accompanying text.

136. *See, e.g.,* Gonzalez, *supra* note 128, at 12 (maintaining that “[m]ore than 85 percent of Common Justice graduates go on to lead law-abiding lives”).

137. Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 591 (2012); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1089.

prosecutors are expected to pursue through the criminal process. Where the victim seeks restorative justice and the offender is a willing participant, this alternative may serve those individual interests better than criminal prosecution would. Provided—and this is a key caveat—that it will not result in a risk to public safety, on balance, restorative justice may be preferable. Using restorative justice in these cases is not dissimilar to the use of problem-solving courts, in that these noncarceral alternatives seek to serve the public interest without radically departing from the norm.

Viewed this way, restorative justice is not an abdication of control to social workers, victims, and prison abolitionists. Instead, the use of restorative justice respects prosecutorial power and discretion because offenders are diverted to restorative justice processes only when the prosecutor makes a threshold determination that the process is preferable after factoring in fairness of outcomes and public safety. This means that prosecutors must develop an understanding of available restorative justice processes and an appreciation for whom they work best. Prosecutors cannot simply shuttle cases off to social service agencies. Further, prosecutors have a responsibility to monitor the outcomes of restorative justice processes, both to confirm that the results are generally consistent with the public interest and so that prosecutors can hold themselves accountable to the public for when and how these processes are employed. Monitoring cannot simply be informal; rather, the collection and analysis of data are essential.

It is reasonable to conclude that by deferring to victims' preferences for restorative justice processes, a prosecutor will serve other criminal justice interests as well. Crime victims often feel mistrustful of, or neglected by, prosecutors' offices.<sup>138</sup> This attitude undermines prosecutors' effectiveness, both because it makes victims more reluctant to report crimes and because it makes them less willing to cooperate with a prosecution. Employing restorative justice as a diversionary alternative gives victims a greater say in how criminal cases are addressed—both a choice between a restorative justice process or the criminal adjudication process and, if the former is elected, a greater role in the process and outcome. One might expect prosecutors who use restorative justice to win greater trust from victims. In communities that perceive the prosecutors and police to be overly punitive, the use of restorative justice may promote public trust as well.<sup>139</sup>

#### CONCLUSION

Proponents of restorative justice have sold progressive prosecutors on it. Newly elected progressive prosecutors will soon attempt to carry out their campaign pledges to use, or expand the use of, restorative justice. This will

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138. See Gonzalez, *supra* note 128, at 9 (observing that when Eric Gonzalez ran for office as Brooklyn DA in 2017, “[p]eople who had been victims of crime felt like the DA’s Office didn’t care about them”).

139. See *id.* at 10 (“When prosecutors make punishment the default, they betray core community values and undermine public trust—especially among low-income folks and people of color.”).

mean that in some felony cases, including some involving serious, violent crimes where the prosecutor would ordinarily pursue a criminal conviction and carceral punishment, the prosecutor will offer restorative justice as an alternative. If both the offender and the victim agree, the prosecutor will divert the case to a social service agency to administer a restorative justice process; and if a successful resolution is reported, the prosecutor will decline to bring, or will dismiss, criminal charges. Eventually, progressive prosecutors will gather both anecdotal evidence and data about the use of restorative justice in different types of felony cases. Assuming that proponents' claims are substantiated—i.e., if the evidence shows a lower recidivism rate and greater victim satisfaction—proponents will urge mainstream prosecutors to follow suit by implementing or expanding restorative justice programs.

As this Article has shown, when it comes to mainstream prosecutors, proponents of restorative justice will have a host of concerns to allay and objections to overcome. How advocates argue their cause will matter. It is unlikely that conventional prosecutors can be persuaded to radically reimagine the criminal justice process. But they need not be. One need not conceptualize restorative justice as a rejection of the traditional adjudicatory process; instead, restorative justice is an alternative that runs parallel to traditional adjudication. Restorative justice processes can also be rhetorically deradicalized by analogizing their use to the establishment of drug courts and other diversion programs that have a proven track record of success. This analogy is not far-fetched: a restorative justice process is comparable to a drug treatment program in that the offender must undergo rigorous rehabilitative processes, and intensive supervision, and meet any number of benchmarks as a condition of a nonprosecution agreement.

From prosecutors' perspective, the key question is whether the public interest is best served in a given case when, rather than being convicted and punished, an offender successfully completes a restorative justice process. The answer will turn in large part on assumptions or available data on such questions as whether restorative justice lowers recidivism rates or better serves crime victims, or whether implementing restorative justice on a selective basis meaningfully reduces the deterrent effect or the expressive value of the criminal law. No matter how much data becomes available, prosecutors' receptivity to restorative justice will ultimately turn on their interpretation of what it means to carry out their mandate to "do justice," an interpretation that, to some degree, is based on value judgments, received wisdom, and belief in the efficacy of the status quo. Even if data were to show convincingly that a restorative justice process elected by the victim and offender is more likely than a criminal prosecution to be healing for the victim and rehabilitative for the offender, there will be countervailing considerations, including public safety and the need to achieve systemic fairness by treating like cases alike. The question is which way the balance tips in any given case and whether a broad application, including in cases of serious, violent crime, can exist outside the jurisdictions of a small number of progressive prosecutors who are willing to give restorative justice a try.

Ideally, as their experience with restorative justice grows, both mainstream prosecutors and the public will be in a better position to answer that question.