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AMERICAN INCARCERATION

CRIMINAL JUSTICE REFORM: SUBSTANCE AND SHADOWS

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NOTE FROM THE DIRECTOR

Karen J. Greenberg

The Arkin Justice Initiative at the Center on National Security is pleased to present its series on criminal justice in the United States.

The flaws of the U.S. criminal justice system have received increased public attention in recent years. At times, however, that attention has focused so intensely on certain areas that it diverted attention away from many of the realities, often buried, that threaten the public. In this series, our goal has been to shed light on some of those hidden attributes of the criminal justice system.

The series includes three reports.

The first report, *The Hidden Facts of Criminalization*, focuses on an area of criminal law that is predominately hidden from an analysis of criminal justice; namely, criminal penalties for administrative violations. This first report highlights the extent to which low-level regulations subject the public to criminal penalties—separate from the criminal statutes of criminal codes. As a result, oversight has proven elusive as well.

The second report, *Incarceration: Conditions in America's Prisons*, focuses on conditions of detention and incarceration in U.S. public prisons. The use, conditions, and prevalence of private prisons in the U.S. have been a primary focus in public critiques of incarceration. This focus has obfuscated a deeper crisis in America's public prisons, which house the vast majority of persons incarcerated in this country. This report seeks to bring attention back to the crisis in our public prisons.

This third report, *Criminal Justice Reform: Substance and Shadows*, examines recent efforts to reform the criminal justice system. Looking specifically at restorative justice programs as well as at reform efforts within New York's discovery process, this project opens a window into the mechanisms and structures that impede those reforms. Our intent here is to illuminate these hidden bureaucratic hurdles and loopholes and, in so doing, enhance the prospects for successful reform.

Our three-part study is intended to provide a useful starting point for adding new information to the study of criminal justice reform in hopes of revealing some of the hidden—and impactful—factors that require attention. Revealing these hidden facts is the first step toward remedying the inequities and unjust punishments embedded in our criminal justice system.

EXECUTIVE SUMMARY

This report investigates where and why efforts to reform criminal justice have failed to reach their intended goals, despite their many achievements. Specifically, this report looks at restorative justice efforts throughout the country and battles over New York's discovery reform as examples of reform efforts.

The United States criminal justice system is both harsh and costly.[1] The United States spends $81 billion on incarceration; however, the real cost in the system may actually be much higher.[2] A 2017 study by the Prison Policy Initiative estimated the cost to be at least $182 billion per year, taking into account the costs of running prisons, legal systems for criminal law, costs to family, and much more.[3] There is also evidence to suggest that the retributive system in place does not deter future crime. The recidivism rate in the United States is one of the highest in the world: 76.6 percent of prisoners are rearrested within five years of being released from prison.[4]

The cost, horrific conditions, and unfairness of today's criminal justice system have spurred a reform movement that has had significant apparent success.[5] On closer inspection, however, many of these reforms are far removed from the direct problem of criminal justice, arrests, trials, and incarceration. Even reforms directly targeting the problem of mass incarceration have born only limited results, begging the question of what has gone wrong in these reforms and what is needed to bring actual change to the U.S. criminal justice system.

This report relies on two examples of criminal justice reform, examining their shortcomings and successes to give a more detailed picture of the broad notion of "criminal justice reform." Focusing first on the proliferation of restorative justice statutes in the United States and then on the more specific and procedurally focused discovery reform in New York, this report

[1] See the two preceding reports in this series, *The Hidden Facts of Criminalization* and *Incarceration: Conditions in America's Prisons*.

[2] Casey Kuhn, The United States Spends Billions to Lock People Up, but Very Little to Help Them Once They're Actually Released, PBS, (Apr. 7, 2021). https://www.pbs.org/newshour/economy/the-u-s-spends-billions-to-lock-people-up-but-very-little-to-help-them-once-theyre-released

[3] Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POLICY INITIATIVE, (Jan. 25, 2017). https://www.prisonpolicy.org/reports/money.html

[4] Liz Benecchi, *Recidivism Imprisons American Progress*, HARVARD POLITICAL REVIEW, (Aug. 8, 2021). https://harvardpolitics.com/recidivism-american-progress/

[5] *See, e.g.*, THE SENTENCING PROJECT, SUCCESS IN CRIMINAL LEGAL REFORMS (Dec. 8, 2021) https://www.sentencingproject.org/publications/successes-in-criminal-legal-reforms-2021/

identifies several factors that drive these reforms' successes and failures. We find:

1. All too often, supposed "reforms" consist of solely aspirational statements, such as "the State of X believes in the principles and practices of restorative justice," with no mandated procedural structure to implement these ideals.
2. When true reforms are attempted, they often ignore the entrenched and complex nature of the criminal justice system. Because of this, they are often stymied by bureaucratic hurdles that pull the system back to its established practices.
3. Reforms *can* be successful when states make tangible changes to the system, particularly if those changes are created and overseen by experts from within the criminal justice system who are familiar with its complexities and processes.

This report highlights the fact that genuine reform is possible, but it requires grappling with the cogs and wheels of the criminal justice system. Unless the details of the system are confronted, reform efforts are likely to be more performative than substantial. Specifically, this report finds that efforts to develop restorative justice programs have been marred by the inadequate statutory language, allowing long-established punitive sentiments to assert themselves. Additionally, failure to consider the practical implications of the existing criminal justice system, such as the risks to defendants from self-incrimination or the collective moving parts required to produce discovery, can waylay well-intentioned reforms.

CASE STUDY: RESTORATIVE JUSTICE

Restorative justice has been looked at as one of the main movements inside the United States criminal justice system combatting the overly punitive and costly problems presented by mass incarceration.[6] Since the concept began to take hold in the 1970s, restorative justice programs and the ideas undergirding them have become increasingly popular worldwide.[7] Restorative justice practices and programs have undoubtedly gained popularity in the United States in recent years. In turn, more states have begun integrating restorative justice aspirations, principles, and programs into States Codes, Regulations, and Court Rules. However, this movement is far from complete. Though restorative justice practices and programs across the country have shown promise, several structural and substantive obstacles impede the movement from achieving its primary goals.

A. WHAT IS RESTORATIVE JUSTICE?

There is no universal definition of restorative justice, but it may be described as "a process whereby all parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future."[8] It relies on community involvement and leadership, rather than the traditional style of state prosecution-led indictment and punishment.[9] Restorative justice processes often include alternative dispute resolution programs such as victim-offender conferences, family group conferences, community conferences, and mediation-style discussions.[10] Often, processes will also include elements of apology, reparation restoration, and counseling for the victim and/or the offender.[11] These processes may aim to replace juvenile and criminal courts, or they might be used in prisons as a healing process to try to reduce recidivism among those released.[12]

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[6] Shannon M. Sliva, Elizabeth H. Porter-Merrill, Pete Lee, *Fulfilling the Aspirations of Restorative Justice in the Criminal System? The Case of Colorado*, 28 KAN. J.L. & PUB. POL'Y, 456, 463-464 (2019).

[7] See Marilyn Armour, *Restorative Justice: Some Facts and History*, CHARTER FOR COMPASSION, https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history

[8] *See* Silva, Porter-Merrill, and Lee, supra note 6 at 461.

[9] *See id.* at 460.

[10] Katherine Beckett & Martina Kartman, Univ. Of Wash., *Violence, Mass Incarceration And Restorative Justice: Promising Possibilities* (2016) at 7. http://www.jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2017/02/Restorative_Justice_Report_Beckett_Kartman_2016.pdf

[11] *See id.*

[12] *See id.*

Restorative justice concentrates its efforts, resources, and time on the victims and survivors of crime, their interests and stakes, and how they have been affected. Restorative justice practices seek to actively involve all parties who were involved in the act and try to find community-based resolutions.[13] A common misconception about restorative justice is that the process focuses on the perpetrator of the crime. However, the offender is not the center of the process—the victim is. One argument supporting restorative justice is that it is designed to offer more personal reparation and control to the victim, in contrast to the traditional criminal justice process that centers and offers reparation only to the state.[14] In fact, studies suggest victims who choose to participate in restorative justice programs experience greater satisfaction and recovery from those processes than from traditional criminal justice processes.[15] For these reasons, restorative justice has been suggested to better serve victims while moving away from the negative repercussions and abuses associated with incarceration.

i. Rising Popularity of Restorative Justice in the States

Most criminal prosecutions are conducted by the states under state law.[16] Consequently, the majority of prisoners in the U.S. are incarcerated because of a violation of state laws.[17] Therefore, state legislatures and courts are the most critical arenas in which restorative justice is discussed and implemented. For that reason, this report focuses mainly on trends and analyses of state law rather than federal law.

As of 2020, 46 jurisdictions have codified the term "Restorative Justice" by either statute, regulation, or court rules.[18] This codification marks an increase from 2014, when only 32 states had codified restorative justice by either statute, regulation, or court rule.[19] Such an increase marks a trend toward the acceptance and support of restorative justice principles across the United States. In total, there are 264 laws, regulations, or court orders dealing with restorative justice.[20] Yet, these reforms vary in their specific

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[13] *See id.*
[14] *See id.* at 6-7.
[15] *See* Maryfield and Przybylski, *infra* note 24 at 2.
[16] *See* Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN, (Apr. 21, 2019). https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html
[17] *See id.*
[18] *See* Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1156-57 (2020).
[19] *See* Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL'Y PRACTICE 77, 85 (2015)
[20] *See* González, *supra* note 18 at 1157.

characteristics and in the degree of implementation of restorative justice practices.[21] As of 2015, the most popularly advocated practice is victim-offender meetings, which 21 states call for in some form.[22] Other practices seen with regularity are victim impact panels in 12 states, community boards in five states, and sentencing circles in three states.[23]

It does not appear that there are any overarching correlations regarding where there is support for statutory provision for restorative justice.[24] Still, as of 2015, the states with the most structured and voluminous number of statutes were in the West and Northeast regions of the United States.[25]

ii. Does Restorative Justice Work?

Studies analyzing the effectiveness of restorative justice practices have shown generally positive results on the effects on recidivism.[26] One study found that restorative justice conferencing reduced offender convictions after the program by anywhere from 7-45 percent.[27] This study also found that the recidivism rates were slightly lower among adult offenders compared to juvenile offenders, which contradicts the commonly held perception that restorative justice programs work better for juveniles.[28] In such cases where the offender voluntarily did the program, recidivism rates were lower compared to when the offender was required to participate.[29] Programs are more effective with low-risk offenders than high-risk offenders.[30] Additional treatment may be required for high-risk offenders when they do participate in restorative justice programs.[31] Finally, restorative justice practices work better when they are voluntary, as opposed to being mandated by a court.[32]

Empirical evidence has also shown that restorative justice processes positively affect the victims who choose to initiate or participate. Studies have shown that victim satisfaction rates for the programs they were

[21] See Sliva and Lambert, *supra* note 19 at 85.
[22] *Id.*
[23] *Id.*; A victim impact panel is a method which gives victims of a crime an opportunity to talk about the impact of that crime upon them and those close to them to a group of offenders. See Maryfield and Roger, *infra*, note 24 at 4.
[24] *Id.*
[25] *Id.*
[26] See Bailey Maryfield and Roger Przybylski, Research on Restorative Justice Practices, RESEARCH AND STATISTICS ASSOCIATION, (Dec., 2020). https://www.jrsa.org/pubs/factsheets/jrsa-research-brief-restorative-justice.pdf
[27] See *id.* at 7.
[28] See *id.*
[29] See *id.* at 6.
[30] See *id.*
[31] See *id.*
[32] See *id.* at 9.

involved in can be as high as 80-90 percent across both locations and cultures.[33] One study even found that victims who participated in restorative conferences reported having a more than 40 percent reduction in symptoms of post-traumatic stress both immediately after the conferences and 6-months post-conference.[34] Victims also tend to have a higher sense of safety after restorative justice processes compared to traditional criminal processes.[35] When offenders forged a personal connection with victims and were involved in constructing restitution agreements alongside victims, compliance rates were significantly higher than in the traditional system (80 percent compliance rate in a restorative justice system vs. 50 percent in a traditional system).[36]

CASE STUDY

Colorado

Colorado has adopted the most restorative justice processes in the country. It has a wide range of statutes creating criminal law processes and procedures such as diversion programs and probation alternatives.[37] Restorative justice principles are legally integrated into both the juvenile and adult criminal justice systems.[38] Colorado gives a clear statutory definition of restorative justice, which few other states have provided.[39] Colorado's approach to restorative justice has developed over time. From 2007 to 2018, the state legislature passed over 40 statutes.[40] The majority of the statutes are housed in the Colorado Criminal Code and Children's Code.[41]

Colorado law allows restorative justice to be used for felonies, misdemeanors, petty offenses, municipal violations, and school-based criminal conflicts.[42] Courts are precluded from ordering restorative justice for certain more serious crimes, such as sexual assault, domestic violence, stalking, and protection-order violations unless the victim requests for

[33] *See* Beckett and Kartman, *supra* note 10 at 7.
[34] *See id.*
[35] *See id.*
[36] *Benefits of Restorative Justice to Victims, Offender, Communities*, MO. ST., 1. https://associations.missouristate.edu/assets/morjc/Benefits_of_RJ_Victims_Offender_Community.pdf
[37] *See* González, *supra* note 18 at 1158.
[38] *See* Sliva, Porter-Merrill, & Lee, *supra* note 6 at 482.
[39] *See* González, *supra* note 18 at 1161-1162.
[40] Colorado Restorative Justice Council, State of the State Restorative Justice in Colorado, ii. (2019)
[41] *Id.*
[42] *See* Sliva, Porter-Merrill, & Lee, *supra* note 6 at 484.

restorative justice to be pursued.[43] Restorative justice processes are made available at various stages of the criminal justice process, both juvenile and adult. Prosecutors are encouraged to consider and offer restorative justice as a part of pre-trial diversion programs and in plea negotiations.[44] Pursuant to the Victim Rights Acts, prosecutors are also required to inform victims of the availability of restorative justice options.[45] In arraignments, courts must inform defendants of the possibility of restorative justice programs.[46] For both juveniles and adults, probation departments must include a restorative justice assessment in presentence investigation reports.[47]

Colorado law is unique in that it creates a state restorative justice council to "advance restorative justice principles and practices throughout Colorado by supporting the development of programs, serving as a central repository for information, assisting in education and training, and providing technical assistance for programs and aspiring programs."[48] The restorative justice council is in charge of disbursing funds to advance restorative justice principles and programs.[49] It also provides information, education, training, and technical assistance for restorative justice programs throughout the state.[50]

The Colorado Restorative Justice Coordinating Council is housed within the State Court Administrator's Office.[51] The configuration of the Council is outlined by law and includes members appointed by each arm of the justice system, ranging from the Department of Corrections to the Colorado State Public Defender.[52] While arguably at first a less conspicuous part of the law, the authority offered to different parts of the criminal justice system for appointment purposes gives the Council more credence, effectiveness, and experience in their goals of trying to implement and inject restorative justice practices into the mainstream criminal justice system efficiently and successfully. This credence and experience manifest in the appointees to the Council. It would be inaccurate to say that all the appointees have significant backgrounds

[43] *See id.* at 484-85.
[44] *See id.* at 482.
[45] *See id.* at 484.
[46] *See id.* at 483.
[47] *See id.*
[48] *See id.* at 479.
[49] *See id.*
[50] *See id.*
[51] *Our History*, RESTORATIVE JUSTICE COLORADO, https://rjcolorado.org/our-story/our-history/ (last visited June 1, 2022)
[52] *Id.*

from within the confines of the criminal justice system. However, many of them do carry such backgrounds, and the ones who do not have considerable tangential work and education experience that relates to the criminal justice system.[53]

B. IMPEDIMENTS TO EFFECTIVE RESTORATIVE JUSTICE IN THE STATES

Where restorative justice practices have been implemented effectively, victims and offenders have displayed high success and satisfaction rates. A large number of states have codified restorative justice principles in some way. However, the movement is being held back by the language of state codes, the practices of officials, and heavy restrictions on who may be involved in a restorative justice practice. Such obstacles limit the effectiveness of restorative justice processes and sometimes even undermine the processes altogether.

i. Inadequate Statutory Language

While the increasing presence and volume of restorative justice statutes in several states have led proponents to hope for dynamic and lasting change in the system, unfortunately, that change has not materialized. One reason for this failure is that many restorative justice statutes and systems in the states are relatively weak. In many cases, state statutes do not attempt to define the term "Restorative Justice" or identify which officials are charged with developing programs or identifying candidates for those programs.[54] Problematic language, for instance, suggests that the state *can* or *may* bring change, not that it *will* bring change.[55] Too often, there are situations where it is unclear whether a prosecutor or judge should refer an offender to a restorative justice system. These statutes are not procedural in nature but aspirational. They may emphasize the importance of incorporating restorative justice into criminal justice, but they offer no tangible requirements or processes. In other words, the statutes are discretionary, and in the field of criminal justice, such discretion will almost inevitably leave capable restorative justice statutes limp.

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[53] *See, e.g.*, Danielle Fagan, RESTORATIVE JUSTICE COLORADO, https://rjcolorado.org/our-story/rj-council-and-staff/danielle-fagan/ (former work in the Sherriff's Office, the District Attorney's Office, and in probation) (last visited June 1, 2022); Robb Miller, RESTORATIVE JUSTICE COLORADO, https://rjcolorado.org/our-story/rj-council-and-staff/robb-miller/ (career prosecutor) (last visited June 1, 2022).

[54] *See* González, *supra* note 18 at 1161.

[55] *Id.*

The statutes are also often very limited in scope. Most restorative justice programs are exclusively for juveniles, closing access to restorative justice to large swaths of those going through the criminal justice system.[56] Restorative justice programs are also designed for almost exclusively for offenders of non-serious crimes.[57] There is evidence to suggest that restorative justice is most effective when it is used to handle more serious crimes, such as violent crimes.[58] One Canadian study found a 38 percent reduction in recidivism for violent offenders who participated in restorative justice programs.[59] Other studies have noted a positive correlation between the long-term success of restorative justice programs and the seriousness of offenses.[60] Allowing offenders who committed violent or otherwise serious crimes to avoid prison by participating in a restorative justice program might be seen as controversial or too politically unpalatable for state legislatures to adopt.[61] But even if fully replacing criminal trials and sentencing is impossible, restorative justice programs could still be used in prisons for the psychological benefit of the victim and offender, or even to reduce the jail time of the offender.[62]

CASE STUDY

Alabama's Aspirational Statute

Alabama Code § 45-28-82.25(c), passed in 2011, gives the District Attorney the discretion to establish a restorative justice program. The particular language of the statute reads, "As part of the pretrial diversion program, the district attorney may establish a restorative justice initiative program within the Sixteenth Judicial Circuit in Etowah County. The guidelines and mechanisms for such an initiative shall be promulgated by the Alabama Office of Prosecution Services. Any additional fees for participation in a restorative justice initiative program by an offender shall be set by the district attorney…" This language allows the District Attorney to create a restorative justice program as they see fit or not to create one at all. Questions of revocation further complicate the

[56] *See* Beckett and Kartman, *supra* note 10 at 7.
[57] *See id.*
[58] *See id.* at 8.
[59] *See id.*
[60] *See id.*
[61] *See* Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism*, 104 MINN. L. REV. 889, 893 (2019).
[62] *See* Beckett and Kartman, *supra* note 10 at 77.

permissive language in this statute. The downfalls of such permissive language are obvious for proponents of restorative justice.

CASE STUDY

California's Aspirational Statutes

California is an odd case in the grand scheme of restorative justice measures among the states. It has 21 statutes on restorative justice, which is more than most other states in the country.[63] But despite a relatively high level of restorative justice codification, the legal scheme does not require or structure an actual restorative justice framework.[64] Instead, the statutes define restorative justice, make declarations about restorative justice,[65] state legislative aspirations, or allocate grant money.[66] These statutes allow California's restorative justice scheme to develop in a highly localized and discretionary manner.[67] Restorative justice in California is implemented county-by-county, with each small jurisdiction given a high level of control over its practices.[68] The results of this system are unclear. Between 2013-2018, those who completed restorative justice Programs in a "Neighborhood Courts" program in Yolo County had a recidivism rate of under eight percent, compared to those released from state prison of 46 percent.[69] However, the Neighborhood Courts are often only for offenders who committed low-level crimes, and it is more likely that those released from state prison committed more serious crimes.[70] California is undoubtedly near the forefront of the restorative justice movement. However, the lack of procedural codification of restorative justice and the highly localized nature of the program provides an example of a state that could perhaps do more to effectively realize the full benefits of restorative justice.

[63] See Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1048 (2019).
[64] See González, *supra* note 18 at 1160.
[65] See, *e.g.*, CAL. PENAL CODE § 17.5(a)(8)(E)
[66] See González, *supra* note 18 at 1160.
[67] See *id.* at 1160-61.
[68] See Janelle Marie Salanga, *"It Would Have Changed My Life:" Restorative Justice Offers Californians Way to Avoid Prison*, CAL MATTERS, (July 15, 2020). https://calmatters.org/justice/2020/07/california-restorative-justice-neighborhood-courts/
[69] See *id.*
[70] See *id.*

ii. Punitive Tendencies

One of the main obstacles to effectively implementing restorative justice measures is that the American people generally may have an appetite for punishment. Evidence suggests that Americans as a group hold relatively punitive views. Some studies have found that many people would take on significant personal cost to see the perpetrator of a transgression punished.[71]

Even though restorative justice offers an alternative to the currently overly punitive criminal justice system, restorative justice processes and laws can be altered by those same attitudes it attempts to avoid. This paradox can be seen most clearly by the tendency of many states to offer half-measures in implementing restorative justice principles and programs. One prominent example appears in the imbalance between juvenile and adult restorative justice programs. There are ten states which have restorative justice processes exclusively for juveniles.[72] Even in those states which do not categorically exclude adults from access to restorative justice programs, the majority of restorative justice processes available in the United States are juveniles.[73] This shows a legislative preference among the states for implementing restorative justice programs for juveniles before moving to adult programs.[74] It has long been recognized in courts that juveniles ought to be treated differently in the criminal justice system compared to adults, often showing more lenience to juvenile offenders.[75] For example, Supreme Court opinions have expressed the idea that juveniles are often less culpable for their actions and have a higher potential to rehabilitate after a transgression.[76] Those principles are reflected across restorative justice laws and processes across the states, where juveniles are given more grace and opportunity for reform than adults.

State prosecutors and district attorneys are also reluctant to implement restorative justice partly because of punitive tendencies. While there is no gradation or sliding scale, the general thought is that the more violent or

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[71] *See* Oriel Feldman Hall & Peter Sokol-Hessner, *Is the Justice System Overly Punitive?*, SCIENTIFIC AMERICAN, (Dec. 9, 2014).
https://www.scientificamerican.com/article/is-the-justice-system-overly-punitive/
[72] *See* González, *supra* note 18 at 1171.
[73] *See* Beckett and Kartman, *supra* note 10 at 7.
[74] *See* González, *supra* note 18 at 1171.
[75] *See id.*
[76] *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 471 (2012).

politically potent a crime is, the less inclined the District Attorney's Office is to use restorative justice statutes that might be at their disposal or could apply to such a situation.[77] Prosecutors are likely to be philosophically committed to the constitutionally prescribed systems of trial or pleading followed by punishment.[78] They might also see the traditional system as providing retribution and justice not only to the victim but to society as a whole.[79] Prosecutors traditionally have broad power to administer justice, often exercised by their ability to bring or not bring charges at their discretion.[80] Restorative justice also forces prosecutors to cede power to other actors, such as social workers who might be involved in the process, or to the victim and offender.[81]

iii. Procedural Missteps: The Entrenched Criminal Justice System and Bureaucratic Inertia

Lack of Confidentiality

Restorative justice promotes open discussion and accountability of criminal acts. However, not every state assures confidentiality in these processes. Offenders and defense attorneys are understandably concerned about participating in such frank discussions when offender statements might generate accountability.[82] For example, Alabama requires such an acceptance of responsibility in writing yet does not protect defendants from the chances that those statements might be used against them in court.[83]

Alabama is not the only state with this type of problem. There is a noticeable absence in legislation, court rules, and regulations governing confidentiality in restorative justice programs, despite the proximity of restorative justice to legal processes.[84] Over 84 percent of jurisdictions do not protect statements made prior to or during restorative justice processes.[85]

This problem exists solely due to inadequate legislation and the complexities and interrelatedness of the criminal justice system. The states

[77] Sliva, Porter-Merrill, & Lee, *supra* note 6 at 493.
[78] See Bruce A. Green and Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2299 (2020).
[79] See *id.* at 2230.
[80] See *id.* at 2293.
[81] See *id.* at 2304.
[82] See González, *supra* note 18 at 1163.
[83] See *id.* at 1192.
[84] See *id.* at 1163.
[85] See *id.*

have the power to strengthen restorative justice programs by eliminating inhibitors like the lack of confidentiality. Colorado offers a positive example of a state that has created protections to mitigate this problem.[86]

The restorative justice statute in Colorado's Children's Code offers confidentiality protections for all statements made during the juvenile restorative justice processes at any stage of the juvenile justice system.[87] Further, adult diversion statutes in the state offer confidential protection for statements occurring during diversion programming.[88] Other states and localities are also making attempts to confront this problem.[89]

The Role of State Prosecutors

The traditional adversarial system of the American justice system is not fully compatible with restorative justice and its policy and practice goals, but the structure of restorative justice is inevitably bound within the entirety of the traditional criminal justice system. The traditional criminal justice system prioritizes an adversarial style of fact finding.[90] Due to Constitutional safeties and state laws, many of which attempt to protect defendants from unfair prosecutorial practices, a tension can arise between restorative justice aims and the traditional practices of the justice system as it is now.[91]

In the American justice system, state prosecutors exercise wide control over the judicial process. Inherent to the system, state prosecutors have expansive discretion when deciding what their options are, how they will prosecute suspects and perpetrators of crime, and whether they will prosecute or charge at all. Along with the urge to punish, noted in Section B.ii, above, many prosecutors are skeptical of the long-term effectiveness of restorative justice despite some positive research on the subject.[92] The study of restorative justice's effectiveness in the long-term is a relatively new field and as a result the extent of research in the area is narrow.[93] As a result prosecutors may feel that the risk of implementing a restorative justice program, especially with adults and violent offenders, is too risky to public safety.[94] Even prosecutors who believe in restorative justice may

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[86] *See id.*; Colorado Restorative Justice Council, State of the State Restorative Justice in Colorado, ii. (2019)
[87] *See id.*
[88] *See* Sliva, Porter-Merrill, & Lee, supra, note 6 at 493. However, these protections are somewhat offset by the fact that such statements are still admissible for impeachment purposes if the defendant so chooses to testify at trial (Id.).
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *See* Green and Bazelon, *supra* note 79, at 2297.
[93] *See id.*
[94] *See id.*

decide against implementing it because of a lack of resources.[95] Despite these reasons, however, it is still clear that a punitive mindset still prevalent among prosecutors nationwide affects their decisions not to implement restorative justice.[96] Violent crimes are accompanied by public attention and political pressure, which, along with the adversarial predisposition of prosecutors, is likely to discourage prosecutors from turning to restorative justice in high-level cases as long as the use of restorative justice is left to their discretion. Thus, the discretionary or permissive language in many restorative justice statutes does not incentivize DA Offices to use these practices for certain crimes, and the inertia of accepted adversarial practices pushes back against reform.

The current state of the American criminal justice system emphasizes retribution, punitiveness, and incarceration. This method of criminal justice has not only been costly but has yielded few positive results. The victim-centered focus of restorative justice offers an alternative solution to the prosecution-led style of the justice system. This has led states, notably Colorado, to develop and implement restorative justice codes into their criminal justice systems. Yet, despite the community and dialogue-infused practices of restorative justice, the full force of its impact has not come to fruition. Multiple impediments, from incomplete and aspirational statutes to the role of state attorneys, have slowed restorative reforms. For this movement to truly change the American criminal justice system, efforts to implement restorative justice need to become more technical and tangible. The problems described above are examples of an incomplete effort—one that has focused more on the idea of restorative justice than on the tangible procedural reforms necessary to implement the strategy.

[95] *See id.*
[96] *See id.* at 2303.

CASE STUDY: DISCOVERY REFORM IN NEW YORK

As one can see, many states have passed laws over the last several years aimed at reforming criminal justice. But when one actually examines the substance of these statutes, much of the codified change is aspirational at best. In sharp contrast to such efforts, New York has embarked on efforts directly confronting the interaction of criminal procedure and imbalances of power in the criminal justice system. Studying New York's attempts at substantive criminal justice reform can help shed light on the issues other states may face when attempting concrete change.

A. DISCOVERY REFORM CODIFIED: GOALS AND CHALLENGES

In 2019, New York codified a "package of statewide criminal justice reforms that include[d] eliminating cash bail for the majority of cases and limiting procedural workarounds to the state's speedy trial statute."[97] A significant part of this sweeping effort was the discovery reform statute, CPL 245, which took effect on January 1, 2020. The statute replaced what was colloquially called the "blindfold law."[98] Its goal was to address many of the inequities that existed for defendants facing criminal charges in New York. Up until that point, New York's discovery rules were considered some of the worst in the country, allowing prosecutors to withhold evidence until just before trial.[99] Even more troubling was that because more than 98 percent of felony arrests ended in "convictions occur[ing] through a guilty plea – prosecutors were almost always allowed to withhold information indefinitely."[100] In other words, without a trial to force evidence production by the prosecution, the majority of defendants had to consider plea offers without being entitled to the evidence in their case first—they entered plea negotiations "blindfolded." Furthermore, absent a trial, defendants had limited ability to force prosecutors to share evidence in a timely manner, so defendants in pretrial detention sometimes waited for long periods of time only to be offered a plea without the information necessary to evaluate the offer. Before CPL 245, a prosecutor could more easily leverage a

[97] See Beth Schwartzapfel, *"Blindfold" Off: New York Overhauls Pretrial Evidence Rules*, THE MARSHALL PROJECT, Apr. 1, 2019.
[98] See Beth Schwartzapfel, *Undiscovered*, THE MARSHALL PROJECT, Aug. 7, 2017.
[99] See Kenneth Cooper, *Are New York's Bail and Discovery Reforms in Renewed Danger*, MINN. J. L. & INEQUALITY, Feb. 9, 2022; Julia Rubio & Linda Garza, Commentary, Texas Prosecutor Calls for Discovery Reform in NY State, N.Y.L.J., Feb. 11, 2019.
[100] See Schwartzapfel, *supra* note 98. This lack of disclosure in criminal cases had been the status quo in New York since 1979; legislators had "introduced bills more than a dozen times in the last 40 years, but the district attorneys association…always blocked the effort." *See id.*

defendant's desperation to "cut a deal" because time and information were on the prosecutor's side.

New York's 2019 discovery law aimed to make the process fairer for those accused of a crime. CPL 245 sought to "shrink case processing times, resulting in shorter jail stays for defendants held in pretrial detention."[101] Faster, easier, more automatic disclosure of the evidence against the defendant could facilitate the defendant's ability to prepare a defense, and would allow more informed decision making by the defense and fairer plea offers by the prosecution. The broader hope was that the changes might result in fewer prison or jail sentences because weak prosecution cases would be weeded out by the new evidentiary rules.[102] The statute prescribed the kinds of evidence that had to be automatically shared between the prosecution and defense when charging someone with a crime, put a strict timeline on when this evidence had to be shared, and put remedies/sanctions in place for non-compliance with the law.[103] But the law is indeed a case study on the problems that states can encounter when trying to enact such concrete reformative justice change. Once it went into effect, the statute was immediately debated–lauded by some and lambasted by others.[104] It became a focus of annual state budget talks and political campaigns.[105] While supporters of CPL 245 fought to keep the reforms in place untouched, prosecutor offices and law enforcement agencies said the law was too burdensome and expensive, and blamed the newly enacted statute for excessive staff overtime, job dissatisfaction, and staff shortages.[106] CPL 245 remained a point of contention throughout New York state's budget talks up and until the annual budget was passed in April, and it is sure to come up again in future partisan debates and state spending discussions.

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[101] *See* Krystal Rodriguez, New York's Discovery Reform Law, Summary of Major Legislative Provisions, CTR. FOR CT. INNOVATION, June 2020 update, https://courtinnovation.org/publications/discovery-NYS.

[102] *See* Krystal Rodriguez, Discovery Reform in New York, Major Legislative Provisions, CTR. FOR CT. INNOVATION, June 2020 update, at 1, https://www.courtinnovation.org/sites/default/files/media/document/2020/Discovery_NYS_Revised_2020.pdf .

[103] *See* N.Y.S. DIV OF CRIM. JUS. SERV., IMPLEMENTATION OF 2020 DISCOVERY LAW CHANGES: UPDATE, at 1 (Dec., 2021) [hereinafter Survey]. https://www.criminaljustice.ny.gov/crimnet/ojsa/FINAL percent20UPDATED percent20Implementation percent20of percent202020 percent20Discovery percent20Law percent20Changes percent20Report percent2012-22-21.pdf.

[104] *See*, Sarah Lustbader, Prosecutors Blame Discovery Reform Law for Overtime, Tax Hikes, and a Murder, THE APPEAL, Feb. 11, 2020; George Joseph, Lawmakers Accuse Brooklyn Judge of Subverting NY's Landmark Discovery Reforms, GOTHAMIST, Dec. 2, 2021.

[105] *See* Robert Anello, Blindfold Removed from Justice in State Criminal Cases in 2020, FORBES, Jan. 8, 2020.

[106] *See* Survey, *supra* note 104 at 3.

CLOSER LOOK

CPL 245: The Details

CPL 245 made sweeping changes to the discovery rules in New York state criminal cases. Before its enactment, defense attorneys had to "make written motions to obtain the prosecutor's evidence during the pretrial period."[107] Disclosure only upon request was especially burdensome for indigent defendants who had court appointed attorneys with heavy caseloads, as well as for defendants in pretrial detention; the onus was on them to request disclosure, and to presumptively know what evidence existed in order to properly motion for it, which was not an efficient or quick process. The new law shifted the burden of evidence production; it required the "automatic" discovery of "all relevant materials that the prosecution ha[d] in its possession," in addition to a "presumption of openness" which directed judges to favor disclosure when interpreting the law in individual cases.[108] The new statute also listed 21 types of evidence that prosecutors had to turn over, many of which were not listed in the old law.[109] Moreover, for the purposes of discovery and compliance with the new law, evidence in the possession of law enforcement was presumed to also be possessed by the prosecutor, which meant that delays that prosecutors encountered in getting evidence from law enforcement offices were not valid excuses in providing late discovery to the defense (and put the onus on prosecutors' offices to get law enforcement to preserve and organize evidence). Law enforcement offices were now required to notify prosecutor's offices of the existence of certain types of recorded evidence in their possession (e.g., 911 calls, body camera video, or audio camera recording).[110]

In addition to the types of evidence to which the defense was entitled under the new law, the timeline for the production of discovery was now strictly prescribed. No longer could disclosure be completed right before pretrial hearings or trial. Under the new rules, the prosecution had to turn over all discoverable materials as soon as practicable, but no later than 15 days after arraignment, with certain specific allowable extensions.[111] Defendants also were no longer required to consider a plea offer without knowing the evidence against them. Under CPL 245, if the prosecutor made a plea offer in the pre-indictment phase, or before the grand jury proceedings took place, the

[107] *See* Rodriguez, *supra* note 102 at 1.
[108] *See id.*
[109] *See* Rodriguez, *supra* note 103 at 2-3.
[110] *See id.*
[111] *See id.* at 3. Subsequent amendments to the law which took effect May 3, 2020, consider defendants custody status in providing the prosecution with additional time to meet these initial discovery obligations; so the prosecution must disclose evidence within 20 days of arraignment for detained defendants, and within 35 days of arraignment for defendants not in custody. *See id.*

prosecution had to turn over discovery materials at least three days before the expiration of the offer; at other stages, evidence had to be turned over "seven days prior to the expiration of any plea offer." In addition to adhering to these requirements, prosecutors were also required to submit a "formal certificate of compliance" with the discovery rules. Noncompliance with any of this disclosure came with a required court-imposed remedy or sanction if: 1) "the delayed delivery prejudiced the party receiving the information," or 2) "when the materials had been lost or destroyed if the materials contained information pertinent to a contested issue."[112]

B. SURVEY AND RESPONSES TO THE IMPLEMENTATION OF THE LAW

After the law went into effect, the Division of Criminal Justice Services (DCJS) "surveyed district attorneys' offices, police departments, sheriffs' offices, forensic laboratories, and defense service providers" as part of a report on "how the new Discovery statute was implemented: the procedures used and resources needed to comply with the law; circumstances where discovery obligations were not met; and detail on case outcomes."[113] The overwhelming response by these offices in this survey was that they lacked adequate staffing and financial resources to gather, review, and produce evidentiary materials within the timeframe demanded under the new discovery rules.[114]

In the summary of survey responses, some consistent themes emerged. Prosecutors and law enforcement offices had to implement extra staff training hours to meet the requirements of the law, and they had to adjust procedures for managing discoverable materials within their offices, including purchasing new software and equipment. Respondents claimed that they had to change how they coordinated with law enforcement agencies and that they had to hire additional staff (and reassign staff) for compliance with the law. Generally, "respondents expressed concern for overworked and overburdened staff,"[115] and some offices claimed they lacked the financial resources to comply with CPL 245.[116] Prosecutors from all over the state "warned that compliance with the new discovery

[112] *See* Rodriguez, *supra* note 102.
[113] *See* Survey, *supra* note 104 at 2.
[114] *See id.* at 3. New York State had made $38.25 million available to the counties outside of New York City to assist with the Implementation of the discovery law and the corresponding bail reform. These survey responses came before the bulk of these funds were distributed. *See id.* Also, "[i]n New York City alone, Mayor Bill de Blasio added $75 million dollars to the City's budget to support compliance with the criminal justice reforms." *See* Anello, *supra*, note 116.
[115] *See* Survey, *supra* note 104 at 5.
[116] The timing of CPL 245's requirements was also not ideal – the "discovery reforms took effect shortly before New York State and the nation faced the COVID-19 pandemic." *See id.* at 2.

obligations without additional resources from the State [would] be difficult."[117] In October 2019, "a representative from the New York State Attorney General's Office echoed those concerns, testifying before state lawmakers that her office would need more than $10 million in new funding to comply with the laws."[118] President of the District Attorneys Association of the State of New York, J. Anthony Jordan, wrote the New York State Governor Kathy Hochul in January of this year, stating that the success of the discovery law depended on the "resources that we devote to discovery exchange" in estimating that $100 million in extra funding was needed to meet the requirements of the discovery law.[119]

C. CPL 245 IN THE PRESS

In the press, discovery reform was seen as the cause of seemingly unrelated woes by those that opposed it, while supporters of the changes said the complaints about the statute were overblown. Prosecutors, for example, blamed the new law for potentially endangering witnesses if they were required to share certain types of evidence with defendants.[120] Meanwhile, public defenders cited the protections written into the discovery law as an adequate solution to this potential problem.[121] Higher taxes were also blamed on the new expenses that the courts and law enforcement encountered in meeting their evidentiary obligations under CPL 245. The New York State Conference of Mayors, including the mayor of Freeport, for example, claimed that the courts and law enforcement would have to "hire more staff and provide overtime" in order to turn over the evidence required under the law, which in turn would cause a tax hike to cover the cost.[122] The governor's office disputed the tax hike claims and responded to the Freeport mayor by saying that "there's no reason for this to raise costs for…village[s] unless they were previously not providing basic evidence" in criminal cases.[123]

Soon thereafter, reports emerged that New York City prosecutors were "leaving in droves" due in part to the increase in work hours that the

[117] *See* Anello, *supra* note 116.
[118] *See id.*
[119] Letter from J. Anthony Jordan, Wash. Cnty. Dist. Att'y, Dist. Att'y Ass'n of the State of N.Y. President to Elizabeth Fine, Counsel to Gov. Kathy Hochul (Jan. 13, 2022), https://www.nysenate.gov/sites/default/files/letterdiscoveryjanuary13.pdf.
[120] *See* Schwartzapfel, supra note 99. For example, the law was incorrectly blamed for the killing of a witness in an MS-13 gang murder case in Nassau County, even though it was later revealed that discovery reform had nothing to do with the death; the witness's name was never disclosed to defendants in the case. *See* Lustbader, *supra*, note 105.
[121] *See* Lustbader, *supra* note 105.
[122] *See id.*
[123] *See id.*

discovery law required. The amount of evidence and the time in which to supply it was said to be too demanding a task, especially when prosecutors were required to get much of the required evidence from law enforcement or face getting cases dismissed.[124] Defense counsel did not uniformly dispute the higher workloads that were a result of discovery reform, but Tina Luongo, the head of the Legal Aid Society's criminal defense practice, pointed out in *The New York Times* piece that it "must not be the case that the way you solve a workload problem is to diminish the rights of somebody accused of a crime."[125]

D. CPL 245: RECENT PROPOSALS

CPL 245 was debated immediately upon passage by the state and continues to be closely monitored in practice; it is always at risk of elimination or change. When discussions about the current New York state budget started a few months ago in anticipation of the April 1st deadline for the annual budget passage, the costs and burdens of the law were at the forefront of political discourse. Only two years old, the statute appeared to be in jeopardy; Governor Hochul hinted that she might roll back some of the reforms in CPL 245.

The governor proposed a change in required compliance with the discovery law and a change in the remedies available to judges for deviating from the discovery rules.[126] Governor Hochul suggested that prosecutors only needed "substantial compliance" with discovery obligations to satisfy the intent of the law instead of being required to turn over all evidence within a strict timeframe after arraignment.[127] Under this type of subjective standard, the prosecution could more easily meet its burden of evidence sharing. Governor Hochul's proffered modifications could have reduced automatic dismissals and given judges more discretion in rejecting defense motions to dismiss cases based on a lack of required disclosure. Several domestic violence victims' groups advocated for the Governor's proposals because

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[124] See Jonah E. Bromwich, *Why Hundreds of NYC Prosecutors Are Leaving Their Jobs*, N.Y. Times, Apr. 4, 2022.

[125] See *id.* Furthermore, debates arose whether the discovery law was being applied correctly in certain instances in order to fulfill the state legislature's intent. For example, Judge Keisha Espinal in Brooklyn was accused by Brooklyn Defenders Services of weakening the discovery law in criminal cases in that borough by issuing a court order which sought to "speed up cases by discouraging defense attorneys from filing last minute motions requesting that cases be dismissed" because of missing evidence from the prosecutor's office. Brooklyn Defenders said the Judge's order denied them a remedy granted under the law and could "incentivize prosecutors to withhold critical information until the eve of the trial." See Joseph, *supra* note 105.

[126] See Editorial Board, *Discover Discovery Reform: Gov. Hochul's Got the Right Idea*, N.Y. Daily News, Mar. 28, 2022.

[127] See Grace Ashford & Jonah E. Bromwich, *New York's Bail Laws, Reconsidered: 5 Things to Know*, N.Y. Times, Mar. 30, 2022.

they disliked the automatic case dismissals allowed under CPL 245 for procedural violations.[128] The Innocence Project, Human Rights Watch, and Kalief Browder's brother came out against the governor's plan, saying that her proposal would open the door to abuse of the discovery law by prosecutors because they would be excused from strict compliance with evidence sharing.[129] They argued that her plan could re-open the door to the problems that the original law was attempting to fix; defendants, particularly detained defendants, once again wouldn't be sure that they were being given all of the evidence in their cases, and couldn't fairly evaluate plea offers. Public defenders argued that the whole public discourse around the discovery law was not based on facts; their view was that the discovery law was being politicized and that false fearmongering was being used to claim that public safety was being hindered by the law.[130]

E. RECENT MODIFICATIONS TO DISCOVERY LAW

In the end, the New York State budget passed in April preserved the bulk of the discovery reforms, and Governor Hochul's proposed changes were not adopted as a whole. For now, the accepted revision "will amend the process for providing late additions to discovery by allowing for fewer consequences if the original discovery was filed in good faith."[131] The revisions will also allow judges more discretion "over whether a case should be thrown out when deadlines are not met."[132] So, in other words, there is still the presumption of openness by prosecutors as far as evidence sharing goes and a required automatic discovery within a set time frame of the same evidence listed in the original law. "Substantial compliance" with discovery rules, as the governor initially proposed, is not the new standard. However, the incentive to strictly comply with the law has been reduced. Noncompliance with CPL 245 no longer equals the dismissal of a case. Judges have more discretion to keep a case on the calendar as long as any

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[128] *See* Bernadette Hogan & Nolan Hicks, *Victim Groups Back Gov. Hochul's Criminal-Justice Overhaul Plan*, N.Y. POST, Mar. 25, 2022.

[129] *See U.S.: Don't Roll Back New York Pretrial Reforms*, HUMAN RIGHTS WATCH (New York, N.Y.), Mar. 24, 2022, https://www.hrw.org/news/2022/03/24/us-don't-roll-back-new-york-pretrial-reforms; Akeem Browder, *Op-Ed: The Governor's Plan will Create More Kalief Browders*, NORWOOD NEWS, Mar. 24, 2022; Innocence Project, https://innocence project.org/petitions/new-york-discovery/ (last visited May 31, 2022).

[130] *See* Brennan Center, *New York Budget Backslides on Bail Reform, Moves Forward on Campaign Financing Reform*, BLACK STAR NEWS, Apr. 11, 20232, https://www.blackstarnews.com/ny-watch/politics//new-york-budget-backslides-on-bail-reform-moves-forward-on-campaign; Chelsia Rose Marcius et al., *New York's Bail Laws are Changing Again. Here's How.*, N.Y. TIMES, Apr. 4, 2022.

[131] *See* Chris Gelardi, *How New York State Just Rolled Back Criminal Justice Reforms*, N.Y. FOCUS, Apr. 9, 2022, https://www.nysfocus.com/2022/04/09/hochul-criminal-justice-budget-roundup.

[132] *See* Marcius et al., *supra* note 131.

accidental omissions/delays of discovery by the prosecution are shown to be in "good faith."[133]

Judging by the discussions surrounding the new evidence rules and their cost, the debate over discovery reform in New York is expected to continue. Because CPL 245 is so recent, further investigation of the law's efficacy and whether its purpose is being met is necessary. Certain questions would be helpful to have answered when it is possible. For example, some of these questions are: 1) Is there compliance with CPL 245? 2) Are cases moving through the criminal justice system quicker? 3) Are defendants spending less time in pretrial detention? 4) Are there fewer plea agreements? 5) Are there fewer convictions? 6) Are there more dismissals? and 7) Are there more lenient or shorter jail/prison sentences? An affirmative answer to these queries will strengthen the case to keep the discovery reforms in New York and possibly serve as a roadmap for other states to make similar substantive changes.

[133] In addition to the discovery compromise in the state budget, $65 million in new funding was given smaller county DA offices to hire staff and buy new technology to deal with increased evidence stemming from compliance with the law. *See* Charles Lane, *A Revised State Law Lets Judges Decide When to Toss Cases Over Missed Deadlines*, GOTHAMIST, Apr. 11, 2022.

CONCLUSION

The examples of restorative justice statutes and discovery reform highlight the pitfalls that sabotage many reform efforts. In particular, in the context of restorative justice and the near failure of discovery reform in New York, it is possible to see the obstacles created by the entrenched criminal justice system. In the former case, statutes outlining anything less than strict, mandatory policies are quickly undermined both by existing habits of criminal justice actors and by the traps of missed details, such as complexities of confidentiality and the interaction of the new system with the existing system. In the latter case, the overwhelming administrative tasks required to make real change to the process not only resulted in bad press and a mass exodus of criminal justice actors, but nearly derailed the entire statute.

Successful reform efforts highlight these same issues. One of the most successful restorative justice programs exists in Colorado, where the state's organic statutes mandate the creation of programs and administrative bodies and mandate that those administrators be individuals who are currently working and operating within the criminal justice system. By empowering individuals from within the system dedicated to reform, Colorado has managed to avoid the procedural missteps of other programs. This knowledge base and understanding are crucial to the success of restorative justice as its space within the greater criminal justice system deems necessary expertise and familiarity.

These case studies suggest several policy recommendations. First, reformers must realize what they are approaching. The problems of inequality and punitivity in the criminal justice system are not only issues of outlook or intention. Instead, they are deeply entrenched and reinforced by the multitude of bureaucratic processes and habits built around them. No matter how well-intentioned, active, or excited a movement is, it will still encounter these self-sustaining administrative practices. Reformers must take on the less lofty and often less publicized procedural details of the criminal justice system to make true change. They must push for mandatory language and actively create new systems to make these changes effective.

Additionally, to smooth the transition and avoid bureaucratic inertia, reformers should utilize reform-minded experts who are already within the system. Familiarity with the actual workings of the system can help reformers to predict and account for the types of administrative needs,

hurdles, and loopholes that can undermine reform. While profound change must be the goal, reformers must also be familiar with the strings that will tie up their aspirations so that those strings can be cut.

Real reform is being enacted in numerous places, but its initial promise is marred by entrenched practices and bureaucratic barriers. These fault lines deserve more attention and analysis, beginning with the realities of restorative justice programs as revealed in this report. Revealing the barriers to adequate reform measures is a first step toward enabling restorative justice programs to achieve their worthy goals.