

## Protecting Restorative Justice Participants: The Implications of Implementing Restorative Justice Practices Without Proper Safeguards for Participants

Abigail Young

Follow this and additional works at: <https://repository.law.miami.edu/umrsjlr>



Part of the [Law and Race Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Abigail Young, *Protecting Restorative Justice Participants: The Implications of Implementing Restorative Justice Practices Without Proper Safeguards for Participants*, 13 U. MIA Race & Soc. Just. L. Rev. 88 ()  
Available at: <https://repository.law.miami.edu/umrsjlr/vol13/iss1/6>

This Note is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Race & Social Justice Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [mperez@law.miami.edu](mailto:mperez@law.miami.edu), [library@law.miami.edu](mailto:library@law.miami.edu) .

Protecting Restorative Justice Participants:  
The Implications of Implementing  
Restorative Justice Practices Without Proper  
Safeguards for Participants

Abigail Young

TABLE OF CONTENTS

INTRODUCTION ..... 91  
     *What is Restorative Justice?*..... 91  
     *Why Restorative Justice?*..... 93  
     *The Problem: Restorative Justice and Privilege* ..... 95  
 PART I: OVERVIEW OF CONFIDENTIALITY AND PRIVILEGE LAWS..... 96  
 PART II: PRIVILEGING RESTORATIVE JUSTICE..... 98  
     *Victim Offender Mediation* ..... 98  
     *Privileged Through State Law*..... 100  
     *Privileged Through Memorandums of Understanding*..... 102  
     *Privileged Through Plea Bargaining* ..... 104  
     *Privileged Through Federal Rule of Evidence* ..... 106  
     *Privileged Through an Alternative Dispute Resolution Statute* .... 108  
 PART III: IMPLICATIONS OF NOT PRIVILEGING THE RESTORATIVE  
     JUSTICE PROCESS..... 111  
     *Nonvoluntary Restorative Justice Practices*..... 112  
     *Requiring Admission of Guilt for Restorative Justice* ..... 112  
     *Pre and Post Adjudication Restorative Justice Implications*..... 114  
 PART IV: POTENTIAL SOLUTION..... 115  
 CONCLUSION..... 116

## INTRODUCTION

*What is Restorative Justice?*

Restorative justice is a victim-centered approach to crime.<sup>1</sup> Rooted in indigenous cultures,<sup>2</sup> it is based on the premise that crime is a violation of individual and interpersonal relationships.<sup>3</sup> Restorative justice involves “all those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations, in order to put things as right as possible.”<sup>4</sup> The process brings together the offender, the victim,<sup>5</sup> and the affected families and communities for mediated conversations.<sup>6</sup> The model’s central purpose is to heal and repair the harm caused.<sup>7</sup> There are many different models of restorative justice<sup>8</sup> practiced in formal and informal settings.<sup>9</sup> Generally, the first step of the process involves meeting the immediate needs of the victim.<sup>10</sup> This is done by giving them space to tell their story and describe the violation done to them.<sup>11</sup> During the mediated conversation the offender acknowledges and takes responsibility

---

<sup>1</sup> See Bailey Maryfield, Roger Przybylski, Mark Myrent, *Research on Restorative Justice Practices*, JUSTICE RESEARCH AND STATISTICS ASSOCIATIONS. Dec. 2020; Mary Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV., 667, 668 (2005).

<sup>2</sup> SONYA SHAH, CARL STAUFFER, SARAH KING, RESTORATIVE JUSTICE LISTENING PROJECT, FINAL REPORT NOV. 2017, Zehr Institute for Restorative Justice (2017); TED WATCHEL, DEFINING RESTORATIVE, 2, (International Institute for Restorative Practices Graduate School 2016) (“Restorative justice echoes ancient and indigenous practices employed in cultures all over the world, from Native American and First Nation Canadian to African, Asian, Celtic, Hebrew, Arab and many others.”).

<sup>3</sup> See Reimund, *supra* note 1, at 670.

<sup>4</sup> Howard Zehr, THE LITTLE BOOK OF RESTORATIVE JUSTICE 48 (Good Books 2015).

<sup>5</sup> While restorative justice practitioners avoid using language like victims and offenders, this article will use these labels for sake of clarity.

<sup>6</sup> sujatha baliga, *A Different Path for Confronting Sexual Assault*, VOX (Oct. 10, 2018, 8:10 am EDT), <https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle>; Kathleen Daly, *What is Restorative Justice? Fresh Answers to a Vexed Question*, in 11 VICTIMS & OFFENDERS 1, 4 (Taylor & Francis Online 2015).

<sup>7</sup> Olivia Dana, Sherene Crawford, *Restorative Prosecution? Rethinking Responses to Violence*, 64 N.Y.L. SCH. REV. 53, 58 (2020).

<sup>8</sup> Maryfield, Przybylski, Myrent, *supra* note 1. (Such as Victim-offender mediation, Victim-offender dialogue, Restorative justice conferencing, Reparative boards, Victim impact panels, Peacemaking circles, and Apology banks.)

<sup>9</sup> See Shah, Stauffer, King, *supra* note 3 (explaining there are four broad categories of where restorative justice is practiced: (1) indigenous and aboriginal; (2) community-based organizations or activist; (3) school and educational environments; and (4) legal systems and institutions.).

<sup>10</sup> See HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES 193-94 (Herald Press 2015).

<sup>11</sup> See *id.*

for the harm. The process generally ends with the parties discussing a reparative plan that addresses how the offender will repair the harm. An example of a reparative plan in the context of campus sexual assault may include counseling for the offender that addresses behaviors associated with risks for perpetrating sexual assault, and mandating the offender participate in efforts to change the overall college campus' social climate in relationship to sexual assaults.<sup>12</sup>

Restorative justice provides a platform for the acknowledgment and assumption of responsibility.<sup>13</sup> This type of offender accountability rarely exists within the United States' criminal legal system.<sup>14</sup> In the traditional criminal legal system, the offenders' assumption of responsibility is replaced with a prison sentence.<sup>15</sup> Within the last twenty years restorative justice practices have become more prevalent within the U.S. criminal legal system.<sup>16</sup> In the criminal legal system, restorative justice practices are implemented pre-adjudication and post-adjudication. Pre-adjudication restorative justice may come in the form of diversion or an alternative program that provides treatment to the offender.<sup>17</sup> Post-adjudication restorative practices include mandating restorative justice as a condition of probation or sentencing and using restorative justice in community reentry programs.<sup>18</sup>

Restorative practices are implemented in almost every state, at regional and local levels.<sup>19</sup> As of July 2020, forty-five jurisdictions have codified restorative justice in their criminal justice systems.<sup>20</sup> Nationally, there are 264 laws governing the practice.<sup>21</sup> The vast majority of the laws are highly localized.<sup>22</sup> While restorative practices are instituted at all phases of the legal system, an analysis reveals that 96% of restorative justice laws grant discretionary decision-making power to state actors.<sup>23</sup> The two principal decision makers across all jurisdictions are prosecutors

---

<sup>12</sup> Donna Coker, *Restorative Responses to Campus Sexual Harm: Promising Practices and Challenges*, INT'L J. RESTORATIVE JUST. 385, 387, 389 (2018).

<sup>13</sup> Andrea Smith, *Beyond Restorative Justice: Radical Organizing Against Violence*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 1, 255 (James Ptacek, ed., 2009).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Thalia González, *The State of Restorative Justice in Criminal Law*, 2020 WIS. L. REV., 1147, 1150 (2020).

<sup>17</sup> See *id.* at 1155 n. 22.

<sup>18</sup> *Id.* at 1168.

<sup>19</sup> Thalia González, *The Legalization of Restorative Justice: A Fifty State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1030-31 (2019); (“[F]orty-five states have codified restorative justice into statutory or regulatory law.”).

<sup>20</sup> González, *supra* note 16 at 1157.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1177.

and courts.<sup>24</sup> The lack of uniform state or national standards allows significant discretionary authority to judges and prosecutors to decide what constitutes restorative justice.<sup>25</sup> The lack of standards also results in evidence that was produced during a restorative process to be admissible in criminal prosecutions.<sup>26</sup> This article provides an overview of mechanisms that privilege the restorative justice process, the shortcomings of these mechanisms, and a potential solution.

### *Why Restorative Justice?*

The U.S. criminal legal system focuses on retribution. The goal of the criminal system is to determine the appropriate punishment for the violation of the law.<sup>27</sup> Generally, victims have no legal standing because the prosecution represents the state, not the victim.<sup>28</sup> As a result, victims are less important to the process and may go unheard.<sup>29</sup> Consequentially, the criminal legal system is primarily offender-driven.<sup>30</sup> Restorative justice is a paradigm shift.<sup>31</sup> It centers the victim's needs and the offender's responsibility for repairing the harm. For accountability to occur, offenders need to acknowledge and assume responsibility.<sup>32</sup> Accountability rarely happens in the contemporary U.S. criminal legal system, as there is an inherent disincentive to truth-telling. When defendants speak they run the risk of their statements being introduced in trial or facing additional charges.<sup>33</sup> Furthermore, defendants that take the

---

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1155.

<sup>26</sup> *Id.*

<sup>27</sup> Mark Umbreit, Betty Vos, Robert Coates, Elizabeth Lightfoot, *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL., 511, 514 (2007).

<sup>28</sup> *Id.*

<sup>29</sup> *But see* Anna Roberts, *Victims, Right?* 42 CARDOZO L. REV. 1449, 1457 (2021) (“More than thirty states have amended their constitutions to add “victims’ rights” provisions.”); Kathryn Young, *Parole Hearings and Victims’ Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 436 (2016) (“In virtually all United States jurisdictions, victims have an official role; this participation may take the form of a direct appeal to the judge, a victim impact statement, or some other kind of entitlement to discuss the crime.”) (internal citations omitted); Jessica Jackson, *Clemency, Pardons, and Reform: When People Released Return to Prison*, 16 U. ST. THOMAS L. J. 373, 388 (“Marsy’s Law is currently a national campaign with dozens of state branches, all advocating for new ballot initiatives to enshrine certain rights to crime victims in state constitutions.”) (internal citations omitted).

<sup>30</sup> Umbreit, Vos, Coates, Lightfoot, *supra* note 27, at 514.

<sup>31</sup> *See* Reimund, *supra* note 1, at 682.

<sup>32</sup> *See* Zehr, *supra* note 10, at 198.

<sup>33</sup> *See* FED. R. EVID. 404(b) (allowing evidence of any other crime, wrong, or act to be “admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”); FED. R. EVID. 405(b)

stand may be impeached in a criminal trial for having a criminal record.<sup>34</sup> Therefore, it is integral that restorative justice participants are able to speak without fearing their words of contrition and admission will be used against them in a criminal prosecution.

Although restorative justice has been part of the American criminal system for over three decades, it is only recently being included in conversations about criminal legal reform.<sup>35</sup> The United States has the highest incarceration rates, possessing twenty-five percent of the world's prison population.<sup>36</sup> If restorative justice is accompanied by racial justice, it can be a tool to reduce mass incarceration. While restorative justice cannot cure all ills that plague our criminal legal system,<sup>37</sup> it can further divest from a punitive system that relies on caging humans.

The benefits of restorative justice go beyond severing the legal system's dependence on punishment. Restorative models decrease the risk of reoffending, particularly for violent crimes.<sup>38</sup> Researchers found that the restorative justice process reduced recidivism rates by an average of seven percent.<sup>39</sup> A Department of Justice meta-analysis indicates that restorative justice practices reduce future delinquent behavior more than traditional court processing.<sup>40</sup> The National Survey on Victims' Views found that the majority of victims believe the criminal legal system relies too heavily on incarceration.<sup>41</sup> The survey revealed that victims generally prefer investments in prevention and treatment instead of spending money

---

("When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct."); FED. R. EVID. 413(a) ("In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant."); FED. R. EVID. 609(a)(1)(A)-(B) (mandating evidence to be admitted in a civil case or in a criminal case when the witness is not a defendant, subject to rule 403, and "in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant" when the crime is punishable by death or by imprisonment for more than one year); FED. R. EVID. 609(a)(2) ("[F]or any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.").

<sup>34</sup> *baliga*, *supra* note 6.

<sup>35</sup> *González*, *supra* note 16, at 1156.

<sup>36</sup> INCARCERATION RATES BY COUNTRY 2020, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country>.

<sup>37</sup> *González*, *supra* note 16, at 1156.

<sup>38</sup> *González*, *supra* note 19, at 1040.

<sup>39</sup> *Maryfield, Przybylski, Myrent*, *supra* note 1.

<sup>40</sup> *González*, *supra* note 19, at 1040.

<sup>41</sup> Alliance for Safety and Justice, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY & JUSTICE, 1, 13 (2016).

locking people in jails and prisons.<sup>42</sup> Restorative justice provides an opportunity for accountability and rehabilitation.<sup>43</sup>

Restorative justice is increasingly prevalent in the criminal legal system. From 1990 to 2000 only fourteen states had codified the term “restorative justice.”<sup>44</sup> By 2015 thirty-four states had legislation promoting the use of restorative justice practices in their juvenile or adult criminal justice systems.<sup>45</sup> Just four years later, by 2019, forty-five states had codified restorative justice into law.<sup>46</sup> Moreover, by 2020 the term “restorative justice” appeared in 229 statutes, court rules, and regulations.<sup>47</sup> As jurisdictions continue to look at diversion programs and alternatives to incarceration, restorative justice practices are becoming more prevalent.<sup>48</sup>

### *The Problem: Restorative Justice and Privilege*

It is integral to the restorative justice process that both the victim and offender are able to speak freely. However, criminal defense attorneys advise their clients not to speak freely in any legal proceeding unless there is a privilege guarantee. If the defendant’s statements are not privileged, they will be admissible in court and be used to prosecute the defendant. Additionally, states that allow courts to mandate participation in restorative justice might be violating the Defendant’s Fifth Amendment protections.

Restorative justice is not universally defined or regulated in the United States.<sup>49</sup> The absence of comprehensive and universal rules and procedural safeguards<sup>50</sup> allows local and state jurisdictions to define the meaning of restorative justice and decide what protections will be granted to participants.<sup>51</sup> This uncertainty hinders the effectiveness of the practice. Without laws that privilege statements and evidence disclosed in the process, restorative justice could exacerbate incarceration rates. The lack of safeguards is especially concerning when an offender is compelled to

---

<sup>42</sup> *Id.*

<sup>43</sup> Dana, Crawford, *supra* note 7, at 58.

<sup>44</sup> Maryfield, Przybylski, Myrent, *supra* note 1.

<sup>45</sup> *Id.*

<sup>46</sup> González, *supra* note 19, at 1031; (“[T]he most significant development . . . occurred from 2013 and 2019. During this five-year period, the number of restorative justice statutes, court rules, and regulations increased from 159 (2013), to 229 in 2019.”) *Id.* at 1058.

<sup>47</sup> *Id.* at 1045.

<sup>48</sup> Maryfield, Przybylski, Myrent, *supra* note 1, at 2.

<sup>49</sup> González, *supra* note 16, at 1161.

<sup>50</sup> Reimund, *supra* note 1, at 682.

<sup>51</sup> González, *supra* note 16, at 1161.



participate in the restorative process, or participation is conditioned upon admission of the facts that led to the charge.<sup>52</sup>

Only seven percent of all restorative laws, nineteen laws in eleven states, address confidentiality.<sup>53</sup> Restorative justice is based on the premise of taking responsibility and repairing the harm.<sup>54</sup> Therefore, when statements from the restorative process may be used in the court of law, offenders will not speak. This impedes the ability of the offender and victim to have an honest and open conversation. Additionally, it is common for participants, such as family members, to discuss potential abuse, drug use, or criminal activity.<sup>55</sup> Not privileging restorative practices also put the participants at risk, not just the offender. While restorative justice practices appear in both civil and criminal contexts, this article will focus on the criminal context.

Part I of this article will provide an overview of the existing confidentiality and privilege laws. Part II will examine how restorative justice can be privileged through specific programs, memorandums of understanding, plea bargaining, federal rule of evidence, and state laws while discussing benefits and limitations. Part III will review the implications of not privileging the restorative justice process. Part IV concludes that state law privileging the restorative justice process is best suited to protect participants.

#### PART I: OVERVIEW OF CONFIDENTIALITY AND PRIVILEGE LAWS

Depending on the context, some statements made by defendants may be inadmissible in court. A confidential communication is one made with the expectation of privacy.<sup>56</sup> Confidentiality is a principle of legal ethics that governs when communications may be disclosed.<sup>57</sup> It is based on a promise not to share any information with anyone outside of the confidential relationship.<sup>58</sup> Privilege is a more absolute protection against compelled disclosure. If the statement is privileged then it is also confidential, but the converse is not true.<sup>59</sup> While confidential information

---

<sup>52</sup> Reimund, *supra* note 1, at 684.

<sup>53</sup> González, *supra* note 16, at 1190.

<sup>54</sup> baliga, *supra* note 6.

<sup>55</sup> E.g., Reimund, *supra* note 1, at 419 n. 161.

<sup>56</sup> *Develop a SART*, OFFICE OF JUSTICE PROGRAMS, [https://www.ncjrs.gov/ovc\\_archives/sartkit/develop/comm-confidentiality-a.html](https://www.ncjrs.gov/ovc_archives/sartkit/develop/comm-confidentiality-a.html) (last visited April 20, 2023).

<sup>57</sup> Lynn S. Branham, “*Stealing Conflicts*” *No More?: The Gaps and Anti-Restorative Elements in States’ Restorative-Justice Laws*, 64 ST. LOUIS U. L.J. 145, 169 n.108 (2020).

<sup>58</sup> Maureen Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. TEX. L. REV. 943, 946 (2008).

<sup>59</sup> Branham, *supra* note 57, at 169 n.108.

is private if subpoenaed it must generally be released unless it is privileged information.<sup>60</sup> Privileged statements, on the other hand, are protected against a court order to disclose.<sup>61</sup>

A privileged communication is defined as a statement made by people within protected relationships that the law shelters from forced disclosure on the witness stand.<sup>62</sup> Examples of protected relationships include lawyer-client, psychotherapist-patient, and marriage.<sup>63</sup> There are limitations to privileged communications. For example, if a lawyer's client or a witness the lawyer calls offers material evidence at trial that the lawyer knows to be false, or comes to know of its falsity, then the lawyer must take reasonable remedial measures such as disclosure to the tribunal.<sup>64</sup> This disclosure rule severely limits what defendants can say in restorative sessions if the process is not privileged. If the defendant admits guilt during a pre-adjudication restorative justice session and the restorative process breaks down, neither the defendant nor a witness can testify that the defendant is innocent as the lawyer will know that the statement of innocence is false. This rule applies to a post-adjudication restorative justice session if the case is still appealable. If in a post-adjudication restorative justice session the defendant reveals information in the session that they testified to the contrary during the trial the lawyer must take remedial measures such as disclosure to the tribunal.<sup>65</sup> Given the attorney-client privilege exceptions, a separate privilege for restorative justice is needed to protect the parties if the process breaks down.

Privilege rules are also integrated into the Federal Rules of Evidence. Federal Rule of Evidence 408 privileges compromise offers and negotiations.<sup>66</sup> It dictates that evidence is inadmissible when it is offering, promising, or accepting a compromise or "attempting to compromise the claim."<sup>67</sup> Federal Rule of Evidence 408 protects conduct and statements "made during compromise negotiations about the claim"<sup>68</sup> when offered to prove or disprove a disputed claim, impeach, or contradict a party.<sup>69</sup> However, evidence disclosed in a compromise may be introduced if offered for a different purpose, such as proving a witness' bias or prejudice.<sup>70</sup>

---

<sup>60</sup> Develop a SART, *supra* note 5.

<sup>61</sup> *See Privilege*, BLACK'S LAW DICTIONARY, 11th ed. 2019).

<sup>62</sup> *Id.*

<sup>63</sup> FED. R. EVID. 501 (advisory committee's notes to 1974 enactment).

<sup>64</sup> MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3).

<sup>65</sup> *Id.*

<sup>66</sup> FED. R. EVID. 408.

<sup>67</sup> FED. R. EVID. 408(a)(1).

<sup>68</sup> FED. R. EVID. 408(a)(2).

<sup>69</sup> FED. R. EVID. 408(a).

<sup>70</sup> FED. R. EVID. 408(b).

Federal Rule of Evidence 410 privileges pleas, plea discussions, and related statements.<sup>71</sup> It prohibits evidence of a plea or participation in plea discussion to be introduced against a defendant in a criminal or civil case.<sup>72</sup> However, there two are exceptions. The first is when another statement during the same plea negotiation is introduced and fairness dictates the statements must be considered together.<sup>73</sup> The second exception is when there is a criminal proceeding for perjury or false statement.<sup>74</sup> Then a statement made during a plea discussion may be admissible if the defendant made the statement under oath, on the record, and with counsel present.<sup>75</sup>

Existing privilege laws demonstrate that legislatures and courts have determined that encouraging and protecting uninhibited discourse can be of greater value to society than the potential for incomplete fact-finding in legal proceedings.<sup>76</sup> The same rationale applies to restorative justice. Restorative justice relies on open dialogue. Offenders must be able to accept responsibility and victims need to have the opportunity to give an unfettered voice to the harm suffered. For this discussion to be possible, participants' statements and evidence in the restorative process need to be privileged. States and restorative justice organizations have attempted to protect participants' statements from admissibility through a variety of mechanisms.

## PART II: PRIVILEGING RESTORATIVE JUSTICE

### *Victim Offender Mediation*

Victim offender mediation (VOM) is the oldest form of restorative justice in the U.S.<sup>77</sup> During the mid-1980s, restorative justice, and victim offender mediation were codified in similar numbers.<sup>78</sup> From the early 1990s to 2002 victim offender mediation was included in more statutes than restorative justice.<sup>79</sup> However, after 2004 a shift happened, and restorative justice laws increased while victim offender mediation

---

<sup>71</sup> FED. R. EVID. 410.

<sup>72</sup> FED. R. EVID. 410(a).

<sup>73</sup> FED. R. EVID. 410(b)(1).

<sup>74</sup> FED. R. EVID. 410(b)(2).

<sup>75</sup> *Id.*

<sup>76</sup> Quince Hopkins, *The Devil is in the Details: Constitutional and Other Legal Challenges Facing Restorative Justice Responses to Sexual Assault Cases*, 50 No. 3 CRIM LAW BULLETIN ART 1 (2014).

<sup>77</sup> Reimund, *supra* note 1, at 673.

<sup>78</sup> González, *supra* note 19 at 1030-31.

<sup>79</sup> *Id.*

remained stagnant.<sup>80</sup> Since 2009, restorative justice laws are more than twice as common as victim offender mediation.<sup>81</sup> Nonetheless, victim offender mediation remains a commonly practiced form of restorative justice.<sup>82</sup>

Victim offender mediation processes encourage offenders to openly discuss their version of the offense being mediated.<sup>83</sup> Therefore, admissions of prior crimes may be revealed as part of the story.<sup>84</sup> In 1994, when victim offender mediation was at the height of its popularity, the American Bar Association (ABA) passed a resolution urging federal, state, and local governments to incorporate VOM programs into their criminal legal systems.<sup>85</sup> Along with the resolution, a list of thirteen program requirements was created.<sup>86</sup> One of the requirements deals with confidentiality.<sup>87</sup> It mandates that “[s]tatements made by victims and offenders and documents and other materials produced during the mediation/dialogue process are inadmissible in criminal or civil court proceedings.”<sup>88</sup> The ABA’s privilege requirement has not been adopted nationwide.<sup>89</sup>

The varying degrees that states privilege VOM shows how drastically participants’ rights change from state to state. For example, Tennessee’s VOM statutes institute some of the ABA protections.<sup>90</sup> Tennessee’s code provides that all materials and communications of VOM centers are privileged and not subject to disclosure.<sup>91</sup> Colorado’s statute authorizing VOM does not establish confidentiality for the parties.<sup>92</sup> However, Colorado does attempt to make statements confidential in three other ways. First, under adult diversion programs, which include restorative justice practices, statements are confidential except for impeachment purposes.<sup>93</sup> Second, if a court orders the parties to participate in restorative justice, any statement during the conference is confidential unless the

---

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Reimund, *supra* note 1, at 407.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 409.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See Id.* at 410.

<sup>90</sup> *Id.*

<sup>91</sup> TENN CODE ANN. § 16-20-103(a) (2020).

<sup>92</sup> COLO. REV. STAT. ANN. § 17-28-103.

<sup>93</sup> COLO. REV. STAT. ANN. §18-1.3-101(9)(d); *See* Shannon Sliva, Elizabeth 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, 493 (2019).

defendant commits a chargeable offense during the conference.<sup>94</sup> Third, there is complete protection for statements made during the restorative process for first-time juvenile petty offenses or municipal violations.<sup>95</sup> Nevertheless, these statutes are vague regarding which party holds the privilege and when it applies.<sup>96</sup> Under these statutes participants risk their statements being admissible because it is not clear who the privilege protects and when the privilege begins in the VOM process. The lack of procedural safeguards discourages participation in the mediation.

When information in victim offender mediation is not privileged, the integrity and effectiveness of the mediation decrease. The Milwaukee County District Attorney's Office operates a Community Conferencing Program which is similar to VOM.<sup>97</sup> However, the program does not guarantee confidentiality. In fact, the program mandates participants execute a Consent to Participate which gives notice that information may be revealed outside of the conferences.<sup>98</sup> This limits the efficacy of the Community Conferencing Program. Assistant Polk County Attorney Gay confirmed situations where facilitators stopped conferences to avoid a potential incriminatory comment and chose not to probe into matters outside of the current case.<sup>99</sup> Restricting conversations because the content may be used against the participants limits the scope of the dialogue. Mediation without clear privilege provisions inhibits the effectiveness and healing benefits restorative programs provide.

### *Privileged Through State Law*

On July 15, 2021, Illinois Governor Pritzker signed Senate Bill 64.<sup>100</sup> It amended the code of civil procedure<sup>101</sup> to encourage the use of restorative justice.<sup>102</sup> Prior to this law, offenders were advised against

<sup>94</sup> COLO. STAT. ANN. § 18-1.3-104(1)(b.5)(I); *See* Sliva, Porter-Merrill, Lee, *supra* note 93, at 493.

<sup>95</sup> Sliva, Porter-Merrill, Lee, *supra* note 93, at 493; COLO. REV. STAT § 19-2.5-208(5)(a) (West 2021) (“The contract and any statements contained in the contract or made by the juvenile to the screening entity administering the contract shall not be used against the juvenile.”).

<sup>96</sup> Reimund, *supra* note 1, at 407.

<sup>97</sup> *Id.* at 675.

<sup>98</sup> *Id.* at 686-87 (“[If] [s]omeone is being physically harmed. Someone is in danger of being physically harmed. Someone has committed a felony, or a sexual assault of any type. [There exists e]vidence that tends to prove an accused innocent of the charges leveled against him or her.”).

<sup>99</sup> *Id.* at 675.

<sup>100</sup> *Illinois SB 64*, TRACKBILL, <https://trackbill.com/bill/illinois-senate-bill-64-civ-pro-restorative-justice/2008344/> (last visited Feb. 18, 2022).

<sup>101</sup> *Id.*

<sup>102</sup> ILLINOIS GENERAL ASSEMBLY, Public Act 102-0100, (2021), <https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=102-0100>.

apologizing to victims because there was no privilege.<sup>103</sup> The new law privileges “participation in such practices and ensur[es] that anything said or done during the practice, or in anticipation of or as a follow-up to the practice, is privileged and may not be used in any future proceeding.”<sup>104</sup> The law defines “practice” as a gathering where parties who have been harmed or caused harm and community stakeholders come together to repair harm, “address trauma, reduce the likelihood of further harm, and strengthen community ties.”<sup>105</sup> The broad definition includes restorative justice practices that are outside the court system such as schools, workplaces, and community groups.<sup>106</sup> With three exceptions,<sup>107</sup> “anything said or done” in the course of a restorative justice practice is privileged, meaning it cannot be used “in any civil, criminal, juvenile, or administrative proceeding.”<sup>108</sup> This change to the code of civil procedures offers protection to those participating in restorative justice discussions.

Colorado has more statutes regulating restorative justice than any other state.<sup>109</sup> Colorado’s statute defines restorative justice to include “victim-offender conferences, family group conferences, circles, community conferences, and other similar victim-centered practices.”<sup>110</sup> There is a state restorative justice counsel that advances restorative justice practices throughout Colorado.<sup>111</sup> Restorative justice practices are integrated into both adult and juvenile criminal systems at all stages of the adjudication, from pre-filing to post-sentencing.<sup>112</sup> Both the adult and child restorative justice statute begins with a legislative declaration stating that the objective is to prioritize restorative justice practices.<sup>113</sup>

---

<sup>103</sup> Pete Sherman, *The Privilege of Restorative Justice*, 109 ILL. B.J. 12, 12 (2021).

<sup>104</sup> Public Act 102-0100, Gen. Assemb., Reg. Sess. (ILL. 2021).

<sup>105</sup> *Id.*

<sup>106</sup> Raymon Troncoso, *Bill Protects Actions, Statements Made in Restorative Programs from Use in Court*, CAPITOL NEWS ILLINOIS, April 21, 2021.

<sup>107</sup> *Id.* (“SB 64 provides exceptions that will waive the privilege granted to recipients under three conditions: if disclosure would prevent death or bodily harm, if disclosure is required under another law, or if a court requires a report on a restorative justice practice taking place.”).

<sup>108</sup> *Id.*

<sup>109</sup> González, *supra* note 16, at 1158.

<sup>110</sup> CO ST § 18-1-901.

<sup>111</sup> Sliva, Porter-Merrill, Lee, *supra* note 93 at 479.

<sup>112</sup> *Id.* at 482.

<sup>113</sup> See CO ST § 18-1-102.5(f); CO ST § 19-2.5-101; SHANNON SLIVA, TYLER HAN, CEEMA SAMIMI, KATIE GOLIEB, JENNY MCCURDY, ALEXANDRIA FORTE, STATE OF THE STATE, RESTORATIVE JUSTICE IN COLORADO, (University of Denver, Graduate School of Social Work June 2019).

Colorado's restorative statute for adults differs from the ones governing youth.<sup>114</sup> The youth statute includes confidentiality provisions noting that "[a]ny statements made during the restorative justice process are confidential" and are not to be used for charging or prosecution unless the youth commits a chargeable offense during the process.<sup>115</sup> The statute defining restorative justice for adults does not include the confidentiality provision that the youth statute provides.<sup>116</sup> A bill was introduced in 2017 that would make all restorative justice practices confidential.<sup>117</sup> However, prosecutors and correctional stakeholders' opposition led to the bill's demise.<sup>118</sup> Without the same confidentiality assurances, adults that participate in restorative justice programs in Colorado run the risk of being prosecuted for anything that is revealed in the process. This lack of protection is contrary to Colorado's legislative declaration that restorative justice's effectiveness lies in the "acceptance of responsibility and accountability by offenders."<sup>119</sup>

### *Privileged Through Memorandums of Understanding*

Without confidentiality protections codified at the state level, some practitioners rely on the use of memorandums of understanding (MOU) with local prosecutors.<sup>120</sup> Depending on the MOU, prosecutors agree not to file charges against the responsible person, and anyone else participating in the restorative justice process.<sup>121</sup> This may include statements made in the preparatory, intermediate, and follow-up stage.<sup>122</sup>

The MOU between the San Francisco District Attorney's Office and the San Francisco Public Defender's Office provided an example of how an MOU is used to privilege statements made in a restorative justice practice. This MOU protected statements made not only in the city's restorative justice program but in all collaborative, problem-solving, court programming processes.<sup>123</sup> However, the San Francisco District Attorney

---

<sup>114</sup> Office of Program Policy Analysis and Government Accountability, *A REVIEW RESTORATIVE JUSTICE IN FLORIDA AND OTHER STATES* 11 (Report No. 20-02, Jan. 2020).

<sup>115</sup> CO ST § 19-2.5-102.

<sup>116</sup> CO ST § 18-1-901.

<sup>117</sup> Sliva, Porter-Merrill, Lee, *supra* note 93 at 493.

<sup>118</sup> *Id.*

<sup>119</sup> CO ST § 18-1-102.5(f).

<sup>120</sup> González, *supra* note 19, at 1052 ("Specifically, restorative justice programs enter into agreements with prosecutors, in which the prosecutor agrees not to use any statements made in preparation for or during a restorative justice process in a pending or subsequent criminal case.") (citations omitted).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Sliva, Porter-Merrill, Lee, *supra* note 93, at 493.

Chesa Boudin was recalled in June of 2022.<sup>124</sup> His recall was in large part due to his image as a progressive prosecutor, backlash against the use of the MOU,<sup>125</sup> and claims that he had overly lenient charging decisions.<sup>126</sup> Since Boudin's recall, San Francisco's Restorative Justice court program was halted and the MOU was suspended.<sup>127</sup> The new District Attorney claims that the restorative justice program was halted because Boudin's administration did not have an appropriate MOU in place.<sup>128</sup> Even with an MOU in place if the subsequent prosecutor decides to ignore a prior MOU the statements may end up being disclosed.<sup>129</sup> The recall election shows that while MOUs may be an effective, ameliorative fix to confidentiality concerns it is not a sustainable solution.

Impact Justice's Restorative Justice Project for juvenile justice in Oakland, California is an alternative example of how MOUs can provide confidentiality.<sup>130</sup> The project has an agreement with the juvenile court prosecutor where "the DA agrees that all new information learned in the conferencing process (including pre-conference meetings) will not be used against the youth."<sup>131</sup> The MOU guarantees that the prosecutor will not subpoena Restorative Justice Project staff or other participants.<sup>132</sup> Additionally, if another youth's criminal conduct is revealed or an

---

<sup>124</sup> Abené Clayton, *San Francisco's Progressive District Attorney Will Face Recall Election*, THE GUARDIAN (Nov. 10, 2021), <https://www.theguardian.com/us-news/2021/nov/10/chesa-boudin-san-francisco-progressive-district-attorney-recall-election>.

<sup>125</sup> *Id.*; Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin.*, N.Y. TIMES, (June 8, 2022), <https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html>.

<sup>126</sup> Jeremy B. White, *San Francisco's Ousted District Attorney Won't Run Again*, POLITICO (Aug. 4, 2022, 01:33 pm), <https://www.politico.com/news/2022/08/04/san-francisco-district-attorney-chesa-boudin-00049868>.

<sup>127</sup> Valerie Ibarra, *What is the Restorative Justice Program, and Why is DA Jenkins Halting this Avenue to Healing?*, SAN FRANCISCO PUBLIC DEFENDER (Aug. 26, 2022), <https://sfpublicdefender.org/news/2022/08/what-is-the-restorative-justice-program-and-why-is-da-jenkins-halting-this-avenue-to-healing/#:~:text=In%20August%202022%2C%20Deputy%20Public,been%20steadily%20growing%20with%20much;Eric%20Ting,SF%20DA%20Brooke%20Jenkins%20says%20restorative%20justice%20halt%20is%20temporary,blames%20Chesa%20Boudin>; Eric Ting, *SF DA Brooke Jenkins Says Restorative Justice Halt Is Temporary, Blames Chesa Boudin*, SFGATE (Aug. 15, 2022, 7:45 am), <https://www.sfgate.com/politics/article/jenkins-halts-restorative-justice-referrals-17374491.php>.

<sup>128</sup> Ting *supra*, note 127.

<sup>129</sup> See Charlie Savage, *The Legal Issues That Led to Cosby's Release*, N.Y. TIMES, July 2, 2021, at A16 (explaining that Bill Cosby was released because "prosecutors violated Mr. Cosby's rights by reneging on an apparent promise not to charge him.>").

<sup>130</sup> Donna Coker, *Crime Logic, Campus Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 204 n.402 (2016).

<sup>131</sup> *Id.* (citing an interview with sujatha baliga, Vice President & Dir., Restorative Justice Project (RJP) (Oakland, California) (2016)).

<sup>132</sup> *Id.*



immigration matter is uncovered during the restorative justice communications the prosecutor agrees not to use that information.<sup>133</sup> The agreement is expansive and covers cases that are not referred by the prosecutor.<sup>134</sup> In pre-charge diversion cases referred by the prosecutor, the youth will not be charged if they complete the process. While the prosecutor may bring cases that are not in diversion, evidence revealed in the restorative justice process remains confidential.<sup>135</sup>

Memorandums of understanding are an ad hoc approach to protecting restorative justice participants' statements.<sup>136</sup> This solution gives prosecutors the power to decide if restorative programs will be privileged. The MOU with the San Francisco District Attorney's Office and Public Defender's Office demonstrates that MOUs are a short-term solution that are not dependable. In the absence of a legally enforceable MOU that includes explicit and detailed privilege protections, the restorative justice participants risk prosecution based on statements made during the process.<sup>137</sup>

### *Privileged Through Plea Bargaining*

Florida has limited restorative justice programming.<sup>138</sup> Florida requires the Department of Juvenile Justice staff to be trained in restorative justice, encourages schools to use restorative justice as an alternative to expulsion and referral to law enforcement, and allows each state attorney to establish a Neighborhood Justice Center.<sup>139</sup> However, like many other states, Florida does not have restorative justice standards or guidelines.<sup>140</sup> There are no confidentiality or privilege protection to participants.<sup>141</sup> The lack of protections threaten the efficacy of restorative justice.

The case of Conor McBride provides a blueprint on how to privilege restorative justice practices when a state does not provide participant protection. Conor McBride was 19 years old when he shot and killed his

---

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> González, *supra* note 16, at 1052.

<sup>137</sup> *See id.*

<sup>138</sup> Office of Program Policy Analysis and Government Accountability, *A REVIEW RESTORATIVE JUSTICE IN FLORIDA AND OTHER STATES* 11 (Report No. 20-02, Jan. 2020).

<sup>139</sup> About RJ, FLORIDA RESTORATIVE JUSTICE ASSOCIATION, <https://www.floridarestorativejustice.com/about-rj.html>, (last visited Feb. 18, 2022).

<sup>140</sup> Office of Program Policy Analysis and Government Accountability, *A REVIEW RESTORATIVE JUSTICE IN FLORIDA AND OTHER STATES* 11 (Report No. 20-02, Jan. 2020).

<sup>141</sup> Florida Restorative Justice Association, *supra* note 139.

fiancé, Ann Grosmaire, during an argument.<sup>142</sup> At that time, Conor and Ann were in a three-year relationship.<sup>143</sup> After Conor shot her he drove to the police department and turned himself in, admitting that he had just killed his fiancé.<sup>144</sup> Conor was charged with first-degree murder.<sup>145</sup> In Florida, first-degree murder comes with a mandatory life sentence.<sup>146</sup> Ann's parents, the Grosmaires, knew Conor well and did not want him to spend the rest of his life in prison.<sup>147</sup> Therefore, the Grosmaires mentioned restorative justice to Conor's parents.<sup>148</sup> After doing more research about restorative justice, Conor's mother, Julie McBride, learned of sujatha baliga, then the director of the restorative justice project at the National Council on Crime and Delinquency.<sup>149</sup> At first baliga did not think restorative justice could be used in this situation due to the severity of the crime committed in a politically conservative place. However, after discovering that the McBrides and Grosmaires were in frequent contact and both requested restorative justice, baliga started to believe that it might be possible.<sup>150</sup>

There was no model on how to host a restorative justice conference because nothing similar had been done in Florida.<sup>151</sup> Florida does not allow mediation for criminal cases.<sup>152</sup> Therefore, baliga decided to use a pre-plea conference meeting as the legal vehicle for the restorative justice sessions.<sup>153</sup> The parties agreed on a pre-plea conference because nothing during the meeting would be admissible at trial.<sup>154</sup> Prior to the conference, Conor was assured that nothing he said during the session could be used as evidence.<sup>155</sup> The conference consisted of Conor, his parents, the Grosmaires, their priest, and their attorneys.<sup>156</sup> The group engaged in a painful conversation where the Grosmaires detailed the impact and

---

<sup>142</sup> Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES MAGAZINE (Jan. 4, 2013), <https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Tullis, *supra* note 142.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Sujatha Baliga, *The Day the Jail Walls Cracked: A Restorative Plea Deal*, TIKKUN, Jan. 10, 2012.

<sup>152</sup> *Id.*; Jim Ash, *The Aim of Restorative Justice is to Make Victims Whole*, FLORIDA BAR NEWS, July 5, 2021.

<sup>153</sup> Baliga, *supra* note 151.

<sup>154</sup> *Id.*

<sup>155</sup> Ash, *supra* note 152.

<sup>156</sup> Baliga, *supra* note 151.

meaning that their daughter's murder had on their lives.<sup>157</sup> Conor then recounted what led to the murder and answered questions.<sup>158</sup> In the end, the Grosmaires offered their forgiveness.<sup>159</sup> Following the conference, the Grosmaires asked the prosecutor for ten to fifteen years of jail time.<sup>160</sup> Three weeks after the conference, Conor took the prosecution's offer of a twenty-year sentence plus ten years of probation<sup>161</sup> along with three conditions – that he take anger management classes, agree to speak publicly about teen-dating violence, and perform community service in areas that Ann would have volunteered had she lived.<sup>162</sup>

In a state like Florida, where there are no rules or regulations regarding the confidentiality or privilege of the restorative justice process, the pre-plea conference offered the Grosmaires and McBrides a meaningful and successful way to host the conversation. For states that do not provide protections to parties involved in restorative justice conversations, McBride's pre-plea conference session provides a roadmap for structuring the conversation so that it is inadmissible against the defendant.

### *Privileged Through Federal Rule of Evidence*

Under the Federal Rules of Evidence, statements made during compromise offers and negotiations<sup>163</sup> and pleas and plea discussions<sup>164</sup> are inadmissible. The purpose of making statements during compromise offers and negotiations inadmissible, under Federal Rule of Evidence 408, is to promote "public policy favoring the compromise and settlement of disputes."<sup>165</sup> Similarly, the purpose of Federal Rule of Evidence 410 which makes evidence of pleas, plea discussions inadmissible against the defendant is to promote the disposition of criminal cases by compromise.<sup>166</sup> McBride's restorative justice session was conducted as a part of the pre-plea conference to allow all statements to remain confidential.<sup>167</sup> This was integral in ensuring the most open and restorative conference possible.

---

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Tullis, *supra* note 142.

<sup>162</sup> Ash, *supra* note 152.

<sup>163</sup> FED. R. EVID. 408(a).

<sup>164</sup> FED. R. EVID. 410.

<sup>165</sup> FED. R. EVID. 408 (ACN 1972 Proposed Rules).

<sup>166</sup> FED. R. EVID. 410 (ACN 1972 Proposed Rules).

<sup>167</sup> Ash, *supra* note 152 ("Connor McBride was assured that anything he said in the session would not be used as evidence.").

The purpose of Federal Rules of Evidence 408 and 410 is to promote compromise, negotiations, and plea agreements. However, the framework of the Federal Rules of Evidence is not expansive enough to provide meaningful protections to restorative justice discussions.<sup>168</sup> Restorative justice involves a dialogue regarding the harm, addresses the victims' needs, and discusses the next steps. This process does not fall within the parameters of a compromise offer or negotiation under Federal Rule of Evidence 408. Furthermore, the two exceptions under 408 greatly reduce protections for restorative justice participants if the process was to be conducted under this rule. First, conduct or statements made during compromise negotiations may be offered in a criminal case when the "negotiations are related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority."<sup>169</sup> Second, the court may admit evidence from compromise offers to show a witness's bias, prejudice, to negate a claim of undue delay, or to prove an effort to obstruct a criminal investigation or prosecution.<sup>170</sup> Federal Rule of Evidence 408 does not offer the broad protection needed for restorative justice participants.

Federal Rule of Evidence 410 provides that in civil and criminal cases, the evidence made in a plea discussion is inadmissible against the defendant. There are two exceptions under Federal Rule of Evidence 410. The first exception allows statements made during plea discussions to be admitted if another statement from the same plea was admitted and if in fairness the statements have to be considered together.<sup>171</sup> The second exception allows the statement to be admitted if it is a criminal proceeding for perjury or false statement and the defendant made the statement under oath, on the record, and with counsel present.<sup>172</sup>

Much like Federal Rule of Evidence 408, Federal Rule of Evidence 410 does not provide the privilege necessary to ensure that the restorative justice process is an open dialogue. Neither evidence rule accounts for conversations outside of the negotiation or plea agreement nor do they protect statements that are made leading up to or after the event. If the restorative justice process is privileged under Federal Rules of Evidence 408 or 410, the scope of the protections must be expanded. The privilege

---

<sup>168</sup> Statements made in compromise or negotiation are privileged in the federal rules and by many states if offered to prove the validity of a claim, but this privilege attaches to compromise of civil claims and would not be applicable in a court diversion.

<sup>169</sup> FED. R. EVID. 408(a)(2); *See U.S. v. Hauert*, 40 F.3d 197, 200 (7th Cir. 1994) (holding evidence of taxpayer's conduct during previous income tax audit, relating to his claim of tax-exempt status, was admissible in subsequent criminal prosecution for tax evasion).

<sup>170</sup> FED. R. EVID. 408(b).

<sup>171</sup> FED. R. EVID. 410(b)(1).

<sup>172</sup> FED. R. EVID. 410(b)(2).

must span the entire process, from preparations to follow-up, include all participants, not just the parties directly involved, and cover all evidence discovered in the process. While enacting an additional Federal Rule of Evidence to privilege the restorative justice process would provide a federal standard of protection, it is insufficient as it would only apply to federal cases.

### *Privileged Through an Alternative Dispute Resolution Statute*

The Uniform Mediation Act (UMA) is a template for laws regarding mediation.<sup>173</sup> Thirteen states, including the District of Columbia enacted the UMA.<sup>174</sup> The Act defines mediation as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”<sup>175</sup> Restorative practices, such as victim offender mediation, may fall under this definition and be covered under the UMA.<sup>176</sup> However, victim offender mediations that involve serious violence will likely not be resolved with a voluntary agreement.<sup>177</sup> To determine if restorative practices may be covered by the UMA, an evaluation of the program needs to be done to determine if it fits under the mediation definition.<sup>178</sup> The UMA provides that “a mediation communication is privileged . . . and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.”<sup>179</sup> This privilege is extended to the “mediation party,”<sup>180</sup> the mediator,<sup>181</sup> and a “nonparty participant.”<sup>182</sup>

If restorative justice participants are to be protected from their statements under the UMA it is crucial that admissions of prior crimes are privileged. Section 5 of the UMA precludes privilege for “a person who intentionally uses mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity.”<sup>183</sup> The UMA comments reveal that this exception does not apply to instances where

---

<sup>173</sup> Andrea Schneider, *Which Means to an End under the Uniform Mediation Act?* 85, MARQ. L. REV. 1, 2 (2001).

<sup>174</sup> Mediation Act, Uniform Law Commission, <https://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bb-ab-fc-7d-e9a-59-110> (last visited April 17, 2023).

<sup>175</sup> Unif. Mediation Act §2(1).

<sup>176</sup> Reimund, *supra* note 1, at 420.

<sup>177</sup> *Id.* at 42.

<sup>178</sup> *Id.*

<sup>179</sup> Unif. Mediation Act §4(a).

<sup>180</sup> Unif. Mediation Act §4(b)(1).

<sup>181</sup> Unif. Mediation Act §4(b)(2).

<sup>182</sup> Unif. Mediation Act §4(b)(3).

<sup>183</sup> Unif. Mediation Act §5(c).

crimes are merely being discussed.<sup>184</sup> The UMA Drafting Committee discussed and ultimately declined to create a privilege exception for admissions of past conduct that “portends future bad conduct.”<sup>185</sup> Accordingly, the UMA privileges disclosure of prior crimes.<sup>186</sup>

Section 6 of the UMA includes two additional privilege exceptions. Section 6(a) includes privilege exceptions for a “signed mediated agreement, a public document, a threat of bodily harm or violent crime, a plan to commit or conceal criminal activity, the response to a claim of misconduct or malpractice, and abuse or neglect cases in which child or adult protective services is a party.”<sup>187</sup> Section 6(b)’s privilege exceptions require a judge to hold an in camera evidentiary hearing to determine if the “need for the evidence substantially outweighs the interest in protecting confidentiality.”<sup>188</sup> This exception applies to criminal cases.<sup>189</sup> Restorative justice participants that rely on the UMA for privilege protections will not be aware of potentially adverse criminal consequences until after the mediation.<sup>190</sup> Allowing this posthoc analysis to determine if evidence produced in the restorative justice session is admissible is the type of exception that hinders the restorative justice process.

Nebraska has second most restorative justice laws.<sup>191</sup> Nebraska has formally practiced restorative justice since the 1990s.<sup>192</sup> The state’s practices can be grouped into family group conferencing, victim-offender mediation, problem-solving courts, and victim-youth conferencing.<sup>193</sup> Nebraska was the first state to adopt the Uniform Mediation Act (UMA).<sup>194</sup> The UMA applies to mediations where the parties are required to mediate by statute, court, or administrative agency.<sup>195</sup> Under the Uniform Mediation Act, communications are privileged unless an exception exists.<sup>196</sup> Aside from the privilege exceptions in the UMA, Nebraska allows two other prominent exceptions. The first is an agreement evidenced by a record signed by all parties. The second is when it is a

---

<sup>184</sup> *Id.*; Reimund, *supra* note 1, at 424.

<sup>185</sup> Unif. Mediation Act §6 cmt. 5.

<sup>186</sup> Unif. Mediation Act §6 cmt. 5; Reimund, *supra* note 1, at 424.

<sup>187</sup> Laflin *supra* note 58 at 966; Unif. Mediation Act §6(a)(1)-(7).

<sup>188</sup> Unif. Mediation Act §6(b).

<sup>189</sup> Unif. Mediation Act §6(b)(1).

<sup>190</sup> Laflin *supra* note 58 at 968.

<sup>191</sup> González, *supra* note 16, at 1158.

<sup>192</sup> Kristen Blankley, Alisha Jimenez, *Restorative Justice and Youth Offenders in Nebraska*, 98 NEB. L. REV. 1, 17 (2019).

<sup>193</sup> *Id.* at 18-20.

<sup>194</sup> Department, *Nebraska First State to Adopt Uniform Mediation Act*, 58 DISP. RESOL. J 9, 9 (2003).

<sup>195</sup> NEB. REV. STAT. § 2-2932(a)(1).

<sup>196</sup> NEB. REV. STAT. § 25-2935(a).

felony proceeding and the court finds that the proponent of the evidence has shown they cannot otherwise obtain it and the need for the evidence is substantially outweighed by the interest in protecting confidentiality.<sup>197</sup>

Nebraska's Juvenile Code relies upon the juvenile privilege statute within Nebraska's 1991 Dispute Resolution Act.<sup>198</sup> Under this Act, confidentiality applies to both communications made in connection with the matter and mediation agreements, so long as the mediation occurs at a statewide community mediation center.<sup>199</sup> For any juvenile case, Nebraska allows the court to provide the parties the opportunity to address issues using restorative justice practices.<sup>200</sup> These practices include victim offender mediations and family group conferences.<sup>201</sup> However, juveniles do not receive the same protections as adults under the Act. Information obtained from a juvenile in the course of a restorative justice program conducted under the Dispute Resolution Act is admissible as rebuttal or impeachment evidence in any future adjudication under the Nebraska Juvenile Code or any criminal proceeding.<sup>202</sup> Additionally, admissions, confessions, or incriminating information can be considered by a court at sentencing or by a juvenile court during disposition proceedings.<sup>203</sup> Therefore, if charges are brought after a juvenile defendant conveys incriminating information in the restorative justice proceeding the juvenile would likely choose not to testify because if they did, they would be impeached with that information. Juveniles risk future prosecution or harsher sentencing as a result of their participation in restorative justice practices.

Despite Nebraska's extensive use and long history of restorative justice, its confidentiality protections are weak. Under the Uniform Mediation Act, the mediation is confidential unless the evidence is offered in a felony prosecution, and the court finds that the need for the evidence is substantially outweighed by the interest in protecting confidentiality. Under the Dispute Resolution Act, communications are confidential unless the offense involves a juvenile. The lack of privilege protections in Nebraska's statute results in offenders being incarcerated due to their participation in restorative justice. Restorative justice prioritizes open

---

<sup>197</sup> NEB. REV. STAT. § 25-2935(a)(1); NEB. REV. STAT. § 25-2935(b)(1).

<sup>198</sup> See NEB. REV. STAT. § 25-2914.01(2).

<sup>199</sup> NEB. REV. STAT. § 25-2914(1); See Blankley, Jimenez *supra* note 192 at 37; NEB. REV. STAT. § 25-2914(4) ("Confidential communications and materials are subject to disclosure when all parties agree in writing to waive confidentiality regarding specific verbal, written, or electronic communications relating to the mediation session or agreement.").

<sup>200</sup> NEB. REV. STAT. § 43-247.03(1).

<sup>201</sup> *Id.*

<sup>202</sup> NEB. REV. STAT. § 25-2914.01(2).

<sup>203</sup> *Id.*

dialogue which commonly involves discussion of prior conduct. Relying on a privilege under a mediation statute may be risky for if no resolution is reached at the mediation, information discussed during the mediation in a criminal matter could be subject to disclosure at trial.<sup>204</sup> If a state provides a broad and complete privilege of the restorative process it is essential that the privilege exists even if the mediation is not successful.

### PART III: IMPLICATIONS OF NOT PRIVILEGING THE RESTORATIVE JUSTICE PROCESS

Many criminal defendants do not testify because doing so may lead to the government eliciting the defendant's criminal history and prior bad acts.<sup>205</sup> Silencing criminal defendants deprives them of crucial rehabilitative and integrative opportunities.<sup>206</sup> Restorative justice relies on open dialogue and admissions of guilt, therefore it is critical that there be space for defendants to speak.<sup>207</sup> Concerns about confidentiality arise for both the victim and offender because non-binding admissions of guilt facilitate candid and open discussions between the victim, offender, and other participants.<sup>208</sup> For defendants to feel at liberty to fully participate in the restorative process, it is imperative that all conversations be inadmissible in court. Without ensuring a complete privilege, the effectiveness of restorative justice is limited.

---

<sup>204</sup> Gabruek Teninbaum, *Easing the Burden: Mediating Misdemeanor Criminal Matters*, 62-JUL DISP. RESOL. J. 63, 65 (2007).

<sup>205</sup> Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1460-61 (2005); ("Under Rule 609 of the Federal Rules of Evidence, a defendant who takes the stand may have his criminal history presented to the jury to impeach his credibility, subject to a balancing test. Over seventy percent of defendants who testify are impeached in this way.") *Id.*

<sup>206</sup> *Id.* at 1496.

<sup>207</sup> Tina Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL'Y 301, 312 (2007); See Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1158 (2009) ("Confidentiality was linked to the rehabilitative philosophy of the juvenile justice system since it was understood that confidential proceedings would allow youth to benefit from treatment and services while being protected from the stigma of a criminal record that might impede their progress in school, work, and the community.").

<sup>208</sup> Hopkins, *supra* note 76, at 50; Christopher Lee, *They All Laughed at Christopher Columbus When He Said the World was Round: The Not-So-Radical and Reasonable Need for a Restorative Justice Model Statute*, 30 ST. LOUIS U. PUB. L. REV. 523, 561 (2011).



*Nonvoluntary Restorative Justice Practices*

While restorative justice is premised on the requirement of voluntary participation by the victim and offender,<sup>209</sup> many statutes do not require the process to be voluntary. Frequently judges or other government officials are allowed to require the person who committed the crime to participate in the restorative justice process.<sup>210</sup> For example, in California and Wisconsin's juvenile system, if the victim consents, an offender may be ordered to participate in victim offender conferencing.<sup>211</sup> In Vermont, "the court may, as a condition of probation, require the offender" to "[p]articipate in the Restorative Justice Program."<sup>212</sup> Missouri authorizes restorative justice programs in the state's correctional centers to "require that offenders offer acts and expressions of sincere remorse."<sup>213</sup> Mandating restorative justice processes removes the opportunity for the offender to understand and assume responsibility for the harm caused.<sup>214</sup> Requiring offenders to participate in restorative programs that mandate an apology hinders the restorative process of the offender owning the harm they committed.

*Requiring Admission of Guilt for Restorative Justice*

"Over half of the restorative justice programs in the United States require the offender to plead guilty or admit guilt to the offense before participating in victim offender mediation, family group conferencing or circle."<sup>215</sup> Recidivism rates decrease when programs operate in non-coercive environments and attempt to involve victims and community members.<sup>216</sup> However, discussions about the underlying facts of the incident is largely discouraged in many restorative programs.<sup>217</sup> When the admission of guilt is a prerequisite to participation in a diversionary program, such as restorative justice, there is "an inducement to admit

---

<sup>209</sup> See Branham, *supra* note 57, at 147-48.

<sup>210</sup> *Id.* at 149.

<sup>211</sup> CAL. WELF. & INST. § 202(f) (2008) ("[J]uvenile court may, as appropriate, direct the offender to complete a victim impact class, participate in victim offender conferencing subject to the victim's consent . . ."); WI ST § 938.34(5r) ("Victim-offender mediation program. Order the juvenile to participate in a victim-offender mediation program if the victim of the juvenile's delinquent act agrees.").

<sup>212</sup> VT. STAT. ANN. TIT. 28, § 252(b)(15) (2018).

<sup>213</sup> MO. REV. STAT. § 217.440 (1997), See Branham, *supra* note 57, at 147-48.

<sup>214</sup> *Id.* at 147.

<sup>215</sup> Mary Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 8 (2004).

<sup>216</sup> Maryfield, Przybylski, Myrent, *supra* note 1.

<sup>217</sup> M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. Rev. 123, 146 (2016).

responsibility to avoid the uncertainty of a court outcome and to dispose of the matter as quickly as possible.”<sup>218</sup>

For example, in Alabama, participation in restorative justice is conditioned upon formal admission of accountability to a state actor.<sup>219</sup> Alabama law requires a written statement from the offender in which they accept “responsibility for the offense” and the statement “shall be admissible in any criminal trial.”<sup>220</sup> Meanwhile, there is no confidentiality protection for participants in pre-trial restorative justice programs.<sup>221</sup> Requiring the admissibility of the statement of guilt relieves the state of its constitutional burden of proving guilt beyond a reasonable doubt. Although Alabama is an outlier among restorative laws in requiring an admissible statement of guilt as a condition of participation in restorative justice,<sup>222</sup> it demonstrates the type of problematic practices that occur when there are no confidentiality requirements.

Alaska conditions participation in restorative justice on formal admission of accountability to a state actor.<sup>223</sup> With the consent of the victim, the prosecutor, and the defendant, a judge can refer a case to a restorative justice program.<sup>224</sup> The parties may also propose the recommendations of the restorative program in the sentencing agreement.<sup>225</sup> If the court accepts the agreement, it can impose the sentence without a pretense of an investigation.<sup>226</sup> Moreover, a judge can be present in a restorative justice proceeding when the proceedings are conducted on the record and the parties agree the minutes kept are a fair representation.<sup>227</sup> A judge can even speak at the proceedings if the comments do not detract from the judge’s neutrality.<sup>228</sup> Instead of allowing restorative justice to be an alternative to punitive sentencing as intended, Alaska’s restorative justice statute integrates the restorative justice process the criminal legal system.

---

<sup>218</sup> Kate Warner, *Family Group Conferences and the Rights of the Offender*, in *FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM?* 141, 142 (Christine Alder & Joy Wundersitz eds., 1994).

<sup>219</sup> González, *supra* note 16, at 1192.

<sup>220</sup> González, *supra* note 19, at 1052; *See* González, *supra* note 16, at 1189 n.292 (“The waiver in Alabama is broad and the statutorily ambiguous as to any limit in duration. *See* ALA. CODE § 45-28-82.25(a)(3) (2020). Such incongruity heightens due process concerns.”).

<sup>221</sup> González, *supra* note 19, at 1052.

<sup>222</sup> Gonzalez, *supra* note 16, at 1192.

<sup>223</sup> *Id.*

<sup>224</sup> ALASKA R. CRIM. P. 11(i)(1) (West 2020).

<sup>225</sup> ALASKA R. CRIM. P. 11(i)(2) (West 2020).

<sup>226</sup> ALASKA R. CRIM. P. 11(e)(1) (West 2020).

<sup>227</sup> ALASKA R. CRIM. P. 11(e)(4) (West 2020).

<sup>228</sup> *Id.*

Massachusetts state law mandates that the offender accept responsibility in order to participate in restorative justice practices.<sup>229</sup> Massachusetts allows restorative justice practices to occur at any stage of the criminal proceedings, including prior to the filing of a criminal complaint.<sup>230</sup> However, the case may not be resolved through restorative justice without judicial approval.<sup>231</sup> Massachusetts law also provides that defendants' statements are confidential, and information obtained during the restorative process may not be used in a criminal prosecution.<sup>232</sup> Additionally, evidence of participation in community-based restorative justice programs alone is not allowed to be used as evidence or an admission of guilt. However, there are two exceptions to the confidentiality protections.<sup>233</sup> Evidence that could otherwise be obtained through an independent source or that would have been inevitably discovered by lawful means is admissible.<sup>234</sup> While these are common exceptions to privilege laws, they result in offenders risking self-incrimination by participating in the restorative justice process.

### *Pre and Post Adjudication Restorative Justice Implications*

If the restorative justice practices are occurring pre-adjudication, there is a risk that should the restorative process break down, anything that was said before and during the process is admitted in the later criminal proceeding.<sup>235</sup> Even if the offense is resolved through the restorative process, the defendant is vulnerable to additional charges from unrelated crimes discussed during the process.<sup>236</sup> There are risks associated with not privileging post-adjudication restorative justice practices. For example, if a defendant reveals information about other crimes that were not charged, additional charges could be levied against them.<sup>237</sup> Without ensuring the communications are privileged and inadmissible in court, the defendant is disincentivized from fully participating.<sup>238</sup> Therefore, for restorative justice to be effective and serve as a meaningful reform to the criminal

---

<sup>229</sup> MA. ST. 276B §1 (“[A]n offender shall accept responsibility for their actions and the process shall support the offender as the offender makes reparation to the victim or to the community in which the harm occurred.”).

<sup>230</sup> MASS. GEN. LAWS. c. 276B, § 2 (2018).

<sup>231</sup> See Georgia Critsley, *First and Last Contact: The Recent Evolution of Diversion Law in Massachusetts*, 100 MASS. L. REV. 85, 97 (2019); MASS GEN. LAWS. C. 276B, § 2 (2018).

<sup>232</sup> MA. ST. 276B §4.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Ikpa, *supra* note 207, at 312.

<sup>236</sup> *Id.*

<sup>237</sup> Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 876 (2013).

<sup>238</sup> *Id.*

legal system, there must be legal safeguards protecting statements from being used against the offender directly or indirectly.<sup>239</sup>

#### PART IV: POTENTIAL SOLUTION

States address making restorative justice privileged and confidential in a variety of ways. The majority of these mechanisms lack sufficient privilege protections. Privileging restorative justice through federal rules of evidence will only impact federal crimes, not prosecutions under state law. Memorandums of understanding only provide protections to a small number of offenders prosecuted in a jurisdiction where a memorandum of understanding exists. Furthermore, as demonstrated by San Francisco's District Attorney Boudin's recall, memorandums of understanding are ad hoc and unreliable as their effectiveness fluctuates depending on who is in office.

Privileging restorative practices through plea bargaining and specific programs mandate a specific way that a restorative process is held. Additionally, privileging through plea bargaining is not a diversionary program. It does not serve as an alternative to the criminal legal system. Instead, the restorative practices are conducted after the offender formally admits guilt. This runs contrary to the paradigm shift that restorative justice offers. While plea negotiations may provide an opportunity for healing and open dialogue as seen in Conor McBride's case, he was still sentenced to almost double the prison sentence that the victim's parents recommended. Ninety percent of criminal cases in the United States are settled by plea agreements.<sup>240</sup> Plea agreements enhance the state's power to punish and incarcerate offenders who are often victims of discrimination based on their race, income, gender, or mental disability.<sup>241</sup> Conducting restorative justice through plea bargaining will only increase the already staggering high number of pleas in the criminal legal system and increase the amount of people incarcerated.

State statutes are able to provide comprehensive protection to restorative justice participants. Whether it is through a mediation or alternative dispute resolution statute as seen in Nebraska, or a specific restorative justice law like the one in Illinois, state statutes that privilege restorative justice practices effectively protect participants. State statutes

---

<sup>239</sup> *Id.*

<sup>240</sup> John Gramlich, *Only 2% of Federal Criminal Defendants Go To Trial, And Most Who Do Are Found Guilty*, Pew Research Center (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

<sup>241</sup> *Id.*

are not a perfect solution, because, like memorandums of understanding, prosecutors will still have the power to make a referral decision to decide what cases benefit from the privilege. To mitigate the prosecutorial discretion, perhaps a community council or a group decision-making process could determine referrals to restorative programs. Nevertheless, unlike memorandums of understanding, statutes provide a blanket privilege to restorative practices throughout the state. For statutes to provide sufficient protection, they must privilege all statements and evidence offered prior, during, and post the restorative sessions. The Illinois 2021 law is a good example of the type of protection state statutes must enact to ensure that restorative practices are centered on their purpose. The 2021 law privileges anything said or done leading up to or after the practice. Additionally, defining the practice as a gathering where parties who have been harmed or caused harm and community stakeholders come together enacts a broad privilege for all those involved in the practice, not just the offender and victim. This is integral as restorative justice hinges on community stakeholders and the involvement of related parties.

Victim offender meeting processes encourage offenders to openly discuss their version of the offense being mediated.<sup>242</sup> Therefore it is common for prior crimes beyond the current offense to be revealed as a part of the story or the offender's desire to take ownership of the past.<sup>243</sup> It is essential for the offender to feel at liberty to divulge all information regarding the crime and surrounding facts for the practice to be its most effective. Furthermore, for restorative justice to serve as a mechanism to decrease the incarcerated population the process must be privileged so it does not feedback in the punitive system. Therefore, states should adopt statutes that mirror Illinois' and provide clear, broad rules governing confidentiality.

## CONCLUSION

If viewed as an abolitionist practice, accompanied by racial justice and gender justice movements, restorative justice has the potential to serve as a tool to transform the criminal legal system. The process relies on an open and honest dialogue between the victim, offender, and community members. Therefore, all participants need to be at liberty to divulge all information necessary to repair the harm without fear of future prosecution. The restorative justice process needs to be privileged both for the protection of the participants and for its efficacy. State laws that

---

<sup>242</sup> Reimund, *supra* note 1, at 407.

<sup>243</sup> *Id.*

privilege the entire restorative justice process and all participants provide the protection needed to allow restorative justice to be conducted as its practitioners intend.