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### The State of Restorative Justice in American Criminal Law

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# THE STATE OF RESTORATIVE JUSTICE IN AMERICAN CRIMINAL LAW

THALIA GONZÁLEZ\*

Restorative justice has been part of the American criminal justice system for more than three decades. Yet, it has only recently expanded into mainstream reform conversations—particularly those addressing mass incarceration and securing justice—and has gained a new urgency following nationwide protests in response to racial violence and anti-Blackness. Such increased attention necessitates that reformists think carefully about the existing legal landscape of restorative justice to ensure that the construction and refinement of restorative justice laws do not yield undesirable state and local practices. Drawing on a dataset of 264 laws, including statutes, court rules, and regulations in 46 jurisdictions, this Article sets forth a comprehensive empirical analysis of the legalization and operationalization of restorative justice within the American criminal justice system. Findings show that while some uniformity exists across the country, the vast majority of restorative justice laws are highly localized with significant discretion in decision-making. Additionally, given the absence of a universal definition of restorative justice, each jurisdiction must interpret what is or is not a “restorative” in its attempt to reach aspirational goals of system reform. This Article’s analysis affirms that there remain continued risks for participants (offenders, victims, and practitioners) in restorative justice processes, in part because of the significant absence of formal, state-level confidentiality protections. Results also indicate an emerging trend: the use of fees to access restorative justice (e.g., “pay to play”). In isolation, these findings would warrant consideration; however, when viewed in totality and contextualized in the contemporary social and political landscape, this study demands careful examination of the risks and benefits of the rapid legalization and expansion of restorative justice in law and policy. While current restorative justice schemes offer important alternatives to the status quo, in present form, restorative justice cannot be viewed as a panacea for all the ills that plague the criminal justice system or society at large. Rather, reformists must look to these laws as a basic infrastructure from which to begin to radically reorient the criminal justice system.

Introduction .....	1148
I. Methods .....	1152
II. Discussion.....	1156
A. System .....	1165
B. Applicability/Adjudication Process.....	1172
C. Decision Maker .....	1176
D. Party Participation (Voluntary vs. Mandatory) .....	1182
E. Waiver of Rights .....	1188
F. Confidentiality/Admissibility .....	1189
G. Fees.....	1193
Conclusion .....	1195

## INTRODUCTION

Restorative justice has been part of the American criminal justice system for more than three decades.<sup>1</sup> As a philosophy and set of practices, it garnered the attention of legal reformists aiming to reenvision justice in the United States as early as the 1970s.<sup>2</sup> These early theorists viewed restorative justice as a new paradigm that might replace the existing criminal justice system.<sup>3</sup> In contrast to punitive or retributive justice, which both largely perceive crime as harm to protected social values, they argued that restorative justice emphasizes relational harms caused by crime or deviance from social norms.<sup>4</sup> American criminologist Howard

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1. See Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 5 UTAH L. REV. 1027, 1057 (2019).

2. Early restorative justice practices were largely variants on victim-offender mediation and family group conferencing models used in juvenile justice and child welfare settings. See, e.g., Kay Pranis, *Conferencing and the Community*, in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 40, 45 (Gale Burford & Joe Hudson eds., 2000); DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* 26 (Ellen S. Boyne ed., 4th ed. 2006); MARK UMBREIT & MARILYN PETERSON ARMOUR, *RESTORATIVE JUSTICE DIALOGUE* 113 (2010); Howard J. Vogel, *The Restorative Justice Wager: The Promise and Hope of a Value-Based, Dialogue-Driven Approach to Conflict Resolution for Social Healing*, 8 CARDOZO J. CONFLICT RESOL. 565, 568 (2007).

3. See GORDON BAZEMORE & MARA SCHIFF, *JUVENILE JUSTICE REFORM AND RESTORATIVE JUSTICE* 27 (2005); William Bradshaw & David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, 69 FED. PROB. 15, 17 (2005); John Braithwaite, *Restorative Justice and De-Professionalization*, 13 GOOD SOC'Y 28, 28 (2004); Theo Gavrielides, *Restorative Justice—The Perplexing Concept: Conceptual Fault-Lines and Power Battles Within the Restorative Justice Movement*, 8 CRIMINOLOGY & CRIM. JUST. 165, 167 (2008); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 10.1, 10.7 (2007); Kay Pranis, *Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations*, in RESTORATIVE COMMUNITY JUSTICE 287 (Gordon Bazemore & Mara Schiff eds., 2001); Mark S. Umbreit, *Avoiding the Marginalization and “McDonaldization” of Victim-Offender Mediation: A Case Study in Moving Toward the Mainstream*, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 213, 214–15 (Gordon Bazemore & Lode Walgrave eds., 1999); VAN NESS & HEETDERKS STRONG, *supra* note 2, at 26; HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990).

4. Restorative justice can also be viewed as a social contract and the basis of civil society through a practical aim of empowering stakeholders to consider a revised vision of justice, which seeks to recognize a broader notion of participatory and

Zehr's seminal work in the field, *Changing Lenses*, drew a sharp contrast between the contemporary United States criminal justice system—grounded in retributive and punitive theories of justice—and the identity of restorative justice.<sup>5</sup> Zehr's work also oriented and legitimized restorative justice in relation to law, specifically criminal justice processes, by reinforcing existing institutional frameworks (e.g., rules, laws, norms, and cognitive frames).<sup>6</sup>

Since the mid-2000s, there has been rapid expansion of restorative justice laws, developing what can now be appropriately characterized as a restorative justice scheme.<sup>7</sup> However, a prominent gap in the field exists: there has yet to be a comprehensive empirical examination of the codification of restorative justice into American criminal law. This leaves

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deliberative processes through active stakeholder involvement. See Liam Leonard & Paula Kenny, *The Restorative Justice Movement in Ireland: Building Bridges to Social Justice Through Civil Society*, 18.2 IRISH J. SOCIO. 38, 41–42 (2010). See also Shannon Moore, *Restorative Justice: Toward a Rights-Based Approach*, in CHILDREN'S RIGHTS IN CANADA—A QUESTION OF COMMITMENT 179, 179–97 (Brian Howe & Katherine Covell eds., 2007); Shannon A. Moore & Richard C. Mitchell, *Rights Based Restorative Justice: Towards Critical Praxis with Young People in Conflict with the Law*, in THE UN CHILDREN'S RIGHTS CONVENTION: THEORY MEETS PRACTICE 549 (André Alen et al. eds., 2007); ZEHR, *supra* note 3, at 184.

5. Zehr argues that restorative justice offers an alternative paradigm to understand law. ZEHR, *supra* note 3, at 184–85; see also Umbreit, *supra* note 3, at 213.

6. The expansion of restorative justice in the criminal process is not universally accepted inside or outside the restorative justice movement. Some argue that restorative processes joined to the outcomes of criminal dispositions cannot be voluntary. Others question whether the use of restorative justice as a diversionary model may cause net-widening for offenses referred to restorative justice that would not otherwise be adjudicated. There is also the concept of net-deepening if in certain jurisdictions, restorative justice processes impose additional requirements that would not be present in the traditional criminal process. Finally, there is also consideration of whether the punitive nature of the current criminal justice system is simply too contradictory to the values of restorative justice to ever allow for any state-embedded restorative justice practice to nothing more than an exercise of state power. See, e.g., Carolyn Boyes-Watson, *What are the Implications of the Growing State Involvement in Restorative Justice?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 216, 216–17 (Howard Zehr & Barb Toews eds., 2004); Annalise Buth & Lynn Cohn, *Looking at Justice Through a Lens of Healing and Reconnection*, 13 NW. J.L. & SOC. POL'Y 1, 2 (2017); Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 761–62 (2000); Theo Gavrielides, *Bringing Race Relations into the Restorative Justice Debate: An Alternative and Personalized Vision of "the Other."*, 45 J. BLACK STUD. 216, 224–26 (2014); M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 133 (2016); George Pavlich, *Critical Policy Analysis, Power and Restorative Justice*, 75 CTR. FOR CRIME & JUST. STUD. 24, 24–25 (2009); Mara Schiff, *Institutionalizing Restorative Justice: Paradoxes of Power, Restoration and Rights*, in RECONSTRUCTING RESTORATIVE JUSTICE PHILOSOPHY 163, 164 (Theo Gavrielides & Vasso Artinopoulou eds., 2013); Ann Skelton & Cheryl Frank, *How Does Restorative Justice Address Human Rights and Due Process Issues?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 203, 204 (Howard Zehr & Barb Toews eds., 2004).

7. Buth & Cohn, *supra* note 6, at 22

policymakers, academics, and reformists often operating not only in disciplinary silos but also jurisdictional ones as they seek to advance new policies and practices aimed at diminishing the United States' overreliance on punitive justice and mass incarceration.<sup>8</sup> While their efforts are well-intentioned and laudable, without a contemporary accounting of the risks and benefits of the current state of restorative justice laws, opportunities for true reform may be missed. Following the death of George Floyd and nationwide protests in response to racial violence and anti-Blackness, there is an even greater urgency to understand how states have structured restorative justice in their juvenile and adult criminal justice systems.<sup>9</sup> This Article not only provides a critical scaffolding for the discourse on restorative justice but also draws attention to restorative justice laws that, if replicated, will undermine efforts to root out inequity and discrimination within the system and end the era of mass incarceration.

Drawing on an original dataset of 264 laws, including statutes, court rules, and regulations in 46 jurisdictions, this Article sets forth a comprehensive empirical analysis of the legalization and

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8. *See id.* at 18.

9. The public discourse surrounding issues of restorative justice, particularly in conversations about criminal justice and juvenile justice, emerged before the summer of 2020 and included news and media coverage. For example, a 2019 media analysis of more than 50 outlets found that restorative justice is increasingly being positioned as the ready alternative or solution to the traditional criminal justice system. González, *supra* note 1, at 1066. National outlets clustered coverage in 4 main areas: politicians with restorative justice platforms, editorial opinion pieces, criminal justice scholarship, and reform activism. *See, e.g.,* Ryan Brooks, *Cory Booker Said His Fight To Legalize Pot Is About "Restorative Justice" for Communities Hit by the War on Drugs*, BUZZFEED NEWS (Feb. 28, 2019, 12:26 PM) <https://www.buzzfeednews.com/article/ryancbrooks/cory-booker-legal-pot-2020-election> [<https://perma.cc/Y76E-GGS5>]; Kira Lerner, *Rep. Ayanna Pressley Unveils Sweeping Plan to Reshape American Criminal Legal System*, THE APPEAL (Nov. 24, 2019), <https://theappeal.org/rep-ayanna-pressley-unveils-sweeping-plan-to-reshape-american-criminal-legal-system/> [<https://perma.cc/J27D-W6EH>]; Michelle Alexander, *Reckoning With Violence*, N.Y. TIMES (March 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> [<https://perma.cc/M87M-KZPN>]; Sean Illing, *Why We Need a More Forgiving Legal System*, VOX (Nov. 15, 2019, 8:30 AM), <https://www.vox.com/future-perfect/2019/11/15/20947924/what-is-restorative-justice-martha-minow> [<https://perma.cc/B2U8-FW3E>]; Twyla Joseph & Kesi Foster, *Opinion: We Want To End the School-To-Prison Pipeline. 2020 Democrats Are Starting To Listen*, BUZZFEED NEWS (Dec. 3, 2018, 4:32 PM), <https://www.buzzfeednews.com/article/twylajoseph/young-people-presidential-candidates-listening> [<https://perma.cc/UT3M-SLJQ>]. Media prior to 2019 also identified restorative justice as a practical solution to state- and national-level concerns with high incarceration rates, excessively punitive sentencing, tenuous relationships between law enforcement and communities, and racially disparate outcomes in the justice system. *See, e.g.,* Rebecca Beitsch, *States Consider Restorative Justice as Alternative to Mass Incarceration*, PBS NEWSHOUR (July 20, 2016, 11:51AM), <https://www.pbs.org/newshour/nation/states-consider-restorative-justice-alternative-mass-incarceration> [<https://perma.cc/3D5H-SWQY>]; KATHERINE BECKETT & MARTINA KARTMAN, *Violence, Mass Incarceration and Restorative Justice: Promising Possibilities* (2016).

operationalization of restorative justice within criminal justice systems. Data was sorted into 12 categories and classified into 23 subcategories. Part II presents the data in the following manner. First, it describes the national landscape and identifies 6 key trends in the aggregate dataset: (1) the absence of a substantive body of procedural restorative justice laws; (2) the presence of restorative justice laws expressing aspirational goals; (3) the lack of confidentiality guarantees for participation in restorative justice; (4) the voluntary nature of participation for victims (in contrast to offenders);<sup>10</sup> (5) the use of categorical crime exemptions; and, (6) the offender-centered orientation where restorative justice is defined relative to an offender's movement through criminal justice systems. It also highlights two emerging trends: the use of fees to access restorative justice (e.g., "pay to play") and the rise of discretionary decision-making authority granted to probation or parole divisions and offices.

Following this foundational section, Part II then disaggregates this data by key categories, including system, application/adjudication process, decision maker (and form of authority), party participation (victim vs. offender), waiver of rights, confidentiality/admissibility, and fees. In each of these sections, findings are presented at combined and individual jurisdictional levels. The sections also highlight current legal frameworks that raise ethical and constitutional concerns.

The aim of this study is not to be prescriptive as to whether reformists should continue to expand restorative justice in criminal law, nor does it seek to answer the theoretical debate as to whether restorative justice should exist in the legal system. The fact is that restorative justice already exists in law and also across multiple public systems, including education and child welfare.<sup>11</sup> Instead, this study provides macro- and micro-analyses of restorative justice laws in the United States so that any discourse promoting, or rejecting, restorative justice as part of criminal justice reform no longer necessarily exists in a vacuum.

In isolation, each of this study's findings warrants consideration. Yet, when viewed as a whole, particularly in light of the contemporary social and political landscape, this study affirms the need for careful examination of the risks and benefits of the rapid legalization and expansion of

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10. This Article adopts the use of the terms offender, victim, and defendant for consistency with the law studied. There is a field-based preference for language, such as "person who caused harm" and "person who was harmed" to move away from the binary assumptions of the criminal justice system. This alternate language also emphasizes the complexity of human interactions and the social, economic, and political conditions in which harm arises. *See, e.g.,* Ashlee George, Assoc. Dir., Restorative Just. Project, Impact Just., Oakland as a Restorative City (Nov. 6, 2019) (describing field-based terminology and preferences).

11. *See* Buth & Cohn, *supra* note 6, at 5, 10, 14 (discussing restorative justice efforts in Chicago spanning across multiple industries such as law enforcement, education, and the civil court system).

restorative justice in law and policy. The current restorative justice scheme offers an important alternative to the status quo but, in its present form, should not be viewed as a ready-made solution to contemporary justice issues. Amid a moral and political reckoning on Black dignity and citizenship, reformists must instead look to these laws as a basic infrastructure from which to begin radically reorienting the criminal justice system, and hopefully, by extension, society.

### I. METHODS

This study employs textual content analysis<sup>12</sup> to develop an in-depth empirical understanding of the current restorative justice scheme in the United States specific to state-level juvenile justice and adult criminal justice systems.<sup>13</sup> Using Westlaw as an aggregator, this original dataset is composed of statutes, court rules, and regulations for 45 jurisdictions and the District of Columbia.<sup>14</sup> Study search terms were derived from an open and iterative coding process beginning with the initial term “restorative justice” and developed by cross-referencing academic and gray literature

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12. Content analysis is an accepted empirical methodology accepted across multiple fields and is an important method to increase both policy makers’ and the public’s understanding of legal systems. *See, e.g.,* John B. Gates, *Content Analysis: Possibilities and Limits for Qualitative Data*, 73 JUDICATURE 202, 202–03 (1990) (arguing that content analysis is a valuable research tool for testing existing theories or theoretical concepts and produces more reliable data in studies); Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63 (2008) (analyzing the history and benefits of content analysis and arguing that content analysis could form the basis for a uniquely legal empirical); Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 L. & SOC’Y REV. 11 (2005) (discussing how social context and social institutions affect workers’ preferences and choices about mobilizing their rights by interviews with workers who negotiated leaves in the workplace); Christina L. Boyd, *In Defense of Empirical Legal Studies*, 63 BUFF. L. REV. 363 (2015) (exploring the importance of empirical studies as an invaluable method of studying law); Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633, 662–75 (2012) (conducting content analysis of the nearly 1,400 law review articles).

13. This study excluded federal laws from the dataset and subsequent analyses. *See, e.g.,* Bruce A. Green & Lara Bazelon, *Restorative Justice from the Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287, 2295 (2020) (discussing how prosecutors have voluntarily collaborated with social service agencies and community based organizations to divert cases to restorative justice); T. Bennett Burkemper, Jr., Nina Balsam & May Yeh, *Restorative Justice in Missouri’s Juvenile System*, 63 J. MO. BAR 128, 131 (2007) (describing the emergence of restorative justice for juveniles in absence of statutory authorization); Mary Louise Frampton, *Finding Common Ground in Restorative Justice: Transforming Our Juvenile Justice Systems*, 22 U.C. DAVIS J. JUV. L. & POL’Y 101 (2018) (providing a quantitative and qualitative analysis of the Fresno County Community Justice Conference Program). However, there is a pressing need for studies that analyze what has and has not worked in criminal justice settings embracing on the ground specificity.

14. Initial review was conducted across 51 jurisdictions (i.e., all 50 states and the District of Columbia).

to identify a comprehensive list of commonly accepted descriptive terms for restorative justice values, principles, practices, and processes.<sup>15</sup> The final set of 15 terms was used to develop study categories and subcategories of analysis,<sup>16</sup> yielding a dataset of 264 laws.<sup>17</sup> As Table 1 indicates, data was sorted into 12 categories. Applying closed coding, the data was further classified into 23 subcategories.<sup>18</sup>

Table 1. Categories and Subcategories

Categories	Subcategories
Jurisdiction	N/A
Date effective	N/A
Applied Term(s)	N/A
Form of Law	Statute Regulation Court rule

15. By identifying the most commonly used derivatives and associated terms for restorative justice, I was able to create a nonarbitrary set of terms for analysis.

16. For this study I applied the following closed set of terms or codes to each statute, court rule and regulation: circle practices, community conferencing, impact panels, family conferencing, family group conferencing, restorative circles, restorative court, restorative justice, restorative practices, restorative processes, victim-offender, victim offender dialogue, victim offender mediation, victim offender, and victim offender conferencing. More generalized terms associated with restorative justice, such as including accountability, restitution or restoration were excluded as they yielded a high number of results that fell outside the study scope.

17. See Thalia González, *The State of Restorative Justice in American Criminal Law: Appendix*, 2020 WIS. L. REV. FORWARD 87 app. 1 <https://wlr.law.wisc.edu/state-restorative-justice-appendix/> [hereinafter *González Online Appendix*].

18. Coding is an empirical data analysis method by which specific terms are applied to data in closed (predetermined) or open (axial) manner. See generally ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 71–72 (2010) (describing closed-ended and open-ended questions in data gathering). In the analysis process, the codes facilitate the identification of concepts around which the data can be assembled into categories, themes or patterns. See, e.g., *id.* at 125–34 (describing how empirical data in legal studies is commonly gathered); Hall & Wright, *supra* note 12, at 80–81, 107–17 (describing the protocols for the systematic coding of judicial opinions); Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 60 99–100 (2013) (“Generally, the methodology for all empirical research has four steps: (1) design the empirical project; (2) collect and code data; (3) analyze the data; and (4) present the final results . . . Whether qualitative, quantitative, experimental, or multi-method, all empirical research must code raw data into standardized variables that can be analyzed.” (citations omitted)). Two research assistants coded data independently. Coding was then cross-compared for validity by 3 individuals. Any outliers to the codebook were noted and confirmed by joint analysis.

System	Juvenile Justice Criminal Justice Both
Application/ Adjudication Process	Pre-adjudication Post-adjudication
Decision Maker	Prosecutor Court Probation or Parole divisions and offices Department of Corrections Other
Role of Victim	Voluntary participation of victim Mandatory participation of victim
Role of Offender	Voluntary participation of offender Mandatory participation of offender
Waiver of Rights	Presence of rights waiver <sup>19</sup> Absence of rights waiver
Confidentiality/ Admissibility	No protection(s) or waiver required Affirmative protection(s)
Fees	Presence of fee Absence of fee

The *systems* category contains 3 subcategories: juvenile justice, criminal justice, or both.<sup>20</sup> Application (the adjudication process) is divided into 2 subcategories: “pre-adjudication” or “post-adjudication.”<sup>21</sup> The code “pre-adjudication” is assigned when a form of restorative justice is procedurally available prior to adjudication.<sup>22</sup> The code “post-

19. All laws for presence of rights of waiver were subclassified by specific right.

20. See, e.g., FLA. STAT. § 985.155 (2020) (subcategory juvenile justice); ARIZ. REV. STAT. ANN. § 12-299(1) (2020) (subcategory criminal justice); IND. CODE § 35-40-6-4(9) (2020) (subcategory juvenile justice and criminal justice).

21. See, e.g., COLO. REV. STAT. § 18-1.3-101(9)(b) (2020) (coded subcategory pre-adjudication); TEX. GOV'T CODE ANN. § 508.324 (West 2019) (subcategory post-adjudication).

22. In the juvenile justice system, “[p]re-adjudication diversion is defined as providing opportunities for youth who would otherwise face formal processing in the court system so that they can avoid an adjudication of delinquency or conviction for a summary offense and instead directing them into an alternative program, including treatment when appropriate.” MODELS FOR CHANGE INITIATIVE PA., GUIDE TO DEVELOPING PRE-ADJUDICATION DIVERSION POLICY AND PRACTICE IN PENNSYLVANIA 7 (2010), <https://www.pccd.pa.gov/Juvenile-Justice/Documents/Pre->

adjudication” is assigned when a form of restorative justice is procedurally available following adjudication.<sup>23</sup> This represents a continuum ranging from sentencing to post-sentencing to parole. The most common example of post-adjudication occurs during sentencing.<sup>24</sup> “Post-adjudication” is also assigned when restorative justice is presented to victims and/or offenders but has no relationship to sentencing.<sup>25</sup>

For the *decision maker* category, laws are coded into 5 subcategories: prosecutor, court, probation or parole divisions and offices, department of corrections, or other.<sup>26</sup> Data is further coded for *participation* of victims and offenders in restorative justice processes. For each party (victims and offenders), the nature of participation is uniquely coded into 2 subcategories: voluntary or mandatory. Voluntary participation for either party is coded when laws provide individuals the capacity to decide whether or not to participate in a restorative process.<sup>27</sup> Mandatory participation is coded for either party when individuals are mandated to participate in a restorative process through a formal mechanism.<sup>28</sup>

The category *waiver of rights* is coded “yes” if the text explicitly defined a right or set of rights the offender is required to waive by

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Adjudication\_Diversion\_Policy\_Guide.pdf [https://perma.cc/HTC6-4W83]. Across the states, pre-adjudication can occur multiple stages. For example, in Pennsylvania:

Pre-adjudication diversion can occur at various decision-making points in the juvenile justice system. It can provide alternatives for youth who have not yet entered the juvenile justice system but who are at imminent risk of being charged with a delinquent act, and can also channel youth who have been alleged to be delinquent away from formal court processing that could result in an adjudication of delinquency.

*Id.* Similar to the juvenile system, certain offenses and offenders are eligible for diversion. While variation exists as to the specific conditions, diversion at the pre-adjudication stage removes the offender from the formal trial process. *E.g.*, *Deferred Adjudication / Pretrial Diversion*, FINDLAW (Feb. 14, 2019), <https://criminal.findlaw.com/criminal-procedure/deferred-adjudication-pretrial-diversion.html> [https://perma.cc/53FS-8S3F]. Though the terms codified into state law in juvenile criminal cases are different than in an adult criminal case, e.g. adjudication hearing is analogous to trial, coding was applied to all terms that yielded the result of diversion or deferred prosecution.

23. See Hans-Jörg Albrecht, *Post-Adjudication Dispositions in Comparative Perspective*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 293, 293 (Michael Tonry & Richard S. Frase eds., 2001) (“Post-adjudication dispositions include sentencing, enforcement of sanctions, and corrections.”).

24. See, e.g., LA. STAT. ANN. § 46:1846 (2020) (coded subcategory post-adjudication).

25. See, e.g., CAL. PENAL CODE § 5006(a)(1)(D) (West 2020) (coded subcategory post-adjudication).

26. See *infra* Part II.C.

27. See, e.g., N.H. REV. STAT. ANN. § 21-H:4(VIII) (2020) (coded subcategory voluntary participation of offender).

28. See, e.g., OHIO REV. CODE ANN. § 2152.19(C) (West 2019–20) (coded subcategory mandatory participation of offender).

participating in a restorative justice process,<sup>29</sup> and “no” if there is no explicit waiver requirement. Secondary analysis determines which rights are subject to waiver.<sup>30</sup>

Codes applied to the category of *fees* are based on the presence or absence of a fee and the nature of the fee.<sup>31</sup> In short, a law is coded “yes” if it requires the offender to pay a fee to participate in a mandated or voluntary restorative justice program or process.<sup>32</sup>

For the *confidentiality/admissibility* category, the coding applies 5 additional derivative terms to the dataset.<sup>33</sup> Once a subset was identified, secondary coding determined if the law affirmatively protects individuals,<sup>34</sup> including practitioners or facilitators involved in restorative processes, or alternatively, waives protections for statements or other information related to restorative justice, thereby creating the potential of admissibility in current or future proceedings.<sup>35</sup>

## II. DISCUSSION

As of July 2020,<sup>36</sup> 46 jurisdictions have codified “restorative justice”<sup>37</sup> into their juvenile and/or adult criminal justice systems.<sup>38</sup> As

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29. See, e.g., ALA. CODE § 45-39-82.05 (2020) (coded subcategory rights waived and “Y”).

30. See *infra* Part II.E.

31. Laws providing for payment of restitution separate from a restorative justice process are excluded from this category.

32. See, e.g., MONT. CODE ANN. § 46-18-201(4)(o) (2019) (coded subcategory fee present).

33. The terms were: “confidential,” “confidentiality,” “admissible,” “admissibility,” and “privilege.”

34. See *infra* Part II.F.

35. See, e.g., ALA. CODE § 45-39-82.05(a)(4) (2020) (coded subcategory waiver of protection); COLO. REV. STAT. § 18-1.3-204(2)(a)(III.5) (2020) (coded subcategory affirmative protection). General restorative justice laws or laws that did not specifically address confidentiality or admissibility were excluded from this category.

36. No proposed legislation was included in this study.

37. For purposes of this Article, the use of “restorative justice” is inclusive of all derivative search terms. See *infra* note 252 and accompanying text.

38. Analysis shows the 2 most commonly used terms are “restorative justice” and “victim-offender.” As of July 20, 2020, the only states that have not codified restorative justice into criminal law are North Dakota, Rhode Island, South Dakota, South Carolina, and Wyoming. See *González Online Appendix*, *supra* note 17, app. 1. This represents an increase in the legalization of restorative justice from prior studies. González, *supra* note 1, at 1031, 1049 (finding that the term restorative justice appears in 229 statutes, court rules, and regulations in 45 states in the criminal justice, education and child welfare systems); Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 JUST. POL’Y J., Fall 2016, at 1, 6 (finding 20 states included balanced or restorative justice in statute or code); Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging*

Figure 1 indicates, these jurisdictions include 45 states and the District of Columbia<sup>39</sup> for a total of 264 laws, including statutes, court rules, and regulations.<sup>40</sup> The color gradient in Figure 1 illustrates the total number of restorative justice laws in each jurisdiction ranging from zero (white) to more than 30 (black). Data shows that 26 jurisdictions have passed between 1 and 5 laws;<sup>41</sup> 15 jurisdictions between 5 and 10 laws;<sup>42</sup> 1 jurisdiction between 10 and 15 laws;<sup>43</sup> 1 jurisdiction between 15 to 20 laws;<sup>44</sup> 1 jurisdiction between 20 to 25 laws;<sup>45</sup> and 1 jurisdiction between 25 and 30 laws.<sup>46</sup> Only 1 jurisdiction has passed more than 30 laws.<sup>47</sup>

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*Legal Doctrine*, 14 J. POL'Y PRAC. 77, 85 (2015) (showing 32 states provided support for the use of restorative justice in criminal justice settings as of 2014).

39. See *González Online Appendix*, *supra* note 17, app. 1.

40. Of the 264 laws over 90% are statutes. Regulations and court rules comprise less than 10% in the overall data distribution. *See id.*

41. Alaska, Arizona, Arkansas, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Virginia, West Virginia, Wisconsin. *See id.*

42. Alabama, Delaware, Florida, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, Ohio, Oregon, Texas, Utah, Washington. *See id.*

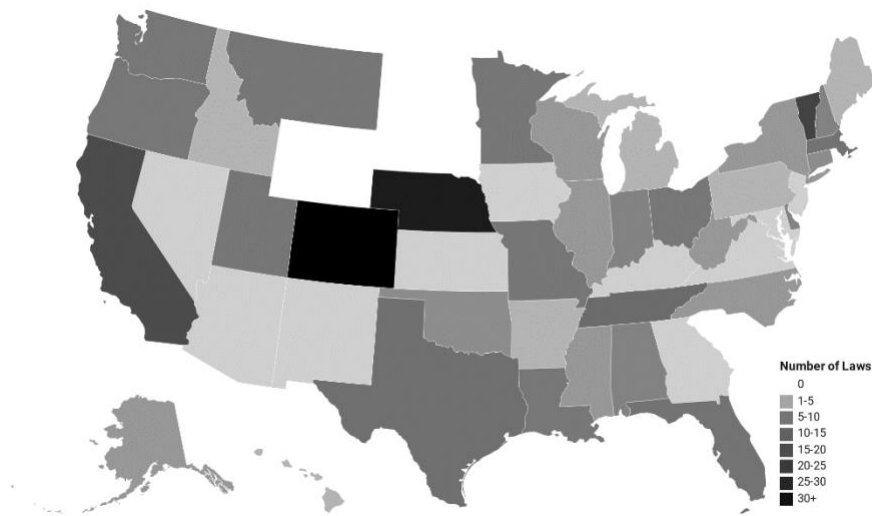
43. Tennessee. *See id.*

44. California. *See id.*

45. Vermont. *See id.*

46. Nebraska. *See id.*

47. Colorado. *See id.* The majority of restorative justice laws in Colorado were passed between 2007 and 2013. Shannon M. Sliva, *A Tale of Two States: How U.S. State Legislatures Consider Restorative Justice Policies*, 20 CONTEMP. JUST. REV. 255, 259–60 (2017).

*Figure 1. Restorative Justice Laws Distributed by Jurisdiction*

Presently, Colorado represents the highest level of legalization of restorative justice across all jurisdictions.<sup>48</sup> The Colorado restorative justice scheme contains a diverse set of laws ranging from aspirational and ideological statements<sup>49</sup> to laws that describe criminal law processes and procedures like diversion programs<sup>50</sup> and probation alternatives,<sup>51</sup> and finally, to criminal law adjacent settings (e.g., the composition of a local juvenile services planning committee).<sup>52</sup> Moreover, 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

48. See *González Online Appendix*, *supra* note 17, app. 1. Of the 37 laws, 15 appear exclusively in the juvenile justice system, 12 exclusively in the criminal justice system, and 10 laws apply to both systems. There were no discernable trends in Colorado, however, a total of 15 laws were unspecific to formal legal procedures. See, e.g., COLO. REV. STAT. § 13-3-116 (2020); COLO. REV. STAT. § 19-2-311 (2020); COLO. REV. STAT. § 19-2-211(1) (2020); COLO. REV. STAT. § 26-6.8-103 (2020); COLO. REV. STAT. § 17-28-103 (2020); COLO. REV. STAT. § 24-33.5-510(3)(d) (2020); COLO. REV. STAT. § 18-1-102(1)(e) (2020); COLO. REV. STAT. § 18-1-102.5(1)(f) (2020); COLO. REV. STAT. § 24-4.1-302.5(1)(1.5) (2020); COLO. REV. STAT. § 24-4.1-303(11)(g) (2020); COLO. REV. STAT. § 19-1-103(44)(b) (2020); COLO. REV. STAT. § 18-1-901(3)(o.5) (2020); COLO. REV. STAT. § 18-25-101(3)(a)(b) (2020); COLO. REV. STAT. 19-2-303 (2020); COLO. REV. STAT. § 25-20.5-801(7) (2020).

49. See, e.g., COLO. REV. STAT. § 19-2-309.5(4)(a)(II) (2020).

50. See, e.g., COLO. REV. STAT. § 19-2-512(2) (2020).

51. See, e.g., COLO. REV. STAT. § 19-2-925(2)(a)(X) (2020).

52. See, e.g., COLO. REV. STAT. § 19-2-211(1) (2020).

technical assistance for programs and aspiring programs.”<sup>53</sup> As the state with the most comprehensive set of restorative justice laws in both the juvenile and adult criminal justice systems, Colorado has sought to develop a large-scale approach to legalizing restorative justice.<sup>54</sup>

Following Colorado with respect to levels of saturation or legalization of restorative justice<sup>55</sup> is Nebraska with 30,<sup>56</sup> Vermont with 20,<sup>57</sup> and California with 18.<sup>58</sup> In Nebraska, 30 restorative justice laws are distributed across 3 categories: the establishment of restorative justice mediation centers under the Office of Dispute Resolution,<sup>59</sup> procedures for such centers,<sup>60</sup> and procedures and processes in juvenile diversion.<sup>61</sup> This more-developed legalization represents restorative justice’s 30-year history in the state: it was first implemented in the child welfare system in the 1990s in the form of family group conferencing.<sup>62</sup> In 2008, that family group conferencing was codified into the juvenile justice system.<sup>63</sup> Notably, however, restorative justice for juveniles is not limited to family group conferencing. For example, county attorneys may also recommend youth participation in victim-offender mediation as part of diversion.<sup>64</sup>

Vermont’s 20 restorative justice laws most substantively address the establishment of restorative justice community centers<sup>65</sup> and the

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53. 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, 479 (2019).

54. *Id.* at 478–85.

55. González, *supra* note 1, at 1053–59.

56. See González *Online Appendix*, *supra* note 17, app. 1.

57. *Id.* Restorative justice as an alternative or adjunct to prosecution has been part of Vermont state policy for 20 years.

58. *Id.*

59. See, e.g., NEB. REV. STAT. § 25-2908 (2019); NEB. REV. STAT. § 25-2902 (2019).

60. See, e.g., NEB. REV. STAT. § 25-2913 (2019); NEB. REV. STAT. § 25-2915 (2019); NEB. REV. STAT. § 25-2911 (2019).

61. See, e.g., NEB. REV. STAT. § 43-2,108.03 (2019); NEB. REV. STAT. § 43-260.06(6) (2019); NEB. REV. STAT. § 43-2,108.04(5)(a) (2019). For example, in June 2019, the Nebraska Legislature enacted Legislative Bill 595, which expanded the Office of Dispute Resolution’s statutory authority to include the provision of restorative justice services. Legis. B. 595, 106th Leg., 1st Sess. (Neb. 2019). Prior to the passage of the 2019 legislation, the Office of Dispute Resolution implemented a three-year statewide restorative justice initiative for juveniles. Kristen M. Blankley & Alisha Caldwell Jimenez, *Restorative Justice and Youth Offenders in Nebraska*, 98 NEB. L. REV. 1, 29 (2019).

62. Blankley & Jimenez, *supra* note 61, at 18.

63. See NEB. REV. STAT. § 43-247.03 (2019).

64. NEB. REV. STAT. § 43-276 (2019). Presently, all statutory authority for victim-offender mediation is limited to juvenile offenders. See, e.g., *id.*

65. See, e.g., VT. STAT. ANN. tit. 24, § 1964 (2020); VT. STAT. ANN. tit. 33, § 5232(b)(7) (2020); VT. STAT. ANN. tit. 33, § 5225(b)(2) (2020); VT. STAT. ANN. tit. 24, § 1961(3) (2020).

procedures and processes in criminal law for juvenile and adult matters.<sup>66</sup> Vermont is one of the few states to adopt restorative justice as a system-level approach for its justice system; state policy is “that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses . . . .”<sup>67</sup> When compared to other jurisdictions, Vermont is also unique as the only state to codify the use of “restorative justice panels”<sup>68</sup> as formal decision-making bodies.

In California, the majority of restorative justice laws are not procedural in nature.<sup>69</sup> Instead, California restorative justice laws fall into 4 categories: definitional,<sup>70</sup> declaratory,<sup>71</sup> aspirational,<sup>72</sup> or grant allocations.<sup>73</sup> This mirrors other states like Illinois<sup>74</sup> and Pennsylvania,<sup>75</sup> whose laws incorporate or adopt concepts of balanced and restorative justice into the juvenile justice system.<sup>76</sup>

Analysis of the combined data reveals that there is no universal form, practice, or process of restorative justice across the country.<sup>77</sup> This leaves

66. See, e.g., VT. STAT. ANN. tit. 28, § 2a (West 2020); VT. STAT. ANN. tit. 33, § 5262(b)(2) (West 2020); VT. STAT. ANN. tit. 28, § 252(b)(15) (2020).

67. VT. STAT. ANN. tit. 28, § 2a (2020).

68. See, e.g., VT. STAT. ANN. tit. 33, § 5262(b)(2) (2020); VT. STAT. ANN. tit. 24, § 1964 (2020).

69. See, e.g., CAL. WELF. & INST. CODE § 742(b) (West 2020); CAL. R. CT. 4.427 (2020); CAL. CODE REGS. tit. 15 § 1371 (2020); CAL. PENAL CODE § 5006(a)(1)(D) (West 2020) (representing the 4 laws that provide procedural specificity for restorative justice).

70. See, e.g., CAL. PENAL CODE § 8052(e)(6) (West 2020); CAL. WELF. & INST. CODE § 202(e) (West 2020).

71. See, e.g., CAL. PENAL CODE § 17.5(a)(8)(E) (West 2020); CAL. PENAL CODE § 3450(b)(8)(E) (West 2020).

72. See, e.g., CAL. PENAL CODE § 422.86(a)(3) (West 2020).

73. See, e.g., CAL. PENAL CODE § 5027(b) (West 2020); CAL. PENAL CODE § 6046.3(a)(1) (West 2020); CAL. PENAL CODE § 5007.3(a)(2)(B) (West 2020).

74. History, ILL. BALANCED & RESTORATIVE JUST., <http://ibarj.org/history.asp> [<https://perma.cc/PE5P-PP75>] (last visited Oct. 26, 2020) (discussing the history of Balanced and Restorative Justice (BARJ) in Illinois).

75. *Our Balanced and Restorative Justice Mission*, PA. JUV. CT. JUDGES' COMM'N, <https://www.jcjc.pa.gov/Balanced-Restorative-Mission/Pages/default.aspx> [<https://perma.cc/3Q9Z-6VXB>] (last visited Oct. 26, 2020) (providing an overview of Balanced and Restorative Justice (BARJ) in Pennsylvania).

76. See, e.g., ADMIN. OFF. OF THE CTS., BALANCED AND RESTORATIVE JUSTICE: AN INFORMATION MANUAL FOR CALIFORNIA (2006), <https://www.courts.ca.gov/documents/BARJManual3.pdf> [<https://perma.cc/M6ZV-MXT8>]. The use of pre- and post- sentencing restorative justice practices in California, like many other jurisdictions examined in this study, has developed in a highly discretionary manner under the initiative's local justice system actors and authorities. *Id.*

77. This is not surprising given the range of restorative justice practices in the United States, from victim offender mediation to family group conferencing to victim impact panels to circles. Blankley & Jimenez, *supra* note 61, at 11–15 (providing a general overview of restorative justice practices). Data was also analyzed to determine a possible relationship between the political ideology of a given jurisdiction and the form codified

each jurisdiction to interpret what is or what is not restorative justice in an attempt to reach aspirational goals for system reform. Disaggregated data indicates that the most commonly codified forms of restorative justice are victim-offender conferencing, mediation, and dialogue,<sup>78</sup> followed by impact panels<sup>79</sup> and family group conferencing.<sup>80</sup> In the absence of macro-level uniformity, one might hypothesize the presence of a preferred form based on the respective system (e.g., juvenile versus adult). Yet, no such association is present in the data.<sup>81</sup> Furthermore, very few jurisdictions even attempt to define restorative justice, which creates significant ambiguity in law and practice no matter what scheme a jurisdiction adopts.<sup>82</sup> Moreover, most often, different forms of restorative justice

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into law and there were no clear trends. To analyze for trends in political association, state-level data saturation was compared to the partisan composition of each state. *See State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 1, 2019), <http://www.ncsl.org/research/about-statelegislatures/partisan-composition.aspx> [<https://perma.cc/37VN-2T54>].

78. The terms “victim offender mediation,” “victim offender dialogue,” and “victim offender conferencing” were combined for purposes of this secondary analysis. In the field of restorative justice, there has been a transition from the original use of victim offender mediation to preferred references to victim offender dialogue and/or conferencing. However, the terms are often used interchangeably to denote similar processes. *See, e.g.*, Toran Hansen & Mark Umbreit, *State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence*, 36 CONFLICT RESOL. Q. 99, 100 (2018), <https://doi.org/10.1002/crq.21234> [<https://perma.cc/PDA7-DDB7>] (meta-analysis of victim offender research); Mark S. Umbreit & Marilyn Peterson Armour, *Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community*, 36 WASH. U. J.L. & POL'Y 65, 77 (2011) (describing the history of victim-offender mediation); Jonathan Scharer, Clinical Assistant Professor and Dir. of the Restorative Just. Project, Univ. of Wis. L. Sch., Presentation in Los Angeles, California (Sept. 19, 2019) (presenting the history of victim offender mediation and evolution of terminology). When disaggregated the terms distribute as: victim-offender mediation appears 41 times, victim-offender dialogue appears 9 times, and victim-offender conferencing appears 29 times.

79. There are 19 mentions of impact panels. *See, e.g.*, LA. ADMIN. CODE tit. 22, § 337(H)(1) (2020); MONT. CODE ANN. § 44-7-302(3) (2019); N.Y. COMP. CODES R. & REGS. tit. 9, § 351.7(g)(5) (2020).

80. There are 14 occurrences of “family group conferencing.” *See, e.g.*, NEB. REV. STAT. ANN. § 25-2912.01 (West 2019); OKLA. STAT. tit. 10A, § 1-4-504(A)(1) (2020); ALASKA R. CRIM. PROC. 11(i)(3) (West 2020).

81. However, there is an association with form when examined against the category of application/implementation and subcategories of pre- and post- adjudication. *See infra* Part II.B.

82. One commonly noted exception is Colorado, which provides: “Restorative justice practices” means practices that emphasize repairing the harm caused to victims and the community by offenses. Restorative justice practices include victim-offender conferences, family group conferences, circles, community conferences, and other similar victim-centered practices. Restorative justice practices are facilitated meetings attended voluntarily by the victim or victim’s representatives, the victim’s supporters, the offender, and the offender’s supporters and may include community members. By engaging the parties to the offense in voluntary dialogue, restorative justice practices provide an opportunity for the offender to accept responsibility for

appear within a list of options available to justice system actors, which can include law enforcement officers, prosecutors, judges, departments of corrections, and parole and probation offices.<sup>83</sup> Absent a definition of restorative justice, this long list of actors creates still more ambiguity.

In addition to a lack of consensus on form, a review of all 264 laws indicates that there is no universal application among the jurisdictions.<sup>84</sup> Restorative justice, as discussed later, exists across the country in a highly discretionary and localized manner with decision-making authority held by a diverse set of state actors.<sup>85</sup> Jurisdictions operationalize restorative justice into pre-trial diversion programs,<sup>86</sup> pre-trial risk assessments,<sup>87</sup> sentencing,<sup>88</sup> and probation terms and conditions.<sup>89</sup> Additionally, in multiple jurisdictions, restorative justice is defined and prioritized in the appropriation of funds to establish restorative justice boards,<sup>90</sup> centers,<sup>91</sup> and/or programs for future use (e.g., pilot programs) in the juvenile and adult criminal justice systems,<sup>92</sup> adding yet another level of variation.

Nevertheless, while there is no universal form of restorative justice or universal procedural application, 6 trends did emerge from the data. First, and related to the above discussion, a substantive body of procedural restorative justice laws is noticeably absent. While some states, like Colorado<sup>93</sup> and Minnesota,<sup>94</sup> have delineated the scope and use of restorative justice in their juvenile and adult justice systems, the level of

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the harm caused to the victim and community, promote victim healing, and enable the participants to agree on consequences to repair the harm, to the extent possible, including but not limited to apologies, community service, reparation, restoration, and counseling. Restorative justice practices may be used in addition to any other conditions, consequences, or sentence imposed by the court.

COLO. REV. STAT. § 18-1-901(3)(o.5) (2020) (adult criminal justice system); *see also* COLO. REV. STAT. § 19-1-103(94.1) (2020) (juvenile justice system).

83. *See, e.g.*, W. VA. CODE § 49-1-206(F) (2020); UTAH CODE ANN. § 63M-7-208(1)(e)(i)(D) (West 2020); KY. REV. STAT. ANN. § 600.020(31)(f) (West 2020).

84. *See infra* Part II.A–B. When data in the categories and subcategories of system and application/adjudication process were crossed, findings indicated a preference for the use of restorative justice in juvenile matters for diversion. *See infra* Part II.A–B.

85. *See infra* Part II.C.

86. *See, e.g.*, COLO. REV. STAT. § 19-2-706(1)(a) (2020); MD. CODE ANN., STATE GOV'T § 9-3209(b)(2)(iv) (2020); MINN. STAT. § 388.24 subd. 2(1) (2020); NEB. REV. STAT. ANN. § 43-2,108.03 (West 2019); ALA. CODE § 45-28-82.25(c) (2020).

87. *See* NEB. REV. STAT. § 25-2912.01 (2019).

88. *See, e.g.*, CAL. CT. R. 4.427(1)(C), (3) (2020).

89. *See, e.g.*, LA. ADMIN. CODE tit. 22, § 337(H)(1) (2020).

90. *See, e.g.*, COLO. REV. STAT. § 13-3-116 (2020).

91. *See, e.g.*, FLA. STAT. ANN. § 985.155(2) (2020).

92. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 9-3209(b)(2)(x) (2020).

93. *See supra* notes 47–54 and accompanying text.

94. *See* MINN. STAT. § 611A.775 (2020); MINN. STAT. § 609.092(b)(5) (2020).

delineation is highly variable across all jurisdictions. This is true whether restorative justice is codified at high,<sup>95</sup> medium,<sup>96</sup> or low levels.<sup>97</sup>

Second, restorative justice laws that express aspirational goals of justice are highly present.<sup>98</sup> Again, in contrast to procedural laws, aspirational laws seek to frame restorative justice as a remedy to existing tensions within the current criminal justice system, including victim satisfaction, offender accountability, rehabilitation, public safety, recidivism, high fiscal costs, and even reduced reliance on incarceration.<sup>99</sup>

Third, participating in restorative justice often comes without a confidentiality guarantee.<sup>100</sup> More than 84% of the jurisdictions examined do not protect statements made prior to or during restorative justice processes. This presents a risk for all participants (offenders, victims, and practitioners) in restorative justice, especially for cases at the pre-adjudication stage.<sup>101</sup>

Fourth, participation for victims is voluntary. No jurisdiction in the United States mandates victim participation in restorative justice.<sup>102</sup> This stands in sharp contrast to mandated participation by offenders in restorative justice in multiple jurisdictions.<sup>103</sup>

Fifth, certain categories of crimes are exempted. Restorative justice processes do not replace or modify formal legal procedures at either the pre-adjudication<sup>104</sup> or post-adjudication<sup>105</sup> stages for crimes in such

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95. See *González Online Appendix*, *supra* note 17, app. 1 (California).

96. See *id.* (Massachusetts).

97. See *id.* (Kansas).

98. See, e.g., COLO. REV. STAT. § 19-2-309.5(4)(a)(II) (2020); VT. STAT. ANN. tit. 28, § 2a (2020); MONT. CODE ANN. § 44-7-301 (2019); TENN. CODE ANN. § 16-20-101 (2020).

99. See, e.g., 730 ILL. COMP. STAT. ANN. 5 / 3-2.5 (West 2020); MASS. GEN. LAWS ANN. ch. 276B § 1 (2018); CAL. PENAL CODE § 17.5(a)(8)(E) (West 2020); MONT. CODE ANN. § 44-7-301 (2019); DEL. CODE ANN. tit. 11, § 9501 (West 2019); TENN. CODE § 16-20-101 (2020).

100. See Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2 J. DISP. RESOL. 401, 401–02 (2004).

101. See generally *id.*, at 401 (discussing a “framework by which victim offender programs can delve into the complexities of mediation confidentiality and avert potential disaster”). For restorative justice facilitators, for example, this means they are subject to subpoenas and could be held in contempt of court if they refuse to comply, including refusing to disclose statements. See *id.*

102. See *infra* Part II.D. Voluntary participation is not the legal norm for offenders, for whom multiple jurisdictions mandate participation in restorative justice. See *infra* Part II.D.

103. See *infra* Part II.D.

104. See, e.g., COLO. REV. STAT. § 18-1.3-104(1)(b.5)(I) (2020); MASS. GEN. LAWS ANN. ch. 276B, § 3 (2018).

105. See, e.g., COLO. REV. STAT. § 18-1.3-104(1)(b.5)(I) (2020).

categories as unlawful sexual behavior,<sup>106</sup> domestic violence,<sup>107</sup> or an offense resulting in serious bodily injury<sup>108</sup> or death.<sup>109</sup> A restorative justice process, however, may be available for such crimes following conviction and/or during confinement.<sup>110</sup>

Sixth, there is an offender-centered orientation,<sup>111</sup> whereby restorative justice is defined relative to an offender's movement through criminal justice systems.<sup>112</sup> Results also indicate 2 emerging trends: the use of fees to access restorative justice (e.g., "pay to play")<sup>113</sup> and discretionary decision-making authority granted to probation or parole divisions and offices.<sup>114</sup>

The primary objective of the foregoing analysis is to identify characteristics, forms, and trends in American restorative justice to provide a more comprehensive typology. But, the analysis also demonstrates opportunities for further micro-level examination to provide a framework for criminal justice reform vis-à-vis restorative justice laws. Detailed empirical analysis of this nature provides the necessary foundation for any broader reform efforts across the United States since, until now, much of the debate has centered on anecdotal claims or limited empirical studies of single jurisdictions or localities.

In contrast to the above macro analysis, the following sections present data by key category: *system, application or adjudication process, decision maker (and form of authority), party participation (victim vs. offender), waiver of rights, confidentiality and admissibility, and fees*. In each section, findings are defined and described through multiple subcategories. This discussion also unpacks the constitutional and ethical dimensions that deserve further attention. Again, the aim of such considerations is to facilitate the construction and refinement of restorative justice into criminal law in a manner that recognizes and counteracts the emergence and spread of undesirable state practices.

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106. See, e.g., MASS. GEN. LAWS ANN. ch. 276B, § 3 (2018).

107. See, e.g., MINN. STAT. § 609.092 subd. 6 (2020); MASS. GEN. LAWS ANN. ch. 276B, § 3 (2018).

108. See, e.g., MASS. GEN. LAWS ANN. ch. 276B, § 3 (2018).

109. See, e.g., MASS. GEN. LAWS ANN. ch. 276B, § 3 (2018).

110. Jonathan Scharrer, Clinical Assistant Professor and Dir. of the Restorative Just. Project, Univ. of Wis. L. Sch., Presentation in Los Angeles, California (Sept. 19, 2019) (describing the use of victim-initiated conferencing processes during confinement following conviction of serious and sensitive crimes).

111. See, e.g., COLO. REV. STAT. § 24-4.1-302.5(1)(l.5) (2020); WASH. REV. CODE § 46.61.5152 (2020).

112. See *infra* Part II.D.

113. See *infra* Part II.G.

114. See *infra* Part II.C.

### A. System

Given the diversity of restorative justice laws across the United States, data was coded and classified by system into 3 subcategories: juvenile justice system, adult criminal justice system, and laws that apply in both systems.<sup>115</sup> This analysis reveals that some jurisdictions have developed a more robust framework for restorative justice in each system independently or overlapping between systems.<sup>116</sup> In others, the legalization of restorative justice occurs in a single law.<sup>117</sup> This level of detail is useful in identifying potential trends or commonalities across the jurisdictions, as well as outliers. It also allows for a more complete picture of which system or, in some instances, jurisdiction, may be ripe for reform efforts. For example, one might hypothesize that jurisdictions with high levels of overall codification have laws pertaining to the criminal justice system, juvenile justice system, and both subcategories. This is true for Colorado, Nebraska, Vermont, and California.<sup>118</sup> However, Texas and Florida, which represent states with high levels of codification of restorative justice laws, have implemented restorative justice in only one system.<sup>119</sup>

The system subcategory with the highest rate of occurrence is “both,”<sup>120</sup> represented by 108 in 28 jurisdictions. Figure 2 shows the distribution across all jurisdictions. The “both” subcategory is comprised of jurisdictions that have codified restorative justice into the juvenile and adult criminal systems either by explicitly stating dual access (e.g., “available to both a juvenile and adult defendant”)<sup>121</sup> or using the term “offender”<sup>122</sup> with applicability to juveniles or adults. While local variances exist, most jurisdictions have adopted restorative justice along a continuum at different stages of criminal procedure.<sup>123</sup>

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115. See discussion *infra* Part II.

116. See González Online Appendix, *supra* note 17, app. 1.

117. See *id.*

118. See González Online Appendix, *supra* note 17, app. 2.A–C.

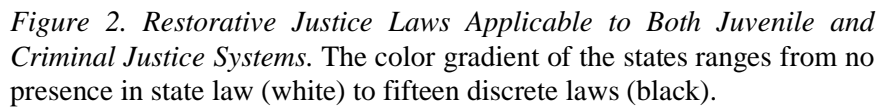
119. Compare *id.* app. 1. with, *id.* app. 2.B.

120. See González Online Appendix, *supra* note 17, app. 2.A. For example, Massachusetts state law provides that: “Participation in a community-based restorative justice program shall be voluntary and may be available to both a juvenile and adult defendant.” MASS. GEN. LAWS ch. 276B, § 2 (2018).

121. See, e.g., MASS. GEN. LAWS ch. 276B, § 2 (2018).

122. See González Online Appendix, *supra* note 17, app. 2.A.

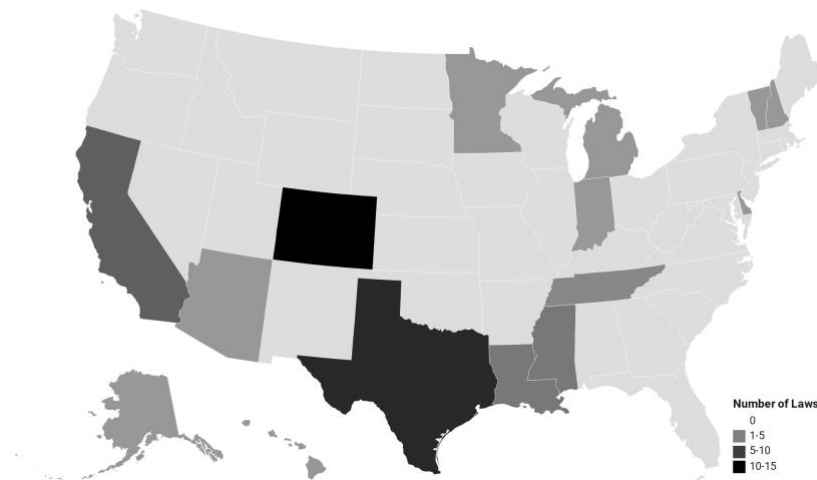
123. See *infra* Part III.B. This can include pre-arrest, pre-charge, pre-adjudication, post-adjudication, sentencing, and post-sentencing. As noted, there are limits based on the offense for the application and/or accessibility of restorative justice. See *infra* Part III.B.



While the majority of laws apply to both systems, there are meaningful differences among jurisdictions when analyzing system-specific laws. Such analysis reveals, for example, that there are far more restorative laws applicable to juveniles (91 in 33 jurisdictions)<sup>124</sup> than adults (42 laws in 15 jurisdictions).<sup>125</sup> Figures 3 and 4 show this comparison.



*Figure 3. Juvenile Justice System Specific Restorative Justice Laws.* The color gradient of the states ranges from no presence in state law (white) to 15 discrete laws (black).



*Figure 4. Criminal Justice System Specific Restorative Justice Laws*

As Figure 3 depicts, 3 states exhibit the most extensive legalization of restorative justice specific to juvenile matters: Colorado (15),<sup>126</sup> Nebraska (15),<sup>127</sup> and Florida (8).<sup>128</sup> All 3 states have integrated restorative justice into their state schemes at the following levels: criminal

126. See, e.g., COLO. REV. STAT. § 19-2-512(2) (2020); COLO. REV. STAT. § 19-2-706(1)(a) (2020); COLO. REV. STAT. § 19-2-925(2)(a)(X) (2020); COLO. REV. STAT. § 19-2-311 (2020); COLO. REV. STAT. § 19-2-905(4) (2020); COLO. REV. STAT. § 19-2-211(1) (2020); COLO. REV. STAT. § 19-2-907(1)(l) (2020); COLO. REV. STAT. § 19-2-708(2) (2020); COLO. REV. STAT. § 19-2-309.5(4)(a)(II) (2020); COLO. REV. STAT. § 19-2-302.5(2)(e) (2020); COLO. REV. STAT. § 18-7-109(5)(d) (2020); COLO. REV. STAT. § 26-6.8-103(1)(f)(2)(a)(III)(C) (2020); COLO. REV. STAT. § 19-1-103(44)(b) (2020); COLO. REV. STAT. § 19-2-303 (2020); COLO. REV. STAT. § 19-2-1002(9)(b)(I)(A)–(B) (2020).

127. See, e.g., NEB. REV. STAT. § 43-245(21)–(22) (2019); NEB. REV. STAT. § 43-247.04(1) (2019); NEB. REV. STAT. § 25-2914.01 (2019); NEB. REV. STAT. § 43-2,108.03(2) (2019); NEB. REV. STAT. § 43-275 (2019); NEB. REV. STAT. § 43-2,108.02(1)(a)(iii) (2019); NEB. REV. STAT. § 43-260.06(6) (2019); NEB. REV. STAT. § 43-2,108.04(5)(a) (2019); NEB. REV. STAT. § 43-247.03 (2019); NEB. REV. STAT. § 43-274 (2019); NEB. REV. STAT. § 43-2,108.01(1)(b) (2019); NEB. REV. STAT. § 43-276(1)(j) (2019); NEB. REV. STAT. § 43-286(4) (2020); NEB. REV. STAT. § 43-246(4) (2019); 390 NEB. ADMIN. CODE § 12-007 (2020).

128. See, e.g., FLA. STAT. § 985.155 (2020); FLA. ADMIN. CODE ANN. r. 63G-2.023(4) (2020); FLA. ADMIN. CODE ANN. r. 63H-2.006(2)(a)(6), (2)(c)(6) (2020); FLA. ADMIN. CODE 63E-7.105(1)(d)(3) (2020); FLA. ADMIN. CODE ANN. r. 63E-7.108(2) (2020); FLA. ADMIN. CODE ANN. r. 63F-13.001(1)(c) (2020); FLA. ADMIN. CODE ANN. r. 63H-2.007(2)(c)(1) (2020); FLA. ADMIN. CODE ANN. r. 63H-2.005(2)(c)(1) (2020).

procedure,<sup>129</sup> structure and framework outside of criminal processes,<sup>130</sup> and aspirational, ideological and definitional statements.<sup>131</sup> Cross-analysis shows that each of these states also has incorporated restorative justice at the pre- and post-adjudication stages.<sup>132</sup> Among these 3 states, the earliest use of restorative justice occurs when law enforcement officers in the field may divert youth offenders into a restorative justice program.<sup>133</sup> In contrast, restorative justice is used in community reentry following release from confinement,<sup>134</sup> as well as in sentencing.<sup>135</sup>

As Figure 4 indicates, Colorado has also adopted a comprehensive set of restorative justice laws applicable to the adult criminal justice system (12).<sup>136</sup> The combined totals of system-specific laws affirm that Colorado presently has the most state-level statutory support for restorative justice in the country.<sup>137</sup> This has been attributed in other research to the state's juvenile justice crisis and national concerns over incarceration rates.<sup>138</sup> As Sliva found, from 2007 and 2013, 11 different bills "added or amended 35 statutes in Colorado code to include support for restorative justice or victim-offender conferencing."<sup>139</sup>

Texas and California follow Colorado as the states with the second and third highest levels of adult criminal justice-specific laws, at 9<sup>140</sup> and

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129. See, e.g., COLO. REV. STAT. § 19-2-512(2) (2020); NEB. REV. STAT. § 43-2,108.03 (2019); FLA. STAT. § 985.155 (2020).

130. See, e.g., COLO. REV. STAT. § 26-6.8-103(C) (2020); NEB. REV. STAT. § 25-2913 (2019); FLA. ADMIN. CODE ANN. r 63H-2.007 (2020). For example, the application process for grant funding of restorative justice services, including centers or organizations, is a structure outside of criminal processes.

131. See, e.g., COLO. REV. STAT. § 24-33.5-510(d) (2020); NEB. REV. STAT. § 25-2912.01 (2020).

132. See *infra* Part III.B.

133. COLO. REV. STAT. § 19-2-302.5 (2020).

134. See, e.g., COLO. REV. STAT. § 19-2-309.5(4)(a)(II) (2020).

135. See, e.g., COLO. REV. STAT. § 19-2-905(4) (2020); MO. STAT. § 558.019 (2019); MONT. CODE ANN. § 46-18-101(3)(i) (2019).

136. See, e.g., COLO. REV. STAT. § 13-3-116 (2020); COLO. REV. STAT. § 17-28-103 (2020); COLO. REV. STAT. § 17-28-101 (2020); COLO. REV. STAT. § 18-1.3-204(III.5) (2020); COLO. REV. STAT. § 16-7-301 (2020); COLO. REV. STAT. § 24-33.5-510(3)(d) (2020); COLO. REV. STAT. § 16-7-202(1) (2020); COLO. REV. STAT. § 18-9-121(3.5)(a)(II) (2020); COLO. REV. STAT. § 18-1.3-101(9)(b) (2020); COLO. REV. STAT. § 18-1-102(e) (2020); COLO. REV. STAT. § 18-1-102.5(1)(f) (2020); COLO. REV. STAT. § 17-34-101(3) (2020).

137. See González, *supra* note 1, at 1055; Sliva, *supra* note 47, at 261–62.

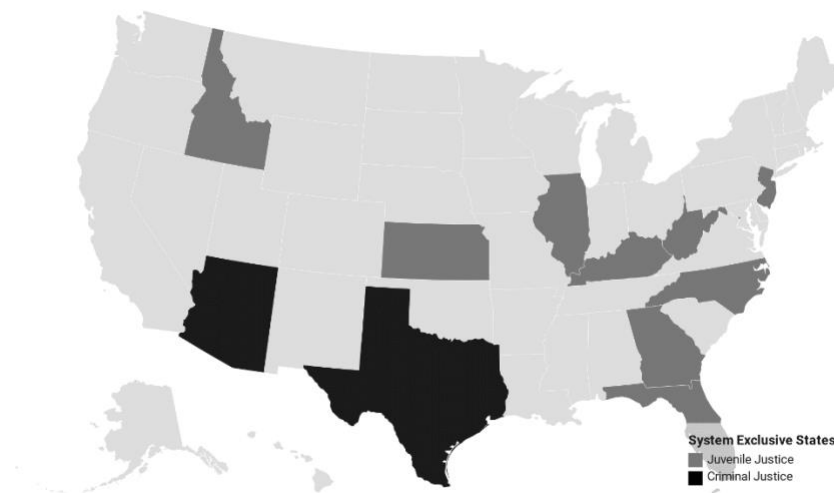
138. Sliva, *supra* note 47, at 261.

139. *Id.* at 259.

140. See, e.g., TEX. GOV'T CODE ANN. § 508.324 (West 2019); TEX. GOV'T CODE ANN. § 2009.053 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 152.007(b) (West 2019); TEX. GOV'T CODE ANN. § 508.191(b) (West 2019); TEX. CODE CRIM. PROC. ANN. art. 56.02(B)(11) (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 56.03 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2019).

5,<sup>141</sup> respectively. As with the juvenile-specific laws, these 3 states integrate restorative justice into procedural laws, aspirational, ideological or definitional laws, and structural laws. In Texas, for example, adult offenders may be offered restorative justice as part of a plea<sup>142</sup> or parole.<sup>143</sup>

In addition to system-specific analysis, this study considers system-exclusivity across jurisdictions, meaning that in some jurisdictions, no co-occurrence with other subcategories exists. Figure 5 presents jurisdictions with system-exclusive laws.



*Figure 5. Restorative Justice Laws by System Subcategory: Jurisdictions with System-Exclusive Laws*

A total of 10 jurisdictions have passed laws exclusively pertaining to the juvenile justice system: the District of Columbia, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, New Jersey, North Carolina, and West Virginia.<sup>144</sup> These jurisdictions combine to have 25 such laws. Ten of these

141. See, e.g., CAL. PENAL CODE § 8052(e)(6) (West 2020); CAL. PENAL CODE § 3450(B)(8) (West 2020); CAL. PENAL CODE § 1170(a)(2) (West 2020); CAL. PENAL CODE § 1230(B) (West 2020); CAL. PENAL CODE § 5006(a)(1)(D) (West 2020).

142. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2019).

143. See, e.g., TEX. GOV'T CODE ANN. § 508.324 (West 2019); TEX. GOV'T CODE ANN. § 508.191(b) (West 2019).

144. See D.C. CODE ANN. § 1-301.81(a)(3) (2020); D.C. CODE ANN. § 24-902(a)-1(2)(C) (2020); FLA. STAT. § 985.155 (2020); FLA. ADMIN. CODE ANN. r. 63G-2.023 (2020); FLA. ADMIN. CODE ANN. r. 63H-2.006(6) (2020); FLA. ADMIN. CODE ANN. r. 63E-7.105(3) (2020); FLA. ADMIN. CODE ANN. r. 63E-7.108(2) (2020); FLA. ADMIN. CODE ANN. r. 63F-13.001(1)(c) (2020); FLA. ADMIN. CODE ANN. r. 63H-2.007 (2020); FLA. ADMIN. CODE ANN. r. 63H-2.005 (2020); GA. COMP. R. & REGS. 96-1-.05(1) (2020); IDAHO ADMIN. CODE r. 05.02.03.230(e) (2020); IDAHO ADMIN. CODE r. 05.02.01.214(d) (2020); 730 ILL. COMP. STAT. ANN. 5 / 2.5-5 (West 2020); 730 ILL. COMP. STAT. ANN. 110

laws address non-procedural elements of restorative justice in the juvenile justice system, such as program funding,<sup>145</sup> staff training,<sup>146</sup> or data collection.<sup>147</sup> Nine laws are procedural in nature,<sup>148</sup> and the remaining 6 are aspirational<sup>149</sup> or definitional.<sup>150</sup>

In the class of juvenile justice-exclusive jurisdictions, the average number of laws is 2.5, and the median number of laws is 2. This suggests that there may be a legislative preference for adopting restorative justice laws in juvenile systems before doing the same in adult systems. One explanation for such preference is the special legal status of juveniles.<sup>151</sup> As United States Supreme Court jurisprudence affirms, courts have accepted the differential identity of juveniles as compared to adults.<sup>152</sup> In *Roper v. Simmons*,<sup>153</sup> for example, the Court held that juveniles should be held less responsible and culpable for their actions and that they are more capable of rehabilitation because of their ongoing development.<sup>154</sup>

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/ 16.1(b)(2) (West 2020); 730 ILL. COMP. STAT. ANN. 5 / 3-2.5-40.1 (West 2020); KAN. STAT. ANN. § 75-7038 (2016); KY. REV. STAT. ANN. § 600.020(31)(f) (West 2020); N.J. STAT. ANN. § 52:17B-169 (West 2020); N.C. WAKE CNTY. 10TH JUDICIAL DIST. CT. R. (2020); N.C. GEN. STAT. ANN. § 7B-2506(7) (2019); N.C. GEN. STAT. ANN. § 7B-1706(a)(4) (2019); W. VA. CODE § 49-5-106(c) (2020); W. VA. CODE § 49-1-206(F) (2020); W. VA. CODE § 49-4-725 (2020).

145. See, e.g., GA. COMP. R. & REGS. 96-1-.05(1) (2020); KAN. STAT. ANN. § 75-7038 (West 2016).

146. See, e.g., FLA. ADMIN. CODE 63H-2.005 (2020); FLA. ADMIN. CODE 63H-2.007 (2020); FLA. ADMIN. CODE 63E-7.108(2) (2020); FLA. ADMIN. CODE 63H-2.006(6) (2009); IDAHO ADMIN. CODE r. 05.02.01.214(d) (2020); ILL. COMP. STAT. 3-2.5-40.1 (2020).

147. See, e.g., FLA. ADMIN. CODE ANN. r. 63F-13.001(1)(c) (2020); WASH. REV. CODE § 13.40.080 (2020).

148. See, e.g., FLA. ADMIN. CODE ANN. r. 63E-7.105(3) (2020); FLA. STAT. § 985.155 (2014); FLA. ADMIN. CODE ANN. r. 63G-2.023 (2018); D.C. CODE ANN. § 1-301.81(a)(3) (2020); IDAHO ADMIN. CODE r. 05.02.03.230(e) (2020); N.C. WAKE CNTY. 10TH JUDICIAL DIST. CT. R. (2020); N.C. GEN. STAT. § 7B-2506(7) (2019); N.C. GEN. STAT. § 7B-1706(a)(4) (2019); W. VA. CODE § 49-5-106(c) (2020).

149. See, e.g., N.J. STAT. § 52:17B-169 (2002); 730 ILL. COMP. STAT. 5 / 3-2.5 (2020); 730 ILL. COMP. STAT. 110 / 16.1(b)(2) (2020).

150. See, e.g., D.C. CODE ANN. § 24-902(a-1)(2)(C) (2020); KY. REV. STAT. ANN. § 600.020 (West 2020); WASH. REV. CODE § 43.10.300 (2020).

151. See, e.g., SPENCER A. RATHUS, CHILDHOOD & ADOLESCENCE: VOYAGES IN DEVELOPMENT 544–46 (6th ed. 2017) (discussing the evolution of child development theories and the well-established understanding of children’s social and psychological differences from adults).

152. See *Roper v. Simmons*, 543 U.S. 551, 602 (2005).

153. 543 U.S. 551 (2005).

154. *Id.* at 553–54; see also STEVEN M. COX, JENNIFER M. ALLEN, ROBERT D. HANSER & JOHN J. CONRAD, JUVENILE JUSTICE: A GUIDE TO THEORY, POLICY, AND PRACTICE 8–9 (6th ed. 2008) (“The delinquent child had ceased to be a criminal and had the status of a child in need of care, protection, and discipline directed toward rehabilitation.” (quoting RUTH SHONLE CAVAN, JUVENILE DELINQUENCY: DEVELOPMENT, TREATMENT, CONTROL 362 (2d ed. 1969))).

Subsequent opinions further strengthened the Court's recognition of distinctions between children and adults.<sup>155</sup> In *Miller v. Alabama*,<sup>156</sup> the Court specifically noted that "[j]uveniles have diminished culpability and greater prospects for reform."<sup>157</sup> Such beliefs are not simply present in legal opinions but also underlie the entire juvenile justice system.<sup>158</sup> As restorative justice has gained broader social acceptance, legislators may have opted to follow these established principles or model themselves after other states that had first codified restorative justice into their juvenile justice system.<sup>159</sup> One potential consequence of this trend is that restorative justice in adult criminal matters is often limited to low-level offenses or occurs only post-adjudication.<sup>160</sup> If one seeks to reduce the scale of incarceration and the collateral consequences of criminal convictions through restorative justice, the differential application between juveniles and adults is an area ripe for reform and advocacy effort.

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155. See *Graham v. Florida*, 560 U.S. 48, 74 (2010) (establishing that life sentences without possibility of parole are inappropriate for juveniles convicted of non-homicide crimes); *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (holding that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment's prohibition on cruel and unusual punishment).

156. 567 U.S. 460 (2012).

157. *Id.* at 471.

158. See, e.g., NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* 4 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., 2013) (noting that delinquency cases are governed by the goals of the juvenile justice system: holding youth accountable, rehabilitating youth to prevent reoffending, and treating them fairly. This distinguishes juvenile justice systems from adult system, where punishment is privileged over rehabilitation); see also Judy C. Tsui, *Breaking Free of the Prison Paradigm: Integrating Restorative Justice Techniques into Chicago's Juvenile Justice System*, 104 J. CRIM. L. & CRIMINOLOGY 635, 641 (2014) (discussing the challenges and opportunities to integrate restorative techniques into its juvenile justice system).

159. As sociological scholarship on the phenomenon of isomorphism explains, one mechanism leading to state-level change is mimicry by norm generating institutions, such as state legislatures, on other similar institutions. Thus, as one state adopted juvenile-centered restorative justice laws, others may have followed. See Francisco J. Granados, *Intertwined Cultural and Relational Environments of Organizations*, 83 SOC. FORCES 883, 885 (2005) (explaining isomorphism). Investigation of isomorphism represents a salient area for future inquiry given the data presented in this study. Such studies would also help inform reform efforts.

160. See, e.g., Sean Hux, *International Lessons in the Systemic Adoption of Felony Restorative Justice in Chicago*, 25 PUB. INT. L. REP. 31, 32–34 (2019) (identifying the limited number of restorative justice programs that accept adult cases); Jonathan Scharrer, Clinical Assistant Professor and Dir., Restorative Justice Project, University of Wisconsin Law School, Presentation at Occidental College (Sept. 19, 2019) (describing perceptions between juvenile and youth offenders and the use of restorative justice for different crimes); Sliva, Porter-Merrill & Lee, *supra* note 53, at 501–02.

Arizona and Texas are the only jurisdictions with restorative justice laws that pertain exclusively to the adult criminal justice system,<sup>161</sup> combining for 10 laws that have local level variance. In Arizona, for example, there is an expressed preference for the development of “community punishment programs” using victim-offender mediation models as part of supervision and surveillance when an offender is not housed in a jail or residential facility.<sup>162</sup> Whereas in Texas, there is greater diversity among the laws.<sup>163</sup> This variation is attributable to both jurisdictional differences and scale (e.g., 9 laws in Texas<sup>164</sup> and 1 in Arizona).<sup>165</sup>

### *B. Applicability/Adjudication Process*

Presently, no common body of procedural restorative justice laws exists in the United States. This trend is particularly evident when applying a cross-analysis between the categories of *system* and *applicability/procedural process*. In this instance, findings indicate that 62% of all restorative justice laws fall outside the stages of criminal justice process, from arrest to parole and community reentry (164 laws total).<sup>166</sup> Thus, to discern any relevant data about restorative justice in these contexts, this study considers applicability at combined and individual jurisdictional levels. The number of jurisdictions that have passed procedural restorative justice laws that pertain to the pre-adjudication

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161. See, e.g., ARIZ. REV. ANN. § 12-299(1) (2020); TEX. GOV'T CODE ANN. § 508.324 (West 2019); TEX. GOV'T CODE ANN. § 2009.053 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 152.007(b) (West 2019); TEX. GOV'T CODE ANN. § 508.191(b) (West 2019); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 56.03 (West 2019 (repealed 2019, repeal effective Jan. 1, 2021)); TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2019).

162. See, e.g., ARIZ. REV. ANN. § 12-299(1) (2020).

163. See, e.g., TEX. GOV'T CODE ANN. § 508.324 (West 2019); TEX. GOV'T CODE ANN. § 2009.053 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 152.007(b) (West 2019); TEX. GOV'T CODE ANN. § 508.191(b) (West 2019); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2019) (repealed 2019, repeal effective Jan. 1, 2021); TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 56.03 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2019).

164. TEX. GOV'T CODE ANN. § 508.324 (West 2019); TEX. GOV'T CODE ANN. § 2009.053 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 152.007(b) (West 2019); TEX. GOV'T CODE ANN. § 508.191(b) (West 2019); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 56.03 (West 2019) (repealed 2019, repeal effective Jan. 1, 2021); TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2019); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2019).

165. ARIZ. REV. ANN. § 12-299(1) (2020).

166. See González Online Appendix, *supra* note 17, app. 3.C.

stage is 28%<sup>167</sup> and 72%<sup>168</sup> at the post-adjudication stage. Figure 6 is a frequency table of this data.

*Table 2. Frequency Table of Criminal Justice and Juvenile Justice Systems and Pre-Adjudication and Post-Adjudication*

System	Applicability	
	Pre-Adjudication	Post-Adjudication
Juvenile Justice System	19 laws	24 laws
Adult Criminal Justice System	1 law	16 laws
Both Systems	8 laws	32 laws
<b>Total Laws</b>	<b>28 laws</b>	<b>72 laws</b>

Figure 6 shows that, across the United States, pre-adjudication restorative justice laws for juveniles occur at a rate 19 times higher than for adults.<sup>169</sup> Similarly, post-adjudication restorative justice options also exist for juveniles at a higher rate than the adult criminal justice system.<sup>170</sup> These findings indicate a legislative preference for restorative justice options for juveniles regardless of the stage of the criminal justice process.<sup>171</sup>

When examined at the jurisdictional level, Nebraska has the highest legalization of pre-adjudication restorative justice laws.<sup>172</sup> All are exclusive to the juvenile justice system and refer to pre-trial diversion processes.<sup>173</sup> Other states, however, encourage the use of restorative justice as an alternative to formal prosecution in juvenile and adult matters. For example, in Washington, laws allow for deferred prosecution for adult

167. See *id.* app. 3.A.

168. See *id.* app. 3.B.

169. See *id.* app. 4.A–B.

170. See *id.* app. 4.D–E.

171. See *supra* Part II.A (presenting hypotheses for this preference).

172. See NEB. REV. STAT. § 43-275 (2019); NEB. REV. STAT. § 43-2,108.03 (2019); NEB. REV. STAT. § 43-260.06(6) (2019); NEB. REV. STAT. § 43-276 (2019); NEB. REV. STAT. § 43-274 (2019).

173. NEB. REV. STAT. § 43-275 (2019); NEB. REV. STAT. § 43-2,108.03 (2019); NEB. REV. STAT. § 43-260.06(6) (2019); NEB. REV. STAT. § 43-276 (2019); NEB. REV. STAT. § 43-274 (2019).

offenders who commit non-felony violations,<sup>174</sup> the use of restorative justice as diversion for juveniles “in lieu of prosecution,”<sup>175</sup> and the referral of juveniles by the “[t]he prosecutor, juvenile court probation counselor, or diversion unit . . . to community-based programs, restorative justice programs, mediation, or victim offender reconciliation programs.”<sup>176</sup> Similar laws exist in Colorado. For juveniles, restorative justice is presented as an “alternative to formal prosecution”<sup>177</sup> and included in “petty offense contract[s].”<sup>178</sup> For adults, restorative justice is one option for pre-trial diversion in specific cases.<sup>179</sup>

The remaining states within the subcategory have only adopted 1 or 2 laws. This subset of laws runs the gamut, from targeting highly detailed and specific to restorative justice processes<sup>180</sup> to simply listing a restorative practice as one option in a larger list.<sup>181</sup> Importantly, the lack of specificity about restorative justice may create barriers for individuals to access such an option. For example, justice system actors without pre-existing familiarity with restorative justice may opt to select an alternate diversionary process.<sup>182</sup> This undermines the very purpose of codifying restorative justice into law. As such, resolving any existing misconceptions, ambiguities, or even misinformation by clarifying existing laws will be important as the legalization of restorative justice continues to expand.

The subcategory of restorative justice laws applicable at post-adjudication stages is comprised of a different set of jurisdictions (27).<sup>183</sup> When viewed in the aggregate, this subcategory occurs almost 2.6 times higher than pre-adjudication. While 2 jurisdictions (Colorado and Vermont) have codified 5 or more laws,<sup>184</sup> the majority of jurisdictions

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174. WASH. REV. CODE § 46.61.5152 (2020); WASH. SEDRO WOOLLEY MUN. CT. R. SWMCrRLJ 7.2(g) (2020).

175. WASH. REV. CODE § 13.40.080 (2020).

176. WASH. REV. CODE § 13.40.070 (2020).

177. COLO. REV. STAT. § 19-2-512(2) (2020).

178. COLO. REV. STAT. § 19-2-302.5 (2020).

179. COLO. REV. STAT. § 18-1.3-101(9) (2020).

180. *See, e.g., id.*

181. *See, e.g.,* W. VA. CODE § 49-1-206(F) (2020); UTAH CODE ANN. § 63M-7-208(1)(i)(D) (West 2020); KY. REV. STAT. ANN. § 600.020 (West 2020).

182. *See, e.g.,* W. VA. CODE § 49-1-206(F) (2020); UTAH CODE ANN. § 63M-7-208(1)(i)(D) (West 2020); KY. REV. STAT. ANN. § 600.020 (West 2020).

183. *See González Online Appendix, supra* note 17, app. 3.B.

184. Colorado has the highest codification of post-adjudication laws (17 laws: 7 exclusive to the juvenile justice system, 5 exclusive to the criminal justice system, and 5 that apply to both systems. *See, e.g.,* COLO. REV. STAT. § 19-2-905(4) (2020); COLO. REV. STAT. § 19-2-907(1)(I) (2020); COLO. REV. STAT. § 19-2-708(2) (2020); COLO. REV. STAT. § 19-2-309.5(4)(a)(II) (2020); COLO. REV. STAT. § 18-7-109(5)(d) (2020); COLO. REV. STAT. § 19-2-925(2)(a)(X) (2020); COLO. REV. STAT. § 19-2-1002(9)(b)(I)(A)–(B) (2020); COLO. REV. STAT. § 17-28-101 (2020); COLO. REV. STAT. § 18-1.3-204(2)(a)(III.5) (2020); COLO. REV. STAT. § 16-7-202(1) (2020); COLO. REV. STAT. § 18-9-121(3.5)(a)(II) (2020);

(25) have codified 1 to 2 laws on average.<sup>185</sup> When combined, these laws fall into 2 main classes: laws that apply to sentencing and probation<sup>186</sup> and laws that apply to parole and community reentry.<sup>187</sup>

Several observations can be made from the data in these subcategories. First, the majority of laws do not address restorative justice with specificity.<sup>188</sup> Second, when compared to the total number of restorative justice laws, the number of laws that are procedural in nature is quite small.<sup>189</sup> Indeed, there are only 4 jurisdictions that seem to be outliers to this trend: Colorado,<sup>190</sup> Minnesota,<sup>191</sup> Washington,<sup>192</sup> and North Carolina.<sup>193</sup> Third, for the subset of jurisdictions in the study that have only 1 restorative justice law,<sup>194</sup> only 2 integrate restorative justice at either pre-adjudication or post-adjudication stages.<sup>195</sup> The rest are unspecific to a formal legal process.<sup>196</sup> This represents preliminary evidence that as restorative justice diffuses into law, it begins with a more general approach and then moves towards operationalization at procedural levels as the overall statutory framework grows.

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COLO. REV. STAT. § 17-34-101(3) (2020). Vermont has legalized restorative justice at post-adjudication stages in 8 laws, 3 exclusive to juveniles and 5 that apply to both. *See, e.g.*, VT. STAT. ANN. tit. 33, § 5232(b)(7) (2020); VT. STAT. ANN. tit. 33, § 5262(b)(2) (2020); VT. STAT. ANN. tit. 33, § 5235(e) (2020).

185. *See González Online Appendix, supra* note 17, app. 3.B.

186. *See, e.g.*, IND. CODE § 35-40-6-4(9) (2020) (applying to sentencing); LA. ADMIN. CODE tit. 22, § 337(H)(1) (2020) (applying to probation).

187. *See, e.g.*, MINN. STAT. § 609.135 subd. 1(b) (2020).

188. This occurs in the pre- and post-adjudication laws. *See, e.g.*, NEB. REV. STAT. § 25-2908 (2019); CAL. WELF. & INST. CODE § 742(b) (West 2020).

189. *See González Online Appendix, supra* note 17, app. 3.A–B.

190. 20 procedural, 17 not applicable. *See id.*

191. 5 procedural, 2 not applicable. *See id.*

192. 6 procedural, 2 not applicable. *See id.*

193. 2 procedural, 1 not applicable. *See id.*

194. *See* ARIZ. REV. ANN. § 12-299(1) (2020); GA. COMP. R. & REGS. 96-1-.05(1) (2020); IOWA ADMIN. CODE r. 201-20.3(904)(c)–(e) (2018); KAN. STAT. ANN. § 75-7038 (2016); KY. REV. STAT. ANN. § 600.020(31)(f) (West 2020); MD. CODE ANN. STATE GOV'T § 9-3209(b)(2) (2020); NEV. ADMIN. CODE § 458.291 (2020); N.J. STAT. ANN. § 52:17B-169 (West 2020); N.M. STAT. ANN. § 29-21-3(B)(2) (2020); VA. CODE ANN. § 19.2-11.4 (West 2020).

195. *See* NEV. ADMIN. CODE § 458.291 (2020); VA. CODE ANN. § 19.2-11.4 (West 2020).

196. *See, e.g.*, ARIZ. REV. ANN. § 12-299(1) (2020); GA. COMP. R. & REGS. 96-1-.05(1) (2020); IOWA ADMIN. CODE r. 201-20.3(904)(4)(c)–(e) (2018); KAN. STAT. ANN. § 75-7038 (West 2016); KY. REV. STAT. ANN. § 600.020 (West 2020); MD. CODE ANN. STATE GOV'T § 9-3209 (2020); N.M. STAT. ANN. § 29-21-3(B)(2) (2020).

### C. Decision Maker

The data was also analyzed and coded by category of decision maker.<sup>197</sup> One purpose of this analysis is to determine which criminal justice system actor(s) are legally granted the authority to initiate, recommend, or require restorative justice.<sup>198</sup> A second purpose is to determine if their authority is discretionary or mandatory. Combined, such analysis provides a more nuanced picture of the intersections of criminal law and restorative justice.

Presently, there are 92<sup>199</sup> laws across 34 jurisdictions within the decision maker category and subcategories.<sup>200</sup> Figure 6 presents the 5 classes of decision makers disaggregated by state actor. This analysis shows that restorative justice laws overwhelmingly advance discretionary decision-making. In fact, more than 96% of the total laws in this subcategory<sup>201</sup> grant discretionary decision-making power to a range of state actors.<sup>202</sup> While some local-level variation in individuals or offices exists, the net result is the same. In Alaska, for example, the court can decide whether or not to allow restorative justice as a part of an offender's sentence.<sup>203</sup> In Massachusetts, it is the district attorney, with the consent of the victim, who elects to present an offender the option to participate in

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197. Initial coding sought to identify the presence of state and non-state actors. However, no laws exist under which a non-state actor assumes the primary role of decision maker. While community-based actors, e.g., restorative justice organizations, conduct restorative justice processes all such actions, under law, are undertaken as a result of state actor referrals. *See, e.g.,* Sujatha Baliga, Sia Henry & Georgia Valentine, *Restorative Community Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County*, IMPACT JUST. 1, 2, 5, 17–18 (2017), [https://impactjustice.org/wp-content/uploads/CWW\\_RJreport.pdf](https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf) [<https://perma.cc/Q3HN-3B3T>] (describing referral processes in Alameda and San Francisco Counties).

198. This includes multiple forms of restorative justice practices, including but not limited to victim-offender mediation, victim-offender conferencing, or family group conferencing. *See, e.g.,* OR. ADMIN. R. 166-150-0080(7) (2020) (victim-offender mediation); CAL. WELF. & INST. CODE § 202(e) (West 2020) (victim-offender conferencing); OKLA. STAT. ANN. tit. 10a, § 1-4-504(A)(1) (2020) (family group conferencing). In some instances, state law does not set forth the specific practice but instead uses the term “restorative justice practice.” *See* COLO. REV. STAT. § 19-2-512(2) (2020).

199. Within the decision maker subcategories, laws fall into 2 classes: (a) laws in which only one decision maker is identified and (b) laws in which decision-making authority is shared between 1 or more state actors. *See e.g.,* N.C. GEN. STAT. § 7B-2506(7) (2019) (court is the sole decision maker); NEB. REV. STAT. § 25-2911 (2019) (authority is shared between prosecutors, probation officers, courts, department of corrections, and other state departments).

200. *See González Online Appendix, supra* note 17, app. 5.

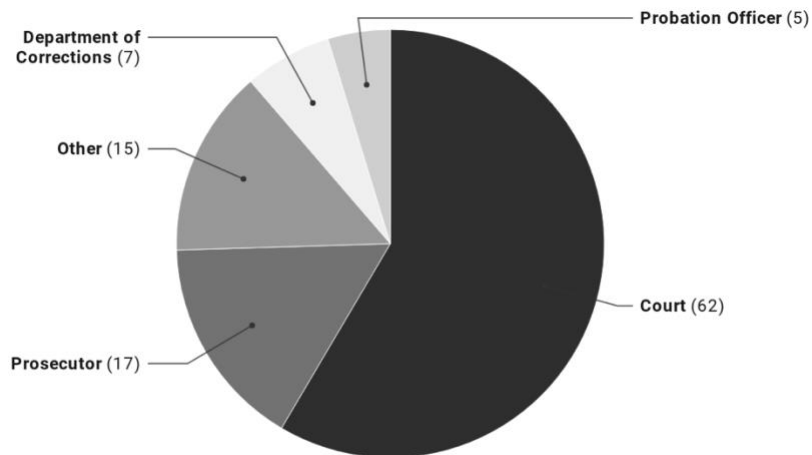
201. 91 laws of 94 total. *See id.*

202. *See id.*

203. ALASKA R. CRIM. PROC. 11(i)(3) (West 2020).

a community-based restorative justice diversion program.<sup>204</sup> Under Colorado law, it is law enforcement officers who can determine whether or not to require that juvenile offenders participate in a diversionary restorative justice program.<sup>205</sup> Again, the point is whoever is making decisions about the availability of restorative justice processes—whether it is the court or the district attorney—has significant discretion.

Only two outliers exist to this dominant model: Indiana and Louisiana.<sup>206</sup> In Indiana, the prosecuting attorney or victim assistance program is required to provide an opportunity to the victim, when the offender agrees, to participate in a form of victim-offender mediation.<sup>207</sup> Similarly, in Louisiana, the court must order as a “condition of probation that the defendant successfully complete a sex offender treatment program,” which includes participation in a victim impact panel.<sup>208</sup>



204. MASS. GEN. LAWS ANN. ch. 276B, § 2 (West 2018).

205. See, e.g., COLO. REV. STAT. § 19-2-302.5(2)(e) (2020). Colorado, the state with the highest overall number of restorative justice laws in the country, has codified discretionary decision-making into 15 laws distributing such power among a variety of state actors. See *González Online Appendix*, *supra* note 17, app. 5.

206. See IND. CODE § 35-40-6-5 (2020); LA. ADMIN. CODE tit. 22, § 337(H)(1) (2020); LA. CODE CRIM. PROC. ANN. art. 895 (2020).

207. IND. CODE § 35-40-6-5 (2020).

208. LA. ADMIN. CODE tit. 22, § 337(H)(1) (2020).

*Figure 6. Distribution of State Actors by Subcategory*

The 2 principal decision makers across all jurisdictions are prosecutors (17 laws)<sup>209</sup> and courts (62 laws).<sup>210</sup> In 16 laws (in 11 jurisdictions), determinations of whether an individual is offered restorative justice at different stages of the criminal justice process are discretionary.<sup>211</sup> In Massachusetts, for example, a prosecutor can choose to divert juvenile or adult offenders to a community-based restorative justice program pre-arraignment.<sup>212</sup> Across multiple jurisdictions, the court, playing a similar role as a Massachusetts prosecutor, for example, can also elect to offer a restorative justice process from a list of statutorily defined alternative measures to offenders.<sup>213</sup> This is true in both adult and juvenile proceedings.<sup>214</sup> However, as discussed above, this occurs for juveniles more frequently at both pre- and post-adjudication stages.<sup>215</sup>

Two secondary subcategories of decision makers exist: probation or parole divisions or offices (5 laws)<sup>216</sup> and department of corrections staff (7 laws).<sup>217</sup> Laws providing probation or parole officers with primary decision-making authority are present in Hawaii, New York, Texas, Utah,

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209. See, e.g., COLO. REV. STAT. § 19-2-512(2) (2020). See Green & Bazelon, *supra* note 13, at 2295 (“The decision whether to divert a case to an agency that administers a restorative justice process, like the charging decision generally, is ordinarily a matter of prosecutorial discretion.”).

210. See, e.g., COLO. REV. STAT. § 19-2-708(2) (2020). For this study, the term “court” is inclusive of common derivations such as “chancery court,” “judge” and “court.” See, e.g., VT. STAT. ANN. tit. 28, § 252(b)(15) (2020) (using the term “court”); W. VA. CODE § 49-4-725 (2020) (using the term “court”); ALASKA R. CRIM. PROC. 11(i)(3) (West 2020) (using the term “judge”); MISS. CODE ANN. § 9-5-87 (2020) (using the term “chancery court”).

211. Prosecutors were granted discretionary decision-making power in Alabama, Colorado, Delaware, Washington D.C., Florida, Massachusetts, Minnesota, Nebraska, Vermont, Washington, and West Virginia. By contrast, Indiana represents the only state in which prosecutors shall provide the opportunity for a restorative justice process for the victim if the accused person or offender agrees. See IND. CODE § 35-40-6-4(9) (2020).

212. MASS. GEN. LAWS ANN. ch. 276B, § 2 (West 2018).

213. See, e.g., NEB. REV. STAT. § 43-247.03 (2019); N.C. GEN. STAT. ANN. § 7B-1706(a)(4) (2019).

214. MINN. STAT. § 609.092(a)(2020); MO. ANN. STAT. § 558.019 (2020); VT. STAT. ANN. tit. 33, § 5235(e) (2020).

215. See *supra* Part II.B.

216. See HAW. REV. STAT. § 571-31.4(c)(11) (2019); N.Y. COMP. CODES R. & REGS. tit. 9, § 351.7 (2020); TEX. GOV'T CODE ANN. § 508.324 (West 2019); UTAH CODE ANN. § 78A-6-602(8)(g) (West 2020); WASH. REV. CODE § 13.40.070 (2020).

217. See COLO. REV. STAT. § 17-34-101(3) (2020); LA. STAT. ANN. § 46:1846 (2020); N.H. REV. STAT. ANN. § 21-H:4 (VIII) (2009); N.H. REV. STAT. ANN. § 21-M:8-k(II)(v) (2020); OR. ADMIN. R. 166-150-0080(7) (2020); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2019) (repealed 2019, repeal effective Jan. 1, 2021).

and Washington.<sup>218</sup> All of these laws grant discretionary decision-making.<sup>219</sup> In New York, for instance, probation officers are empowered to determine whether adult and juvenile offenders may be referred to victim-offender mediation or victim impact panels.<sup>220</sup> Similarly, in Washington, probation officers may determine which “juveniles to [refer to] community-based programs, restorative justice programs, mediation, or victim offender reconciliation programs.”<sup>221</sup> These laws have all been enacted from 2018 to 2020, indicating an emerging trend.<sup>222</sup>

Laws granting a state’s department of corrections decision-making power follow the same pattern.<sup>223</sup> Decisions occur most frequently when a department of corrections receives and decides whether or not to act upon a victim’s request for restorative justice.<sup>224</sup>

The final subcategory (“other”) includes, but is not limited to, law enforcement officers,<sup>225</sup> diversion units,<sup>226</sup> and crime victim assistance programs.<sup>227</sup> This subcategory is comprised of 15 laws in 10 jurisdictions.<sup>228</sup> These laws allow for a single class of decision makers as

218. See HAW. REV. STAT. § 571-31.4(c)(11) (2019); N.Y. COMP. CODES R. & REGS. tit. 9, § 351.7 (2020); TEX. GOV’T CODE ANN. § 508.324 (West 2019); UTAH CODE ANN. § 78A-6-602(8)(g) (West 2020); WASH. REV. CODE § 13.40.070 (2020).

219. See, e.g., UTAH CODE ANN. § 78A-6-602(8)(g) (West 2020) (“The court’s probation department *may* require a minor to . . . attend victim-offender mediation . . .” (emphasis added)).

220. N.Y. COMP. CODES R. & REGS. tit. 9, § 351.7(g) (2020).

221. WASH. REV. CODE § 13.40.070(11) (2020).

222. Three laws were passed in 2019. See NEB. REV. STAT. § 25-2911 (2019); N.Y. COMP. CODES R. & REGS. tit. 9, § 351.7 (2020); WASH. REV. CODE § 13.40.070 (2020). One law was passed in 2020. See UTAH CODE ANN. § 78A-6-602(8)(g) (West 2020). Though outside the scope of this Article, this trend warrants further future inquiry.

223. See COLO. REV. STAT. § 17-34-101(3) (2020); LA. STAT. ANN. § 46:1846 (2020); N.H. REV. STAT. ANN. § 21-M:8-k(II)(v) (2020); OR. ADMIN. R. 166-150-0080(7) (2020); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2019) (repealed 2019, repeal effective Jan. 1, 2021).

224. The dominant form is victim-offender conferences. See, e.g., COLO. REV. STAT. § 17-34-101(3) (2020), LA. STAT. ANN. § 46:1846 (2018); N.H. REV. STAT. ANN. § 21-M:8-k(II)(v) (2020); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2019) (repealed 2019, repeal effective Jan. 1, 2021).

225. See, e.g., COLO. REV. STAT. § 19-2-302.5(2)(e) (2020).

226. See, e.g., WASH. REV. CODE § 13.40.070 (2020).

227. See, e.g., VA. CODE ANN. § 19.2-11.4 (West 2020).

228. See CAL. PENAL CODE § 8052(e)(6) (West 2020); COLO. REV. STAT. ANN. § 19-2-302.5(e) (West 2015); COLO. REV. STAT. ANN. § 17-28-103 (West 2011); COLO. REV. STAT. ANN. § 18-1.3-204(III.5) (West 2020); COLO. REV. STAT. ANN. § 18-1.3-501(1.5)(a) (West 2020); IND. CODE ANN. § 35-40-6-5 (West 2020); IND. CODE ANN. § 31-41-1-5 (West 2016); ME. STAT. tit. 34-A § 1214(3)(F) (2018); MICH. COMP. LAWS ANN. § 798.33(e) (West 2017); NEB. REV. STAT. § 25-2911 (2019); N.H. REV. STAT. ANN. § 21-H:4 (VIII) (2009); N.J. STAT. ANN. § 52:17B-169 (West 2002); VA. CODE ANN. § 19.2-11.4 (West 2010); WASH. REV. CODE ANN. § 13.40.070 (West 2019); WASH. REV. CODE ANN. § 13.40.080 (West 2018).

well as shared decision-making authority.<sup>229</sup> Under either model, determinations are made on a case-by-case basis. A Nebraska statute illustrates the shared authority model providing that restorative justice centers approved for both the criminal and juvenile justice systems may accept cases from state actors or “any other interested person or agency upon the request of the parties involved.”<sup>230</sup> Similarly, in New Jersey, state statute requires the “Juvenile Justice Commission (JJC) in the Department of Law and Public Safety and the Administrative Office of the Courts, Superior Court Family Division to incorporate into the juvenile justice system the principles of balanced and restorative justice.”<sup>231</sup>

This study also conducted an analysis to determine how, and if, laws provide victims with decision-making authority to initiate, recommend, or require restorative justice. Although restorative justice theorists prioritize victims as key decision makers in practices and processes,<sup>232</sup> this prioritization is rarely codified into law.<sup>233</sup> When victim decision-making occurs, it is a state-controlled discretionary process in which a victim may request (directly to the state) to participate in a restorative justice process with their offender.<sup>234</sup> The most common form of restorative justice in this instance is victim-offender mediation or conference.<sup>235</sup> The state of Maine, however, has adopted a broader scope of restorative justice. The Victim Services Coordinator receives and processes requests by victims to obtain the “benefits of restorative justice.”<sup>236</sup> And, in Massachusetts, the scope also varies. Under state statute, the power to initiate restorative justice

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229. Compare VA. CODE ANN. § 19.2-11.4 (West 2020) (vesting decision-making authority in Crime and Victim Justice Programs), with NEB. REV. STAT. § 25-2911 (2019) (providing for shared decision-making authority).

230. NEB. REV. STAT. § 25-2911 (2019).

231. N.J. STAT. ANN. § 52:17B-169 (West 2002).

232. See, e.g., ZEHR *supra* note 3, *passim* (arguing restorative justice offers an alternative paradigm that emphasize victim-centered mediation and healing).

233. See, e.g., ALASKA R. CRIM. PROC. 11(i)(3) (West 2020); COLO. REV. STAT. § 17-28-103 (2020); COLO. REV. STAT. § 18-9-121(3.5)(a)(II) (2020); COLO. REV. STAT. § 18-1.3-501(1.5)(a) (2020); COLO. REV. STAT. § 17-34-101(3) (2020); LA. STAT. ANN. § 46:1846 (2020); MASS. GEN. LAWS ANN. ch. 276B, § 2 (West 2018); N.H. REV. STAT. ANN. § 21-H:4(VIII) (2009); N.H. REV. STAT. ANN. § 21-M:8-k(II)(v)(2010); OHIO REV. CODE ANN. § 2929.27(A)(12) (West 2019–20); OHIO REV. CODE ANN. § 2929.17(L) (West 2019–20); OKLA. STAT. tit. 22, § 991a(A)(1)(m) (2020); TEX. GOV'T CODE ANN. § 508.324 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2019) (repealed 2019, repeal effective Jan. 1, 2021).

234. See, e.g., LA. STAT. ANN. § 46:1846(C) (2020). The statute prohibits contact between certain categories of victims and offenders “unless the victim or his immediate family members initiate the communication through the Department of Public Safety and Corrections, and it is agreed that the victim and the offender participate in a formally defined restorative justice program administered through the department.” *Id.*

235. TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2019) (repealed 2019, repeal effective Jan. 1, 2021); TEX. GOV'T CODE ANN. § 508.324 (West 2019); COLO. REV. STAT. ANN. § 17-28-103 (West 2011).

236. ME. REV. STAT. ANN. tit. 34-A, § 1214(3)(F) (West 2019).

processes lies not solely with the victim but instead requires consent of both the victim and the prosecutor for a juvenile or adult offender to be diverted at pre-arraignment.<sup>237</sup> Despite the presence of restorative justice as part of the criminal justice system since the 1970s,<sup>238</sup> formalization of a victim decision-making role is relatively new: each law providing a specific role for victims was enacted within the last 10 years.<sup>239</sup>

Although it is less common, an analogous process for offenders also exists.<sup>240</sup> In Washington, offenders may affirmatively request participation in a restorative justice-based diversion process as part of sentencing.<sup>241</sup> Similarly, in Colorado, a juvenile offender may directly express their desire to participate in a restorative justice process to the district attorney.<sup>242</sup> As is the case with victims, these discretionary petitions must be approved by the state,<sup>243</sup> which maintains primacy of authority.

The legal literature has long considered how discretionary decision-making in the criminal justice system has significant short- and long-term consequences for individuals and communities based on race and gender.<sup>244</sup> This study demonstrates that that discretionary decision-making

237. MASS. GEN. LAWS ANN. ch. 276B, § 2 (West 2018).

238. González, *supra* note 1, at 1028; Umbreit & Armour, *supra* note 78, at 65; VAN NESS & STRONG, *supra* note 2, at 22–26; Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 519 (2007).

239. See COLO. REV. STAT. §§ 17-28-103, 18-9-121(3.5)(a)(II) (2020); COLO. REV. STAT. § 18-1.3-501(1.5)(a) (2020); ME. REV. STAT. ANN. tit. 34-A, § 1214(3)(F) (West 2020); MASS. GEN. LAWS ch. 276B, § 2 (2019); N.H. REV. STAT. ANN. § 21-H:4(VIII) (2020); TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(11) (West 2019) (repealed 2019, repeal effective Jan. 1, 2021). While outside the scope of this Article, the development of formal and legally recognized restorative justice practices and processes for victims warrants further scholarly consideration.

240. In Colorado, Nebraska, Oklahoma, Washington, and Wisconsin, offenders may request participation in restorative justice practices (victim-offender mediation and conferencing). See González *Online Appendix*, *supra* note 17, app. 4. The State of Washington is the only jurisdiction that provides this option solely to the offender. See WASH. REV. CODE § 10.05.010 (2020) (effective Jan. 1, 2021). In all other states, the law(s) provide that *any* involved party, including but not limited to, the offender, may request restorative justice measures from the court. See González *Online Appendix*, *supra* note 17, app. 4.

241. See WASH. REV. CODE § 10.05.010 (2020) (effective Jan. 1, 2021).

242. See COLO. REV. STAT. § 19-2-512(2) (2020).

244. See *id.*

244. See, e.g., Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 745–76 (2018) (examining how Afrocentric features influence bias, with characteristics typically associated with blacks correlating to the lengths of sentences); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 832–35 (2013) (discussing prosecutorial discretion and its role in producing racial disparities); Cynthia E. Jones, “Give Us Free”: *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 938 (2013) (“[N]early every study on the impact of race in bail

extends to restorative justice. Accordingly, examination of the risks associated with discretionary decision-making in restorative justice is increasingly necessary. This is particularly true when considering the local conditions (e.g., unique economic or political environments within jurisdictions) that may implicitly or explicitly shape whether a prosecutor, judge, probation officer, or other justice system actor offers restorative justice to an offender.<sup>245</sup> Further, for those system-involved individuals whose identities fall at the intersection of race, gender, sexual orientation, and/or ability, social constructions and assumptions may heighten the risk of losing the discretionary opportunity to access restorative justice.<sup>246</sup> For reformists advancing increased legalization and expansion of restorative justice in law and policy, it is important to evaluate whether the dominant model of highly discretionary decision-making achieves justice's aims.

#### *D. Party Participation (Voluntary vs. Mandatory)*

As already discussed, this study examines the role of victims and offenders to initiate, recommend, or require restorative justice. Analysis of victims and offenders in restorative justice laws, however, is not limited to this category. Data was also coded for participation of victims and offenders<sup>247</sup> in restorative justice and, more specifically, whether

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determinations has concluded that African Americans are subjected to pre-trial detention at a higher rate and are subjected to higher bail amounts than are white arrestees with similar charges and similar criminal histories.”); Mark Osler, *Short of the Mountaintop: Race Neutrality, Criminal Law, and the Jericho Road Ahead*, 49 U. MEM. L. REV. 77, 90–93 (2018) (describing “hidden” discretionary decision-making by police, prosecutors, and judges); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805–22 (2012) (arguing the relevance of implicit bias to prosecutorial discretion and decision-making); THE SENT’G PROJECT, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* 11–19 (2d ed. 2008) (reviewing racial disparities at key points in the justice system).

245. See, e.g., Ronald S. Everett & Deborah Periman, “*The Governor’s Court of Last Resort: An Introduction to Executive Clemency in Alaska*,” 28 ALASKA L. REV. 57, 71 (2011); Carole Goldberg & Duane Champagne, *A Review of Explaining Race Disparities in South Dakota Sentencing and Incarceration by Richard Braunstein and Amy Schweinle*, 50 S.D. L. REV. 475, 482 (2005).

246. Black women and girls’ behaviors are cast against societal gender and femininity norms based on white, middle-class values. See, e.g., MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 55–62 (2011); Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2045–51 (2017).

247. The term “offender” includes individuals in the juvenile and adult criminal justice systems.

participation is voluntary or mandatory.<sup>248</sup> This category was selected for inclusion given the broad consensus that restorative justice processes are intended to be voluntary for all participants.<sup>249</sup>

In totality, victim and offender participation in restorative justice<sup>250</sup> is described and defined in 89 laws in 32 jurisdictions.<sup>251</sup> In all jurisdictions where laws discuss a victim in relation to restorative justice,<sup>252</sup> their participation is voluntary.<sup>253</sup> Though theorists and legislators portray restorative justice in criminal law as reducing reliance

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248. Participation is voluntary when individuals can decide whether or not to participate in a restorative process, and it is mandatory when mandated through a formal mechanism. See *supra* notes 27–28 and accompanying text.

249. There is a robust discussion in the literature regarding the voluntary nature of restorative justice. While not universal agreement, there is broad consensus that restorative justice processes are intended as a voluntary process for all participants. See, e.g., Carolyn Boyes-Watson, *Reflections on the Purist and the Maximalist Models of Restorative Justice*, 3 CONTEMP. JUST. REV. 441, 443–45 (2000) (addressing the voluntary nature of restorative justice processes and challenges with truly voluntary engagement); W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM. J. TRIAL ADVOC. 501, 514 (2008); Sliva, Porter-Merrill & Lee, *supra* note 53, at 494 (arguing that “requiring or coercing victim participation is contrary to restorative principles and replicates the victim disempowerment present in the modern criminal system”); Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 260–62 (2005) (noting the American Bar Association’s endorsement of victim-offender mediation “included that participation by both offenders and victims be entirely voluntary” and that the *UN Basic Principles on the Use of Restorative Justice Programs in Criminal Matters* “underscore the voluntary nature of participation in restorative justice procedures”); ZEHR, *supra* note 3, at 46 (asserting that voluntariness is a central element of restorative justice).

250. Restorative justice processes include general restorative justice-based programs, ALASKA R. CRIM. PROC. 11(i)(3) (West 2020); victim-offender conferencing, COLO. REV. STAT. § 19-2-905(4) (2020); victim-offender alternative case resolution programs, DEL. CODE ANN. tit. 11, § 9504(b) (2019); victim-offender dialogue, MICH. COMP. LAWS ANN. § 798.33(e) (West 2020); and victim-offender mediation, OHIO REV. CODE ANN. § 2929.27(A)(12) (West 2019–20).

251. See *González Online Appendix*, *supra* note 17, app. 6.A–C.

252. Analysis was conducted for all study terms and derivatives of restorative justice. The most common form of restorative justice in this subcategory is victim-offender mediation.

253. See, e.g., COLO. REV. STAT. § 18-1.3-204(2)(a)(III.5) (2020) (“Nothing in this subparagraph shall be construed to require a victim to participate in restorative justice practices or a restorative justice victim-offender conference.”). Some scholars argue that it is impossible for restorative processes to be fully voluntary when the outcomes are linked to a criminal disposition. See, e.g., Hanan, *supra* note 6, at 142–44 (arguing “[t]he mandatory nature of the programs employs the criminal justice system to directly coerce compliance with the restorative justice agenda”); Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 275 (1993) (contending that the modern criminal justice system and forms of coercion are at odds with restorative justice).

on incarceration and increasing responsiveness to victim needs,<sup>254</sup> laws inclusive of victim participation represent a smaller class than those that address offender participation. This is consistent with the general trend of an offender-centered approach among restorative justice laws.

Twenty jurisdictions, for a total of 38 laws, expressly codify victim participation in restorative justice.<sup>255</sup> Examination of these laws reveals there is generally no common or universal approach exists across these jurisdictions.<sup>256</sup> Additionally, variation is present in form, consent structure, and use at a particular procedural stage.<sup>257</sup> For example, in Colorado, if a juvenile wishes to participate in restorative justice processes with a victim, one model is a victim-offender conference, which “may only be conducted after the victim is consulted by the district attorney and offered an opportunity to participate or submit a victim impact statement.”<sup>258</sup> Colorado also provides for the use of undefined “restorative justice” processes.<sup>259</sup> Michigan law offers restorative justice under a general body of policies that aim to improve victim satisfaction, including victim-offender mediation.<sup>260</sup> The Alaska Supreme Court has authorized judicial referral to a restorative justice program to occur only when the victim, offender, and prosecuting attorney all agree.<sup>261</sup> In Massachusetts, both adult and juvenile cases may be diverted to community-based, restorative justice programs “pre-arraignment or at any stage of a case with the consent of the district attorney and the victim.”<sup>262</sup>

While victim participation is exclusively voluntary, this is not the case for offenders. Offender participation in restorative justice can be either mandatory or voluntary, depending on the jurisdiction.<sup>263</sup> There is no established procedure to ensure that such voluntary entry into a restorative justice program or process is “knowing,” similar to the legal protections for a defendant that waives their rights as part of a plea bargaining context.<sup>264</sup> Thirty-eight laws across 17 jurisdictions establish

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254. See Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 378, 393.

255. Alabama, Alaska, California, Colorado, District of Columbia, Florida, Hawaii, Indiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, Ohio, Oklahoma, Texas, Utah, Virginia, and West Virginia. See *González Online Appendix*, *supra* note 17, app. 6.A.

256. See *id.*

257. ALASKA R. CRIM. PROC. 11(i)(3) (West 2020).

258. COLO. REV. STAT. § 19-2-905(4) (2020).

259. COLO. REV. STAT. § 19-2-512(2) (2020).

260. MICH. COMP. LAWS ANN. § 798.33(e) (West 2020).

261. ALASKA R. CRIM. PROC. 11(i)(3) (West 2020).

262. MASS. GEN. LAWS ANN. ch. 276B, § 2 (2019).

263. See *González Online Appendix*, *supra* note 17, app. 6.B–C.

264. The Supreme Court has expanded the knowing and voluntary requirement to the plea-bargaining context. See Michael Nasser Petegorsky, *Plea Bargaining in the Dark*:

voluntary participation for offenders to enter into restorative processes at various procedural points.<sup>265</sup> In Virginia, for example, an offender may participate in victim-offender reconciliation programs following conviction based on a victim's request.<sup>266</sup> Under Nebraska law, an offender can agree to restorative justice following court referral of the parties to family group conferencing or victim-offender mediation "prior to the commencement of formal judicial proceedings" or alongside "a pending court case."<sup>267</sup> In West Virginia, the court may divert a juvenile offender to a restorative justice program, attended voluntarily by both the victim and offender.<sup>268</sup>

Compelling an offender to participate in restorative processes creates tension between the goals of including restorative justice in law (e.g., diversion, accountability, decreased recidivism, increased victim satisfaction, healing, and harm repair<sup>269</sup>) and the constitutional rights

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*The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3608 (2013). When evaluating "knowing," courts generally consider the extent to which a defendant understands the nature and consequences of a plea to be limited to the immediate scope of the proceedings, satisfying themselves that a defendant made an intelligent waiver if she understood how the rights she waived were implicated in the plea bargaining and sentencing at hand. *See, e.g.*, Russell D. Covey, *Plea-Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595, 609 (2013) (discussing how plea-bargaining is recognized as a critical stage in the criminal justice process which requires "both prosecutors and defense counsel [to] conduct bargaining within minimum constitutional parameters"); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 719–20 (Supp. 2006) (discussing the standard of knowledge and voluntariness in plea bargaining established in *Brady v. United States*, 397 U.S. 742 (1970)); *see also Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969) (a waiver cannot be presumed from a silent record and a defendant must make an affirmative showing of knowledge).

265. Alabama, Alaska, California, Colorado, Delaware, District of Columbia, Florida, Indiana, Massachusetts, Minnesota, Nebraska, New Hampshire, Oklahoma, Texas, Virginia, Washington, and West Virginia. *See González Online Appendix, supra* note 17, app. 6.B.

266. VA CODE ANN. § 19.2-11.4 (2020).

267. NEB. REV. STAT. § 25-2911(3) (2019).

268. W. VA. CODE § 49-4-725 (West 2020).

269. *See, e.g.*, Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 117 (2004) (discussing restorative justice and victim satisfaction); Kathleen J. Bergseth & Jeffrey A. Bouffard, *The Long-Term Impact of Restorative Justice Programming for Juvenile Offenders*, 35 J. CRIM. JUST. 433 (2007) (examining how restorative justice decreases the likelihood of recidivism); William Bradshaw & David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, 69 FED. PROB. 15, 19 (2005) (finding lower rates of recidivism for juvenile offenders diverted to restorative justice programs); Buth & Cohn, *supra* note 6, at 2, 10, 15 (discussing the role of healing in restorative justice); DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 54–55 (1999) (The central concern of restorative justice is "healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator . . ."); ZEHR, *supra* note 3, at 40 (arguing harm repair as a central goal of restorative justice).

intended to protect the accused throughout the criminal process.<sup>270</sup> Yet, mandatory offender participation is codified in 45 laws across 17 jurisdictions.<sup>271</sup> In North Carolina and Ohio, juveniles can be ordered by the court to participate in the victim-offender reconciliation program post-adjudication, in accordance with a disposition.<sup>272</sup> Vermont statute grants the court the authority to order, as a condition of probation, an adult defendant to participate in a restorative justice program.<sup>273</sup> California penal code provides that intermediate sanctions for adult offenders, imposed by correctional agencies include but are not limited to “[r]estorative justice programs, such as mandatory victim restitution and victim-offender reconciliation.”<sup>274</sup> Some laws also provide that both mandatory and voluntary offender participation in restorative justice practices exist.<sup>275</sup> Under Oklahoma law, for instance, courts may order offenders, or they may elect, to voluntarily participate in restorative-based alternative dispute resolutions.<sup>276</sup>

Variation exists not only across jurisdictions relative to participation but also with respect to the *effect* of an offender’s agreement to enter into restorative justice processes on the final disposition of the case.<sup>277</sup> In Massachusetts, voluntary participation in a restorative justice process may be a final case disposition for both juvenile and adult defendants.<sup>278</sup> In this instance, one can imagine the possibility of individuals trading their constitutional rights for a potential positive resolution to their case.<sup>279</sup> In contrast, under New Hampshire law, an offender’s decision to voluntarily

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270. See, e.g., U.S. CONST. amends. V (privilege against self-incrimination and due process right), VI (rights to public trial by peers, effective assistance of counsel, and confrontation), XIV, § 1 (incorporating fundamental constitutional rights against the states).

271. California, Colorado, Connecticut, Louisiana, Minnesota, Mississippi, Missouri, Montana, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Utah, Vermont, Washington, and Wisconsin. See *González Online Appendix*, *supra* note 17, app. 6.C.

272. N.C. GEN. STAT. ANN. § 7B-2506(7) (2020); OHIO REV. CODE ANN. § 2152.19(C) (West 2019–20).

273. VT. STAT. ANN. tit. 28, § 252(b)(15) (2020).

274. CAL. PENAL CODE § 8052(e)(6) (West 2020).

275. California, Colorado, Minnesota, Oklahoma, and Washington. See *González Online Appendix*, *supra* note 17, app. 6.B.

276. OKLA. STAT. tit. 10A, § 1-4-504(A)(1) (2020).

277. See OHIO REV. CODE ANN. § 2152.19(C) (West 2019–20); MASS. GEN. LAWS ANN. ch. 276B § 2 (West 2020); N.H. REV. STAT. ANN. § 21-H:4(VIII) (2020); TEX. GOV’T CODE ANN. § 508.324 (West 2019). In Colorado, it is not statutorily required that courts advise adult offenders about the possibility of restorative justice during “providency or plea advisements.” See Sliva, Porter-Merrill & Lee, *supra* note 53, at 483.

278. MASS. GEN. LAWS ANN. ch. 276B § 2 (West 2020).

279. Specifically, waiver implicates the right against self-incrimination, right to a trial by jury, right to confrontation and cross-examination of witnesses, right to appeal, and the right counsel. See *supra* note 270.

participate in victim-offender dialogue “shall not affect the court’s decision relative to sentencing, parole, or other types of supervised or unsupervised release programs.”<sup>280</sup> Similarly, in Texas, if the Pardons and Paroles Division receives a request from a victim to participate in victim-offender mediation, the division cannot reward the offender for their voluntary participation in this process by “modifying conditions of release or the person’s level of supervision or by granting any other benefit to the person.”<sup>281</sup>

Such state-level differences represent an important area of examination, especially for those concerned with the potential of restorative justice laws to enhance the legitimacy of the criminal justice system without actually addressing its structural flaws, failures, and inequity.<sup>282</sup> Replication of mandatory participation, for example, stands in sharp contrast to restorative justice principles<sup>283</sup> and echoes concerns voiced by scholars in other areas of criminal law.<sup>284</sup> As national and local interest in advancing restorative justice to diminish reliance on policing,

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280. N.H. REV. STAT. ANN. § 21-H:4(VIII) (2020).

281. TEX. GOV’T CODE ANN. § 508.324 (West 2019).

282. As Hanan argues, for example:

[C]oercion worked by the threat of prosecution and other pressures exerted by the criminal justice system. They may miss an issue of self-incrimination or the manner in which a defendant may feel forced to please the victim in order to avoid criminal sanctions. Moreover, the presence of crime control professionals—probation officers, corrections specialists and academic criminologists—raises concerns that even the therapeutic goals of restorative justice may be swallowed by the traditional crime control goals of deterrence through punishment.

Hanan, *supra* note 6, at 154. In other work, I argue that restorative justice’s centrality in law may limit its potential to transform these systems or produce socially just results, or at the very least be compromised and co-opted. Thalia González & Annalise Buth, *Restorative Justice at the Crossroads: Politics, Power, and Language*, 22 CONTEMP. JUST. REV. 242, 248–51 (2019).

283. See *supra* note 269 and accompanying text; see also Jennifer Llewellyn, *Bridging the Gap between Truth and Reconciliation: Restorative Justice and the Indian Residential School Truth and Reconciliation Commission*, in FROM TRUTH TO RECONCILIATION: TRANSFORMING THE LEGACY OF RESIDENTIAL SCHOOLS 15 (M. Brant-Castellano, L. Archibald & M. DeGagne eds., 2008); Vicky De Mesmaecker, *Victim-Offender Mediation Participants’ Opinions on the Restorative Justice Values of Confidentiality, Impartiality and Voluntariness*, 1 RESTORATIVE JUST. INT’L J. 334, 336–38 (2013).

284. See, e.g., Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 33–34 (2013) (analogizing the pressures faced by defendants to plea bargain); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 365–68 (2005) (discussing prosecutorial discretion to decide the offenses charged and sentence lengths offered in plea bargains as increased incentives for defendants to plead guilty).

punitive justice, and over-incarceration continues to grow,<sup>285</sup> there is a significant opportunity to address current inconsistencies in law, policy, and practice.

### *E. Waiver of Rights*

Laws that require that defendants waive their constitutional rights in order to participate in restorative justice occur in a small subset of the jurisdictions included in this study. In examining this category, it is useful to know not only *how* many states require waiver, but also, and more importantly, *which* rights the defendant must waive. Given that restorative justice in criminal justice systems is a state-sanctioned, formal legal process, scholars have argued that it is problematic at best, and unconstitutional at worst, to require waiver of essential constitutional rights such as the right to trial by jury, the right against self-incrimination, as well as liberty and property interests, to participate.<sup>286</sup> Needless to say, outside of legal theory, this is an underexplored area that merits future empirical studies.<sup>287</sup>

Here, the category of waiver of rights is comprised of 5 laws in 3 states.<sup>288</sup> These laws can be divided into 3 classes based on the specific right waived: right to a speedy trial,<sup>289</sup> right to trial by a jury of peers,<sup>290</sup>

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285. See, e.g., Michelle Alexander, Editorial, *Reckoning with Violence*, N.Y. TIMES, March 4, 2019, at 21.

286. See, e.g., Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternative Paradigm for Justice*, 20 CUNY L. REV. 323, 336–39 (2017) (arguing that restorative justice processes in the criminal justice system implicate the rights of the accused in such areas as due process and coercion, right against self-incrimination and right to counsel); Hanan, *supra* note 6, at 152–54; Tina S. 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 (2007) (discussing the theoretical tensions between due process and restorative justice); Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 685 (2005) (discussing due process concerns and the right against self-incrimination); Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 12–31 (2004) (addressing due process and state action).

287. There is a noticeable absence of literature exploring the implementation of restorative justice attentive to due process issues. I argue such studies are imperative to move the discourse further. New research should consider not only how restorative justice is expressed in law but also how the legalization of restorative justice translates into behaviors, assumptions, practices, and processes in courtrooms, community-based programs, and even departments of corrections.

288. See ALA. CODE § 45-28-82.25(a)(3) (2020); ALA. CODE § 45-39-82.01(c) (2020); ALA. CODE § 12-25-32(2)(b)(23)(i–iii) (2020); FLA. STAT. § 985.155(4)(a) (2020); COLO. REV. STAT. § 18-1.3-101(9)(b) (2020).

289. See, e.g., COLO. REV. STAT. § 18-1.3-101(9)(b) (2020).

290. See, e.g., ALA. CODE § 45-28-82.25(a)(3) (2020).

and right to counsel.<sup>291</sup> The first group exists in all 3 states.<sup>292</sup> In Alabama,<sup>293</sup> this occurs when an offender entering into a pre-trial diversion program<sup>294</sup> is required to waive, for the entirety of their case, their right to a speedy trial.<sup>295</sup> In Colorado, the statutory provision provides that the waiver, rather than for the entirety of a case, occurs only for the period of diversion.<sup>296</sup> In Florida, the text does not set forth any provisional or fixed duration of the waiver.<sup>297</sup> Alabama is the only state that waives the right to a jury trial when an offender enters into a pre-trial diversion program.<sup>298</sup> The third class is also only present in 1 state. In Florida, when a juvenile participates in a restorative justice program, the juvenile and the juvenile's parent or legal guardian must waive "the right to be represented by a public defender while in the Neighborhood Restorative Justice program."<sup>299</sup>

#### *F. Confidentiality/Admissibility*

As Figure 8 illustrates, only 7% of all restorative laws—19 laws in 11 states<sup>300</sup>—in the United States address confidentiality. Though variant with respect to the procedural stage (e.g., diversion or post-adjudication during probation), the laws can be grouped into 3 classes.

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291. See, e.g., FLA. STAT. § 985.155(4)(a) (2020).

292. There is variance among these states regarding waiver. In Colorado, the waiver is limited in duration. See COLO. REV. STAT. § 18-1.3-101(9)(b) (2020). In contrast, 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.

293. ALA. CODE § 45-39-82.05(a)(1) (2020); ALA. CODE 45-28-82.25(a)(1) (2020).

294. One programmatic option is restorative justice. See, e.g., ALA. CODE § 12-25-32(2)(b)(23)(i-iii) (2020).

295. ALA. CODE § 45-39-82.01(c) (2020); ALA. CODE 45-28-82.25(c) (2020).

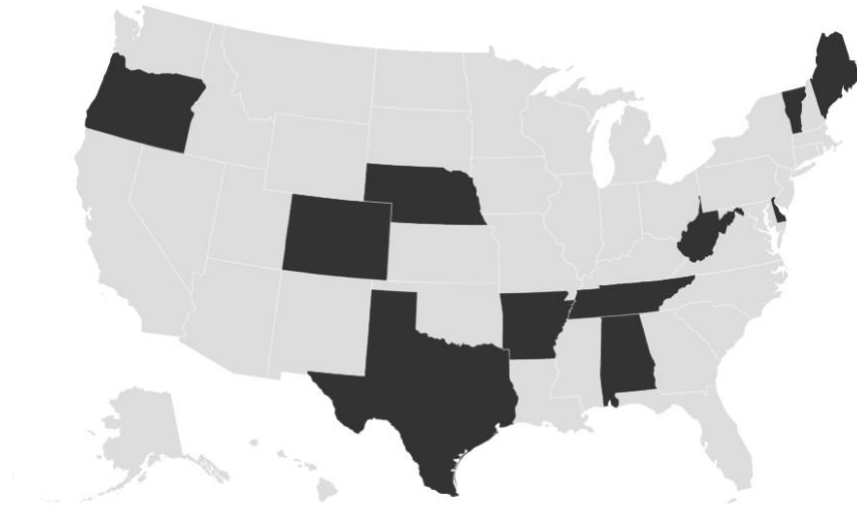
296. COLO. REV. STAT. § 18-1.3-101(9)(b) (2020).

297. FLA. STAT. § 985.155(4)(a) (2020).

298. One programmatic option for pre-trial diversion is restorative justice. See ALA. CODE § 12-25-32(2)(b)(23)(i-iii) (2020).

299. FLA. STAT. § 985.155(4)(a) (2020).

300. The following states have codified confidentiality in 2 laws: Alabama, Colorado, Maine, Nebraska, Oregon, and Tennessee. ALA. CODE § 45-39-82.05(a) (2020); ALA. CODE § 45-28-82.25(1) (2020); COLO. REV. STAT. § 18-1.3-104(b.5)(I) (2020); COLO. REV. STAT. § 18-1.3-204(2)(a)(III.5) (2020); ME. STAT. tit. 15, § 3204 (2019); ME. STAT. tit. 34-A, § 1214(3)(F) (2019); NEB. REV. STAT. § 25-2914.01 (2019); NEB. REV. STAT. § 43-247.03 (2019); OR. REV. STAT. § 161.398(2) (2020); OR. REV. STAT. § 423.600 (2020); TENN. CODE ANN. § 16-20-103; TENN. CODE ANN. § 16-20-102 (2020). The following states have codified confidentiality in 1 law: Alaska, Delaware, Massachusetts, Texas, Vermont, and West Virginia. ALASKA R. MINOR OFF. PROC. 21 (2020); DEL. CODE ANN. tit. 11, § 9503(b) (2019); MASS. GEN. LAWS ch. 276B, § 4 (2018); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2019); VT. STAT. ANN. tit. 28, § 205(c)(3) (2020); W. VA. CODE § 49-4-725 (2020).



*Figure 8. Confidentiality Laws.* The color gradient of the states indicated presence (black) or absence (gray).

The first group represents laws that affirmatively protect statements made during restorative justice processes. Such laws exist in Colorado, Maine, Massachusetts, Nebraska, Oregon, Tennessee, Texas, Vermont, and West Virginia,<sup>301</sup> but differences exist with respect to scope. In Colorado, for example, the confidentiality of “statements” made during a victim-offender conference cannot be waived or used as a basis for charging or prosecuting a defendant unless “the defendant commits a chargeable offense during the conference.”<sup>302</sup> Similarly, in Maine, “statements of a juvenile or of a juvenile’s parents, guardian or legal custodian made to a juvenile community corrections officer . . . during a

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301. Other states, such as Illinois, have considered statutory provision that would generally prohibit the admission into evidence of communications made during a restorative justice practice. The new section would provide:

If a restorative justice practice is convened, neither the fact that it has been convened, nor anything said or done within the practice, is admissible in any court, unless this privilege is: (1) waived, in court or in writing, by the party or parties about whom the information relates; (2) subject to one or more of the exemptions in subsection (f); or (3) used in furtherance of a criminal act.

*See* MICHAEL J. KAUFMAN, 9 ILL. PRAC. SERIES, ILLINOIS CIVIL TRIAL PROCEDURE § 22:18 (2d ed. 2019); *see also* S.B. 678, 2019 Leg., Reg. Sess. (Cal. 2019), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB678](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB678) [<https://perma.cc/XKX5-K5RU>] (“This bill would make specified statements, and information derived from those statements, made as a part of the program inadmissible in any action or proceeding.”).

302. COLO. REV. STAT. § 18-1.3-104(b.5)(I) (2020).

restorative justice program . . . are not admissible in evidence during the State's case in chief at an adjudicatory hearing against that juvenile."<sup>303</sup>

Conversely, in Texas, confidentiality is extended to "communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure."<sup>304</sup> In Nebraska, any written or verbal communication made "in connection with matters referred to a restorative justice program which relates to the controversy or dispute undergoing restorative justice and agreements resulting from the restorative justice program" are confidential and privileged.<sup>305</sup> A comparable protection is present in Oregon whereby "documents or oral communications created, submitted or provided for use in the restorative justice program" are all confidential and exempt from disclosure.<sup>306</sup>

There is also variation among these laws with respect to timing within the criminal justice process, though ambiguity exists here, too. In West Virginia, Nebraska and Tennessee, for example, the statutes are silent as to a specific restorative justice process or the stage of use in the criminal justice system.<sup>307</sup> Lastly, some laws apply only to juveniles,<sup>308</sup> others only to adults,<sup>309</sup> and, in some instances, to both.<sup>310</sup>

The second class of laws joins confidentiality and a defendant's potential access to a restorative justice program. This occurs in 2 states, Alaska and Alabama, and significant differences exist.<sup>311</sup> In Alabama, an individual must waive confidentiality by providing a written statement that *shall be admissible* in any criminal trial "admitting his or her participation in, and responsibility for, the offense which is the subject of the application for entry into the pre-trial diversion program."<sup>312</sup> Alabama represents an outlier among all restorative laws in requiring an admissible statement of guilt as a condition of participation in restorative justice. In Alaska, by contrast, an individual can elect to admit "to one or more acts alleged in

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303. ME. STAT. tit. 15, § 3204 (2019).

304. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (West 2019).

305. NEB. REV. STAT. § 25-2914.01 (2019).

306. Confidentiality is not limited to inadmissibility "as evidence in any subsequent administrative or judicial proceeding, including board proceedings and deliberations" but also extends to non-use and non-disclosure by restorative justice program staff, volunteers or participants for any purpose unrelated to the program. OR. REV. STAT. § 161.398(2) (2020).

307. W. VA. CODE § 49-4-725 (2020); NEB. REV. STAT. § 25-2914.01 (2019); TENN. CODE ANN. § 16-20-103 (2020).

308. See, e.g., ALASKA R. MINOR OFF. PROC. 21 (2020); ME. STAT. tit. 15 § 3204 (2019); NEB. REV. STAT. § 43-247.03 (2019).

309. VT. STAT. ANN. tit. 28, § 205(c)(3) (2020).

310. MASS. GEN. LAWS ch. 276B, § 4 (2018).

311. ALA. CODE § 45-39-82.05(A) (2020); ALA. CODE § 45-28-82.25 (1) (2020); ALASKA R. MINOR OFF. PROC. 21 (West. 2020).

312. ALA. CODE § 45-39-82.05(A)(4) (2020); ALA. CODE § 45-28-82.25(A)(4) (2020).

the petition” upon “the court’s agreement to the recommendations made by a restorative justice program.”<sup>313</sup> In either instance, participation in restorative justice is conditioned on formal admission of accountability to a state actor.<sup>314</sup>

Laws in Delaware and Colorado represent a third class in which confidentiality and privilege are waivable under certain circumstances. In Delaware, this occurs if materials are submitted by the individual to the “the program for the purpose of avoiding discovery of the material in a subsequent proceeding.”<sup>315</sup> In this instance, a court can waive confidentiality privileges.<sup>316</sup> Colorado privileges any statement made during restorative justice unless “the defendant commits a chargeable offense during the conference.”<sup>317</sup>

This study affirms earlier research on confidentiality and restorative justice.<sup>318</sup> Participation in restorative justice in 34 states poses a risk for both offenders and practitioners that evidence derived from restorative justice processes may or may not be privileged. One ad-hoc remedial measure to address the absence of protections codified at the state level is the use of Memorandum of Understandings (MOUs) between local prosecuting authorities and practitioners or programs.<sup>319</sup> In such MOUs, restorative justice programs enter into agreements, which stipulate that prosecutors will not use statements made in preparation for or during a restorative justice process in pending or subsequent criminal cases.<sup>320</sup> However, the use of MOUs is not a model without uncertainty.<sup>321</sup> That is, unless an MOU contains legally enforceable promises, it cannot carry the same weight as a contract.<sup>322</sup>

So, in the absence of explicit statutory protections, legally binding MOUs, or the importation of privilege from other alternative dispute resolution processes, the use of restorative justice carries the risk of

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313. ALASKA R. MINOR OFF. PROC. 21 (West 2020).

314. In Alabama, since restorative justice occurs pre-adjudication, this mandatory statement abridges a defendant’s Fifth Amendment right against self-incrimination. U.S. CONST. amend. V.

315. DEL. CODE ANN. tit. 11, § 9503(b) (2019).

316. *Id.*

317. COLO. REV. STAT. § 18-1.3-204(2)(III.5) (2020).

318. González, *supra* note 1, at 1051–52.

319. *See id.* at 1052.

320. *See id.*

321. There is no evidence to suggest MOUs are universally adopted across the country. Interview with Jonathan Scharrer, Clinical Assistant Professor, Restorative Just. Project Dir., Univ. of Wis. L. Sch., in L.A., Cal. (Dec. 17, 2019) (on file with author).

322. Cf. Samantha Buckingham, *Reducing Incarceration for Youthful Offenders With a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 876 (2013) (explaining that, “without binding assurances that [victim-offender mediation] communications are confidential[,] . . . a defendant would be foolhardy to participate or would be chilled from participating in a meaningful and open way”).

feeding back into formal punitive processes or triggering new criminal or civil processes. This could occur in multiple scenarios: if either party withdraws during the process; if the facilitator determines the process to be inadequate, incomplete, or a failure; or if a prosecutor or judge denies approval of the agreement resulting from the process. This approach raises ethical and constitutional concerns that should not be overlooked by those who seek to expand the current restorative justice scheme or attorneys whose clients face the choice of whether or not to participate in restorative justice.

### G. Fees

While there has been robust attention to the use of statutory fines, surcharges, and administrative fees<sup>323</sup> in the criminal justice system, no studies have examined or even discussed the use of fees in the context of restorative justice.<sup>324</sup> The absence of such attention is most likely attributable to the lack of comprehensive analysis of restorative justice laws within the criminal justice system. This study presents the first data in this area. Though a small universe within the restorative justice scheme, the use of fees—in particular, a “play to pay” model—is noteworthy.<sup>325</sup>

Table 3 presents the 10 laws within this category of analysis.<sup>326</sup> It shows two key differences in these laws. First, states that set forth a

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323. The use of fines and fees in criminal justice systems has been shown to disenfranchise system-involved individuals. Additionally, they have led to significant collateral consequences. *See, e.g.*, Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 227–29 (2012); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 290–95 (2014); Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 57–59 (2019); Beth A. Colgan, *Economic Liberty and Equal Justice*, 43 HARV. J.L. & PUB. POL’Y 31, 32–33 (2020); JESSICA FEIERMAN, NAOMI GOLDSTEIN, EMILY HANEY-CARON, & JAYMES FAIRFAX COLUMBO, JUVENILE L. CTR., DEBTORS’ PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 6–8 (2016), <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf> [<https://perma.cc/U7C7-PGFQ>]; Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486, 492 (2016).

324. This is true in the restorative justice literature as well. There is no scholarship previously identifying this trend empirically or raising it theoretically.

325. In light of prior research on economic sanctions, any efforts to expand the architecture of restorative justice in the criminal law (whether emerging from the political momentum following George Floyd’s death and national protests or not) should be wary of replicating these laws and further perpetuating inequities.

326. *See* ALA. CODE § 15-18-180(b)(1) (2020); ALA. CODE § 45-28-82.25(c) (2020); COLO. REV. STAT. § 18-1.3-104(b.5)(I) (2020); COLO. REV. STAT. § 19-2-905(4) (2020); LA. CODE CRIM. PROC. ANN. art. 895 (2020); LA. ADMIN. CODE tit. 22 § 337(H)(1) (2020); MONT. CODE ANN. § 46-18-201(4)(o) (2019); NEB. REV. STAT. § 25-2908(5) (2019); NEB. REV. STAT. § 43-274 (2019); TEX. CIV. PRAC. & REM. CODE ANN. § 52.007(a) (West 2019); CONN. GEN. STAT. § 54-56g(3)(b)(g) (2020).

maximum fee amount required and those that provide no specificity as to amount. Second, states that qualify the fee with a clause of ability to pay and those states that do not.

*Table 3. Jurisdictions with Fees by Specificity*

	State	Fee	Conditional
<b>Maximum Given</b>	Colorado <sup>327</sup>	No more than \$125.	Yes
	Colorado <sup>328</sup>	No more than \$125.	Yes
	Montana <sup>329</sup>	Up to \$150 for program expenses.	No
	Texas <sup>330</sup>	“Reasonable fee,” not to exceed \$350.”	Yes
	Connecticut <sup>331</sup>	No more than \$75.	Yes
<b>Unspecified Amount</b>	Alabama <sup>332</sup>	Undefined amount.	No
	Alabama <sup>333</sup>	“Any additional fees for participation in a restorative justice initiative program by an offender shall be set by the district attorney . . . .”	No
	Louisiana <sup>334</sup>	“All costs . . . shall be paid by the offender.”	No
	Louisiana <sup>335</sup>	“All costs . . . , pursuant to this Paragraph shall be paid by the offender.”	No
	Nebraska <sup>336</sup>	Sliding fee scale based on income.	Yes

327. COLO. REV. STAT. § 18-1.3-104(b.5)(I) (2020).

328. COLO. REV. STAT. § 19-2-905(4) (2020).

329. MONT. CODE ANN. § 46-18-201(4)(o) (2019).

330. TEX. CIV. PRAC. & REM. CODE ANN. § 52.007(a) (West 2019).

331. CONN. GEN. STAT. § 54-56g(3)(b)(g) (2019).

332. ALA. CODE § 15-18-180(b)(1) (2020).

333. ALA. CODE § 45-28-82.25(c) (2020).

334. LA. CODE CRIM. PROC. ANN. art. 895 (2020).

335. LA. ADMIN. CODE tit. 22 § 337(H)(1) (2020).

336. NEB. REV. STAT. § 43-274 (2019).

## CONCLUSION

This Article's purpose is to present the contemporary legal landscape of restorative justice in criminal law. As such, it provides essential scaffolding in the critical moment that we face. The increasing exchange between criminal justice reform and restorative justice cannot be ignored.<sup>337</sup> Proponents and opponents of the expansion of restorative justice in law should not advance changes to the existing scheme without fully knowing its present dimensions.<sup>338</sup> To do so likely would result in policies and practices yielding consequences antithetical to their aims.

While prior work on state-level restorative justice laws exists, this study represents the most comprehensive examination of the restorative justice scheme in juvenile and adult criminal justice systems in the United States.<sup>339</sup> When viewed at the macro- or micro-levels, the legalization of restorative justice in these systems exists in highly individualized contexts with low to medium commonalities. This diversity is not surprising given

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337. See, e.g., Gavrielides, *supra* note 6, at 224–26 (discussing restorative justice as a possible remedy for the issue of racial harm seen as a product of the traditional criminal justice system); DAVID R. KARP, JULIE SHACKFORD-BRADLEY, ROBIN J. WILSON, & KAAREN M. WILLIAMSEN, A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2–5 (2016), [http://www.skidmore.edu/campusrj/documents/Campus\\_PRISM\\_Report\\_2016.pdf](http://www.skidmore.edu/campusrj/documents/Campus_PRISM_Report_2016.pdf) [<https://perma.cc/4CJE-S4XY>] (discussing restorative justice as an alternative to traditional criminal justice when addressing sexual misconduct on college campuses); Yana Kunichoff, *Should Communities Have a Say In How Residents Are Punished For Crime?*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/chicago-restorative-justice-court/524238/> [<https://perma.cc/8KBX-NJAW>] (discussing how a Chicago neighborhood is using a restorative justice approach rather than a traditional punishment approach to keep offenders out of jail); Chaitanya Motupalli, *Intergenerational Justice, Environmental Law, and Restorative Justice*, 8 WASH. J. ENV'T L. POL'Y 333, 343–48 (2018) (discussing the unique capacity for restorative justice to address those who perpetuate environmental problems and its possible advantages over current environmental law); Marilyn Armour, *Restorative Practices: Righting the Wrongs of Exclusionary School Discipline*, 50 UNIV. RICH. L. REV. 999, 1019–23 (2016) (describing empirical outcomes of restorative justice and state legislation to codify restorative justice in education codes to address zero tolerance).

338. This study underscores the need for new research to inform ongoing debates about reform. For example, the current body of scholarship is missing extensive investigation of local practices that exist *outside* of state law. As discussed, there are numerous individual-level dynamics that can impact whether, how, and if restorative justice is available in a given jurisdiction. See *supra* Part II.A. More fine-grained research will allow for examination of the unintended consequences of the institutionalization of restorative justice in criminal law and, more importantly, best practices to promote new justice norms.

339. González, *supra* note 1; Pavelka, *supra* note 38; Sliva & Lambert, *supra* note 38; Shannon M. Sliva, *Finally “Changing Lenses”? State-Level Determinants of Restorative Justice Laws*, 98 PRISON J. 519 (2018).

the trajectory and growth of restorative justice since the 1970s.<sup>340</sup> Once conceptualized as an outlier adjacent to American criminal law, restorative justice is now a mainstream justice model operationalized into law, policy, and practice.<sup>341</sup>

As such, this Article is timely not only across multiple academic fields but also has concrete implications on policy and practice. Its findings, for example, are not limited to general observations or trends. Instead, they provide detailed insight into areas of law that may require heightened attention. It will be insufficient, for instance, if restorative justice laws continue to perpetuate the ills of discretionary decision-making. Similarly, there is a critical need for increased consideration of restorative justice laws that affirmatively protect confidentiality to mitigate due process concerns. As calls for expansion of restorative justice to address racial injustice and structural harm swell, policymakers will also need to limit, if not fully eliminate, the use of fees.

To meet the demands for new forms of justice, the very architecture of the criminal justice system must be interrogated and reimaged. Restorative justice is salient to such discourse. While it offers fresh perspectives to pressing issues, it is not a radical idea without a pre-existing legal foundation.<sup>342</sup> In these times, the challenge for reformists

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340. González, *supra* note 1, at 1057–59.

341. As I have argued in other work, the importance of understanding the legalization of restorative justice is not isolated to advocacy movements or policymaking. This study affirms that justice system actors must make decisions regarding the use of restorative justice at multiple stages of the criminal justice processes. The legal academy is remiss in not providing increased curricular attention to restorative justice. Presently, only a small number of law schools offer restorative justice courses ranging from reading groups to intercession seminars to clinics. *See, e.g.*, Restorative Justice Project, UNIV. OF WIS. LAW SCHOOL, <https://law.wisc.edu/fjr/rjp/>. Without substantive attention to restorative justice, law students will be inadequately prepared to represent the needs of their clients or effectively work in systems that increasingly use some form of restorative justice practice, process, or remedy. *Id.* at 1066–67.

342. Restorative justice within and adjacent to criminal justice systems is not a new phenomenon. While the research continues to evolve, it has been shown to improve victim satisfaction, maintain community safety, promote healing and reintegration, and reduce the use of punitive practices, including incarceration. *See, e.g.*, Jeff Bouffard, Maisha Cooper & Kathleen Bergseth, *The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 465, 477–78 (2017) (examining several variations of an RJ program for juvenile offenders, including direct mediation, indirect forms of victim/offender mediation accomplished without direct victim/offender contact, the use of community panels); González, *supra* note 1, at 1039–41 (providing a literature review of empirical studies); Latanae Parker, *Penal Reform and the Necessity for Therapeutic Jurisprudence*, 20 GEO. J. LEGAL ETHICS 863, 866 (2007) (arguing that restorative justice is more cost effective than traditional incarceration); HEATHER STRANG, LAWRENCE W. SHERMAN, EVAN MAYO-WILSON, DANIEL WOODS & BARAK ARIEL, CAMPBELL SYSTEMATIC REVIEWS, RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-TO-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION. A SYSTEMATIC REVIEW 47–49 (2013), <https://onlinelibrary.wiley.com/doi/pdf/10.4073/csr.2013.12>

and academics alike will be to determine what the next iteration of the restorative justice scheme should, and will, look like in order to achieve lasting and positive reforms to criminal justice in the United States.

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[<https://perma.cc/2DYE-WC2J>] (providing an assessment of the effect of face-to-face restorative justice conferencing on repeat offending and on available measures of victim impact); *see also* COUNTY HEALTH RANKINGS & ROADMAPS, *Restorative Justice in the Criminal Justice System* (Mar. 24, 2017), <https://www.countyhealthrankings.org/take-action-to-improve-health/what-works-for-health/strategies/restorative-justice-in-the-criminal-justice-system> [<https://perma.cc/Y6BC-NAUF>].