

Michigan Law Review

Volume 119 | Issue 6

2021

Restorative Federal Criminal Procedure

Leo T. Sorokin

U.S. District Court for the District of Massachusetts

Jeffrey S. Stein

U.S. District Court for the District of Massachusetts

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Procedure Commons](#), [Law and Society Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Leo T. Sorokin & Jeffrey S. Stein, *Restorative Federal Criminal Procedure*, 119 MICH. L. REV. 1315 (2021).
Available at: <https://repository.law.umich.edu/mlr/vol119/iss6/14>

<https://doi.org/10.36644/mlr.119.6.restorative>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RESTORATIVE FEDERAL CRIMINAL PROCEDURE

Leo T. Sorokin* & Jeffrey S. Stein**

UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR. By *Danielle Sered*. New York: The New Press. 2019. Pp. 305. Cloth, \$24.49; paper, \$18.99.

INTRODUCTION

“We can make America what America must become” (p. vi). So begins Danielle Sered’s¹ essential new text, *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair*: with an urgent call to action. This admonition, issued almost sixty years ago by James Baldwin, challenges the reader to engage in the quintessentially American project of “form[ing] a more perfect Union”²—that is, participating in the ongoing, collective project of crafting a more egalitarian society that promotes human flourishing.³ In this moment, when violence pervades American society even as America “incarcerates a larger proportion of its people than any other country,”⁴ Sered repurposes Baldwin’s enduring exhortation to focus the American project on one critical task: a wholesale reappraisal of our criminal justice system.

* U.S. District Judge for the District of Massachusetts.

** Term Law Clerk, Hon. Leo T. Sorokin, U.S. District Judge for the District of Massachusetts. The authors thank Allyson Lorimer Crews, Maria D’Addieco, Amy Robinson, Eve Primus, Rachel Barkow, Seema Gajwani, Ramya Krishnan, Hon. Denise J. Casper, Jaime Herbert, Lori Holik, Jessica Hedges, and the editors of the *Michigan Law Review*.

1. Executive Director, Common Justice.

2. U.S. CONST. pmbl.

3. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 19 (2011) (arguing that the Constitution created a “legal and political framework” through which the Declaration of Independence’s egalitarian “promises can be redeemed in history”). In the opening pages of her book, Sered both hopefully evokes the concept of constitutional perfection and problematizes a triumphant view of the American creed. See p. 2 (“The notions of equality and liberty that are meant to define us and bind us can only truly be ours if we understand them as a destination to which we are relentlessly headed, not a station we have already reached.”); pp. 1–2 (“We talk about liberty and equality and the pursuit of happiness and [yet] we cannot or will not break down the barriers to equal access for all.”); see also AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 6–7 (2010) (arguing that the mythology of “constitutional perfection” disregards a long historical record throughout which “democratic ideals themselves gained strength and meaning through frameworks of exclusion”).

4. Lynn Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181, 198.

While Sered's book is replete with empirical data and research-based arguments, two statistics she cites suffice, at the outset, to demonstrate the urgency of reform: (1) in recent years, "a full 56 percent of cases in which victims were injured went unreported" to the police (p. 34), and (2) fewer than half of reported violent crimes were solved by the police.⁵ This Review adopts Sered's view that these troubling and uncomfortable facts demand a clear-eyed honesty, a willingness to question familiar methods (and, if necessary, discard them), and a hunger for repairing interpersonal and systemic harm.

Baldwin's words echo throughout Sered's book, serving as a motif that orients her inquiry.⁶ Following Baldwin's approach, as well as his axiom that Americans must understand our history if we are to be "released from it,"⁷ a central aspect of Sered's project is to challenge narratives that have long dominated our socio-legal structures. Indeed, Sered acknowledges that the narratives she seeks to challenge are as familiar to American readers as "baseball and apple pie" (p. 1). The standard narrative runs as follows: Incarceration—especially for long periods of time—is "the single blunt instrument" that effectively deters crime and keeps us safe (p. 12). Victims of

5. P. 33. According to the FBI, the clearance rate for violent crimes reported to the police in 2019 was just 45.5 percent, and the clearance rate for property crimes was a mere 17.2 percent. *Crime in the United States, 2019*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-25> [<https://perma.cc/SD6W-2ELG>]. See generally LYNN LANGTON, MARCUS BERZOFKY, CHRISTOPHER KREBS & HOPE SMILEY-MCDONALD, U.S. DEP'T OF JUST., VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010, at 1 (2012), <http://bjs.gov/content/pub/pdf/vnrp0610.pdf> [<https://perma.cc/7ARM-3WNY>] ("During the period from 2006 to 2010, 52% of all violent victimizations, or an annual average of 3,382,200 violent victimizations, were not reported to the police."); Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1556–57 (2014) (establishing that "most sexual violence goes unaddressed" by the criminal justice system).

6. Recently, Baldwin's call to action has also been reiterated by prominent members of the legal profession. For example, in the wake of nationwide uprisings that responded to George Floyd's death, see generally Dionne Searcey & David Zucchini, *Protests Swell Across America as George Floyd Is Mourned Near His Birthplace*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/06/06/us/george-floyd-memorial-protests.html> [<https://perma.cc/HS3T-33RK>], justices of the Massachusetts Supreme Judicial Court and the Washington Supreme Court urged members of their states' judiciary and bar to engage in the same critical project. See *Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar*, MASS.GOV (June 3, 2020), <http://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and> [<https://perma.cc/E44S-XRTS>] ("As judges, we must look afresh at what we are doing, or failing to do . . . to create in our courtrooms, our corner of the world, a place where all are truly equal."); *Letter from Justices of the Washington Supreme Court to Members of the Judiciary and the Legal Community*, WASH. CTS. (June 4, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf> [<https://perma.cc/M37U-5U2Z>] ("Too often in the legal profession, we feel bound by tradition and the way things have 'always' been.").

7. James Baldwin, *A Letter to My Nephew*, PROGRESSIVE, Dec. 1962, at 19, 20, <http://progressive.org/magazine/letter-nephew> [<https://perma.cc/CW7E-86D4>].

crime either fixate on revenge or display uncommon, almost saintly grace (and nothing in between) (pp. 20–21). Violence is committed by “bad” individuals who can be understood (and punished) without reference to their social context (p. 83). Responsible parties (Sered’s term for perpetrators of violence or criminal defendants found guilty of such actions) and survivors (Sered’s term for victims of violence) have diametrically opposed interests and occupy cleanly divisible roles in the processes that respond to harm (p. 142). Prison holds offenders accountable for their actions (p. 91); alternatives to incarceration crafted with the participation of survivors and community members let responsible parties off the hook (p. 161).

According to Sered, “[o]ur society’s continual retelling of [these] stor[ies] is, quite simply, unethical” (p. 42). Most importantly she says, these stories have justified a system that leaves survivors without a voice and makes all of us—especially people of color—less safe. In fact, “prison does not merely fail to rehabilitate the people it confines,” Sered explains, “it contributes to the likelihood that they will commit greater harm in the future” (p. 66). Our tendency to “pathologize the angriest victims,” as well as “the forgiving ones,” elides the vast majority of survivor experiences, which occupy a “messy middle” filled with emotions like “compassion, grief, loss, fury, . . . confusion . . . love, despair, resentment, terror, and hope” (pp. 21–22). Perpetrators of harm cannot be understood without reference to the “larger ecosystem that made the harm likely in the first place” (p. 83). Responsible parties and victims often have “multiple roles as at once harmed and responsible, at once owed and in debt” (p. 142). And prison, rather than teaching offenders their lesson, does not require anyone to “face the human impacts of what they have done,” take responsibility for their “decisions and the pain they have caused,” or “do the extraordinarily hard work of answering for that pain and becoming someone who will not commit that harm again.”⁸

8. P. 91. Notably, Sered’s critique echoes the words of Bobby Fitzpatrick, one of the successful graduates of the District of Massachusetts’s restorative justice program, who remarked:

It’s easy to go to jail. I mean, I know [that sounds] crazy, but it is. You don’t have to worry about anything. You just go to jail and that’s it. [But] [i]t’s hard to stand up in front of a room and tell everybody what you did, and what you did to *them*, and see the expressions and the hurt and the pain that you bring to somebody else.

Bobby Fitzpatrick, Remarks at the National Workshop for U.S. Magistrate Judges (Apr. 11, 2018) (on file with authors) (emphasis added). Indeed, most prisons and jails expect little of an incarcerated individual beyond complying with institutional rules and providing labor (compensated with wages that are illegal outside of prison). See U.S. CONST. amend. XIII, § 1 (forbidding involuntary servitude “except as a punishment for crime whereof the party shall have been duly convicted”); Charles Decker, *Time to Reckon with Prison Labor*, YALE INST. FOR SOC. & POL’Y STUD.: LUX ET DATA (Oct. 1, 2013), <https://isps.yale.edu/news/blog/2013/10/time-to-reckon-with-prison-labor-0> [<https://perma.cc/54Z3-3V4S>] (“According to the Federal Bureau of Prisons, federal inmates earn 12 cents to 40 cents per hour for jobs serving the prison, and 23 cents to \$1.15 per hour in Federal Prison Industries factories.”); see also Isabelle Chapman, *Prison Inmates Are Fighting California’s Fires, but Are Often Denied Firefighting Jobs After*

Thus, Sered powerfully argues, the narratives we continue to tell and believe must be rejected or revised.

But Sered's book has ambitions far beyond critiquing narratives. This may be so for several reasons. First, Sered intervenes in the debate over criminal justice reform at a moment when scholars and policymakers of all political stripes recognize certain shared premises.⁹ Second, while Sered has undoubtedly produced a powerful and skilled scholarly work, she is not, primarily at least, a scholar. Rather, Sered is the director of Common Justice, a New York City-based nonprofit that "operate[s] an alternative to incarceration and victim services program for serious and violent felonies" (p. 133). Her book, then, is not merely a critique; instead, Sered uses Common Justice to provide a positive vision for reform. Third, Common Justice does not stand as a singular vision. Sered's book arrives in the midst of numerous initiatives across the country seeking to infuse restorative justice practices into the criminal justice system.¹⁰

Inspired by a commitment to restorative justice principles,¹¹ Common Justice "offer[s] a survivor-centered . . . process that gives those directly im-

Their Release, CNN (Oct. 31, 2019, 3:46 PM), <https://www.cnn.com/2019/10/31/us/prison-inmates-fight-california-fires-trnd/index.html> [<https://perma.cc/DL4Q-JD3Q>] ("The inmates work long hours, earning between \$2.90 and \$5.12 a day, and an additional \$1 an hour when they're battling fires."). However, there are some positive exceptions. See *First Step Act Implementation Fact Sheet*, U.S. DEP'T JUST. 2 (July 19, 2019), <https://www.justice.gov/opa/press-release/file/1184766/download> [<https://perma.cc/V6FU-VXH5>] (describing the Bureau of Prisons' Residential Drug Abuse Program). See generally SUNNY SCHWARTZ WITH DAVID BOODELL, *DREAMS FROM THE MONSTER FACTORY* (2009) (describing programming in San Francisco jails that works to reduce violence against women).

9. See, e.g., Ellen S. Podgor, Introduction, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 534 (2012) ("Perhaps what has been the most impressive aspect of this movement [to stop overcriminalization] is that it has no political or ideological colors. Its voice comes from the left, the right, Democrats, Republicans . . ."); Jonathan Feniak, *The First Step Act: Criminal Justice Reform at a Bipartisan Tipping Point*, 96 DENV. L. REV. F. 166, 166 (2019) ("The broad bipartisan support the FIRST STEP Act garnered is the continuation of an ongoing state-level wave of criminal justice reforms and may be the 'tipping point' for additional federal and state criminal justice system reforms." (footnotes omitted)). Additional literature, however, explores the nature and implications of this "bipartisan consensus" from a critical perspective. See, e.g., Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 272–73 (2018); I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 591–92 (2016).

10. See *infra* Part II.

11. As Sered notes, "restorative justice" is a contested term. See also Doron Samuel-Siegel, *What Is Restorative Justice?*, 23 RICH. PUB. INT. L. REV., no. 2, 2020, at 1, 5–6, <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1473&context=pilr> [<https://perma.cc/CQC8-UYGS>] ("There are some who believe very strongly that restorative justice is a term that refers to a set of methods or processes for responding to crime. . . . There are others who reject what they see as a rather narrow . . . definition, and they take the position that restorative justice is actually a theory of justice. . . . Still others like to focus on thinking about restorative justice as a set of values."). Sered's discussion of restorative justice, while often focused on processes and methods—like circle dialogues and mutually agreed-upon reparation projects—also highlights larger principles and values. See p. 135 (describing "restorative justice" as "a decision-making process that involves those most directly impacted by a given

pacted by acts of violence the opportunity to shape what repair will look like, and, in the case of the responsible party, to carry out that repair instead of going to prison” (p. 133). Operated as a partnership with the Kings County and Bronx District Attorneys’ Offices in New York City, Common Justice only accepts a case when the survivor, the prosecutor, and the responsible party all consent.¹² The reparation agreements that result from Common Justice’s program are long-lasting, with services rendered to both survivors of harm and responsible parties.¹³

Central to Common Justice’s work “is a dialogue process, often called a circle, that includes the responsible party, the harmed party, and support people” (p. 135). Participants work collectively to “identify the harm that was done and begin to define a pathway to repair” (p. 135). Ultimately, with the help of trained facilitators, “all parties decide on agreements other than incarceration to hold the responsible party accountable in ways meaningful to the person harmed” (pp. 136–37). This often includes commitments to (formal and informal) education, tailored and sincere apologies, addressing harmful reliance on drugs or alcohol, and paying restitution, among other “creative commitments particular to each case” (p. 137).

Sered explains that Common Justice’s work is guided by “four core principles”: interventions must be “survivor-centered, accountability-based, safety-driven, and racially equitable” (p. 14). For the past decade, the organization has worked with hundreds of survivors and perpetrators of violence and has achieved truly staggering success: “[F]ewer than 6 percent of Common Justice participants ha[ve] been terminated from the program for being convicted of a new crime” (p. 134), “[m]ore than 85 percent of Common Justice graduates go on to lead law-abiding lives,”¹⁴ and “survivors report 80 to 90 percent rates of satisfaction with restorative processes, as compared to 30 percent for traditional court systems.”¹⁵ While Sered is the

harm in identifying the pathway toward repair—and then carrying out the actions to get there”); p. 138 (noting that “restorative justice’s primary concern [is] with harm rather than with broken rules”); p. 139 (“Restorative justice requires a fundamental belief in the humanity of those who have been harmed and those who caused harm.”).

12. See Miriam Krinsky & Taylor Phares, *Accountability and Repair: The Prosecutor’s Case for Restorative Justice*, 64 N.Y.L. SCH. L. REV. 31, 41 (2019–2020).

13. See *Common Justice Model*, COMMON JUST., https://www.commonjustice.org/common_justice_model [<https://perma.cc/WL8K-TPS9>].

14. Eric Gonzalez, *Using the Power of Prosecutors to Drive Reform*, CRIM. JUST., Fall 2019, at 9, 12. The rate of recidivism among Common Justice participants contrasts sharply with the recidivism rate among federal offenders. See U.S. SENT’G COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf [<https://perma.cc/6RGD-E8S3>] (“Over an eight year follow-up period, almost one-half of federal offenders released in 2005 (49.3%) were rearrested for a new crime or rearrested for a violation of supervision conditions.” (emphases omitted)).

15. Michelle Alexander, Opinion, *Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> [<https://perma.cc/5TQA-NQSA>].

first to admit that “[r]estorative justice will not fully replace incarceration,” and notes that “it is not a panacea,” she persuasively presents restorative justice practices and principles as viable improvements to traditional criminal justice theory and law (p. 133).

This Review complements Sered’s work, aiming to situate restorative justice interventions in a legal institution that, as a matter of course, confronts harms that emanate from both violent and nonviolent offenses: the federal courts. In doing so, this Review explores questions that necessarily follow from any attempt to integrate restorative justice principles into the federal criminal system: How might federal criminal procedure more effectively center the needs of survivors, defendants, family members, and other nonparties? How can the various actors within the court system facilitate processes that repair harm? In an era of few jury trials,¹⁶ how can the courts involve community members when they engage in restorative processes?¹⁷

These questions inform how we might integrate restorative justice practices into the work of the federal courts. But they do not, at least overtly, confront a series of undeniable and significant tensions at work in such an effort: Will any coercive, court-driven process result in truly restorative justice?¹⁸ Are the criminal justice system’s barriers to unbridled truth telling incompatible with a restorative justice framework that assumes an offender’s guilt?¹⁹ For that matter, are the federal courts an appropriate site for restorative justice interventions?²⁰

Before this Review confronts—albeit in attenuated form—these challenges, it first recounts Sered’s arguments. Part I summarizes Sered’s claims, including her deconstruction of the roots of violence, her characterization of survivors’ oft-ignored needs, her prescription for centering accountability in

16. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (recognizing the “reality that criminal justice today is for the most part a system of pleas, not a system of trials” and observing that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas”); Jocelyn Simonson, *The Criminal Court Audience in a Post-trial World*, 127 HARV. L. REV. 2173, 2175 n.3 (2014) (citing Department of Justice statistics showing that “ninety-six percent of federal criminal cases during fiscal year 2009 that did not end in dismissal ended with a guilty plea”).

17. *Cf.* Jocelyn Simonson, Essay, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 261–62 (2019) (arguing that “we might do well to include the public more often in our adjudication of cases”); *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34 (2003) (“The criminal process in the United States has become largely an administrative one, with . . . little intervention by the people.”).

18. *See, e.g.*, Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. REV. 323, 342–43 (2017).

19. *Cf.* p. 135 (arguing that “[i]f you walk into a courtroom . . . [y]ou will just see someone who has caused harm in a room full of people who are disconnected from that harm and making a decision about what to do”).

20. *Cf.* Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573 (2021) (criticizing court-based programs that address underlying problems that often lead to encounters with the criminal justice system, like drug addiction).

our response to harm, and her description of restorative justice practices that Common Justice utilizes. Then, Part II situates Sered's project within the larger ecosystem of restorative justice interventions. Next, Part III describes restorative justice interventions that are being implemented in the United States District Court for the District of Massachusetts. Finally, Part IV explores challenges and critiques that complicate efforts to integrate restorative justice into the federal criminal system.

I. SERED'S THEORY AND PRACTICE

A. *Understanding Violence*

Few would quarrel with one of Sered's first claims: that violence is "a defining feature of our culture" (p. 2). But this statement leads Sered to a conundrum: How can this be so, she asks, in "a country that makes violence our shared enemy" (p. 2) and deploys overwhelming financial resources²¹ to maintain an elaborate "machinery"²² of criminal justice? In other words, why is it that violence is so pervasive, that so many violent crimes are unreported, and that so many reported crimes remain unresolved? To gain some purchase on these questions, Sered contends that we must first examine "the history of our national relationship to violence" (p. 2). Then, in light of these historical conditions, Sered urges us to understand the factors that often contribute to individual-level violence.

In America, Sered says, thinking honestly about violence requires reckoning with the pervasive terror of America's "origin story"—that is, the centuries-long enslavement of Black people²³ and the genocide of Native peoples (pp. 192–93). Sered explains that white supremacy—the ideological engine of slavery and related forms of domination²⁴—"is the ultimate normalizer of violence" (p. 56). Such normalization, Sered argues, "was necessary for white slave owners to become people who could commit [great] harm against other human beings" (p. 55). And, she concludes, it was necessary for white

21. In 2016, a White House report estimated that "[r]eal expenditures on the criminal justice system as a whole total over \$270 billion, or \$870 per capita and have grown by over 70 percent in the last two decades." COUNCIL OF ECON. ADVISORS, EXEC. OFF. OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 5 (2016), http://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf [<https://perma.cc/CRM8-WHKG>].

22. Cf. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE*, at xx (2012) (arguing that the criminal justice system has become a "machine" run by skilled "insiders" that appears "opaque, technical, and amoral" to members of the general public).

23. See Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), <http://nytimes.com/interactive/2019/12/20/magazine/1619-intro.html> [<https://perma.cc/QV2D-C7EV>] (arguing that "[o]ut of slavery—and the anti-black racism it required—grew nearly everything that has truly made America exceptional").

24. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1731 (1993).

people to conceive of and operationalize laws that maintained a system of racialized exploitation.²⁵

Further, Sered draws a through line from America's "origin story" to the present day. Her book joins the growing body of scholarship that links modern-day violence with America's racial hierarchy, outlining the policy choices that have segregated communities of color;²⁶ deprived them of wealth, autonomy, and opportunities for human flourishing;²⁷ and simultaneously introduced "unevenly applied law enforcement" (p. 4), often in the form of quasi-military forces.²⁸ Indeed, data collected by the federal government "consistently show that young black men are among the most likely to be victimized by violence overall" (p. 211).

But understanding the historical and systemic nature of violence is not enough, Sered argues; instead, we must also learn from the teachings of "[d]ecades of research about the individual-level causes of violence" (p. 67). First, Sered explains that "the desire to commit violence [is often] an attempt to quell arising feelings of shame" (pp. 67–68). She highlights research demonstrating that feelings of shame are especially prevalent in instances of street violence, where committing harm may be perceived as the only available means of "securing respect," "managing disrespect," and "safeguard[ing] against injury and death" (p. 68). Next, Sered underscores the detrimental nature of social isolation, which cuts individuals off from "supportive relationships" that might otherwise help them "feel connected and protected" (p. 70). For those who live under conditions of poverty, isolation often thwarts their path toward financial security, disconnecting them from potential employers and other community members who might help them find stability and establish structured, flourishing lives (p. 70).

Sered also describes the cyclical nature of harm, observing that "there may be no experience more likely to predict committing future violence than surviving it" (p. 73). This is so, Sered says, because "violence itself normalizes violence," increasing "the likelihood of someone committing harm by modeling power through violence" (p. 73). Finally, Sered explains that "an inability to meet one's economic needs drives violence" (p. 77). Sustained poverty,

25. See p. 57; see also Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 935–41 (2019).

26. See RICHARD ROTHSTEIN, *THE COLOR OF LAW*, at xii (2017) (chronicling "scores of racially explicit laws, regulations, and government practices [that] combined to create a nationwide system of urban ghettos, surrounded by white suburbs").

27. See *id.* at 184 (noting that median Black household wealth is less than 10 percent of median white household wealth); see also MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 260 (2017) ("There are two banking systems in America. One is the regulated and heavily subsidized mainstream banking industry; the other is the unregulated, costly, and often predatory fringe industry. The black community has historically been under the latter system, having been left out of the former.").

28. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 75–77 (rev. ed. 2012) (describing the "transformation from 'community policing' to 'military policing,'" including the use of SWAT teams to conduct "military-style raid[s]" to enforce drug laws).

she says, presents many barriers that make violence more likely, including “untenable housing arrangements” and “unmanageable debt” (p. 77). Moreover, Sered writes of the acute pain and resentment that can flow from material inequity, dovetailing with—and compounding—the effects of shame (p. 77).

Ultimately, Sered’s framework—combining essential historical context with a taxonomy of individual-level drivers of violence—sheds significant light on how interpersonal harm pervades American society, notwithstanding the criminal justice system we have built to address and prevent it. In her account, our social order has dehumanized the subjects of violence and normalized extreme punishment for people of color (while simultaneously countenancing leniency for others). Indeed, Sered explains, “[w]hite people are far less likely than their black counterparts to be arrested, charged, convicted, sentenced, or given the maximum sentence for any crimes, including drug, property, and violent offenses” (p. 59). She also explains that our primary remedial tool, incarceration, “is characterized by precisely what we know to be the main drivers of violence” (p. 67)—that is, feelings of shame that flow from social ostracization, extreme isolation from one’s family and community, repeated exposure to violence,²⁹ and financial precarity throughout and following a term of imprisonment.³⁰ Given these characteristics, Sered remarks, “[i]t would be hard to conceive of a less rehabilitative environment than a U.S. prison” (p. 64). Thus, Sered says, if our collective mobilization against violence is to be effective—that is, if it is to promote safety in communities of color and prevent, rather than perpetuate, violence—historical and research-based evidence suggests the need for a different societal response.

B. *Listening to Survivors*

Even if the operation of the criminal justice system is disconnected from an accurate understanding of violence, it could be that it brings incredible

29. P. 76 (“A 2007 Bureau of Justice Statistics study estimated that 60,500 people incarcerated in state and federal prisons were sexually abused in the prior twelve months alone.”). Additional research demonstrates that prison violence is an especially common experience for members of vulnerable populations. *E.g.*, Judson Adams, Halle Edwards, Rachel Guy, Maya Springhawk Robnett, Rachel Scholz-Bright & Breanna Weber, *Transgender Rights and Issues*, 21 *GEO. J. GENDER & L.* 479, 515 (2020) (“Incarcerated transgender people are approximately ten times more likely to be sexually assaulted than the general prison population, with nearly forty percent of transgender people in state and federal prisons reporting a sexual assault in the previous year.”).

30. Pp. 77–79 (describing typical wages for prison work as “not more than twelve to forty cents per hour” and noting that “a criminal record can be a barrier to obtaining gainful employment,” as well as to “receiving federal financial aid” to attend college). The financial toll of incarceration is not limited to individual prisoners. *See* Alana Semuels, *What Incarceration Costs American Families*, *ATLANTIC* (Sept. 15, 2015), <http://theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412/> [<https://perma.cc/Q8WL-ZG44>] (citing a recent study that found that “nearly 65 percent of families are suddenly unable to pay for basic needs such as food and housing” when a family member is incarcerated).

solace to victims and survivors. After all, as Sered reminds us, the workings of our current system are often justified by reference to victims' desires (p. 20); news reports repeatedly describe victims as "breath[ing] a sigh of relief" when a perpetrator is apprehended, convicted, and incarcerated (p. 37). Certainly, public safety—both for a particular individual and the community at large—is a critical and central value of our criminal justice system. But does the criminal justice system truly help survivors heal in the aftermath of a traumatic experience?

In Sered's telling, the answer is an emphatic no. Victims who choose to engage with the criminal justice system—a surprisingly small proportion of all survivors—more often than not encounter a system that leaves their "questions . . . unanswered, their voices excluded, their input legally not required . . . and their preferences frequently disregarded" (p. 30). When a perpetrator pleads guilty, in some cases to a lesser crime than was initially charged, victims may feel that a trial-less resolution has deprived them of their only opportunity for public recognition of the gravity and truth of a traumatic experience.³¹ And in the small portion of cases that go to trial, victims must relive their initial trauma, all while sidelined as "powerless" spectators with few, if any, opportunities to convey their needs to decisionmakers.³² At the point of resolution, when a guilty conviction is entered or a perpetrator is sent to prison, many victims report "that they still feel exactly the way they did the day the crime occurred" (p. 40). Rather than facilitating healing and repair, Sered describes a system that leaves victims with unresolved pain and a sense of deep insecurity.

How might our societal response to violence address these consistent failures? Sered suggests that we must begin by centering survivors—that is, we must listen to them and design a system that is directly responsive to survivors' needs (p. 20). Building on years of practice at Common Justice, including hundreds of interactions with survivors of violent crimes, Sered presents a clear taxonomy of what survivors need in the aftermath of violence.

First, Sered explains, survivors "want validation that what happened to them is wrong" (p. 23). At bottom, this requires us to take their pain seriously, not blame or judge them for what happened to them, and affirm that "society's norms, values, and expectations" demand that they be protected from similar harm in the future (pp. 23–24). Second, survivors also want answers (p. 24). In order to recover from trauma, Sered explains that survivors need a "coherent narrative"—a story about what happened and why—that will help them find meaning as they begin the path to recovery (p. 24). Because survivors want answers, Sered argues, they deserve a forum that will present opportunities to ask the questions that will help them understand why they

31. See pp. 32–33.

32. See p. 31 (outlining the many "negative impact[s] of trials on crime victims," including "the sense that their voices are not nearly as central or consequential in the process as they had imagined" (footnote omitted)).

were harmed (p. 25). Third, survivors “want to speak and they want their voices heard” (p. 25). Such communication is essential for survivors to reclaim a sense of control (p. 26). Many survivors also “want the person who harmed them to repair the harm as best they can,” which may require the responsible party to, among other things, “apologize, contribute positively to their community, or pay restitution” (p. 28). But, Sered explains, regardless of whether survivors ultimately experience repair (with or without the participation of the person who hurt them), survivors consistently want interventions that will help them and others feel safe (p. 28). Finally, and universally in Sered’s experience, survivors want “to know that the person who hurt them w[ill] not hurt anyone else” (p. 30; emphasis omitted).

One of the great tragedies that Sered identifies is that our current criminal justice system “delivers almost none of these things to the vast majority of victims” (p. 30). However, Sered’s reoriented framework—like other accounts that center survivors’ experiences—provides new ways of responding to interpersonal violence.³³

C. Promoting Accountability

A core component of Sered’s path forward is a rejuvenated vision of accountability. In Sered’s telling, accountability is another casualty of our current system; indeed, prison, contrary to the prevailing narrative, repeatedly “lets people off the hook” (p. 91). It does not require perpetrators of harm to “come face to face” with the people they victimized or “to own their responsibility for [their] decisions” (p. 91). Necessarily, according to Sered, a more effective system—one that properly understands the nature of violence and the needs of survivors—must facilitate true accountability, not extreme punishment masquerading as such.

For Sered, true accountability requires five critical steps. First, accountability must begin with truth telling (p. 97). The truth is essential, Sered argues, because it requires a responsible party to “abandon[] the wide variety of defenses” that they might otherwise deploy to explain away the gravity of the harm they inflicted, like “denial, dishonesty, minimization, [and] excuses” (p. 97). Telling the truth requires vulnerability (p. 97). It allows survivors, still haunted by trauma, to “locate responsibility somewhere” (p. 99). And it allows survivors to “start to answer . . . questions about *why* what happened happened” (p. 99).

Next, and relatedly, accountability involves “[a]cknowledging the [i]mpact of [o]ne’s [a]ctions on [o]thers” (p. 96). Too often, Sered explains, violence is experienced as an expression of indifference to another’s pain; acknowledgement can be so cathartic precisely because it requires a respon-

33. See, e.g., Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 458 (2006) (arguing that “victim healing involves more than punishing the offender” and that “by rethinking the roles victims perform in the criminal justice system, we may provide them with a more comprehensive menu of options to facilitate their recovery from crime”).

sible party to face what they have done and “experience[] it as wrong” (p. 103). Relying on the work of South Africa’s Truth and Reconciliation Commission, Sered’s third step emphasizes the importance of expressing genuine remorse (pp. 106–07). In her framework, remorse is “the gesture that opens a pathway to forgiveness” (p. 109) and a signal that the responsible party is intrinsically motivated to address the consequences of their actions (p. 108).

The fourth step, which Sered calls “doing sorry,” situates accountability in the future: it demands that responsible parties undertake “a set of actions that demonstrate remorse in practice” (p. 112). In some cases, “doing sorry” involves a responsible party working alongside the person they have harmed to figure out how they can “make things as right as possible” (p. 113). But in all cases, “[i]t is the completion of these agreements, not merely the formulation of them, that constitutes accountability” (p. 113). Finally, in Sered’s framework, accountability requires a responsible party to no longer commit similar harm (p. 119). Necessarily, this final step demands that individuals who have committed past harms “develop a greater sense of self-worth and dignity,” set and achieve short- and long-term goals, ask for help, and “build durable strategies” to move through their lives free of violence (p. 119).

Sered’s careful attention to accountability will no doubt speak to the experience of many long-time practitioners in the criminal justice system, including those who are initially skeptical of frameworks that do not center adjudication and punishment.³⁴ Indeed, many criminal-law practitioners have personally observed the human collateral damage of violent crimes: for example, survivors of violence and, all too often, the families of criminal defendants. Moreover, they have experienced the ways in which criminal-law rules and procedures often encourage, even if unintentionally, the avoidance of responsibility for causing harm.³⁵ They have encountered the view that no harm flowed from a person’s criminal acts and recognized that view as the byproduct of denial and minimization. And, undoubtedly, they will have observed frequent post-prison recidivism. In this way, Sered’s focus on accountability speaks powerfully to actors in the criminal justice system who might approach restorative justice principles with reservation.

D. *Practicing Restorative Justice*

Sered’s critique highlights the criminal justice system’s significant shortcomings in conceptualizing and responding to violence, centering the needs of survivors, and demanding accountability from responsible parties. But Sered offers more than a critique. She also presents an alternative set of practices for addressing violence that—while not intended to fully replace the

34. Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287, 2299 (2020) (describing many prosecutors’ philosophical predisposition toward adjudication and punishment).

35. See *infra* notes 107–108 and accompanying text.

criminal justice system or its reliance on incarceration³⁶—will, in her telling, more effectively “involve[] those most directly impacted by a given harm in identifying the pathway toward repair” (p. 135).

For Sered, that pathway is restorative justice. Restorative justice has “roots tracing back to a wide range of indigenous practices” from across the world.³⁷ In its modern formulation, “[a]s described by Howard Zehr, one of the early leaders in the restorative justice movement in the United States” (p. 140), restorative justice focuses its inquiry on three central questions: “Who has been hurt? What are their needs? Who has the obligation to address the needs, put right the harms, and restore relationships?” (p. 140; emphasis omitted).

Common Justice centers these questions in its fifteen-month program that intervenes in cases of serious violence committed by sixteen- to twenty-six-year-olds, including gunpoint robberies, assaults, and shootings (pp. 133–34). The organization provides an “intensive violence intervention curriculum” that responsible parties must complete in addition to their participation in restorative justice dialogues (p. 134). Participants who are successful—that is, those who complete the mandatory program elements and fulfill the commitments that they make to the people they harmed—are not incarcerated, and the pending felony charges against them are removed from their records (p. 134).

The restorative justice component of Common Justice’s work employs “a dialogue process, often called a circle, that includes the responsible party, the harmed party, and support people” (p. 135). Each participant engages in “robust preparation” before entering the circle, which involves, among other things, learning what options are available to the participants, communicating about “the emotional and physical impact of their experience,” describing the personal and social context in which the particular harm occurred, and “begin[ning] to think through possible agreements for what meaningful repair could look like” (p. 136). Participants are also connected to social services—including medical, employment, and educational services—that are likely to support the healing process (p. 136).

After this extensive preparation, the circle convenes as an opportunity for accountability and healing. Harmed parties are able to ask why the violence occurred, to describe its impact on them, and “to regain control and a sense of agency relative to the incident” (p. 136). Responsible parties are able

36. P. 133. In this way, Sered’s framework differs from abolitionist and transformative justice traditions that envision a societal response to violence that eradicates carceral institutions. See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1643 (2019) (arguing that “efforts to reform criminal legal processes in order to attempt to realize idealized visions of justice are doomed to simply further entrench existing injustices if they are not accompanied by more transformative demands”).

37. P. 133; see also Robert Yazzie, “*Life Comes from It*”: Navajo Justice Concepts, 24 N.M. L. REV. 175, 181 (1994) (describing the Navajo approach to restorative justice, which involves “a sophisticated system of egalitarian relationships where group solidarity takes the place of force and coercion”).

to take accountability and demonstrate that they understand the impact of their actions. Finally, the dialogue provides a space for all parties to decide on agreements other than incarceration that will hold the responsible party accountable while also working toward repair for those who have been harmed (pp. 136–37).

These agreements are as variable as the individuals Common Justice serves. While the agreements often have numerous provisions and lengthy durations, a few recurring features merit specific attention. Many agreements require, *inter alia*, a symbolic gesture. In one case, the survivor of a stabbing asked the responsible party to meet him several times at the place where the stabbing occurred, greet him respectfully, and shake his hand (p. 137). Another agreement, arising out of a hate crime that occurred on the subway, involved the responsible party agreeing to stay off of the subway for a year (p. 116). In this way, the agreement was designed such that the responsible party would walk in the survivor's shoes and understand the all-encompassing nature of her trauma: the survivor explained that she no longer felt safe riding the subway after the attack, a "change [that had] rippled through every part of her life" (p. 115). Other agreements involve taking the GED exam, conducting community service, sharing reflections with a group of one's peers, or planning activities with one's children (p. 144). Whether symbolic or practical, these agreements require responsible parties to do real, hard work that is meaningful to them, the persons they harmed, and the community writ large.

The design of Common Justice's process evidences careful attention to the needs of harmed parties *and* responsible parties. Harmed parties have agency throughout, including the power to not participate at all in the circle dialogue. Of course, many survivors of harm have no desire to personally engage with the person who harmed them, even if the survivor seeks repair, not punishment. Those who do not want to attend a circle may instead be represented by a surrogate—someone who knows the harmed party and their particular circumstances or, alternatively, someone who has been through a similar experience. Harmed parties have no obligation to consult with a surrogate, though many "write a letter and have it read aloud" or "provide a list of questions" (p. 138). Some harmed parties choose to attend only one portion of the circle process (p. 138). In any of these scenarios, survivors are in the driver's seat: while they do not have a veto over the agreement, they are empowered.³⁸ Given Sered's observation that the loss of autonomy and power is a central trauma endured by survivors of violent crime, the empowerment inherent in this process is directly responsive to survivors' needs.³⁹

38. Of course, survivors possess a veto at the outset of the process insofar as Common Justice will not provide its services without the survivor's consent. See Krinsky & Phares, *supra* note 12, at 41.

39. P. 26 (noting that "[t]rauma is fundamentally an experience of powerlessness").

Common Justice also centers the needs of responsible parties. The circle, as well as the process leading up to it, provides meaningful and public opportunities for a responsible party to take accountability, confront their own trauma, and make serious commitments about how they will make different decisions in the future. Indeed, addressing their own trauma through the circle dialogues, Sered posits, is often the breakthrough that allows responsible parties “to acknowledge the impact [that the harm] had on the victims of their crimes” (pp. 122–23). And just as survivors need a coherent narrative, responsible parties need to understand the personal context that led to their own acts of violence. The power of restorative justice to provide that narrative is best exemplified by Shawn, a young man of color who, after his arrest for a shooting in East New York, participated in a circle process and “dr[e]w a link between his own trauma [from witnessing a friend get fatally shot] and his decision to shoot” (p. 151).

Such breakthroughs are, in Sered’s experience, necessary for responsible parties to truly flourish in the future. As Shawn, himself a Common Justice participant, poignantly remarked at the conclusion of his restorative justice process, “the judge is in here now,” pointing to his head (p. 152). After a two-year-long restorative justice process, Shawn went on to complete college, find employment as a welder, and take on a leadership position in an antiviolence community nonprofit (p. 152). Ultimately, Common Justice believed in Shawn’s great capacity for insight and transformation and facilitated a process that “dismantle[d] the barriers to those things being fully present and expressed” (p. 153).

Hardened practitioners of the criminal law might deride Common Justice’s practices as “hippie” social work or greet them with disbelief that anything can be accomplished without wielding dominating authority.⁴⁰ Sered’s work answers these challenges. She meticulously explains the shortcomings of the current approach. Indeed, as Sered’s work documents, few survivors of violent crime or parents who have lost children to drug overdoses would express unqualified endorsement of the criminal justice system’s response to their pain (pp. 30–33). And given the current system’s failure to facilitate accountability or rehabilitation for responsible parties, few would contend that prevailing responses ensure victims’ safety or provide meaningful opportunities for individuals and communities to escape cycles of harm. How can we

40. For example, one initially skeptical prosecutor in the District of Columbia remarked that her first reaction to a restorative justice diversion program was: “Oh, OK, so we’re not going to prosecute you? We’re going to sit around in a circle with, like, the hippies down the hallway [in the restorative justice project], and we’re going to have a talk and then you don’t have any punishment?” However, after witnessing the effectiveness of restorative justice processes, that same prosecutor “is now referring some of the most serious cases on her docket” to a restorative justice program operated by the D.C. Office of the Attorney General. See Carrie Johnson, *D.C. Prosecutors, Once Dubious, Are Becoming Believers in Restorative Justice*, NPR (July 2, 2019, 5:00 AM), <http://www.npr.org/2019/07/02/735506637/d-c-prosecutors-once-dubious-are-becoming-believers-in-restorative-justice> [<https://perma.cc/C6CF-XJ57>]; see also *infra* notes 52–60 and accompanying text (describing the restorative justice program in more detail).

can do better? In answering that question, Sered grounds her response in scholarly research, empirical data, and above all, insight derived from extensive experience on the front lines of efforts to repair interpersonal harm.

II. THE ECOSYSTEM OF RESTORATIVE JUSTICE INTERVENTIONS

Until We Reckon arrives as restorative justice interventions, both within and without the criminal justice system, are proliferating throughout the country. This Part briefly maps the terrain of such interventions, situating Sered's project within the broader spectrum of projects influenced by restorative justice principles.

One end of the spectrum is occupied by community-based interventions that seek to apply restorative justice principles and practices without the involvement of state actors.⁴¹ Sometimes called "transformative justice,"⁴² these interventions "aspire to work toward broader social, political, and economic change" in addition to responding on an individualized level to interpersonal harm, all without reference to or connection with the criminal justice system.⁴³ For example, participants in Black Youth Project 100 have developed processes to address sexual harm within their organizations that center the adoption of new training and curricula, involve community-led councils that convene to prevent and intervene in specific instances of harm, and utilize mediation and accountability sessions that apply restorative justice practices vis-à-vis responsible and harmed parties.⁴⁴ These community-based responses intentionally eschew the coercive power of the state⁴⁵ while intending to "address the social causes of violence and hold people accountable without exposing them to police violence and state incarceration."⁴⁶

Another set of interventions involves nonprofit organizations that partner with actors within the criminal justice system to divert offenders away from the traditional path of prosecution and incarceration, "offer[ing] restorative justice as an alternative to jail and prison."⁴⁷ Here, the coercive power of the state sits in the background. Common Justice, which, as men-

41. See Angela P. Harris, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice*, 25 BERKELEY J. GENDER L. & JUST. 199, 220 (2010) (book review) (describing the transformative justice processes of GenerationFIVE, an Atlanta- and Oakland-based organization that seeks to end child sexual abuse).

42. See Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not 'Transformative Justice.' Here's Why.*, APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/> [https://perma.cc/4FT7-GBS8].

43. McLeod, *supra* note 36, at 1630–31.

44. *Id.* at 1631–32.

45. Some assert that voluntary agreements form the basis for restorative justice and that any involvement with the state renders a process coercive such that it may not be called "restorative justice." See Agnihotri & Veach, *supra* note 18, at 342.

46. Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 46 (2019).

47. Green & Bazelon, *supra* note 34, at 2288.

tioned above, operates as a partnership with the Kings County and Bronx District Attorneys' Offices in New York City, falls squarely within this category.⁴⁸ A similar partnership focusing on juvenile offenders exists between the organizations Impact Justice, Community Works, and the San Francisco District Attorney's Office.⁴⁹ Given that some states have recently enacted statutory authorizations for prosecutors to integrate restorative justice services into their work,⁵⁰ such prosecutor-nonprofit partnerships may continue to proliferate, depending on prosecutors' "willingness to cede control" to nonprofit partners.⁵¹

A third model for restorative justice interventions obviates this particular prosecutorial concern by creating programming that is run entirely within a prosecutor's office. For example, in 2016, the District of Columbia's Office of the Attorney General (OAG) launched an in-house restorative justice program that operates as an eight-person unit staffed with trained restorative justice facilitators.⁵² The OAG's program receives referrals from both prosecutors and victims who have requested an alternative to prosecution for juvenile and some adult cases.⁵³ After a referral is approved, a facilitator from the OAG's team is assigned to the case and contact is made with the offender and the complaining witness.⁵⁴ As with Common Justice's program, preconference sessions are held with all interested parties, including family and community members who offer their support to directly impacted individuals.⁵⁵ Then, the OAG's facilitator convenes a community conference at which the parties work toward an agreement that is "captured in writing, signed by all participants, and monitored for compliance by the restorative justice facilitator."⁵⁶ Finally, should a responsible party not meet the terms of the agreement, "the case is then returned to the prosecutor for pros-

48. *Id.* at 2295.

49. *Id.* at 2290 n.26.

50. *See, e.g.*, Act of May 17, 2019, No. 595, § 28, 2019 Neb. Laws 1026 (codified at NEB. REV. STAT. § 43-274(3)(a) (2020)) (providing that "the county attorney or city attorney may utilize restorative justice practices or services as a form of, or condition of, diversion or plea bargaining or as a recommendation as a condition of disposition, through a referral to a restorative justice facilitator"); Act of May 24, 2000, No. 148, § 62 (codified as amended at VT. STAT. ANN. tit. 28, § 2a(a) (LEXIS through Act 1 of 2021 Sess.)) ("It is the policy of this State that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses . . .").

51. Green & Bazelon, *supra* note 34, at 2310.

52. Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69, 88 (2019–2020); Email from Seema Gajwani, Chief, Restorative Just. Section, Off. of the Att'y Gen. for the Dist. of Columbia, to Hon. Leo T. Sorokin, U.S. Dist. J., Dist. of Massachusetts (July 31, 2020, 10:59 AM) (on file with the *Michigan Law Review*).

53. Currently, OAG facilitator caseloads include cases involving gun possession, shootings, stabbings, and robberies. Gajwani, *supra* note 52.

54. Gajwani & Lesser, *supra* note 52, at 88 & n.124.

55. *Id.*

56. *Id.* at 88.

ecution.”⁵⁷ Since its inception, 6 percent of all cases in the office have been forwarded to its restorative justice program, leading to 118 successful restorative justice conferences.⁵⁸ Only 7 of these cases have been returned to prosecutors for failure of the parties to reach agreement or a defendant’s failure to complete the terms of an agreement.⁵⁹ According to the office, a preliminary analysis demonstrates “a 15 percent reduction in the recidivism rate for youth who undergo restorative justice, rather than being prosecuted in the traditional manner.”⁶⁰

Another model involves interventions during the late stages of the criminal justice system, including in prisons. An example of this approach is Bridges to Life, a faith-based Texas nonprofit that partners with several state prisons to operate a fourteen-week program in which volunteers facilitate small-group circle sessions with incarcerated individuals and surrogate victims, as well as lead panel discussions in which victims describe the “painful ripple effects” that violence has had in their lives.⁶¹ Bridges to Life was founded by a Houston native, John Sage, whose sister was murdered in 1993.⁶² In the wake of that tragedy, Sage volunteered in prisons and found that engaging in a circle process not only helped the incarcerated individuals he met, but was also instrumental to alleviating his own lingering trauma.⁶³ According to a 2005 study performed by University of Texas researchers, “only 12.4% of post release [Bridges to Life] participants have been reincarcerated, a figure that stands in stark contrast to the 3-year recidivism rate of 31.4% for the general offender population in Texas.”⁶⁴

Just as “restorative justice” itself is a contested term,⁶⁵ these various models present distinct visions of how and where to intervene with restorative justice principles.⁶⁶ As Seema Gajwani, the chief of the D.C. OAG’s Re-

57. *Id.*

58. Natalie Delgadillo, *Restorative Justice Has the D.C. Attorney General’s Office Looking at Prosecutions in a New Light*, DCIST (May 8, 2020, 1:33 PM), <http://dcist.com/story/20/05/08/restorative-justice-has-the-d-c-attorney-generals-office-looking-at-prosecutions-in-a-new-light/> [<https://perma.cc/8BZP-TDJW>].

59. Gajwani, *supra* note 52.

60. Delgadillo, *supra* note 58.

61. Marilyn Peterson Armour, John Sage, Allen Rubin & Liliane C. Windsor, *Bridges to Life: Evaluation of an In-Prison Restorative Justice Intervention*, 24 MED. & L. 831, 833–34 (2005).

62. *History of BTL*, BRIDGES TO LIFE, <https://www.bridgestolife.org/history-and-mission> [<https://perma.cc/5JMH-UEE8>].

63. *Id.*

64. Armour et al., *supra* note 61, at 834.

65. See Samuel-Siegel, *supra* note 11.

66. Indeed, the programs and models highlighted here are just some of the many restorative justice interventions proliferating across the country. See p. 134 (referencing additional nonprofit organizations that utilize restorative justice practices across the country, like “Project NIA and the Community Justice for Youth Institute in Chicago; Restorative Justice for Oakland Youth (RJOY) and Community Works in Oakland and San Francisco; the Community Conferencing Center in Baltimore; [and] the Insight Prison Project in San Quentin”); Yana

storative Justice Section, remarked: “A lot of the giants in this [restorative justice] field feel very uncomfortable with [the OAG’s] model” because it is run exclusively within a prosecutor’s office.⁶⁷ Likewise, some proponents of transformative justice argue that true restoration cannot occur within “[i]nstitutions that are themselves violently punishing” people, like prisons, as any such intervention will solely focus on already-incarcerated individuals and neglect larger structures and systems that perpetuate violence.⁶⁸ By contrast, Sered, who is deeply critical of mass incarceration, nonetheless does not argue that restorative justice practices will replace prison altogether (p. 133). Ultimately, Sered’s contribution is valuable not only for its own articulation of restorative justice theories and practices but as a foil to other competing models of restorative justice interventions.

III. RESTORATIVE INTERVENTIONS IN THE FEDERAL CRIMINAL SYSTEM

Having canvassed Sered’s theory and practice and mapped the current terrain of restorative justice interventions, this Review now turns to the integration of restorative justice practices and concepts into court proceedings in the United States District Court for the District of Massachusetts. These interventions seek to harness the core insights of restorative justice theory—especially its focus on repairing harm, promoting accountability, and centering the needs of survivors—by applying them within extant federal criminal procedures and utilizing familiar institutional vehicles and actors.⁶⁹

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/9WMH-VN5J>] (describing a program that integrates restorative justice into the Circuit Court of Cook County in Chicago); Susan J. Butterwick, Timothy P. Connors & Kathleen M. Howard, *Tribal Court Peacemaking: A Model for the Michigan State Court System?*, MICH. BAR J., June 2015, at 34, 34 (describing the Washtenaw County Peacemaking Court in Michigan, “the first state court to adopt the use of tribal court peacemaking principles to resolve cases”); see also LARA BAZELON, RECTIFY: THE POWER OF RESTORATIVE JUSTICE AFTER WRONGFUL CONVICTION 134 (2018) (describing restorative justice interventions between victims and exonerees in cases of wrongful conviction).

67. Delgadillo, *supra* note 58; see also Eli Hager, *They Agreed to Meet Their Mother’s Killer. Then Tragedy Struck Again.*, MARSHALL PROJECT (July 21, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/07/21/they-agreed-to-meet-their-mother-s-killer-then-tragedy-struck-again> [<https://perma.cc/2TJL-X23U>] (describing the tragic consequences of a restorative justice intervention implemented by prosecutors who failed to prepare a victim’s family for the range of outcomes that might flow from a restorative justice process).

68. Josie Duffy Rice & Clint Smith, *Justice in America Episode 20: Mariame Kaba and Prison Abolition*, APPEAL (Mar. 20, 2019), <https://theappeal.org/justice-in-america-episode-20-mariame-kaba-and-prison-abolition/> [<https://perma.cc/L68R-MA4F>].

69. The views expressed herein regarding restorative justice principles in the District of Massachusetts reflect only the individual views of the authors and are not statements by the District of Massachusetts or any other judge.

A. *Repair, Invest, Succeed, Emerge (RISE)*

In 2015, the District of Massachusetts created RISE, an intensive presentence-supervision program modeled on similar programs in other federal district courts.⁷⁰ Like many of these programs, RISE requires the defendant to plead guilty and delays sentencing by twelve months so that the defendant can participate in a rigorous, tailored supervision program.⁷¹ Unlike any similar programs in the federal system, however, RISE also includes participation in a restorative justice program.⁷²

RISE is a voluntary program available to released defendants who have tendered a relatively early guilty plea. An eligible defendant is a person: (a) with a “serious history of substance abuse or addiction” which “substantially contributed to the commission of the charged offense,” or (b) whose history reflects “significant deficiencies in full-time productive activity, decision making, or pro-social peer networks, as a result of which the defendant would benefit substantially from a structured pretrial program.”⁷³

The district judge presiding over a defendant’s case determines acceptance into RISE after receiving a nonbinding, consensus recommendation from a committee comprised of several district and magistrate judges, several U.S. Probation Officers, a representative of the United States Attorney’s Office, and a representative of the Federal Public Defender’s Office.⁷⁴ Once accepted into the RISE program, that committee, along with counsel and the defendant, creates an individualized set of goals that will help the defendant build a sober, employed, and law-abiding life.⁷⁵

In addition to attending monthly appearances before a magistrate judge, RISE participants must take part in the court’s four-part restorative justice program. First, each participant meets individually with a restorative-justice-trained probation officer. During this brief meeting, the probation officer explains the principles behind restorative justice and prepares the participant to engage in a circle dialogue. Second, each participant attends a two-day circle workshop with other RISE participants; several community members,

70. See, e.g., U.S. DIST. CT. FOR THE E. DIST. OF N.Y., ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK 7–11 (2015), https://img.nyed.uscourts.gov/files/local_rules/ATLEDNY_SecondReport.Aug2015.pdf [<https://perma.cc/CBT3-Z7VA>] (describing the United States District Court for the Eastern District of New York’s Pretrial Opportunity Program).

71. *The RISE Program*, U.S. PROB. & PRETRIAL SERVS. OFF. FOR DIST. MASS., <https://www.map.uscourts.gov/sites/map/files/RISE%20Program%20Statement%202.0%202017.pdf> [<http://perma.cc/ARY5-8BDJ>].

72. See *id.*

73. *Statement Submitted by Judge Leo T. Sorokin, District of Massachusetts*, U.S. SENT’G COMM’N 9 (Mar. 15, 2017) [hereinafter *Sorokin Statement*] (quoting *The RISE Program*, *supra* note 71), <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Sorokin.pdf> [<https://perma.cc/GGJ9-RESG>].

74. To date, no participant has been accepted over the objection of the United States Attorney’s Office.

75. *The RISE Program*, *supra* note 71, at 2.

always including surrogate victims; and a representative from the U.S. Attorney's Office, a defense counsel, or a probation officer. The restorative-justice-trained probation officer cofacilitates the circle along with a volunteer whose son was killed as a result of the drug trade.⁷⁶ Critically, the judge presiding over a participant's case is not given any information about what was said or done during the two-day restorative justice workshop. In fact, information about what was said by a participant or their level of participation in the workshop is never reported to anyone, and a participant's attendance at the workshop satisfies the second part of RISE's restorative justice program.⁷⁷

The circle workshop is the centerpiece of RISE's restorative justice component. It aims to help the RISE participants appreciate that their crimes harmed real people, that they too may have been harmed by their crimes or other circumstances in their life, and that they bear an obligation to repair the harm they caused. The circle dialogue is often transformative, not just for offenders, but for the probation officers, lawyers, and community members⁷⁸ who participate and help facilitate the discussion. As one scholar described the two-day workshop:

Sitting in a room for eight hours a day, the RISE participants came face-to-face with people who had lost children and close family members to overdoses and shootings. Also in the room were prosecutors, defense lawyers, judges, and probation officers, but not in their traditional roles. They, too, participated in the circle exercises, sharing personal experiences, and offering support and encouragement. Mostly, they listened without judgment as the offenders haltingly described their own victimization at the hands of other people. They spoke of their addiction, mental illness, abuse, and poverty.⁷⁹

While the meeting and circle workshop are mandatory for RISE participants, the remainder of the restorative justice program is optional. In the

76. Sorokin *Statement*, *supra* note 73, at 8. Other practitioners who have integrated restorative justice practices into drug court settings have observed that the "victimless" nature of drug trade offenses need not be a barrier to a meaningful and effective process. See Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 492 (2009).

77. A similar pilot program in the United States District Court for the District of Hawaii, the Restorative Reentry Circle Pilot Program, also adheres to a clear separation between the sentencing judge and the restorative justice process. See Lorenn Walker & Leslie E. Kobayashi, *Hawaii Federal Court Restorative Reentry Circle Pilot Project*, FED. PROB., June 2020, at 48, 49, https://www.uscourts.gov/sites/default/files/84_1_5_0.pdf [<https://perma.cc/LLQ8-9QCF>].

78. Notably, one community member who participated in a RISE circle workshop after the loss of her son to a drug overdose remarked that she arrived at the workshop expecting to "meet monsters"; instead, she found not only people (and not monsters), but also powerful insights that she would bring home to her daughter who was in a "dark place" in the aftermath of her son's death. This community member has since returned to participate in additional RISE circle workshops.

79. BAZELON, *supra* note 66, at 122–23.

third and fourth parts of the restorative justice component, participants complete additional reading assignments and ultimately undertake an individualized project of repair.⁸⁰ The project must demonstrate an appreciation for the real human harm caused by their actions and engage in some activity to repair at least some of that harm. By way of example, one defendant convicted of drug distribution felt responsible for the tragic path of a close childhood friend who abused drugs and later died of an overdose. In his restorative project, this defendant met with his childhood friend's mother in a meeting arranged by the U.S. Probation Office. During that meeting he explained his role in his friend's drug abuse, expressed remorse, took accountability for his actions, and answered the questions of his friend's mother.⁸¹ Over the past five years, 48 RISE participants have completed both the informational session and the two-day workshop, and most participants volunteered to proceed to the third and fourth parts of the restorative justice program.⁸²

No promises are made to RISE participants regarding sentencing. To date, however, most defendants who have successfully completed RISE have received sentences without further incarceration, such as probation or time served. This result is likely due to a confluence of factors: the transformative power of the restorative justice component; the intrinsic motivation that many defendants feel during the twelve months prior to their sentencing; the provision of court resources that center participant self-empowerment (like parenting classes, mental health and drug treatment services, employment-skills trainings, and education opportunities); and the selection of defendants who rarely face sentences that exceed five years.⁸³ However, the circle workshop's transformative power cannot be understated. As one former participant explained at his sentencing hearing:

[W]hen I had [to go to] the restorative justice program, right, I was kind of upset about taking the days off of work, because I was trying to save money

80. See Email from Allyson Lorimer Crews, Deputy Chief U.S. Prob. Officer, Dist. of Massachusetts, to Hon. Leo T. Sorokin, U.S. Dist. J., Dist. of Massachusetts (July 18, 2020, 08:06 AM) [hereinafter July 2020 RISE Data] (on file with the *Michigan Law Review*).

81. As his friend's mother later explained to U.S. Probation Officer Maria D'Addieco: "For me, the fact that he stood up and took responsibility for many years of my son's life [and that he contributed to my son's addiction] is powerful, that means a lot to me." Email from Maria D'Addieco, U.S. Prob. Officer, Dist. of Massachusetts, to Hon. Leo T. Sorokin, U.S. Dist. J., Dist. of Massachusetts (July 29, 2020, 2:30 PM) (on file with the *Michigan Law Review*). After that conversation, the RISE participant and his friend's mother "planted a tree in her backyard to honor his friend's love for gardening." *Id.* Two years later, the RISE participant "recount[ed] how the process of picking out and planting the tree brought him and his friend's mother closer," and explained that "the tree is a constant reminder of the commitment he made to her to remain sober and never be part of anyone else's addiction." *Id.*

82. July 2020 RISE Data, *supra* note 80.

83. So far, almost all of the RISE participants have faced either drug distribution or firearms charges. Additionally, the RISE Committee has been selective in recommending acceptance into the program; of the 146 individuals who have applied since 2015, seventy have been accepted. *See id.*

to move into my own place and be back with my wife. But then when I got there, and you know, I heard the people share the impact that it's had on people's lives, like drugs, gun violence, whatever it may have been; and the experience that I had there is like almost like an aha moment for me, like now I realize the impact that it makes on people's lives . . . I have to say, that was like one of the biggest changing points for me in my recovery.⁸⁴

Given the success of RISE's restorative justice component, the District of Massachusetts is now expanding its capacity to make circle workshops available to more defendants. Specifically, the U.S. Probation Office is currently training two assistant United States attorneys, as well as the chair of the district's Criminal Justice Act Board, to facilitate additional restorative justice cohorts. With this additional institutional capacity, the court will begin to offer the restorative justice programming to other defendants who are awaiting sentencing, as well as defendants who are returning to the community from federal prison.

While both RISE and Common Justice are informed by restorative justice principles, some notable differences between the programs merit discussion. For example, Common Justice only intervenes in cases of where a responsible party has directly harmed an identifiable survivor, as in cases of assaults or armed robberies.⁸⁵ Through its "survivor-centered" processes, Common Justice empowers the individual survivor; as explained above, Common Justice will not accept a case, facilitate a restorative justice circle, or sanction a responsible party's reparation project without a survivor's consent.⁸⁶ Indeed, the individual survivor often plays a central role in designing the reparation project that the responsible party undertakes at the culmination of Common Justice's programming.⁸⁷

At first blush, RISE might seem to depart from Common Justice's "survivor-centered" approach by virtue of the types of harms it seeks to address. Unlike Common Justice, RISE often intervenes in cases that were pursued by the U.S. Attorney's Office not because a specific survivor was hurt but because a defendant distributed illegal substances, like fentanyl or heroin, or illegally possessed a firearm (but did not engage in a crime of violence).⁸⁸ Notwithstanding this important difference in RISE's purview, the program seeks to center the experience of survivors in a number of ways. First, surrogate victims who participate in RISE circles—including those who have lost children to drug overdoses or as a result of violence that was related to the

84. Transcript of Sent'g Hearing at 3, *United States v. Tanguay*, No. 1:17-cr-10067 (D. Mass. Oct. 17, 2018). This sort of breakthrough is not an isolated experience for RISE participants. See BAZELON, *supra* note 66, at 126–27 (describing one RISE participant's reconnection with his teenage son after participating in the restorative justice workshop and realizing that he needed to break his family's cycle of substance abuse and violence).

85. *Common Justice Model*, *supra* note 13.

86. *Id.*

87. *Id.*

88. *The RISE Program*, *supra* note 71.

drug trade—powerfully convey the incredible harms that inevitably flow from RISE participants’ conduct. As in Common Justice’s programming, surrogate victims forcefully counteract the forms of denial or minimization that participants might otherwise embrace, including the idea that participants have merely engaged in “victimless crimes.”⁸⁹ Relatedly, RISE offers a setting in which participants can recognize *themselves* as survivors of harm—individuals who have, in many cases, grown up in neighborhoods filled with violence, survived violence as children, or experienced the many collateral consequences of our society’s significant shortcomings in ensuring its citizens’ safety and providing for their flourishing.⁹⁰ By enabling participants to confront what it means to be a survivor—both of the harm that they have caused and the harm that they have experienced—RISE’s programming, like Common Justice’s, aims to lay the groundwork for participants to empathize with those they have harmed, accept responsibility for their actions, and ultimately take accountability. In this way, RISE also demonstrates that restorative justice principles can drive accountability and facilitate healing in a range of cases, not just those resulting from instances of violent harm.

B. *Additional Restorative Proceedings*

Judge Sorokin has also begun to integrate restorative justice practices into various court proceedings. This Review now turns to two such examples.

1. Status Conferences for the Benefit of Survivors

In 2016, a death penalty case was reassigned to Judge Sorokin for a second penalty-phase trial.⁹¹ The underlying crimes at issue in the case—three murders—had occurred about fifteen years earlier. The case had already involved multiple proceedings, including two separate appeals to the United States Court of Appeals for the First Circuit, one affirming the original sentence of death⁹² and the other affirming another district judge’s order vacat-

89. As one RISE participant explained:

Participating in [the restorative justice circle] completely changed the way I view things, it changed the way I treated the world. I truly believed at first that my crime didn’t hurt anybody. But I was completely wrong. So naïve and so blind. . . . And as much as it hurts me to know now all this damage that I’ve done, I would never want to go back to not knowing that my crime was not victimless. I need to always keep these thoughts in the front of my mind, so I’ll never forget. So I’ll always remember that ripple effect.

Email from Maria D’Addieco to Hon. Leo T. Sorokin, *supra* note 81.

90. BAZELON, *supra* note 66, at 122–23.

91. Notice of Reassignment, *United States v. Sampson*, No. 1:01-cr-10384 (D. Mass. Jan. 6, 2016), ECF No. 2129; *see also* Notice of Intent to Seek the Death Penalty, *Sampson*, No. 1:01-cr-10384 (D. Mass. Nov. 19, 2002), ECF No. 103; Order on Defendant’s Application for Certificate of Appealability, *Sampson*, No. 1:01-cr-10384 (D. Mass. June 2, 2016), ECF No. 2281.

92. *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007).

ing that sentence.⁹³ Inspired by restorative justice principles, over the course of the second penalty-phase proceedings, Judge Sorokin met in open court, on the record, with the family members of the murder victims.⁹⁴ In these meetings, Judge Sorokin explained his role, the reasons for decisions made, the next steps in the process, and the procedures governing the trial. Judge Sorokin also welcomed questions. At the conclusion of the trial, members of the victims' families expressed appreciation that the court had "creat[ed] a safe space" for them by "allowing [them] to be part of the process as much as possible" and "sharing information every time [the court] could."⁹⁵ Another family member remarked that the court's "patience, grace, and consideration during this trial was so important to [members of the victims' families]," and that he would "never forget it for the rest of [his] life."⁹⁶

Sered's observation that survivors often feel sidelined by the criminal justice process provides a broader justification for these types of meetings with survivors of violence or victims of other crimes (p. 30). As a result, Judge Sorokin has, in appropriate cases, begun to hold similar status conferences specifically for the benefit of victims or survivors of certain offenses.

For example, in a recent case in which a defendant pleaded guilty to an armed bank robbery⁹⁷ involving an exchange of gunfire within the bank, Judge Sorokin convened a presentencing status conference for those who were present at the bank during the commission of the offense.⁹⁸ At the outset, Judge Sorokin explained the sentencing process, including the Probation Office's creation of a presentence report that outlines the defendant's personal history,⁹⁹ as well as some of the factors that a judge may consider when sentencing a defendant.¹⁰⁰ Then, Judge Sorokin outlined the types of remedies that survivors could ask for in addition to incarceration,¹⁰¹ including that the defendant apologize; that he explain why he committed the bank

93. *Sampson v. United States*, 724 F.3d 150 (1st Cir. 2013).

94. See Status Conference, *United States v. Sampson*, No. 1:01-cr-10384 (D. Mass. July 27, 2016), ECF No. 2375; Order, *Sampson*, No. 1:01-cr-10384 (D. Mass. Aug. 31, 2016), ECF No. 2450 (describing status conference).

95. Transcript of Sent'g Hearing at 14, *Sampson*, No. 1:01-cr-10384 (D. Mass. Mar. 24, 2017), ECF No. 2959.

96. *Id.* at 10.

97. Rule 11 Hearing, *United States v. Rosado*, No. 1:19-cr-10219 (D. Mass. Feb. 24, 2020), ECF No. 41 (documenting proceedings).

98. Status Conference, *Rosado*, No. 1:19-cr-10219 (D. Mass. June 8, 2020), ECF No. 59.

99. See Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1615–16 (1980) ("The presentence report is the most important document in the federal criminal process, serving as the basis for both sentencing determinations and later correctional treatment.").

100. See 18 U.S.C. § 3553(a).

101. In this case, the defendant faces a ten-year mandatory minimum sentence. See Order, *Rosado*, No. 1:19-cr-10219 (D. Mass. June 22, 2020), ECF No. 64 (describing sentencing conference).

robbery; that he participate in a restorative justice or victim-offender dialogue process; that he educate himself about the experience of being a victim of an armed robbery; that he commit himself to never doing something like this again; that he seek social services, like mental health and substance abuse treatment; that he stay away from the bank where the robbery occurred or the individual survivors; or that he obtain and remain in gainful employment that will help him lead a flourishing, nonviolent life. Finally, Judge Sorokin offered time for survivors to ask any questions that they might have about the process, either by raising questions orally or by submitting questions in writing.

2. Rule 11 Questions

Similarly, Judge Sorokin has begun to integrate restorative justice concepts into most Rule 11 proceedings where a defendant enters a guilty plea.¹⁰² After acceptance of the plea, Judge Sorokin suggests that the parties consider questions inspired by restorative justice principles as part of their preparation for sentencing.

The questions include: Who has been harmed by the offense? Depending on the specifics of the case, harmed parties may include identifiable victims, community members, the defendant, the defendant's family, codefendant-codefendants, or, in cases involving the drug trade, drug-abusing customers. Next the parties are asked to consider: How were those people harmed by the offense? This too is very context specific, but parties are urged to widen the scope of their inquiry to consider harms that are often rendered invisible in the adversarial criminal justice system. For example, community members may have been harmed by the risk of violence that often accompanies the drug trade. A defendant's children may have been harmed by their father's absence or dangerous choices.

Next, the parties are urged to consider who is responsible for those harms. That inquiry, the parties are reminded, does not begin and end with the defendant, but should also include other actors who may have victimized or taken advantage of the defendant, as well as the defendant's social and economic environment. Finally, the parties are urged to consider what should be done to repair the harm, and, most importantly, what the defendant should do to bring about that repair. As in Sered's framework, repair could involve a sincere apology, as well as undertaking projects to repair oneself, one's family, and one's community.

Prompting the parties in this way has a number of salutary effects. In some cases, defendants may, upon reflection of these questions, undertake meaningful reparation projects during the time between their Rule 11 hearing and their sentencing hearing. Such actions may repair some of the harm they have done, as well as demonstrate meaningful accountability, thus providing the court with more than words for evaluation at sentencing. In

102. FED. R. CRIM. P. 11(a).

other cases, these questions may help frame the issues that the court must evaluate under 18 U.S.C. § 3553. In all cases, these questions help reorient the sentencing process to promote basic values at the heart of the criminal justice system—honest accountability, genuine remorse, actual repair, and public safety—while evaluating how the individual arrived at sentencing in light of both his or her individual actions and the larger “context” (p. 1) (to use Sered’s apt word).

IV. CHALLENGES AND CRITIQUES

Restorative justice practices and theories are undoubtedly relevant to the federal criminal justice system. Yet, any attempt to transpose those practices and theories into the federal system must, at the outset, confront head on the significant tensions between the restorative justice framework and federal criminal law. In this final part, this Review pauses to reflect on some of the challenges presented by this integrationist project.¹⁰³

First, there is the matter of coercion and power. Quite unlike federal criminal law, restorative justice is a framework that requires true agency and empowerment of its subjects, not just for survivors, but for responsible parties. Sered’s work follows from the premise that “[t]he use of authority undermines the development of responsibility and self-regulation.”¹⁰⁴ In Sered’s telling, the agreements that parties enter into within a restorative justice framework are efficacious because of, not in spite of, the responsible party’s agency in the decision-making and healing process: as Sered puts it, “[r]esponsible parties are asked to answer for what they have done from a position that affirms and reorients their personal power, rather than one that aims to constrict it.”¹⁰⁵ In the federal criminal system, on the other hand, dramatic power imbalances pervade, and remedies—like criminal sanctions and conditions of supervised release—are ultimately imposed by a judge, even if they are informed by the recommendations and statements of the parties, lawyers, and officers of the U.S. Probation Office.¹⁰⁶

Next, there is the matter of truth telling. Restorative justice requires a robust commitment to the truth in order to function. The federal criminal

103. Though discussed in the context of the federal criminal justice system, many of these observations are also applicable to efforts to integrate restorative justice practices into state criminal justice systems.

104. P. 108 (quoting Fredo Villaseñor, *Pranis: How Can Driftwood Solve Conflict?*, CHAUTAUQUAN DAILY (Aug. 1, 2013), <https://chqdaily.wordpress.com/2013/08/01/pranis-how-can-driftwood-solve-conflict> [<https://perma.cc/74UJ-XQTU>]).

105. P. 143. Nonetheless, it is worth noting that even in Sered’s power-affirming framework, there exists, looming in the background, the threat of incarceration as an incentive to carry out mutually agreed upon commitments. See p. 116–17 (describing a responsible party’s compliance with her agreement to stay off of the subway for a year so that the survivor of her attack, which took place on a subway car, would feel safer).

106. Most obviously, there can be no agreement between the court and the defendant that in any way approximates the agreement between a responsible party and survivor in Common Justice’s model.

system, like most criminal systems, on the other hand, has erected significant barriers to such truth telling, even in cases where defendants admit to wrongdoing. The rules themselves (and effective lawyers) strongly discourage defendants from speaking at all, let alone admitting anything until a carefully scripted plea is proffered in a formal court setting. Denial and avoidance are often rewarded. An admission at any other point in the process, before or after a plea, could have serious consequences, a reality that may incentivize circumscribed participation in various court proceedings and sentencing hearing allocutions.¹⁰⁷ In those cases where a defendant maintains his innocence or merely declines to admit responsibility, a matrix of constitutional and evidentiary rules operate to diminish the likelihood that the defendant will proffer an honest account of his experience.¹⁰⁸ Thus, background rules may limit a defendant's willingness to freely and honestly communicate, presenting a challenge for any intervention that sounds in restorative justice principles.

Then there is the matter of remedies. For Sered, a central element of the restorative justice process is mitigating the collateral consequences of having committed harm.¹⁰⁹ As explained above, responsible parties who successfully complete Common Justice's program have their felony charges dismissed (p. 134). This feature of the program is necessary, Sered argues, because the consequences of a felony conviction—including the denial of public housing and other welfare benefits, exclusion from much of the job market, and barriers to receiving financial assistance for higher education—make the path to repair significantly more difficult by reintroducing some drivers of violence, like financial precarity, into ex-participants' lives (p. 172). Any restorative justice intervention in the federal criminal justice system must similarly consider the extent to which it is truly restorative—that is, the extent to which it provides responsible parties with an opportunity to succeed after they have demonstrated personal growth.¹¹⁰

107. Sara R. Faber, Note, *Competency, Counsel, and Criminal Defendants' Inability to Participate*, 67 DUKE L.J. 1219, 1251 (2018).

108. See Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 858 (2008) (arguing that “[b]y encouraging defendants to remain silent throughout the process, the system suffers an ‘institutional loss of information about defendant perceptions and experiences’”); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450–51 (2005) (noting that “in millions of criminal cases often involving hours of verbal negotiations and dozens of pages of transcripts, the typical defendant may say almost nothing to anyone but his or her own attorney” and arguing that this phenomenon “has systemic implications for the integrity of the justice process”).

109. P. 172; see also Adelman, *supra* note 4, at 201 (arguing that “judges [ought to be able] to provide offenders with relief from collateral consequences”).

110. P. 133. Relatedly, Sered argues that parole should be used “to reward people for engaging in constructive activities and refraining from violence” while in prison. P. 170; see also Sorokin Statement, *supra* note 73, at 4 (recommending that the U.S. Sentencing Commission amend Section 5K.1.1 of the Sentencing Guidelines to acknowledge “the possible importance

Finally, there is the matter of institutional capacity. Sered speaks of building “an interlocking system of institutions” that will “support survivors,” “secure healing,” and “prevent future harm” by integrating restorative justice practices (p. 227). But whether a given institution may become a part of the “interlocking system” that Sered envisions will itself turn on at least two threshold questions: Is the institution an appropriate site for restorative justice? If so, does the institution have the requisite knowledge, infrastructure, and buy-in from relevant stakeholders to successfully carry out restorative justice programs?

As to the first question, some critics argue that court-based restorative justice programs merely “co-opt” restorative justice rhetoric and practices in order to “restore the negative image of [the criminal justice system]” while only allowing a narrow category of defendants to participate in programming.¹¹¹ Others argue that efforts like integrating restorative justice practices in the courts “may actually disincentivize long-term, systemic reform” because “they help the broken system continue to operate in perpetuity despite its flaws.”¹¹² These are worthy critiques. However, as other scholars have rejoined, reformist moves, like introducing restorative justice practices into courts, “hold the potential to reframe shared understandings of criminalized conduct,” may “reshape criminal law administrative institutions” by introducing new tasks for institutional actors and new partnerships with outside organizations, and “may enable broader systemic change [by] altering conceptual approaches to prevalent social problems.”¹¹³ And critically, in the here and now, institutional actors within the criminal justice system—including judges—should draw upon frameworks like restorative justice that will maximize the core human values that animate our system of criminal justice.¹¹⁴

CONCLUSION

Sered’s critique of the criminal justice system and her affirmative case for adopting restorative justice practices are in service of an even larger undertaking: a collective “reckoning” that she describes as unavoidable if we are to meaningfully confront the racial inequities and recurring traumas that pervade our societal response to violence. That such a reckoning is vitally important is evidenced by the many personal narratives that Sered effectively

of a defendant assisting in the saving of the life of another by assisting the government in arranging treatment for a person abusing controlled substances”).

111. Agnihotri & Veach, *supra* note 18, at 340–41.

112. Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1508 (2017) (emphasis omitted).

113. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1644–54 (2012).

114. See p. 139 (“Restorative justice requires a fundamental belief in the humanity of those who have been harmed and those who caused harm.”); cf. Kim McLane Wardlaw, *Essay, Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1646 (2010) (arguing in defense of “empathetic judging”).

weaves into her text, each one highlighting the shortcomings of our current response to interpersonal harm.

These stories underscore the human lives at stake in our reckoning with our past. And they suggest that our legal institutions—ultimately designed to be sites of justice and repair for *humans*—must be informed by the restorative justice principles at the center of Sered’s project. It is true that integrating restorative justice principles into the federal criminal justice system will not, in and of itself, erase racial inequities, ensure accountability, end violence, or bring solace to survivors. And it is true that significant conceptual and practical challenges complicate such efforts. But it is also true that restorative justice provides a uniquely powerful framework for approaching questions of harm and centering the needs of *all* of the people affected by any given instance of harm.

We have only just begun to consider how restorative justice principles can be reconciled with and integrated into the federal criminal justice system. Indeed, given the proliferation of state laws that overtly provide for restorative justice processes,¹¹⁵ it is likely that the federal system will continue to build institutional knowledge and resources around restorative justice practices.¹¹⁶ With its incisive descriptive framing and powerful persuasive writing, Sered’s book will continue to be an essential resource in our collective endeavor.

115. Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1067 (“[N]early all the states have codified restorative justice in some form.”).

116. See Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?*, 37 MCGEORGE L. REV. 787, 796–98 (2006) (arguing that a precharging diversionary restorative justice program would comport with federal criminal procedure).