

Developing a Restorative Justice Framework for Sexual Offenses: Victim Empowerment,
Community Protection & Offender Accountability

Despite declining crime rates in the United States, sexual assault remains major problem.¹ One in three American women will be sexually assaulted in her lifetime, as will thirteen percent of American men.² Though high, these numbers obscure actual incidence of sexual assault in American society, as many people who are victimized are victimized repeatedly either by the same perpetrator³ or by a different perpetrator a later point in time.⁴ The harm caused by these crimes extends from victims, who often suffer psychological and physical trauma,⁵ to victims' families and their respective communities.⁶

¹ TRACY VALAZQUEZ, VERA INST. OF JUSTICE, *THE PURSUIT OF SAFETY: SEX OFFENDER POLICY IN THE UNITED STATES* 4 (2008) (noting violent crimes have been declining for the past thirty years). Although overall crime rates have been declining, there was a 25% percent increase in the number of rapes and sexual assaults reported to police from between 2006 and 2006. US: Soaring Rates of Rape and Violence Against Women, <http://www.hrw.org/en/news/2008/12/18/us-soaring-rates-rape-and-violence-against-women> (last visited Aug. 30, 2009).

² GEORGE MASON UNIV. SEXUAL ASSAULT SERVS., *WORLDWIDE SEXUAL ASSAULT STATISTICS* 1 (2005).

³ See C. Quince Hopkins & Mary Koss, *Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses*, 11 *VIOLENCE AGAINST WOMEN* 693, 710 (2005).

⁴ Kate Walsh et al., *Resiliency Factors in the Relation Between Childhood Sexual Abuse and Adulthood Sexual Assault in College-Age Women*, 16 *J. CHILD SEXUAL ABUSE* 2, 12 (2007) (finding 75% of college-age women reporting sexual assault while in college had be victims of sexual assault previously).

⁵ Diana M. Elliot, *Adult Sexual Assault: Prevalence, Symptomatology, and Sex Differences in the General Population*, 17 *J. TRAUMATIC STRESS* 203, 203-204 (2004).

⁶ See *A Victim's Right to Speak*, <http://ojp.usdoj.gov/ovc/publications/infores/impact/impact.htm> (last visited Aug. 30, 2009) ("Not only do victims suffer the detrimental consequences of crime, but the impact of crime often carries over into victims' extended families and respective communities. The impact on these secondary victims is just as real and measurable as the impact on primary victims.").

Unfortunately, societal response to sex crimes has been misguided.⁷ Recent legislative efforts to stop sexual offending include strict sentencing laws, enhanced registration and community notification requirements, and residency restrictions.⁸ In passing such laws lawmakers have discouraged reporting by victims,⁹ eschewed evidence based practices which would promote community safety¹⁰ and ultimately wasted limited resources. In contrast, a restorative justice framework dealing with sex offenders, as proposed in this paper, has the potential to encourage victims to report sex crimes and to safeguard communities from sex offenders.

Restorative Justice is premised on the belief that when an offender is willing to acknowledge wrongdoing, is willing to be accountable for his actions, is willing to make reparations to those he has injured, and is willing to take corrective action, societal pardon and reintegration should occur. The primary objectives of the restorative justice framework presented in this paper are to create a model for dealing with sex offenders which will (1) fully attend to the needs of victims, (2) prevent recidivism by reintegrating offenders into society, (3) enable offenders to take responsibility for the harm they have caused, and (4) empower communities prevent crime. The model proposed is not structured as an alternative to the current criminal justice system. Rather, it seeks to add restorative justice processes to the existing criminal justice system. Its aim is to allow victims who desire to take an active role in the

⁷ See discussion *infra* Part III.

⁸ VALAZQUEZ, *supra* note 1, at iii.

⁹ See VALAZQUEZ, *supra* note 1, at 8 (describing how recent sentencing reforms may discourage reporting by victims).

¹⁰ See discussion *infra* Part III.

criminal justice process to do so when the offender is willing to acknowledge wrongdoing, make reparations, and be accountable for his crime.¹¹

Part II of this paper examines misconceptions about sex offenders, as understanding these criminals and whom they victimize is essential to understanding the failings of current social policy. Part III describes current social policy and explains the need for systemic change, making clear how the current system for adjudicating and sentencing of sex offenders fails to respond to victims' needs or protect communities. Part IV describes the criticisms which have been leveled against the use of restorative justice in dealing with sex crimes. Additionally, it describes two programs which illustrate how a restorative justice framework can successfully be applied in the context of sexual offenses. These programs provide useful illustrations of the potential for restorative justice in this area, as one program works exclusively with misdemeanor and "low-level" felony sex crimes, while the other deals exclusively with offenders who have the highest risk of recidivism. Part IV also examines where these programs have failed to appropriately listen to victims and protect communities. Part V proposes a restorative justice framework for dealing with sex crimes. It draws on evidence based evidenced practices, recommendations from law enforcement agencies and restorative justice literature.

II. WHO ARE SEX OFFENDERS? MYTHS & REALITIES

The term sex offender, as used in this proposal, encompasses anyone who breaks a law pertaining to sex.¹² As of September 2008, there were more than 636,000 people registered as

¹¹ Throughout this paper, when referring to victims of sex crimes, I predominantly use gender neutral terms in recognition that a substantial number of man are sexually assaulted each year. However, I will generally use male pronouns to describe offenders recognizing the gendered nature of sex crime perpetration.

¹² Many sexually deviant behaviors were widely accepted in the past are now criminalized, and many sexual behaviors which were criminal in the past are widely accepted. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, THE KEY ROLE OF JUDGES IN MANAGING JUVENILE SEX

sex offenders in the United States.¹³ This number is striking when considered in conjunction with the gendered nature of sex crime *perpetration*; it is estimated that 99% of registered sex offenders are male – meaning roughly 1 out of every 160 American males is currently a registered sex offender.¹⁴

The number of registered sex offenders has doubled in the last decade.¹⁵ The growing registration rate stems from registration requirements designed to protect the public by managing the risk sex offenders pose when they are in communities.¹⁶ Unfortunately, registration and other methods of sex offender management currently used are misguided because they are designed to protect against those crimes which garner the most media attention - “the abduction, rape and murder of a child by a stranger who is a previously convicted sex offender.”¹⁷ Fortunately, such horrific crimes are rare.¹⁸ Legislative efforts in this area should be based on the real threats facing communities. This Part presents information about sex offenses, in an

OFFENSE CASES: KEYS TO INFORMED DECISION MAKING 3 (2006) (noting both masturbation and use of contraceptives have been criminalized at some point because they were considered deviant sexual behavior). *Id.* This paper is not aimed assessing the wisdom the current laws, rather it is concerned with how society should deal with the problem of sexual abuse. Sexual abuse can be defined as “sexual interaction between persons of any age that is perpetrated against the victim’s will[,] without consent[,] or in an aggressive, exploitative, manipulative, or threatening manner.”

Id.

¹³ VALAZQUEZ, *supra* note 1, at 1.

¹⁴ *Id.* This data used for this calculation looks only at the gender of sex offenders released from prison. *Id.* If there is a systemic bias in incarcerating male sex offenders at a higher rate than female sex offenders, the proportion of males may actually be lower.

¹⁵ *Id.*

¹⁶ See Michael G. Petrunik, *Managing Unacceptable Risk: Sex Offenders, Community Response, and Social Policy in the United States and Canada*, 46 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 483, 485-89 (2002) (comparing the current “community protection approach” which is predicated on risk-management with earlier attempts to use a “clinical approach” and a “justice approach.”).

¹⁷ HUMAN RIGHTS WATCH, NO EASY ANSWERS 4 (2007)

¹⁸ *Id.*

effort to dispel the misconceptions which have led to these laws and provide a background for the proposal.

a. Most Sex Crimes are Committed by Family Members or Acquaintances

Strangers account for only 13.8% of sexual assaults, while family or acquaintances of the victim commit the remaining 86.2%.¹⁹ Looking exclusively at child victims, strangers are responsible for only 7% of sexual assaults, while family members and acquaintances commit the remaining 93%.²⁰ With adult victims, strangers are responsible for 27.3% of all sexual assaults, while the remaining 72.7% of assaults are committed by family or acquaintances.²¹

b. Juveniles are Responsible for a Significant Number of Sex Crimes and Present Different Risks than Adult Offenders

Juveniles are responsible for a significant number of sex crimes. Offenders under the age of 18 commit 20% of all rapes, and 50% of all child molestations.²² These offenders differ from their adult counterparts in significant ways which suggests different sentencing and treatment modalities are appropriate.²³

¹⁹ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000).

²⁰ *Id.* Of the 93% committed by family and acquaintances, family members are responsible for 34.2% of sexual assaults, and acquaintances are responsible for 58.7% of sexual assaults. *Id.*

²¹ See *Id.* Of the 72.7% committed by family and acquaintances, family members are responsible for 11.5% of sexual assaults, and acquaintances are responsible for 61.1% of sexual assaults.

²² CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, UNDERSTANDING JUVENILE SEXUAL OFFENDING BEHAVIOR: EMERGING RESEARCH, TREATMENT APPROACHES AND MANAGEMENT PRACTICES 1 (1999).

²³ *Id.* at 2-4. See also Mary P. Koss et al., *Disposition and Treatment of Juvenile Sex Offenders from the Perspective of Restorative Justice*, in THE JUVENILE SEX OFFENDER (Harward Barbaree ed.) (forthcoming), available at [http://restoreprogram.publichealth.arizona.edu/research/Koss%20\(In%20Press\)%20Disposition%20and%20Treatment%20of%20Juvenile%20Sex%20Offenders.pdf](http://restoreprogram.publichealth.arizona.edu/research/Koss%20(In%20Press)%20Disposition%20and%20Treatment%20of%20Juvenile%20Sex%20Offenders.pdf).

Juveniles who commit sex crimes are unlikely to have deviant sexual arousal patterns, while such patterns are commonly identifiable in adults.²⁴ Juvenile offenders have frequently been sexually victimized themselves, while little relationship exists between a personal history of sexual victimization and adult sex offending.²⁵ Juveniles' sex crimes are characterized by impulsivity and opportunity, while adult crimes typically involve considerable planning.²⁶ Most importantly, there is little evidence that juveniles who are convicted of sex crimes are likely to sexually reoffend as adults.²⁷ While there is a *slight* correlation between sexual offending as a juvenile and sexual offending as an adult, a more accurate predictor of whether a juvenile will commit a sex crime as an adult is whether the juvenile has been convicted of *any* crime.²⁸ By contrast, being convicted of a sexual offense while an adult is a predictor of future offending.²⁹ Yet, even in the adult population, recidivism is low.³⁰

c. Recidivism Rates for Sexual Offenses

Estimates of specific recidivism for sexual offenses vary. In 2005, the Washington State Institute for Public Policy reported a sexual recidivism rate for sex offenders over a five year period of 2.8%.³¹ A study by the Ohio Department of Rehabilitation and Correction found that over a ten year period 8% of sex offenders were reincarcerated for a sex crime.³² The New York

²⁴ NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 12, at 17.

²⁵ *Id.* It is estimated that between 40 and 80 percent of juvenile offenders were victims of sexual abuse. CTR. FOR SEX OFFENDER MGMT., *supra* note 22, at 1-2.

²⁶ NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 12, at 16. Juveniles who commit sexual offenses frequently have problems with impulse control in other areas as well. CTR. FOR SEX OFFENDER MGMT., *supra* note 22, at 3.

²⁷ VALAZQUEZ, *supra* note 1, at 13.

²⁸ *Id.*

²⁹ *Id.* at 6.

³⁰ *Id.*

³¹ *Id.*

³² HUMAN RIGHTS WATCH, *supra* note 17, at 27.

Department of Correctional Services found a sexual reoffense rate over a ten year-period of 9%.³³

Estimates of general recidivism - the likelihood a sex offender will commit any crime after being found guilty of a sex crime - appear to be lower for sex offenders than for other criminal groups. The Washington State Institute for Public Policy found that within five years after adjudication 24.5% of sex offenders will commit another crime while the general criminal population had a recidivism rate of 48%.³⁴ A 1994 study by the Department of Justice found 24% of sex offenders will commit a crime within three-years after release, while the general criminal population had a recidivism rate of 46.9%.³⁵

Unfortunately, it is difficult to determine an exact recidivism rate for sex offenders. Rates vary depending on how recidivism is measured and the length of time a study evaluates.³⁶ Rates may also be skewed underreporting of sex crimes.³⁷ Notwithstanding these issues, research supports that sex offenders are less likely to recidivate than other criminals are and that only a small percentage of sex offenders released from prison commit additional sex crimes.³⁸

The characteristics of sex offenders themselves and the sex crimes they commit are useful in predicting recidivism. The Department of Justice found rapists released from prison have the highest rearrest rate of all sex offenders, with 46% being rearrested within a three-year period after release from prison.³⁹ Sexual recidivism for rapists, however, is low: only 2.6% of

³³ *Id.*

³⁴ VALAZQUEZ, *supra* note 1, at 6.

³⁵ *Id.*

³⁶ HUMAN RIGHTS WATCH, *supra* note 17, at 26. Recidivism may be measured using arrest rates, conviction rates, or self-reports from offenders. *Id.*

³⁷ VALAZQUEZ, *supra* note 1, at 6.

³⁸ HUMAN RIGHTS WATCH, *supra* note 17, at 26.

³⁹ *Id.* at 29.

those rearrested were arrested for another rape.⁴⁰ Adult males who molest boys have the highest rate of sexual recidivism, with approximately one-third committing another sexual offense within fifteen years.⁴¹ Other factors which correlate with recidivism include the relationship of the offender to the victim,⁴² the age of the offender at the time of the offense,⁴³ the age of the offender when released from prison,⁴⁴ and whether the offender has been able to obtain housing.⁴⁵

d. Treatment is Effective at Reducing Recidivism

Successful completion of a sex offender treatment program has a substantial impact on rates of sexual recidivism. Though the effectiveness of sex offender treatment has been challenged, the challenge appears to be based on a limited conception treatment. Critics of treatment are correct that is ineffective at “curing” offenders of sexually deviant impulses, however, recidivism can be reduced through cognitive behavioral therapy aimed at helping offenders control thoughts and impulses.⁴⁶

A 2002 review of the literature found a sexual recidivism rate of rate of 12.3% for offenders who receive treatment and 16.8% for offenders who do not.⁴⁷ It also found overall

⁴⁰ *Id.*

⁴¹ *Id.* at 27 (noting that two of thirds sex offenders with the highest risk of recidivism do not reoffend).

⁴² *Id.* at 30 (noting those who have offended against family members are less likely reoffend than those who offend against strangers).

⁴³ VALAZQUEZ, *supra* note 1, at 13 (noting low sexual recidivism in juvenile sex offenders).

⁴⁴ HUMAN RIGHTS WATCH, *supra* note 17, at 30 (noting offenders released who are older than fifty reoffend at a rate of half the reoffense rate of those released under fifty).

⁴⁵ See VALAZQUEZ, *supra* note 1, at 96 n.328 (suggesting sex-offenders less likely to reoffend if have access to stable housing).

⁴⁶ Petrunik, *supra* note 16, at 486-87 (2002) (noting the ineffectiveness of treatment aimed at “curing” offenders but the “significant impact” the use of cognitive behavioral therapy in relapse prevention with sex offenders).

⁴⁷ See REAGAN DALY, VERA INST. OF JUSTICE, TREATMENT AND REENTRY PRACTICES FOR SEX OFFENDERS 2-4 (2008).

recidivism is reduced when offenders receive treatment, with 27.9% of those who received treatment committing another crime compared to 39.2% of offenders who did not receive treatment.⁴⁸ Treatment has only been shown to be effective when happens outside of prison, in the community.⁴⁹ The results are inconclusive as to whether prison based treatment is effective.⁵⁰ The efficacy of prison based treatment may be limited by the harassment sex offenders are subject to while incarcerated. This harassment leads them to avoid disclosing their crimes, minimize their crimes if they are disclosed, and avoid active participation in treatment.⁵¹

e. Misunderstood Threats and Failed Legislative Response

In contrast to actual recidivism rates, 74% of Americans convicted sex offenders will commit additional sex crimes when released.⁵² Americans are also under the impression 49% of sexual assaults are committed strangers.⁵³ Sociologists suggest these misunderstandings and the legislation the misunderstandings has spurred is the result of a “moral panic” – exaggerated public fear of a perceived threat – and point to the rise of 24 hour cable news stations and internet news sites as the cause.⁵⁴

Legislators themselves have helped fuel public misperceptions by overstating the problem of recidivism. Former Washington State Representative Jennifer Dunn, attempting to

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 4-5.

⁵⁰ *Id.*

⁵¹ See Charles Schwabe, *Learning to Pass: Sex Offenders' Strategies for Establishing a Viable Identity in the Prison General Population*, 49 INT'L J. OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 614, 622-624 (2005) (discussing strategies sex offenders use to prevent other criminals from being aware of the nature of the crime the offender committed due fear of harassment by other inmates).

⁵² VALAZQUEZ, *supra* note 1, at 7.

⁵³ *Id.*

⁵⁴ *Id.* at 4.

garner support for Megan’s Law, said the recidivism rate for sex crimes is “astronomical.”⁵⁵ Former Florida representative Mark Foley stated the recidivism rate for sex crimes against children is 90%.⁵⁶ Texas Senator Kay Baily Hutchinson stated that more than 40% of sex offenders will repeat their crime.⁵⁷

III. FAILURES OF THE CURRENT MODEL

Misconceptions regarding sexual offenses have resulted laws being passed which do not address the true problems faced by victims and communities. Recent legislative response has been aimed at monitoring offenders in communities and keeping offenders in prison.⁵⁸ This has been done through longer sentences, mandatory minimums, enhanced registration and community notification requirements, and residency restrictions.⁵⁹ Although well meaning, these legislative responses have focused on preventing the rare and high-profile cases child abduction by an adult, sex-offender stranger.⁶⁰ Such focus does not address the problems which face victims and communities daily. The following Part examines how such laws fail to respond to the needs of victims, fail to aid communities in adequately identifying and protecting themselves from threats, and failed to reduce offender recidivism.

a. The Current System Fails to Serve Victims

Many victims of sex crimes choose not to report the crime to law enforcement.⁶¹ This suggests the current model for dealing with sex crimes fails victims in some way.⁶² The

⁵⁵ HUMAN RIGHTS WATCH, *supra* note 17, at 25 n.37.

⁵⁶ *Id.* at 25 n.38.

⁵⁷ *Id.*

⁵⁸ See VALAZQUEZ, *supra* note 1, at 1 (describing current legislative response to sex crimes).

⁵⁹ *Id.*

⁶⁰ *Id.* at 3.

⁶¹ CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUSTICE, KEY ROLES FOR LAW ENFORCEMENT IN SEX OFFENDER MANAGEMENT 2 (2008).

Department of Justice has identified six reasons underreporting of sex crimes occurs: (1) the personal nature of sex crimes; (2) victims' anxiety about their identity becoming public, (3) victims' worries that they will not be believed if they report the crime or may be blamed for the offense, (4) victims' self-doubt or self-blame, (5) victims' emotional ties to offenders, financial dependence on offenders, or concerns about the what will happen to offenders, and (6) fears about retaliation by the offender.⁶³ The current system of adjudicating and sentencing sex offenders exacerbates many of these problems. A restorative justice approach, on the other hand, could minimize them.

As the Department of Justice noted, sexual victimization is an extremely personal crime. Trials, however, force victims to retell intimate details of the offense in a public forum, exposing their identity.⁶⁴ At trial, victims' frequently fear they will not be believed or even be blamed for the crime.⁶⁵ This fear is well-founded. A defense attorney's job is to discredit survivors and discredit their account of the victimization.⁶⁶ This may have the effect of exacerbating self-blaming in victims.⁶⁷ Additionally, there is often a need to sequester witness, denying victims' access to their friends and family who may act as a support network.⁶⁸ Studies have shown the trial process itself actually causes harm to victims of sex crimes.⁶⁹

Additionally, victims who are financially or emotionally dependant on offenders are often dissuaded from coming forward because of concerns raised about the prison sentence the

⁶² See Hopkins, *supra* note 3, at 694 (noting that many victims choose not to report the crime against them because they feel the current criminal justice system can do nothing for them).

⁶³ CTR. FOR SEX OFFENDER MGMT., *supra* note 61, at 3.

⁶⁴ Hopkins, *supra* note 3, at 695.

⁶⁵ *See Id.*

⁶⁶ *Id.* at 696.

⁶⁷ *Id.* at 695.

⁶⁸ *Id.*

⁶⁹ *Id.*

offender may receive.⁷⁰ The present system also fails to protect victims from retaliation by the offender. Many offenders who commit misdemeanors, such as peeping, receive only a fine.⁷¹ Other sex offenders, even when convicted, may receive only unsupervised probation.⁷²

Despite these barriers, many victims do come forward. When they do, the system fails to respond to their needs. Prosecution rates for sex crimes are low, often there is little communication with victims, and victims are frequently prevented from telling their full story.⁷³ Victims also have little or no say in the disposition of the crimes committed against them⁷⁴ and detectives frequently believe victims are lying.⁷⁵ Most troubling, when victims of sex crimes do come forward, it is usually because they hope to prevent further victimization, of either themselves or others.⁷⁶ Yet, the current approach to sex offender management is not effective at preventing offenders from reoffending – endangering the community the victim came forward to protect.

b. Failing to Protect Communities

The current criminal justice response to sex crimes is predicated on community protection through risk management and incarceration.⁷⁷ This approach has not protected communities. As discussed above, many victims chose not to report their crime, thus preventing

⁷⁰ See *infra* Part III.b.

⁷¹ Hopkins, *supra* note 3, at 694.

⁷² *Id.*

⁷³ *Id.* at 694, 696.

⁷⁴ OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, VICTIM INPUT INTO PLEA AGREEMENTS 3-5 (2002).

⁷⁵ See KIMBERLY A. LONSWAY, THE NAT'L CTR. FOR PROSECUTION OF VIOLENCE AGAINST WOMEN, FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT 1 (2009) (noting studies on false reports of sexual assault which utilized the opinions of detectives to determine if a report was false found approximately 41% of reported incidents to be false, while the actual number is likely between 2 and 8%).

⁷⁶ CTR. FOR SEX OFFENDER MGMT., *supra* note 61, at 3.

⁷⁷ Petrunik, *supra* note 16, at 485.

communities from identifying and responding to the threat of sexual offenses. Moreover, when a crime is prosecuted and guilt is established, disposition of the offender fails to prevent future incidents of sexual victimization. While the current legislative methods of controlling sex offenders – mandatory minimum sentencing, long prison sentences, registration requirements, community notification and residency restrictions - should play some role in sex offender management, current application of these methods is problematic.⁷⁸

Laws requiring mandatory minimum sentences for sex offenders limit the discretion of prosecutors in recommending sentences in exchange for a guilty plea. The result has been offenders pleading to non-sex crimes and prosecutors not being able to incentivize offenders getting treatment.⁷⁹ Additionally, mandatory minimum sentences have led to instances where the prison sentence may be disproportionate to the crime.⁸⁰ Finally, mandatory minimum sentences may decrease the likelihood victims or witnesses of sexual assault will come forward out of fear over what will happen to the offender.⁸¹

A push toward longer prison sentences for sex offenders also raises troubling issues. There is no evidence longer prison sentences are effective in deterring offenders from

⁷⁸ See CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, LEGISLATIVE TRENDS IN SEX OFFENDER MANAGEMENT 1 (2008) (noting the questionable effectiveness and high cost of these measures).

⁷⁹ *Id.* at 9-10.

⁸⁰ In *State v. Berger*, 104 P.3d 378 (2006), the Arizona Supreme Court recently upheld the sentence of a high school teacher who was sentenced to 200 years in prison, with no possibility of early release, for possession of 20 images of child pornography.⁸⁰ Justice Berch, dissenting in part, suggested the sentence may violate the 8th Amendment's prohibition on sentences which are grossly disproportionate to the crime. *Id.* at ¶ 79. Berch noted that the teacher had no prior convictions, there were never any accusations he had any improper contact with a child, and that the minimum sentence of 10 years for possession of one image of child pornography is more than the minimum sentence for a number of serious violent crimes. *Id.* at ¶¶ 67, 73.

⁸¹ See VALAZQUEZ, *supra* note 1, at 8.

committing additional sex crimes when released.⁸² Adding to this problem for offenders who desire to no longer offend, treatment in prison settings may not be effective at lowering recidivism.⁸³ Longer prison sentences may also discourage victims reporting by victims.⁸⁴ Though offenders who truly represent a threat should be subject to very long prison sentences, as currently used, mandatory minimums and long sentences are misallocations of resources which could be spent on services to victims and treatment for offenders.

Registration requirements for sex offenders have increased in recent years, as have the punishments for not registering.⁸⁵ Registration requirements appear to be ineffective at reducing recidivism when looking at offenses against strangers, and only minimally effective at reducing recidivism against family and acquaintances.⁸⁶ Other studies have found they are ineffective at reducing recidivism entirely.⁸⁷ On a more fundamental level, registration requirements appear flawed because they are based on the crime the offender was convicted of, not the likelihood the offender will recidivate.⁸⁸ Registration of juveniles' is especially problematic as there is nothing suggesting juveniles will reoffend.⁸⁹ Finally, registration requirements frequently include

⁸² *Id.*

⁸³ DALY, *supra* note 47, at 4-5.

⁸⁴ See VALAZQUEZ, *supra* note 1, at 8.

⁸⁵ See VALAZQUEZ, *supra* note 1, at 10-11. Under Georgia's sex offender registration law, for example, offenders can face life imprisonment for failing to register their address with the state. Shaila Dewan, *Homelessness Could Mean Live in Prison for Offender*, N.Y. TIMES, August 3, 2007. Exacerbating the problems offenders face, Georgia's residency restrictions make it difficult for offenders to find housing, homeless offenders are necessarily in violation of registration requirements which require an address, and there is only one homeless shelter in Atlanta which accepts sex offenders. *Id.*

⁸⁶ See VALAZQUEZ, *supra* note 1, at 10-11.

⁸⁷ See VALAZQUEZ, *supra* note 1, at 12.

⁸⁸ One area this has proved problematic is in certain cases of statutory rape. See HUMAN RIGHTS WATCH, *supra* note 17, at 9 (describing the hardships faced an man who must register as a sex offender for life because he had consensual sex with a fourteen-year old girl he was a senior in high school, though her parents had consented to the relationship).

⁸⁹ See VALAZQUEZ, *supra* note 1, at 12.

individuals not convicted of sex crimes, for instance kidnapping of a minor or false imprisonment of a minor.⁹⁰ Listing these individuals on registries needlessly increases community fear of sex crimes. Public registries may also make it difficult for offenders to find employment, increasing the risk of offender recidivism.⁹¹

Community notification requirements also pose problems. First, it has not been shown to be effective at reducing recidivism.⁹² Second, many offenders have reported that community notification requirements have led to vigilantism.⁹³ Often members of the offenders' family suffer the results of such vigilantism and face a "courtesy stigma" as the result of living with the offender.⁹⁴ Though community notification should be utilized for some offenders, this should be determined on a case by case basis and coupled with educational outreach in the community.

Residency restrictions have also proven problematic. There is no evidence residency restrictions lower recidivism.⁹⁵ Rather, they are often so pervasive they leave offenders with few places to live, resulting in offenders not reporting their whereabouts to police.⁹⁶ Residency restrictions may actually hurt public safety by making it more difficult for offenders to reintegrate as often they are forced them to live in areas where there are few opportunities for employment and few social services.⁹⁷ Though residency restrictions may make sense in some contexts, for instance to keep pedophile-predators away from children, blanket restrictions on where offenders can live and work ultimately harm attempts by offenders to lead productive and offense free lives thereby increasing the likelihood offenders will recidivate.

⁹⁰ *Id.* at 2.

⁹¹ HUMAN RIGHTS WATCH, *supra* note 17, at 11.

⁹² *See* VALAZQUEZ, *supra* note 1, at 16.

⁹³ HUMAN RIGHTS WATCH, *supra* note 17, at 11.

⁹⁴ Petrunik, *supra* note 16, at 500.

⁹⁵ *See* VALAZQUEZ, *supra* note 1, at 20.

⁹⁶ *Id.*

⁹⁷ *Id.*

Ineffective legislative efforts, combined with constant media attention on sex offenders has been created a system which is not focused on actual threats but imagined ones, and this has led to real problems. Rather than spending money on services for victims, programs to educate communities about how to protect themselves, providing services to offenders aimed at reducing recidivism, and focusing spending on monitoring offenders who present large risks, legislators continue to pass laws which target a small number of offenders.⁹⁸

c. The Current System Fails Offenders who Desire to Change

In addition to failing victims and communities, the current approach to sex offender management fails offenders who wish to live offense free lives. As discussed above, current approaches stigmatize offenders who seek to reintegrate, causing them problems in finding stable housing and employment. Additionally, they subject both the offender and the offender's family to vigilantism.

Restorative justice, in stark contrast, could greatly help offenders who wish to live offense free lives. Learning to empathize with victims is central to many treatment programs.⁹⁹ The techniques used to develop empathy are similar to many of the processes which are used in restorative justice conferencing. Treatment frequently utilizes victim impact statements, offenders answering victim's questions and offender clarification letters as methods to hold offenders accountable - helping offenders develop empathy, and minimizing denial about the crime.¹⁰⁰ Additionally, guided imagery apologies – in which the offender imagines interacting with the victim, acknowledges the harm caused, takes responsibility for the harm, commits to not

⁹⁸ *Id.* at 29. See also HUMAN RIGHTS WATCH, *supra* note 17, at 104-106 & 112 (describing the financial burden sex offender management has placed on state budgets in Iowa and California).

⁹⁹ Mark S. Carich et al., *Enhancing Victim Empathy for Sex Offenders*, 12 J. CHILD SEXUAL ABUSE 255, 256-257 (2004).

¹⁰⁰ See *Id.* at 265-270.

further offend, expresses regret for sexually violating the victim, and performs restitution – are used with sex offenders to help them develop empathy.¹⁰¹ Restorative justice conferencing would serve similar purposes for offenders, giving the offender the opportunity to accept responsibility for the harm he had caused.

IV. RESTORATIVE JUSTICES WITH SEX CRIMES: SUCCESSES AND CRITICISMS

Recognizing the shortcomings of the present system of dealing with sex crimes two innovative programs have emerged – RESTORE and Circles of Support and Accountability (“COSAs”). These programs are illustrative of the possibilities of restorative justice in this area because they deal with different types of offenders. This part will briefly describe how these programs work, as well as where they have succeeded and failed to respond to the needs of victims and the communities. It will then address criticisms of restorative justice in dealing with sexual offenses.

a. RESTORE

RESTORE is a partnership between the Tucson City Attorney’s Office, the Pima County Attorney’s office and the University of Arizona College of Public Health.¹⁰² Its mission is to “facilitate a survivor-centered, community driven resolution of selected individual sex crimes that creates and carries out a plan for accountability, healing, and public safety”¹⁰³

The process RESTORE utilizes is fairly straight-forward – when a complaint is filed the prosecutor determines if it is appropriate for referral to the RESTORE program.¹⁰⁴ Eligible cases are those where the crime is the offender’s first offense, the offender is an adult, and the offender

¹⁰¹ *Id.* at 271.

¹⁰² RESTORE: JUSTICE THAT HEALS, OVERVIEW MANUAL (2006)

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 14.

used no more force than was necessary to commit the offense.¹⁰⁵ If the case is appropriate for referral, a representative from RESTORE calls the victim and discusses the program, asking if they would like to participate in RESTORE instead of proceeding to trial.¹⁰⁶ If the victim would like to participate, a RESTORE representative discusses with the offender whether he would like to participate.¹⁰⁷ Asking the victim prior to asking the offender may place less pressure of the victim to participate than if the offender had already agreed to participate.¹⁰⁸

If both the offender and the victim desire to participate, staff members work with both the victim and the offender prior organizing a face-to-face meeting in order to assure both parties are prepared for the a meeting.¹⁰⁹ The conferencing model utilized by RESTORE involves participation by family or friends of the survivor and offender.¹¹⁰ It gives all parties a chance discuss with the offender the harm his act caused.¹¹¹ If victims prefer not to meet with the offender face-to-face but desire to participate in RESTORE, they can write an impact statement which is read to the offender by the victim's friends, family or RESTORE staff.¹¹² 80% percent of the victims of misdemeanor level crimes, and 20% percent of the victims of felony level crimes opt to have a statement read instead of meeting with the offender.¹¹³

¹⁰⁵ *Id.* at 9.

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.*

¹⁰⁸ See PAMELA RUBIN, RESTORATIVE JUSTICE IN NOVA SCOTIA: WOMEN'S EXPERIENCE AND RECOMMENDATIONS FOR POSITIVE POLICY DEVELOPMENT AND IMPLEMENTATION 68 (2003), available at <http://www.thans.ca/file/32>.

¹⁰⁹ RESTORE: JUSTICE THAT HEALS, *Supra* note 102, at 8.

¹¹⁰ *Id.* at 11-12.

¹¹¹ *Id.*

¹¹² Mary P. Koss, Restorative Justice for Sex Crimes Outside the Context of Intimate Partner Violence (2006) (unpublished manuscript, available at <http://restoreprogram.publichealth.arizona.edu/research/Koss%202006%20RJ%20for%20Sex%20Crimes.pdf>)

¹¹³ *Id.*

During conferencing, parties formulate a Redress Agreement.¹¹⁴ A Redress Agreement includes mandatory supervision and treatment requirements as well as any restitution the victim desires.¹¹⁵ Restitution can be financial or require the offender to perform certain acts such as community service or informing certain people of the wrongful act in order to clear the survivor's name.¹¹⁶

Following conferencing, the offender must agree to undergo treatment and must complete treatment within a year.¹¹⁷ During this time, he must report to a board of community members who oversee his progress.¹¹⁸ If the offender fails to complete the program or reoffends the case is moved referred back to the prosecutor's office which has discretion about whether to prosecute the crime.¹¹⁹

The model developed by restore serves the need it victims. It does not pressure victims to participate, provides counseling prior to conferencing, and gives victims option to participate even if they do not want direct contact with the offender. When victims do want contact, the family conferencing model provides benefits over a one-on-one meeting. The presence of those close to the victim allows them to express the harm that was done to them, and creates an opportunity for the offender to be accountable for that harm as well. The presence of those close to the offender forces the offender to acknowledge how his crimes have hurt those close to him.

The RESTORE program, however, could go further in serving communities and offenders by expanding its eligibility requirements and duration. Because RESTORE screens

¹¹⁴ RESTORE: JUSTICE THAT HEALS, *supra* note 102, at 12.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 17.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 9.

out offenders who have offended in the past, even if they have not received treatment or been held accountable, offenders who desire to participate and who have offended previously are de incentivised from admitting other offenses and being accountable to their other victims. Other problems stem from the fact that monitoring and treatment only occur for one year. This may not be enough to assure offenders are fully rehabilitated.¹²⁰

Moreover, the effectiveness of RESTORE might be increased if it was integrated into the criminal justice system. In drug courts, it has been observed that the ceremonial power of the judge, as well as the threat of immediate court sanctions, helps and may even be necessary to keep addicts moving through treatment.¹²¹ Additionally, a restorative justice program integrated into the current justice system could aid victims in getting restraining orders or other legal remedies they may need to feel safe.

b. Circles of Support and Accountability

COSAs present a model for reintegration of offenders. The aim of COSAs is to “(1) reduce the risk of reoffense by sex offenders; (2) to ease the offender’s transition into the

¹²⁰ Only 40% of sex offenders who commit another sex crime after release from prison do so within one year of release. Bureau of Justice Statistics Criminal Offender Statistics, <http://www.ojp.usdoj.gov/bjs/crimoff.htm#sex> (last visited Aug. 29, 2009)

¹²¹ Joshua Matt, *Jurisprudence & Judicial Roles in Massachusetts Drug Courts*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 151, 177 (2004). There is reason to believe the sex offenders would benefit from a judicial role in the process as addicts in drug courts do. Several areas in New York State have successfully utilized a Sex Offense Court which helps to organize all the parties responsible for monitoring and treatment of the offender with the aim of holding offender accountable. CTR. FOR COURT INNOVATION, ESTABLISHING A MODEL COURT: A CASE STUDY OF THE OSWEGO SEX OFFENSE COURT 2, http://www.courtinnovation.org/_uploads/documents/a_case_study2.pdf. The Sex Offense Court works closely victim’s organizations with the aim of increasing victim access to information, and use of victim impact statements. *Id.* at 3. Like drug court, judges are able to provide immediate sanctions if offenders are not complying with treatment requirements or monitoring. *Id.* at 2.

community; and (3) to address the fears of victims in a practical way.”¹²² Circles consist of volunteers from the community and a high-risk sex offender.¹²³ High risk offenders enter the program voluntarily and agree to be accountable to the other circle members for following a relapse prevention plan and other activities designed to minimize the risk the offender poses.¹²⁴ COSAs give the offender pro-social contacts, as well as helping offenders find housing and employment.¹²⁵ COSAs have been successful at reducing offender recidivism to 60% of what psychosexual evaluations predicted.¹²⁶ However, COSAs have been criticized as not providing adequate outreach to victims or holding offenders accountable to victims.¹²⁷

c. Criticisms of Using Restorative Justice With Sexual Offenses

Critics of using restorative justice with sex crimes have voiced a number of concerns. First, that the use of restorative justice would not sufficiently convey the seriousness of sex crimes.¹²⁸ Second, that the power differential present with sexual offenses could lead to manipulation of the process by the offender.¹²⁹ Finally, concerns related to whether communities have the correct mindset and access to the necessary resources to hold offenders accountable and protect the safety of victims.¹³⁰

i. Taking Sex Crimes Seriously

¹²² Stacey Hannem & Michael Petrunik, *Circles of Support and Accountability: A Community Justice Initiative for the Reintegration of High Risk Sex Offenders*, 10 CONTEMP. JUST. REV. 153, 159 (2007).

¹²³ *Id.* at 159-160.

¹²⁴ *Id.* at 160.

¹²⁵ *Id.* at 160.

¹²⁶ *Id.* at 168.

¹²⁷ David Dyck, *Circles of Support and Accountability: The Need to Make Room for More Victim/Survivor Input*, 3 (2000), www.voma.org/docs/dyck.pdf.

¹²⁸ Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334, 342 (2006).

¹²⁹ *Id.* at 340.

¹³⁰ *Id.* See also Hopkins, *supra* note 3, at 709-712 (discussing potential problems with victim physical and emotional safety).

Critics express concerns that offenders and observers may view the restorative justice process as too easy, thereby reinforcing a belief that sexual offending can be justified.¹³¹ There is also a fear that taking sexual assaults out of the criminal justice system may “re-privatize” crimes against women, undermining the work the women who struggled to make gendered violence a public issue.¹³² Finally, some believe that to convey the seriousness of sex crimes offenders must be punished.¹³³

These concerns should be taken seriously. Restorative justice programs working with sex offenders must denounce sexual violence and ensure the offenders appreciate, are accountable for, and attempt to rectify the harm caused to victims and community members. This process will not be an “easy” option for offenders, rather one which requires them to make serious changes. Keeping offender accountable to communities as well as victims will ensure sexual violence is not “re-privatized” by keeping communities aware of these crimes.

By way of contrast, it is unclear that the current system takes sex crimes seriously. While some offenders face quite severe sanctions, the majority of reported sex crimes are not prosecuted,¹³⁴ detectives frequently assume reports of sexual assault are false,¹³⁵ and if convicted, many offenders serve little or no time in prison.¹³⁶ Restorative justice allows offenders to take responsibility for the harm they have caused to victims, and allow victims to

¹³¹ Daly, *supra* note 128, at 340.

¹³² *Id.* See also Stephanie Coward, *Restorative Justice in Cases of Domestic and Sexual Violence: Healing Justice?*, Part III(2), http://www.hotpeachpages.net/canada/air/rj_domestic_violence.html (raising concerns that community based restorative justice programs will not do enough to denounce gendered violence undermining progress which has been made).

¹³³ See Coward, *supra* note 132, at Part I (noting feminists worked hard to have sexual violence recognized as a true crime deserving public attention and punishment).

¹³⁴ Hopkins, *supra* note 3, at 694.

¹³⁵ LONSWAY, *supra* note 75, at 1.

¹³⁶ Hopkins, *supra* note 3, at 694.

express the seriousness of the crime against them. Although punishment is not an outcome in restorative justice, it is not clear victims need punishment to feel vindicated as “victim satisfaction with the criminal justice process is far more closely linked to the *opportunity to participate* than to the outcome.”¹³⁷

ii. Power Concerns

Critics raise concerns that offenders may use power imbalances to manipulate the restorative justice process.¹³⁸ They also suggested that the power differential present in sexual assault will skew any restitution agreed to by the parties.¹³⁹ Moreover, critics fear that victims’ needs will be overshadowed by a community desire to build consensus, coercing victims into participation,¹⁴⁰ as well as into accepting an apology victims’ may feel is inappropriate or insincere.¹⁴¹

These concerns are well-founded. Some attempts to use Restorative Justice with sexual assaults have not been structured in a way to avoid these problems, and victims reported that they felt coerced by both prosecutors and restorative justice staff members.¹⁴² Restorative justice programs could minimize the likelihood of this occurring during the restorative justice process by working with victims’ groups to identify potential problems with program design and correcting those problems.

Restorative justice programs could also minimize the possibility of victim’s being coerced into participation through using of victim advocates from the District Attorney’s Office to discuss the possibility of restorative justice, as opposed using staff members from the

¹³⁷ A Victim’s Right to Speak, *supra* note 7 (emphasis added).

¹³⁸ Daly, *supra* note 128, at 340.

¹³⁹ Hopkins, *supra* note 3, at 712-714.

¹⁴⁰ RUBIN, *supra* note, at 108.

¹⁴¹ Daly, *supra* note 128, at 340.

¹⁴² RUBIN, *supra* note, at 108.

restorative justice program. During conferencing, power differentials could be rectified through preparation with the victim and the offender beforehand, having supports for the victim present, utilizing a program philosophy that puts victims' needs ahead of community needs, and monitoring offender verbal and nonverbal signals which may intimidate victims. Additionally, by working with victims' prior to conferencing to help them develop possibilities for restitution, restorative justice programs could help victim's identify what they want in a restitution agreement and help them formulate such agreement, preventing any power issues during conferencing from effecting the agreement.

A program designed with these concerns in mind would give power back to victims. It would give victims the opportunity, if they want the opportunity, to tell their story in a supportive environment. It would allow victims to take an active role, rather than a passive role, in the criminal justice process.

iii. Restorative Justice Programs Integrated into the Current Justice System Could Provide Necessary Resources, Oversight and Direction.

Critics have expressed concern with using community based restorative justice programs to deal with sexual violence.¹⁴³ They suggest that community norms may reinforce victim blaming.¹⁴⁴ Also, that given the cost of treatment and monitoring for sex offenders, and the emotional needs of victims, restorative justice programs based in the community may lack resources to treat offenders and assist victims.¹⁴⁵ Finally, that community based programs may not have stringent requirements for training employees or rigorous program evaluation methods,

¹⁴³ Daly, *supra* note 128, at 340.

¹⁴⁴ Daly, *supra* note 128, at 340.

¹⁴⁵ Daly, *supra* note 128, at 340.

and that these problems could open the door to further traumatizing victims and leaving communities unsafe.¹⁴⁶

A restorative justice system integrated into the current criminal justice system could address these concerns.¹⁴⁷ Integration would allow probation officers and other state controls to be used in monitoring the offender. Resources could be diverted from the prison system to restorative justice programs to deal costs. Additionally, costs for offender treatment and monitoring could be offset by requiring offenders to contribute to these services. Finally, strict training and program evaluation requirements could be utilized to assure sure victims and communities are gaining from the restorative process.

V. PROPOSAL

The following proposal outlines a restorative justice program to work with survivors of sex crimes. It is structured to deal with the concerns raised by critics, examining how police should respond when a report is first made, the special issues which are present when the survivor is a minor or when the sexual assault occurs in the course of an ongoing relationship, and the monitoring and treatment practices which should be utilized to protect communities.

a. When Sex Crime is Reported

When the victim of a sex crime reports the crime to police, officers should immediately connect the victim with victim advocates who are trained in taking statements and working with victims, and who can provide victims with links to resources in the community.¹⁴⁸ Victim

¹⁴⁶ Coward, *supra* note 132, at Part III(6).

¹⁴⁷ *Id.*

¹⁴⁸ See CTR. FOR SEX OFFENDER MGNT., *supra* note 61, at 3 (suggesting that after a victim reports a sex crime, law enforcement should immediately connect the victim with victim advocates and provide information about resources available to victims and their families).

advocates should be sensitive to the cultural norms of the populations they serve to prevent further traumatization.¹⁴⁹ Ideally, these individuals would work with the victim throughout the restorative justice process, providing both continuity and support for the victim, as well as making sure the victim's needs remain paramount during the process.

Rather than following the RESTORE model, which contemplates staff from the RESTORE program discussing the option of restorative justice, the option of restorative justice would be presented by victim advocates who have been working with the victim since the crime was initially reported. If victims indicate they wish to participate in a restorative justice program, prosecutors would talk to offenders regarding the participation. Offenders should not be eligible to participate if they have already completed, or have started and failed a treatment program. Prior to agreeing to participate, offenders should be able to consult with an attorney to assure they fully understand the ramifications of participation.

If the offender decides to participate, is willing to be accountable to the victim for the harm caused and accept responsibility for the crime, a prosecutor should file charges and the offender should plead guilty. This will allow immediate sanctions should the offender not fulfill agreed upon restitution and treatment requirements.¹⁵⁰ The case should then be referred to restorative justice staff to work with the victim in preparation for conferencing with the offender. Counseling services should also be available to the victim, as well as those close to the victim if they will be attending the conference.

¹⁴⁹ Cultural differences between victims appear to effect the way they and their families process shame and blame. See Lisa Aronson Fontes, *Sin Vergüenza: Addressing Shame with Latino Victims of Child Sexual Abuse and Their Families*, 16 J. CHILD SEXUAL ABUSE 61, 79-80 (2007). If law enforcement is not sensitive the needs of survivors, they may inadvertently re-traumatize victims. See CTR. FOR SEX OFFENDER MGMT., *supra* note 61, at 3.

¹⁵⁰ After completion of the program, the plea should be vacated to prevent offenders from needing to comply with federal requirements.

The restorative justice program itself should be integrated into the criminal justice system.¹⁵¹ This serves communities by allowing probation officers to monitor offenders and would allow judges to sanction offenders immediately if they are not fulfilling the requirements of the program. It would serve victims by giving them access to additional remedies, such as stalking or restraining orders if these were desired. Finally, it would serve offenders by drawing on the power of judges to help encourage reform.

i. Protecting Victim Interests During Entry and Conferencing

Due to the sensitive and traumatic nature of sexual offenses, the well-being of survivors should be at the forefront of any restorative justice program working with victims of sex crimes. Victims must not feel pressure to participate in the restorative justice program and substantial pre-conference counseling should be undertaken with victims to prepare them for meeting with the offender. Substantial work should also be done with offenders to assure they are ready to accept responsibility for their actions and will not engage in victim blaming.

Victims should have the option of having a prepared statement read to the offender if they do not want to meet face-to-face, but still wish to participate. In such cases, restorative justice staff should work with the victim to develop a restitution agreement which would be presented to the offender. If the victim has no objection, those close to the victim should meet with the offender to tell their story. Survivors should be informed they have the option to back-out of the process at any time prior to conferencing.

Conferencing would be modeled after the RESTORE program. Ideally, both the victim's family or friends and someone close to the offender would be present, although victims should

¹⁵¹ Integration of a restorative justice program into the criminal justice system may create problems if it drifts out of touch with community needs. Organizers should be mindful of community needs through consultation with victim's groups and community outreach.

have the choice of limiting who is present. Generally, programs should strive to have a family member accompany the offender as offenders with family support are less likely to be rearrested.¹⁵² The staff member at the conference should watch for victim blaming by the offender or others during the conference. Those present at the conference should agree to confidentiality, and programs should strive to protect the victim's identity throughout the process.

ii. Considerations when the Victim is a Minor

The use of restorative justice when the victim is a minor raises a different set of issues. Whether the model described in this paper is appropriate may depend on the age of the minor, the age of the offender, and the type of crime.¹⁵³ In addition to developmental issues related to age, crimes against minors also present obstacles because they are frequently committed by the victim's family.¹⁵⁴ When this is the case, family loyalties may become divided and offenders may receive mixed messages regarding blame.¹⁵⁵ Nevertheless, restorative justice has potential in this area.

There is evidence that when a minor has been sexually abused by a parent, a "confrontational interview" between the minor and the offending parent can help the minor recover, reducing trauma, flashbacks, isolation and self-blame.¹⁵⁶ For offenders, interviews help

¹⁵² DALY, *supra* note 47, at 6.

¹⁵³ While many crimes against children are inappropriate for restorative justice, with crimes such as statutory rape, when consensual sex occurs between two teenagers who are close in age, restorative justice may still be appropriate. Although, presuming consent, it may be the parents of the younger child who address the harm done.

¹⁵⁴ See *supra* text accompanying note 20.

¹⁵⁵ Daly, *supra* note 128, at 7.

¹⁵⁶ Anne Welfare & Robyn Miller, A Confrontative Interview for Victims of Interfamilial Sexual Abuse: An Alternative to Apology that Reverses Power Differentials in a Therapeutic Way 8 (1999) (unpublished manuscript, *available at* <http://www.aic.gov.au/conferences/rvc/welfare.pdf>).

them recognize gravity of the harm caused and aid in developing empathy.¹⁵⁷ During confrontational interviews, victims relate to the offender the victims' experience of the abuse and the impact it has on their lives.¹⁵⁸ Confrontational interviews are contrasted with "apology interviews" in that the aim is to give victims an opportunity to be heard by their abusers rather than give abusers an opportunity to apologize.¹⁵⁹ Though reunification is not necessarily suggested in cases of parental incest,¹⁶⁰ confronting the offender may give the survivor "strength to face the next step in recovery."¹⁶¹ Integrated in the criminal justice system, restorative justice programs may provide a good forum for such interviews as interview success depends on coordinating the "the client system, the offender system, the therapist's system, and the broader agency system."¹⁶²

Minors who have been offended against by a family member, be it a parent or a sibling, should be appointed a *guardian ad litem* to advocate on the child's behalf. The *guardian ad litem* should work with the family, as well as the child, to assess whether the family is supporting the survivor or making excuses for and enabling the offender.

iii. *Considerations when Sexual Assault Occurs in an Ongoing Relationship*

Use of restorative justice when sexual assault occurs during an ongoing relationship is an area of contention.¹⁶³ Yet, with the proper controls, it could greatly benefit women who are in

¹⁵⁷ *Id.* at 4.

¹⁵⁸ *Id.* at 3.

¹⁵⁹ *Id.*

¹⁶⁰ Barbara W. Boat & Sarah B. Foreman, *Consider the Source: A Commentary on Incest and Parental Contact*, 17 J. CHILD SEXUAL ABUSE 13, 14-15 (2008).

¹⁶¹ Welfare, *surpa* note 156, at 8.

¹⁶² *Id.* at 9.

¹⁶³ See Hopkins, *supra* note 3, at 710-711 (noting the "emotional abuse involved in an ongoing battering relationship typically is more extensive and comprehensive than that which surrounds acquaintance rape, simply by virtue of the length of the relationship and the more extensive

sexually abusive relationships. By providing an alternative to the current system, women who have not reported the crimes against them over fear of what would happen to the offender may be more likely to report. Increased reporting would in turn ensure victims have access to the services they need, and hopefully prevent future assaults through treatment and monitoring of the offender. Moreover, in cases where the victim is financially dependent on the offender, financial restitution from the offender could aid them in escaping dependence.

The use of restorative justice to deal with sexual victimization that occurred during an ongoing relationship would only succeed if coupled with ways to limit the potential for future harm. A restorative justice program integrated into the present system would allow the victim to access additional resources such as stalking or restraining orders as necessary to provide the victim with peace of mind, and enable immediate legal sanctions if the offender does not abide by restitution agreements.

b. Educational Programs Necessary to Protect Victims

Essential to the intake phase any restorative justice response to sex crimes is increased education within the law enforcement community aimed at ensuring those who work with victims are educated about the realities of sexual assault.¹⁶⁴ Presently, police are less likely to investigate rapes when the victim says the offender was an acquaintance than they are when the victim says the offender was a stranger, despite evidence that acquaintance rape is far more common.¹⁶⁵ Similarly, children are less likely to be believed if they report sexual abuse by a

involvement of the parties with each other as intimates and potentially coparents rather than acquaintances.”)

¹⁶⁴ The Department of Justice has noted “introductory training for officers can dispel common myths, assumptions, or biases that may unduly influence officers’ interpretations and responses during the investigative process.” *CTR. FOR SEX OFFENDER MGT.*, *supra* note 65, at 3.

¹⁶⁵ *Id.* at 3 n.2.

family member than if they report abuse by a stranger.¹⁶⁶ By failing to investigate and move forward with these cases the harm caused to victims may be exacerbated.¹⁶⁷

c. Offender Accountability to Victims

During conferencing, offenders must be willing to do what they can to repair the harm they caused. This can be done through financial restitution or the offender agreeing to engage in certain activities. Though money cannot compensate for the psychological harm done by the crime, it can compensate victims for medical expenses, lost wages, childcare and other expenses that are a result of the crime.¹⁶⁸ Victims be free to have financial restitution paid to them or donated to charities which work to prevent future acts of sexual violence or which provide services to victims.

Donations could play an important role in victim support. By funding organizations which provide services to victims the availability of such services is increased. As a result, survivors who come into the system with few resources will be more likely to have access to such services immediately, as opposed to needing to wait to receive financial restitution from the person who perpetrated the crime against them.¹⁶⁹

d. Offender Accountability to the Community

¹⁶⁶ See Sarah E. Ullman, *Relationship to Perpetrator, Disclosure, Social Reactions, and PTSD Symptoms in Child Sexual Abuse Survivors*, 16 J. CHILD SEXUAL ABUSE 19, 31 (2007).

¹⁶⁷ See *Id.* at 34 (noting disbelief when a victim discloses a sex crime is associated with negative psychological outcomes for the victim).

¹⁶⁸ MARLENE A. YOUNG, NAT'L ORG. FOR VICTIM ASSISTANCE, *MEETING VICTIM NEEDS: WHAT IS THE ROLE OF VICTIM COMPENSATION IN RECOVERY?* 4-5 (2003).

¹⁶⁹ Such services, if supplemented with state funds, may have also symbolic value for victims. See *Id.* at 5. It could serve as recognition from society that they have been wronged. *Id.* This may be cathartic for victims of sex crimes who struggle with self-blame.

Society too is harmed by sex crimes, as they take a psychological toll on community members who live in fear of such crimes.¹⁷⁰ Offenders must be willing to be accountable for their role in this harm by agreeing to treatment and monitoring when appropriate, thereby easing societal fears through preventing recidivism. To be accountable, offenders should also agree to bare at least part of the financial burden accompanying such programs.

The type of treatment and level of monitoring offenders agree to should be based on an assessment of the threat the offender poses.¹⁷¹ Using such assessments as opposed to the crime the offender committed as the basis for treatment and monitoring protects communities as well as helping offenders rehabilitate because low risk offenders are less likely to recidivate when they undergo a less intensive treatment programs.¹⁷²

Treatment programs should design by experts outside of the department of corrections as these programs are likely more effective at treating offenders.¹⁷³ Offenders participating in such programs should be accountable to the state for a portion of the cost of evaluating effectiveness of these treatment programs and development of updated treatment models. States should also develop state-specific actuarial tools for predicting recidivism as these will be more accurate at predicting the risk of recidivism in a given areas, informing states as to the level of monitoring which should be required.¹⁷⁴

¹⁷⁰ See Michael M. O’Hear, *Perpetual Panic*, 21 FED. SENTENCING REP. 69, 69 (2008) (noting intense public fear of sexual offenses).

¹⁷¹ The Static-99, a tool for evaluating recidivism in sex offenders can “differentiate meaningfully between sex offenders with higher and lower probabilities of recidivism.” R. Karl Hanson & David Thorton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 L. & HUM. BEHAV., 119, 133 (2000).

¹⁷² DALY, *supra* note 47, at 9.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

Basing the intensity of treatment and level of monitoring offenders must agree to on psychosexual evaluations raises a few problems. Accurate prediction of sex offender recidivism requires the offender be honest with the treatment staff regarding sexual impulses and past behavior. Because sexual impulses are an area of shame for many sex offenders, they may be hesitant to fully disclose. Additionally, offenders would have incentive to not disclose fully as it could lead to increased treatment and monitoring requirements. While ideally offenders would be honest so as to be fully accountable to communities, it may be unwise to base treatment and monitoring, and ultimately community safety on an offender's word. To prevent the offender from withholding information, the offender's answers should be verified via a polygraph, a tool frequently used in sex offender management.¹⁷⁵

The second problem raised by linking treatment and monitoring to psychosexual evaluations is that accurate prediction will require offenders to disclose past crimes against other victims. Ideally, offenders would be accountable to these victims as well, providing them with an opportunity to request restitution and meet with the offender. Unfortunately, notifying victims who chose not to report the crime is invasive and might interfere with their recovery. To respect victim privacy, and to keep offenders accountable, law enforcement should have access to treatment records disclosing the names of additional victims if a victim comes forward and accuses the offender of a sex crime. Prosecutors should not prosecute crimes based on treatment records, however, unless the victim comes forward and wishes to have the crime prosecuted.

e. Reassessing Treatment

When developing new treatment models states be aware of and attempt to rectify the problems of current treatment modalities. These include excluding victims, underutilizing

¹⁷⁵ See CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, TWENTY STRATEGIES FOR ADVANCING SEX OFFENDER MANAGEMENT IN YOUR JURISDICTION 9 (2008).

neighbors and family members, and expecting communities to accept offenders without giving them support necessary to get past their fear and anger.¹⁷⁶ New treatment models developed should make use of victims, when victims desire to be involved, through face-to-face meetings with the offender or through impact statements by the victim. These will help develop empathy in offenders.¹⁷⁷ Family members and neighbors should be listened to for their perspectives on treatment and monitoring. Additionally, there should be outreach in communities, giving people forum to express their fears, become educated on the realities of sexual offending, and encourage community members to provide opportunities to aid in reintegration.

f. Offender Management

In fashioning monitoring and community safety measures judges should have authority to order any of the currently used methods of sex offender management, ranging from residency restrictions to community notification to electronic surveillance. In making these determinations judges should be guided by the recommendations of treatment staff and desires of the victim. This will require collaboration between treatment staff, probation officers, victim advocates, and the judge.¹⁷⁸ Additionally, judges should be willing to modify orders when offenders complete treatment, secure housing or find employment.¹⁷⁹ Modification of orders would incentivize risk lowering behavior on the part of the offender and reinforce positive behaviors.¹⁸⁰

g. Community Outreach and Offender Resources

¹⁷⁶ Koss et al., *supra* note 23.

¹⁷⁷ See Carich et al., *supra* note 99, at 265-270 (describing ways to increase empathy in sex offenders).

¹⁷⁸ The New York Sex Offense Court may be a useful model fashioning a system of judicial oversight. See *supra* discussion accompanying note 121.

¹⁷⁹ See DALY, *supra* note 47, at 10 (noting reevaluation of dynamic risks can help therapists develop individualized treatment plans and targeted interventions).

¹⁸⁰ One problem with current methods of sex offender management is that they do not change as the offender improves, providing no incentive to live without offending. See HUMAN RIGHTS WATCH, *supra* note 17, at 79.

When community notification is appropriate for community safety or offender accountability it should take place in a manner which allows communities, law enforcement, victim advocates and offenders to meet together. This would give voice to community members, allowing them to share their concerns, clarify issues and ask questions. Meetings of this sort would inform community members while minimizing the problems posed by community notification methods, such as exaggerated fears or hostility towards offenders.¹⁸¹

Law enforcement should actively encourage communities organize COSAs for appropriate offenders. Appropriate offenders are those who are high-needs, have low self-esteem, limited or no pro-social supports, and a want to lead an offence-free life.¹⁸² COSAs would provide offenders with support from individuals outside of the criminal justice system, as well keep the community members involved in the reintegration process.

Restorative justice programs should also engage with employers, as employment reduces the risk of recidivism in sex offenders.¹⁸³ Employment also allows offenders pay for treatment and pay restitution. Restorative justice programs could educate employers about currently existing tax credits for hiring felons and the low recidivism rates of sex offenders.

For offenders who need greater levels of monitoring, half-way houses should be utilized rather than incarceration. Half-way houses, which would monitor the coming and going of the offender, would allow the offenders to find employment so that they could pay restitution. Additionally, half-way houses would allow offenders to participate in effective community based treatment programs.

¹⁸¹ CTR. FOR SEX OFFENDER MGMT., *supra* note 61, at 5.

¹⁸² SARAH ARMSTRONG ET AL., UNIVS. OF GLASGOW AND STIRLING, CIRCLES OF SUPPORT AND ACCOUNTABILITY: CONSIDERATIONS OF THE FEASIBILITY OF PILOTS IN SCOTLAND 7 (2008).

¹⁸³ Petrunik, *supra* note 16, at 501.

VI. CONCLUSION

The problem posed sex offenders is one without a perfect solution. It is clear, however, that the current judicial process does not serve victims, communities, or sex offenders. This has been recognized to some extent. There appears to growing support for letting sex offenders have a second chance.¹⁸⁴ Solutions will necessitate changing how we spend public funds – toward providing services for victims and offenders, and away from spending on incarceration. While such solution may not be palatable on the surface, it is necessary given the inherent problems the current system poses.

¹⁸⁴ VALAZQUEZ, *supra* note 1, at 18 (“[O]ver the past 10 years, the proportion of [survey] respondents who believe that sex offenders should be given every opportunity for a new start as law-abiding citizens has increased by 15 percent—from 49 percent in 1997 to 64 percent in 2007.”).