
NOTES

**MAKING AMENDMENTS TO MAKE AMENDS:
THE CASE FOR EXPANDING ELIGIBILITY OF 276B
RESTORATIVE JUSTICE PROGRAMS TO GENDER-BASED
CRIMINAL OFFENDERS IN MASSACHUSETTS**

SAV ARGUELLO*

ABSTRACT	88
INTRODUCTION	88
I. LEGAL BACKGROUND.....	92
A. <i>Prosecution and Incarceration</i>	92
1. Reliance on Criminal Convictions and “No-Drop” Prosecution Policies	92
2. Problems with Incarceration.....	97
B. <i>The Present Status of Restorative Justice</i>	101
1. Restorative Justice	101
2. Massachusetts and the Current State of the Restorative Justice Program	106
II. ARGUMENT.....	108
A. <i>Restorative Justice May Offer Better Outcomes</i>	108
1. Victim Empowerment and the Underreporting Dilemma.....	108
2. Curbing Recidivism and Protecting Public Safety	110
B. <i>Building Out Chapter 276B: How Massachusetts Can Craft an Effective Restorative Justice Program for Gender-Based Criminal Offenders</i>	112
1. Ensuring Safety Throughout the Process.....	114
2. Identifying Post-Conferencing Tools to Promote Comprehensive Success	117
CONCLUSION.....	118

* Sav Arguello (they/them/theirs) is a law clerk to the Honorable Chief Justice Mark V. Green of the Massachusetts Appeals Court. The views expressed in this Note are wholly attributed to Sav, and do not reflect the views or opinions of Chief Justice Green or the Massachusetts Appeals Court. Sav graduated *cum laude* from Boston University School of Law in May 2022. During their time at BU Law, Sav served as the Managing Editor for the Public Interest Law Journal for Volume 31. They extend sincere thanks to the editorial staff at PILJ for their contributions to the development of this Note, and express special thanks to Professor Gerald Leonard for his thorough and insightful advising on this Note.

ABSTRACT

In 2018, Massachusetts enacted an omnibus criminal justice reform act, which introduced the practice of restorative justice conferencing to the Commonwealth under General Laws chapter 276B. However, chapter 276B leaves a rather large class of criminal defendants—and, importantly, their victims—ineligible for this community conferencing program: those charged with crimes of sexual assault or domestic violence. Available research on the effectiveness of current approaches to addressing gender-based crime, such as no-drop prosecutorial policies, indicate serious deficiencies in promoting safety and empowerment of victims. Contrastingly, data on the effectiveness of restorative justice conferencing suggests better outcomes for both victims and defendants. This Note proposes that Massachusetts should remove the restriction on eligibility for conferencing under chapter 276B for gender-based crime defendants, and recommends utilizing pre-existing resources and programs available in the Commonwealth to ensure the safety and well-being of participants in the restorative justice process.

INTRODUCTION

What do we expect from our criminal justice system in responding to crimes of sexual assault and domestic violence? Why do we prosecute these crimes in the first place? As with many categories of violent crimes, the answers to these questions tend to mirror our jurisprudential justifications for criminal punishment generally: the retributive function of repairing harmed persons and communities,¹ and the utilitarian function of safeguarding an offender's victims from future harm.² In the context of sexual assault and domestic violence crimes, the retributive function focuses on the promotion of victim empowerment³ while the utilitarian function may refer to the protection of public safety.⁴ The prevailing question, then, is whether our current system of prosecution and incarceration has been successful in achieving these stated goals. For this question, there are few clear answers.

The American criminal justice system often presumes that prosecution and subsequent incarceration of offenders who have committed a gender-based

¹ See David Wood, *Punishment: Nonconsequentialism*, 5 PHILOSOPHY COMPASS 470, 471–72 (2010).

² See David Wood, *Punishment: Consequentialism*, 5 PHILOSOPHY COMPASS 455, 458–60 (2010).

³ See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865–66 (1996); Elie A. Maalouf, *Tougher Measures: How the New Massachusetts Strangulation Law Demonstrates the Need for Stricter Penalties and No-Drop Prosecution Policies in Domestic Violence Disputes*, 50 SUFFOLK U. L. REV. 295, 309 (2017) (“Advocates favoring no-drop prosecution argue that such policies empower the victim . . .”).

⁴ See Hanna, *supra* note 3, at 1865.

crime⁵ will be the most effective means of promoting victim's empowerment and protecting public safety.⁶ Proponents of the existing criminal justice framework contend that increased conviction and incarceration rates empower victims by increasing confidence in the state's ability and inclination to hold violent offenders accountable.⁷ With regard to public safety, conviction and incarceration of offenders shields victims from contact with their abusers, and prosecutors work to reduce the risk of retaliatory violence against reporting victims.⁸ In light of these justifications, many jurisdictions in the last four decades have created more criminal offenses relating to gender-based violence and adopted more aggressive prosecutorial approaches.⁹

Such reforms have left much to be desired. Despite increased rates of conviction in gender-based criminal cases,¹⁰ victims of gender-based crimes continue to report mistrust and dissatisfaction with state actors and the criminal justice system.¹¹ Some prosecutorial policies use coercive strategies to ensure victim cooperation, which may disempower and retraumatize victims.¹² Furthermore, higher conviction rates of domestic or sexual violence offenders do not translate neatly to increased protection of victims long-term, and may in

⁵ For purposes of clarity throughout the note, I will use the term "gender-based crime" interchangeably with the terms "sexual assault" and "domestic violence crime," although it should be noted that gender is not a perfect proxy for categorizing this class of offenses.

⁶ See Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 182–84 (2003); Maalouf, *supra* note 3, at 309.

⁷ See Maalouf, *supra* note 3, at 306–09; Hanna, *supra* note 3, at 1865–86.

⁸ See Maalouf, *supra* note 3, at 308.

⁹ See Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 263 (2014); see generally discussion *infra* Section I.A.

¹⁰ See Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 466 (2002); Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 873–74 (1994) (noting decreasing case dismissal rates, increased victim cooperation, and improved plea acceptance, all of which likely lead to higher ultimate conviction rates).

¹¹ See Eliza A. Lehner, Note, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J.L. & FEMINISM 207, 208–11 (2017); see also Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 155 (2016) [hereinafter Coker, *Crime Logic*]; Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 802–05 (2001) [hereinafter Coker, *Crime Control*].

¹² See Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 71–73 (2017); Maalouf, *supra* note 3, at 309; Han, *supra* note 6, at 184.

fact directly jeopardize victim safety by giving offenders room for plea deals that offer few protective mechanisms.¹³

Aggressive prosecution policies are even more vulnerable to criticism in light of growing concerns about the propriety of mass incarceration and the potential criminogenic¹⁴ effects of imprisonment.¹⁵ Prison abolitionists lambaste the harsh conditions of incarceration as inhumane, violent, and excessive.¹⁶ Moreover, some evidence suggests that incarceration is ineffective at preventing or decreasing re-offense.¹⁷ Imprisonment may reinforce patterns of aggression which precipitate domestic or sexual violence, and the lack of community support and resources for released offenders may also increase the likelihood of recidivating conduct.¹⁸

Criminal justice reformers and prison abolitionists believe that there is a viable alternative to this system of prosecution and incarceration: restorative justice programs.¹⁹ Restorative justice encompasses a wide range of programs which reimagine justice as healing rather than as punishment.²⁰ Many restorative justice programs include options for facilitating dialogue between victims, offenders, and community members to reach agreements regarding the harms caused by an offense and the steps necessary to address those harms.²¹ Restorative justice programming seeks to empower victims by allowing them to play an active role in achieving justice and healing.²² Restorative justice programs may also lend themselves to the promotion of public safety, in terms of both physical safety and emotional well-being for victims and offenders.²³

As of 2020, forty-six jurisdictions had adopted some legislation regarding restorative justice programming, with a total of 264 laws establishing the goals and procedural frameworks for restorative justice programming across the country.²⁴ There is a growing effort across the country to provide criminal

¹³ See Han, *supra* note 6, at 183; see generally discussion *infra* Section II.A.

¹⁴ The term “criminogenic” is defined as “producing or leading to crime.” *Criminogenic*, MERRIAM-WEBSTER LEGAL DICTIONARY (2021). This definition suggests, then, that incarceration itself may cause some crime.

¹⁵ See Goodmark, *supra* note 12, at 84–88.

¹⁶ See *id.*

¹⁷ See *id.* at 85.

¹⁸ See *id.* at 87–88.

¹⁹ See Joe Hudson, *Contemporary Origins of Restorative Justice Programming: The Minnesota Restitution Center*, 76 FED. PROB. 49, 49 (2012).

²⁰ See generally Thalia Gonzalez, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147 (2020).

²¹ See *id.* at 1156–1183.

²² See Loren Walker & Leslie A. Hayashi, *Pono Kaulike: A Hawaii Criminal Court Provides Restorative Justice Practices for Healing Relationships*, 71 FED. PROB. 18, 21 (2007) [hereinafter Walker & Hayashi, *Pono Kaulike*].

²³ See discussion *infra* Section II.B.

²⁴ Gonzalez, *supra* note 20, at 1150.

defendants with alternatives to incarceration, and similarly, to give victims a wider range of options for achieving justice.²⁵

Massachusetts is among the forty-six jurisdictions that have already adopted restorative justice statutes.²⁶ Chapter 276B of the Massachusetts General Laws creates a restorative justice program that allows defendants to engage in community-based conferences to reach healing solutions for all parties involved in a crime.²⁷ After the enactment of chapter 276B, which came as part of an omnibus criminal justice reform bill in 2018, the state accelerated its trend of decreasing the prison population and became the state with the lowest incarceration rate in the country²⁸

Presently, however, chapter 276B renders defendants charged with sexual assault or domestic violence crimes ineligible for these conferences.²⁹ The bar on eligibility for defendants places an equal restriction on victims' access to such remedies.³⁰ As heightened scrutiny of the criminal justice system across the United States prompts increasing skepticism of incarceration as a response to gender-based crime, assessing the viability of restorative justice programming for domestic and sexual offenders is of critical importance. This Note advocates for the expansion of chapter 276B to offer restorative justice conferences to defendants charged with gender-based crimes. That expansion is necessary to promote victim empowerment while resisting the impulse to incarcerate.

This inquiry requires a comparison of conventional prosecution to restorative justice programs with respect to the goals of promoting victim's empowerment and protecting public safety. Section I.A of this Note explores the current system of prosecution and incarceration of gender-based criminal offenders, its relative merits, and its shortcomings. Section I.B looks critically at the present status of restorative justice programming in the United States and highlights its potential applicability to gender-based criminal defendants in Massachusetts.

Part II of this Note argues that the eligibility criteria for access to non-carceral alternatives for offenders should be expanded to include offenders of gender-based crimes. Restorative justice programs promote long-term healing for defendants and communities and may offer stronger empowerment mechanisms for victims of gender-based crimes. Restorative justice as an alternative to incarceration may also better promote public safety by mitigating conditions tending to lead to recidivist behavior. Expansion of chapter 276B to defendants charged with gender-based crime can readily meet the overarching goals of victim empowerment and protection of public safety and is a necessary step

²⁵ *See id.* at 1147.

²⁶ MASS. GEN. LAWS ch. 276B (2022).

²⁷ *Id.*

²⁸ *See* Katie Lannan, *Report: Mass. Has The Lowest Incarceration Rate In The Country*, WBUR NEWS (Apr. 25, 2019), <https://www.wbur.org/news/2019/04/25/vera-institute-massachusetts-prison-population>.

²⁹ ch. 276B § 3.

³⁰ *Id.*

towards reaching Massachusetts's goal of reforming the state's criminal justice system overall.

I. LEGAL BACKGROUND

A. *Prosecution and Incarceration*

1. Reliance on Criminal Convictions and “No-Drop” Prosecution Policies

Beginning in the 1980s and gaining significant traction throughout the 1990s, the women's rights movement called for more effective enforcement responses to gender-based crimes.³¹ In response to these calls, policymakers expanded gender-based crime responses in two major ways: by enacting legislation with more expansive definitions of sexual and domestic violence crimes,³² and by implementing prosecutorial “no-drop” policies which restrict prosecutors' discretion to drop sexual assault or domestic violence cases.³³ Even as statutes began to reflect an increased interest in addressing gender-based crime, the lax approach to enforcement led activists to focus on managing prosecutorial discretion.³⁴

Victims' rights advocates began to advocate no-drop prosecution policies for gender-based criminal cases.³⁵ No-drop, or mandatory prosecution policies, restrict a prosecutor's ability to drop charges against a defendant in a gender-based criminal case, even if a victim requests it or otherwise recants their testimony or becomes unavailable to aid in the prosecution.³⁶ Such policies take one of two forms: “soft” no-drop policies, which “discourage” prosecutors from dropping charges in domestic violence cases,³⁷ and “hard” or “victim-coercive” policies, which strictly bar prosecutors from dropping charges and require them to pursue a case using “all means available.”³⁸ In hard no-drop jurisdictions, a

³¹ Maalouf, *supra* note 3, at 306–07.

³² Corsilles, *supra* note 10, at 853–54. Such legislative enactments included “warrantless misdemeanor arrest statutes, anti-stalking legislation, and specialized domestic abuse laws . . .” *Id.* at 853.

³³ *Id.* at 856.

³⁴ Houston, *supra* note 9, at 262–63 (“The value of pro-arrest and mandatory arrest policies, however, depended on prosecutorial follow-through. If prosecutors failed to file charges or filed and then dropped charges, arrest offered little deterrent value. Moreover, if prosecutors were unlikely to proceed with a case, the police were less likely to make the effort to arrest. As a result, increasing the rate of prosecution in domestic violence cases became tied to pro-arrest and mandatory arrest policies.”).

³⁵ *Id.* at 263.

³⁶ See Han, *supra* note 6, at 161–62 (defining “no-drop” prosecution).

³⁷ Houston, *supra* note 9, at 263.

³⁸ Maalouf, *supra* note 3, at 308; Han, *supra* note 6, at 181; see Houston, *supra* note 9, at 263.

victim may be subpoenaed to testify, and risks facing penalties, including possible imprisonment, if they are unwilling to cooperate.³⁹

Most counties in Massachusetts follow soft no-drop policies.⁴⁰ In Suffolk County, former District Attorney Rachael Rollins's 2019 policy memo noted that the office's "goal is to help each survivor . . . make the best and most informed decisions," and further stated that "[a]t the same time, prosecution strategy and sentencing recommendations are ultimately our [office's] responsibility."⁴¹ The Rollins memo also suggested that while plea offers to defendants may change depending on a victim's decision about whether to testify, prosecutors need not drop charges when victims choose not to take the stand.⁴² The Norfolk District Attorney's office lauds its Family Violence Unit for "enhancing victim safety and decreasing the incidents of domestic assault through the rigorous prosecution of offenders . . ."⁴³ By Massachusetts state law, in assault and battery cases where the victim and perpetrator have a special relationship,⁴⁴ the discretion to drop charges shifts from the victim to the District Attorney's office.⁴⁵

Advocates of no-drop prosecution policies contend that such policies promote victim empowerment by mandating that the criminal justice system hold all aggressors to account for violent acts.⁴⁶ No-drop supporters believe that victims are hesitant to seek redress through the criminal justice system because they do not believe prosecutors take their claims seriously.⁴⁷ They argue that if jurisdictions mandate prosecution in these cases, victims will see that their

³⁹ Houston, *supra* note 9, at 263.

⁴⁰ While most counties do not expressly use the term "no-drop" when referring to policies surrounding intimate partner violence, an expressed commitment to prosecuting cases regardless of victim cooperation is properly characterized as a form of soft no-drop policy. See Policy Memorandum by Rachael Rollins, District Attorney, Suffolk County (Mar. 2019) 16–17, <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf>; *Family Violence and Stalking*, NORFOLK DIST. ATT'Y, http://www.nfkda.com/familyviolence_stalking.html (last visited Jan. 8, 2023).

⁴¹ Policy Memorandum by Rachael Rollins, *supra* note 40, at 23. Notably, the memo makes reference to restorative justice and commits to having all personnel in the District Attorney's office "seek input" from victims about how they would like to see their cases proceed. *Id.* at 22–23.

⁴² See *id.* at 22.

⁴³ *Family Violence and Stalking*, *supra* note 40.

⁴⁴ See MASS. GEN. LAWS ch. 265 § 13M (2022). A "family or household member" is defined under the statute as "[p]ersons who (i) are or were married to one another, (ii) have a child in common regardless of whether they have ever married or lived together or (iii) are or have been in a substantive dating or engagement relationship" *Id.*

⁴⁵ See *As the victim in a Massachusetts domestic assault and battery case, can I have the charges dropped?*, URBELIS L., LLC (2022), <https://www.massduidefenselawyer.com/as-the-victim-in-a-massachusetts-domestic-assault-and-battery-ca.html>.

⁴⁶ Maalouf, *supra* note 3, at 306–09.

⁴⁷ *Id.* at 307 & n. 94–95.

claims are being taken seriously, and will seek to report more often.⁴⁸ Further, no-drop policies will eventually resolve the “vicious cycle” of underenforcement of this class of crimes, whereby victim noncooperation undermines prosecutorial motivation to pursue cases, and vice versa.⁴⁹

No-drop policies are also said to center the victim’s personal experience and tailor the prosecutorial process to achieve the correct criminal disposition.⁵⁰ Victims retain a degree of agency while their cases unfold because prosecutors remain ethically bound to consider the wishes of the victim, including providing the victim opportunities for consultation before making key decisions about pursuing charges or offering alternative dispositions.⁵¹

Supporters of no-drop policies also claim that their adoption protects victims.⁵² Mandated participation by victims shifts the burden of deciding whether to pursue legal action from the victim to the state exclusively.⁵³ Victims may rely, it is argued, on the decreased risk of retaliation by an offender if the offender understands that the prosecution will proceed irrespective of the victims’ wishes or participation.⁵⁴ More generally, advocates of no-drop policies contend that an even broader safety interest lies in ending abusive relationships by bringing offenders to justice through the criminal justice system.⁵⁵

How effective have these aggressive prosecution policies actually been in achieving the benefits purported by their supporters? It is true that conviction rates in gender-based criminal cases have increased since the emergence of no-drop policies.⁵⁶ Empirical data suggests that this may be at least partly correlated to increased enforcement at the charging stage of prosecution, with no-drop jurisdictions seeing case dismissal rates ranging between 10% and 35%, versus 50% to 85% dismissal rates from those states not adopting such policies.⁵⁷ Victim cooperation is as high as 95% in jurisdictions with no-drop policies—though this figure includes jurisdictions where victim participation is

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ Hanna, *supra* note 3, at 1877 (“Even in the context of criminal prosecution, . . . practice often revolves around serving the needs of individual women . . .”).

⁵¹ *See* ABA CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION § 3-3.2(h) (AM. BAR ASS’N 2017) (“Where practical, the prosecutor should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the prosecutor prior to the decision whether or not to prosecute, to pursue a disposition by plea, or to dismiss the charges.”) (emphasis added).

⁵² *See* Hanna, *supra* note 3, at 1865; Maalouf, *supra* note 3, at 308; Han, *supra* note 6, at 182–83.

⁵³ *See* Hanna, *supra* note 3, at 1865.

⁵⁴ *Id.*

⁵⁵ Han, *supra* note 6, at 182.

⁵⁶ *See* Epstein et al., *supra* note 10, at 466.

⁵⁷ *See* Corsilles, *supra* note 10, at 873–74.

compelled—which advocates argue supports the theory that confidence in the system’s ability to take gender-based crime seriously has risen.⁵⁸ Some studies suggest that outcomes of gender-based criminal cases are also more comprehensive, meaning that sentences ordering jail time are increasingly accompanied by some kind of no-contact provision for offenders.⁵⁹ No-drop proponents contend that this has positively contributed to the promotion of victim and public safety, referencing studies that conclude that victims with permanent restraining orders in place against offenders see a decreased risk in psychological or physical abuse in the long-term.⁶⁰

No-drop policies remain deeply controversial, despite data pointing to some of the positive effects of no-drop policies.⁶¹ Critics raise important concerns regarding both the empowerment theories and the public safety justifications for these policies.⁶² According to critics, the empirical data showing increases in victim cooperation and conviction rates fails to address the fuller context of gender-based criminal cases.⁶³

Critics claim that no-drop policies do not meet their broad societal empowerment goals. Increased victim cooperation may appear to signal that confidence in the criminal justice system is growing,⁶⁴ but the persistent problem of underreporting of gender-based crimes suggests that this is not necessarily the case.⁶⁵ Reasons vary as to why victims hesitate to report,⁶⁶ but hostility and dismissiveness towards victims by state actors undoubtedly continues to contribute to victims’ unwillingness to bring cases forward.⁶⁷ Institutional hostility towards victims is not likely cured by the implementation of no-drop policies in many jurisdictions, and this cuts against the empowerment claims made by no-drop advocates.⁶⁸

Some scholars also challenge the argument that aggressive prosecution promotes individual empowerment of victims. Critics highlight that traditional

⁵⁸ *Id.* Of course, given that hard no-drop jurisdictions often compel victim participation in the process, it is difficult to determine if increased rates of cooperation correlate to an increase in genuine confidence in the system.

⁵⁹ Barbara E. Smith et al., EVALUATION OF EFFORTS TO IMPLEMENT NO-DROP POLICIES: TWO CENTRAL VALUES IN CONFLICT, FINAL REPORT 50 (2001).

⁶⁰ Victoria L. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA 589, 589 (2002).

⁶¹ See Han, *supra* note 6, at 183, 185; see also Hanna, *supra* note 3, at 1855–57.

⁶² See generally Epstein et al., *supra* note 10; Han, *supra* note 6; Hanna, *supra* note 3.

⁶³ See Epstein et al., *supra* note 10, at 467–68.

⁶⁴ See Corsilles, *supra* note 10, at 873–74.

⁶⁵ See LYNN LANGTON ET AL., U.S. DEP’T OF JUST., NCJ 238536, VICTIMIZATIONS NOT REPORTED TO POLICE, 2006–2010, at 4 (2012), <http://www.bjs.gov/content/pub/pdf/vnrp0610.pdf> [<https://perma.cc/6PUC-6MSD>]; see also Lehner, *supra* note 11, at 208–09.

⁶⁶ See Lehner, *supra* note 11, at 208; see also Kimberly D. Bailey, *It’s Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777, 1785, 1792–1800 (2012).

⁶⁷ See Lehner, *supra* note 11, at 208; see also Coker, *Crime Logic*, *supra* note 11, at 155.

⁶⁸ See generally Lehner, *supra* note 11, at 208.

feminist theories of “empowerment” view it as a “*process* of encouraging and facilitating a victim’s own decision-making,” rather than as an end justifying the coercive means of mandated victim participation.⁶⁹ Coerced participation in criminal prosecution undercuts this process.⁷⁰ Furthermore, claims that no-drop policies contribute to the empowerment of individual victims are largely ignorant of the intersectional nature of race and gender for victims of color.⁷¹ As Beth Richie explains, “it is problematic for the African-American community, which has experienced widespread injustice within the criminal justice system, to turn to the same system ‘as a vehicle for protection and problem resolution.’”⁷²

There is also reason to doubt that no-drop policies promote public safety in gender-based criminal cases. Critics point out that while offenders may be more likely to plead guilty to charges in a no-drop jurisdiction, such pleas often result in sentences of probation or reduced jailtime.⁷³ The majority of victims with longstanding financial and emotional attachments to their abusers become exposed to long-term safety risks upon the offender’s release that the system of prosecution is ill-equipped to address.⁷⁴ While supporters of no-drop policies theorize that offenders are less likely to engage in retaliatory behavior under a no-drop regime, there is little empirical evidence to confirm this.⁷⁵ Finally, claims that comprehensive sentencing for offenders has increased victims’ safety fail to account for the fact that, while *permanent* no-contact orders cause significant decreases in the risk of subsequent abuse, *temporary* orders—which are much more common in many jurisdictions, including Massachusetts⁷⁶—are not nearly as effective.⁷⁷

No-drop policies and other legislative enactments are well-intentioned measures to respond to the problem of gender-based crime.⁷⁸ However, claims that such policies are effective in empowering victims and promoting public safety are supported by evidence that is at best mixed, and at worst false.⁷⁹ This means of enforcement presumes that the only correct method for combatting domestic and sexual violence and empowering its victims is via prosecution and

⁶⁹ Han, *supra* note 6, at 184 (emphasis in original).

⁷⁰ *Id.*

⁷¹ Hanna, *supra* note 3, at 1880.

⁷² *Id.*

⁷³ Han, *supra* note 6, at 183.

⁷⁴ Epstein et al., *supra* note 10, at 467–68, 479–81.

⁷⁵ See Han, *supra* note 6, at 183; see also Epstein et al., *supra* note 10, at 467.

⁷⁶ See MASS. GEN. LAWS ch. 209A, § 3 (2022). Abuse prevention orders in Massachusetts may only become permanent after one year. *Id.*

⁷⁷ Holt et al., *supra* note 60, at 590–91. This study did conclude that temporary restraining orders *are* effective in reducing reports to police of subsequent violence between the offender and the victim, albeit to a lesser degree than permanent orders. *Id.*

⁷⁸ See generally Maalouf, *supra* note 3.

⁷⁹ See discussion *supra*.

incarceration.⁸⁰ The following Section will argue that this presumption warrants scrutiny.

2. Problems with Incarceration

As incarceration rates have skyrocketed between the 1970s and the present day, prison abolitionists⁸¹ have called upon the American criminal justice system to seek alternative pathways to accountability, even for the nation's most violent offenders.⁸² Abolitionists argue that incarceration is an ineffective means of addressing gender-based crime.⁸³ First, incarceration has failed to reduce instances of re-offense by previously convicted gender-based criminal offenders, and circumstances incident to incarceration may actually contribute to cycles of violence and recidivist tendencies.⁸⁴ Furthermore, abolitionists argue that the system of incarceration is systemically and inherently racist, inhumane, and violent, and should therefore not be viewed as an appropriate means of accountability for any kind of offender.⁸⁵

Recidivism is an important metric for evaluating the effectiveness of incarceration as a response to gender-based crime, because many gender-based crimes reflect repeated violence within intimate relationships.⁸⁶ In one statistical analysis reviewing criminal history data of formerly incarcerated persons across

⁸⁰ See Coker, *Crime Control*, *supra* note 11, at 824–25.

⁸¹ Allegra McLeod defines the prison abolitionist movement as:

a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement. . . . A prison abolitionist framework entails, more specifically, developing and implementing other positive substitutive social projects, institutions, and conceptions of regulating our collective social lives and redressing shared problems—interventions that might over the longer term render imprisonment and criminal law enforcement peripheral to ensuring relative peace and security.

Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161, 1163 (2015).

⁸² See Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1685–86 (2019).

⁸³ See Amy Clark, *Thinking Through Incarceration and Sexual Violence*, STATES OF INCARCERATION, <https://statesofincarceration.org/story/thinking-through-incarceration-and-sexual-violence> (last visited Jan. 8, 2023).

⁸⁴ See Goodmark, *supra* note 12, at 85; see also MARIEL ALPER & MATTHEW R. DUROSE, BUREAU OF JUST. STAT., NCJ 251773, RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005–14), at 1 (2019); Tamika L. Payne, *Domestic Violence Recidivism: Restorative Justice Intervention Programs for First-Time Domestic Violence Offenders* 32–33 (June 2017) (Ph.D. dissertation, Walden University) (on file with Walden Dissertations and Doctoral Studies Collection at ScholarWorks).

⁸⁵ See Goodmark, *supra* note 12, at 58, 83–88; Cullors, *supra* note 82, at 1685–86.

⁸⁶ Recidivism for purposes of this Note includes rates of reconviction as well as subsequent arrests. See *supra* note 17. Some recidivism figures are limited to re-offense of gender-based crimes specifically, while other figures will represent re-arrest for any other criminal activity. See discussion *infra* Section I.A.2.

the United States over a nine-year span, researchers found that prisoners who were incarcerated for rape or sexual assault were three times as likely as other types of offenders to be re-arrested for sexual offenses, at a rate of 7.7%.⁸⁷ This finding suggests that any given offender's incarceration does not deter them from perpetrating future repeated incidences of sexual violence. Other studies have similarly found that incarceration of domestic violence offenders has little deterrent effect on domestic violence crimes: in a study of 3,662 domestic violence offenders in Hamilton County, Ohio, researchers found that convicted offenders who were sentenced to both serve jailtime and complete a period of probation were significantly more likely to be re-arrested over a period of eight years, as compared to offenders who were either acquitted or received less severe jail sentences upon conviction.⁸⁸ This finding indicates that incarceration is of little deterrent value for domestic violence offenses.⁸⁹

Some scholars attribute the likelihood of re-offense by gender-based criminal offenders in part to the reinforcement of norms surrounding the construction of masculinity as well as accepted dynamics of power and control within prisons.⁹⁰ Incarcerated persons, particularly those who have been convicted of gender-based crimes, enter prison with extreme views regarding masculinity and power.⁹¹ Scholars believe that social behaviors within prisons are reflections of overarching cultural norms of sexual objectification and dehumanization, sexist hate language (i.e., terms equating femininity with weakness), and masculine domination through violence.⁹² While incarcerated, these views become extended, hardened, and reproduced, often through the perpetration of physical and sexual violence against the incarcerated people themselves.⁹³ Between 10% and 20% of incarcerated individuals will experience some form of physical abuse while in prison, with even more being witness to or perpetrators of violence.⁹⁴ Many victims, perpetrators, and witnesses to this violence experience symptoms of post-traumatic stress disorder, which in turn correlates strongly to future perpetration of gender-based violence.⁹⁵

⁸⁷ ALPER & DUROSE, *supra* note 84, at 5.

⁸⁸ John Wooldredge & Amy Thistlethwaite, *Court Dispositions and Rearrest for Intimate Assault*, 51 CRIME AND DELINQ. 75, 80, 85–87 (2005). The study looked only at suspects arrested for misdemeanor assaults against intimate partners, meaning that the severity or degree of the crime charged did not bear on sentencing discrepancies. *Id.* at 76. The study concludes in part that more severe or extensive sentences contributed to a greater likelihood of re-arrest on subsequent domestic violence charges. *Id.* at 97.

⁸⁹ *See id.*

⁹⁰ *See* Goodmark, *supra* note 12, at 87–88.

⁹¹ *See id.*

⁹² *See* SpearIt, *Gender Violence in Prison & Hyper-masculinities in the 'Hood: Cycles of Destructive Masculinity*, 37 WASH. U. J.L. & POL'Y 89, 95–106 (2011).

⁹³ *See* Goodmark, *supra* note 12, at 88; SpearIt, *supra* note 92, at 106.

⁹⁴ Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 589 (2007).

⁹⁵ Goodmark, *supra* note 12, at 87.

Economic burdens placed on released convicts also help to explain the recidivism rates of convicted gender-based criminal offenders.⁹⁶ A 2002 study found that the degree of income inequality within a country has a “significant positive effect” on rates of homicide and robberies; the study concluded that poverty rates may also have a predictive effect on rates of violent crime.⁹⁷ Post-incarceration difficulties in becoming financially stable also point towards an increased risk of re-offense.⁹⁸ The financially burdensome task of obtaining stable housing post-incarceration highlights this point. In 2002, between 30% and 50% of big-city parolees were homeless.⁹⁹ Data which suggests that victims and offenders tend to be significantly entangled in terms of finances and housing supports an inference that recently released offenders may return to cohabiting with their victims because alternative housing options are not readily available.¹⁰⁰ Released convicts face greater struggles in becoming economically independent, as employment opportunities may be limited due to stigma or lack of financial resources, thus augmenting the likelihood of recidivism.¹⁰¹

Economic and social destabilization of disadvantaged communities also bears on the likelihood of recidivism.¹⁰² Offenders are often released back into neighborhoods that have suffered from the loss of community members to incarceration, both financially via wage and income depression, and socially through the deprivation of essential community networks.¹⁰³ Some researchers have posited that disadvantaged communities see higher rates of domestic violence in part due to the weakening of social ties that help mold community norms.¹⁰⁴ Because incarceration contributes to the economic destabilization of both individual offenders and their communities, released offenders are more likely to engage in recidivist behavior.¹⁰⁵

Criminality in many respects reflects larger systemic inequities, with gender-based crime in particular being a reflection of patriarchal hegemony and economic inequality.¹⁰⁶ Gender-based violence, then, is not the *source* of

⁹⁶ See Wendy Heller, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. POVERTY L. & POL’Y 219, 219–20 (2006); see also Goodmark, *supra* note 12, at 85.

⁹⁷ See Pablo Fajnzylber et al., *Inequality and Violent Crime*, 45 J.L. & ECON. 1, 15–18, 25 (2002). Rates of homicide and robberies obviously do not translate neatly onto an analysis of gender-based crimes; however, the positive correlation between income inequality and violent crimes in general is instructive for purposes of this analysis on incarceration. *Id.*

⁹⁸ See Heller, *supra* note 96, at 219–20; see also Goodmark, *supra* note 12, at 83, 85.

⁹⁹ Heller, *supra* note 96, at 230.

¹⁰⁰ See Epstein et al., *supra* note 10, at 477.

¹⁰¹ See Goodmark, *supra* note 12, at 83, 85.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 85–87.

¹⁰⁵ See *id.*

¹⁰⁶ See Clark, *supra* note 83; see also Goodmark, *supra* note 12, at 84. Ironically, this is nearly an identical argument to that employed by no-drop activists to support the push for

structural violence so much as it is a product of it.¹⁰⁷ Scholars suggest that incarceration reinforces destructive patriarchal ideologies about power, control, and masculinity that ultimately perpetuate incidents of gender-based violence.¹⁰⁸ Systemic poverty correlates to the likelihood of both an initial incidence of abuse and post-incarceration re-offense.¹⁰⁹ In light of these considerations, the lack of deterrence by incarceration from future gender-based offenses for those convicted of gender-based crimes stems from poverty and patriarchy, as opposed to individual proclivity for committing violent acts.¹¹⁰ It is not simply that incarceration fails to deter re-offense of gender-based crimes, but rather that it may contribute to the very conditions that ripen convicted offenders to re-offend.

Prison abolitionists further contend that the very practice of incarceration is racist, and this rings especially true in cases of alleged gender-based crime.¹¹¹ Rape law in particular has an insidious history of targeting Black men for criminal conviction, and this targeting has contributed to the pervasive dehumanization and vilification of Black men.¹¹² Black individuals are disproportionately represented in the criminal justice system for gender-based crimes.¹¹³ Despite representing about 13% of the overall population of the United States, Black individuals made up 48.2% of all persons incarcerated in state prisons for violent sexual offenses in a study commissioned by the Bureau of Justice Statistics drawing on more than two dozen datasets maintained by the Federal Bureau of Investigation over several decades.¹¹⁴ As for domestic and family violence crimes, while victim reports estimate that approximately 14.9% of reported offenders were Black, nearly half of all felony domestic violence

aggressive prosecution and increased incarceration of domestic and sexual offenders. *See* Hanna, *supra* note 3, at 1855–57, nn.22–23.

¹⁰⁷ *See* Clark, *supra* note 83.

¹⁰⁸ *See* SpearIt, *supra* note 92, at 95–106; Goodmark, *supra* note 12, at 87–88.

¹⁰⁹ *See* Goodmark, *supra* note 12, at 85.

¹¹⁰ *See id.* at 84.

¹¹¹ *See id.* at 85; Cullors, *supra* note 82, at 1685–86.

¹¹² *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1089 n.2 (1986).

¹¹³ *See* LAWRENCE A. GREENFELD, BUREAU OF JUST. STAT., NCJ 163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT (1997); *see also* DUROSE ET AL., BUREAU OF JUST. STAT., NCJ 207846, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 10, 13–14 (2005); ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF 8 (2021), <https://www2.census.gov/library/publications/decennial/2000/briefs/c2kbr01-01.pdf> (people identifying as Black or African American represented 12.3% of the population as of the 2000 census). The statistics represented from these studies do not appear to control for underreporting of the crimes. *See* GREENFELD, *supra*; DUROSE ET AL., *supra*. The reports do note that the channeling function from reporting to conviction seems to target people of color. GREENFELD, *supra*; DUROSE ET AL., *supra*.

¹¹⁴ GRIECO & CASSIDY, *supra* note 113, at 3, 8; GREENFELD, *supra* note 113.

defendants were Black.¹¹⁵ So, while Black individuals do not appear to be perpetrating the majority of gender-based crimes, they remain the most prosecuted, convicted, and incarcerated demographic for such crimes.¹¹⁶

Abolitionists also lambaste incarceration for being violent and inhumane, both for how it contributes to community degradation and for the harsh treatment that offenders face while in prison.¹¹⁷ Besides economic destabilization, incarceration exacerbates breakdowns in community ties and networks.¹¹⁸ Incarceration removes offenders from society entirely, depriving communities of their family members and income-earners while alienating offenders from valuable and necessary support networks.¹¹⁹ Incarcerated persons also report high rates of trauma from being in prison, both as a result of sexual and physical violence perpetrated against offenders and more generally from the extremely harsh and sometimes dire conditions of many prisons.¹²⁰

By all accounts, it appears plausible that incarceration may beget more violence than it prevents, and the practice of incarceration raises serious concerns of racial inequity, structural violence, and inhumanity.¹²¹ It is thus difficult to argue that incarceration is a systemically effective means of addressing gender-based crime. Abolitionists argue that multi-dimensional modern feminist theory leaves plenty of room for both believing victims of gender-based crimes and resisting incarceration as a response.¹²² The increased support for abolition as a politic begs this question: Is there a way to respond to gender-based violence in a way that does not require incarceration, yet adequately accounts for the safety and healing of victims? This Note consequently considers restorative justice as one potential alternative to incarceration.¹²³

B. *The Present Status of Restorative Justice*

1. Restorative Justice

As of 2020, forty-six jurisdictions in the United States had adopted some rule or regulation regarding “restorative justice.”¹²⁴ The practice varies widely among jurisdictions, but the overarching aspirations and goals of restorative

¹¹⁵ DUROSE ET AL., *supra* note 113, at 13–14, 71.

¹¹⁶ See GREENFELD, *supra* note 113; see also DUROSE ET AL., *supra* note 113, at 11, 71.

¹¹⁷ See Goodmark, *supra* note 12, at 84–88.

¹¹⁸ See discussion *supra* Section I.A.2.

¹¹⁹ See Goodmark, *supra* note 12, at 85–87.

¹²⁰ See discussion *supra* Section I.A.2.

¹²¹ See *id.*; see also ALPER & DUROSE, *supra* note 84, at 14.

¹²² See Abbe Smith, *Can You Be A Feminist And A Criminal Defense Lawyer?*, 57 AM. CRIM. L. REV. 1569, 1573–76 (2020).

¹²³ See discussion *infra* Section I.B.

¹²⁴ Gonzalez, *supra* note 20, at 1147.

justice are generally consistent.¹²⁵ Restorative justice programming emphasizes relational healing, rather than punitive retribution, as the primary goal of addressing criminal activity.¹²⁶ One of the theories underlying restorative justice is that crimes disrupt communities almost as pervasively as they do the individual parties involved.¹²⁷ By reimagining responses to crime to focus on community restoration and healing, restorative justice proponents argue that progressive and long-lasting outcomes may be achieved for all those involved, including for both the victim *and* the offender.¹²⁸

There are several prominent models of restorative justice in use.¹²⁹ Broadly, restorative justice models have deep roots in indigenous tribal practices.¹³⁰ Among the various models are restitution models, mediation models, and conferencing or circle models.¹³¹ Many jurisdictions with restorative justice statutes employ multiple models for tailored use or have hybrid models combining several types of practice.¹³² Each model requires offenders to accept responsibility and then engages stakeholders, such as the victims or other community members impacted by the harm, in facilitated dialogue to discuss appropriate remedies.¹³³ In jurisdictions where restorative justice practice is available to gender-based criminal offenders, the models are adaptable to the victim's desired level of participation or interaction with the offender.¹³⁴

¹²⁵ See *id.*; see also Kyle Ernest, *Is Restorative Justice Effective in the U.S.? Evaluating Program Methods and Findings Using Meta-analysis 15* (Aug. 2019) (Ph.D. dissertation, Arizona State University) (on file with Arizona State University Library).

¹²⁶ See Ernest, *supra* note 125, at 15.

¹²⁷ Susan Sarnoff, *Restoring Justice to the Community: A Realistic Goal?*, 65 FED. PROB. 33, 33 (2001). Other considerations of the restorative justice model include that “the victim, community, and offender should all participate in determining the outcome of crime–government should surrender its monopoly over the process; . . . components reflect a holistic philosophy.” *Id.*

¹²⁸ See Harry Mika et al., *Listening to Victims—A Critique of Restorative Justice Policy and Practice in the United States*, 68 FED. PROB. 32, 33 (2004). Some concerns regarding restorative justice models are that the processes may even be directed too pointedly at the needs of an offender as opposed to a victim. *Id.*

¹²⁹ The models listed in this paragraph are far from an exhaustive list, but they are informative as to the types of programs that produce evaluative empirical data. See Ernest, *supra* note 125, at 18–24; see also CHANDRA WINDER & ANA P. NUNES, *RESTORATIVE JUSTICE EVALUATION REPORT i–iii* (July 2017). Many jurisdictions with restorative justice statutes employ multiple models for tailored use or have hybrid models combining several types of practice. See Ernest, *supra* note 125, at 23; see also Gonzalez, *supra* note 20, at 1147.

¹³⁰ See Ernest, *supra* note 125, at 18–23.

¹³¹ See *id.* at 18–24.

¹³² See *id.* at 23–24; see also Gonzalez *supra* note 20, at 1161 n.82.

¹³³ See generally Ernest, *supra* note 125, at 18–24.

¹³⁴ See Loren Walker & Leslie Hayashi, *Pono Kaulike: Reducing Violence with Restorative Justice and Solution-Focused Approaches*, 73 FED. PROB. 23, 24–25 (2009) [hereinafter Walker & Hayashi, *Reducing Violence*].

Supporters of restorative justice argue that these models are effective both in promoting victim empowerment and enhancing public safety, but the evidence is mixed.¹³⁵ Evidence of restorative justice's effectiveness and potential for addressing gender-based crime stems from both qualitative and quantitative sources.¹³⁶ Empirical data on restorative justice sometimes presents mixed findings, datasets may be sparse in detail, and study findings depend heavily on the types of restorative justice programs being evaluated. Many jurisdictions have commissioned independent evaluations of program effectiveness, and these studies provide limited insight as to how well restorative justice meets stated rehabilitation goals.¹³⁷ Recently, some studies have emerged which attempt to evaluate restorative justice programs across the country and measure general effectiveness.¹³⁸

Restorative justice conferencing models allow conference facilitators to tailor programs to the specific needs of victims and offenders.¹³⁹ Conferencing programs, such as the RESTORE program, which ran from 2002 to 2007 in Tuscon, Arizona, provide intensive pre-screening processes to evaluate the suitability of engagement in the program by both victims and offenders.¹⁴⁰ During conferencing, a trained facilitator conducts a discussion between the victim and offender and may include other professionals, such as alcohol or substance abuse disorder treatment providers.¹⁴¹ In many conferencing programs, both victims and offenders may be accompanied by friends or family members to provide support and encouragement.¹⁴² Most conferences begin by having the offender describe their conduct, with an emphasis placed on taking personal accountability for their actions.¹⁴³ The victim has an opportunity to describe the impact of the offender's actions on them, as well as time to ask the offender questions.¹⁴⁴ Successful conferencing concludes with the creation of a reparative plan, which can include rehabilitative measures for offenders (e.g., counseling, substance use treatment, etc.), restitution, or no-contact agreements.¹⁴⁵

Advocates for restorative justice conferencing contend that these programs empower victims, as well as community members, by providing safe and meaningful opportunities to communicate how they were harmed, and what

¹³⁵ See *id.* at 24–25; see also Coker, *Crime Logic*, *supra* note 11, at 150–52.

¹³⁶ See generally Ernest, *supra* note 125, at 41–50.

¹³⁷ See generally Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 24–25; WINDER & NUNES, *supra* note 129.

¹³⁸ See generally Ernest, *supra* note 125.

¹³⁹ Coker, *Crime Logic*, *supra* note 11, at 194.

¹⁴⁰ *Id.* at 191, 193.

¹⁴¹ *Id.* at 191.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

must be done to promote adequate redress and healing.¹⁴⁶ Many studies of victim satisfaction report high levels of satisfaction with conferencing, and victims specifically report feeling empowered; several of these studies are evaluated below.¹⁴⁷

Colorado, which enacted its restorative justice legislation in 2013, has commissioned several state-wide evaluations that address victim satisfaction.¹⁴⁸ Qualitative findings showed that most victims participating in a restorative justice program felt a strong sense of control throughout the process.¹⁴⁹ One study involving eight qualitative interviews of victims who had recently participated in conferencing showed that the majority of victims' expectations were met, that victims believed the experience on the whole was positive for all participants, and that they would be willing to participate in a restorative justice program in the future.¹⁵⁰ Satisfaction data gathered in Colorado from all conferencing participants in 2016 and 2017 showed that 96% of victims¹⁵¹ agreed or strongly agreed with the statement "I am satisfied with the process," 98% of other participating community members agreed or strongly agreed, and 98% of offenders also agreed or strongly agreed.¹⁵²

In Hawaii, the Pono Kaulike restorative justice program, a post-conviction conferencing program available to victims, offenders, and community members, also reported high levels of satisfaction from participants.¹⁵³ In a study in which sixty-one conferencing participants¹⁵⁴ responded to a satisfaction survey with options ranging from "very positive" to "very negative," sixty people reported that the process was "positive" or "very positive."¹⁵⁵ Only one person reported

¹⁴⁶ See Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 25–26; WINDER & NUNES, *supra* note 129, at 20–25.

¹⁴⁷ See discussion *infra*.

¹⁴⁸ See *Colorado RJ Council Sponsored Publications & Reports*, RESTORATIVE JUST. COLO., <https://rjcolorado.org/resources/research-and-publications/> (last visited Jan. 8, 2023); WINDER & NUNES, *supra* note 129, at 20.

¹⁴⁹ WINDER & NUNES, *supra* note 129, at 19–20.

¹⁵⁰ *Id.* at 20–26.

¹⁵¹ Out of a total of 171 victims participating in conferencing, 105 victims completed the satisfaction survey. *Id.* at 7, 26.

¹⁵² *Id.* at 26.

¹⁵³ Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 24–26. It is difficult to know to what degree the timing of a restorative justice conference affects participant perceptions or overall satisfaction. It may be the case that victims are more likely to feel the program was effective in a post-conviction setting, though some participants in the Colorado pre-conviction programs indicated that one of their motivations for pursuing conferencing was to reduce the charges for the offender. See WINDER & NUNES, *supra* note 129, at 21.

¹⁵⁴ This figure includes both victims and offenders. Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 24–26. In total, thirty-eight eligible defendants for the conferencing program completed the program, with a control group of twenty-one defendants who were also eligible for conferencing but did not receive the Pono Kaulike intervention. *Id.* at 25.

¹⁵⁵ *Id.*

that any part of the process was negative, and two others reported that some parts of the process were “mixed.”¹⁵⁶ The majority of responding participants reported that conferencing was effective either because it allowed for open communication between parties or because it allowed them to report how they felt.¹⁵⁷

Comprehensive studies on victim satisfaction across many restorative justice programs yield less clear data, but have generally confirmed that restorative justice produces high levels of victim satisfaction.¹⁵⁸ In a meta-analysis of 121 programs, 66% of programs had at least one measure of victim satisfaction.¹⁵⁹ Data from the meta-analysis of these studies indicated that victims participating in some kind of restorative justice process were 86.7% more likely to be satisfied than those who experienced only traditional criminal justice processes.¹⁶⁰ Researchers characterized the comprehensive review of victim satisfaction data from restorative justice programming as “overwhelmingly positive.”¹⁶¹

There is also evidence suggesting that participation in restorative justice conferencing may enhance public safety. Measures of recidivism show that offenders participating in restorative justice conferencing are less likely to be re-arrested or convicted for any crimes than offenders in the control groups that did not participate in conferencing.¹⁶² In Colorado, post-program recidivism rates in 2016 showed that only about 9.5% of participating offenders who had exited the restorative justice diversion program for a full year had new charges filed against them; further, only 4.4% of offenders that were one year beyond their participation in restorative justice programming failed to complete their restorative justice contracts.¹⁶³ Compared to other diversion programs offered to youthful offenders during the same time period, recidivism rates for restorative justice participants were about half.¹⁶⁴ In Hawaii, a study of post-conferencing recidivism rates in the Pono Kaulike program showed that a control group of convicted offenders who were eligible for, but did not participate in, the conferencing program, reported re-offense at a rate of 57%, while restorative justice participants reported re-offense at a rate of only 29%.¹⁶⁵

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 23–26.

¹⁵⁸ Ernest, *supra* note 125, at 52–55, 75–78.

¹⁵⁹ *Id.* at 65.

¹⁶⁰ *Id.* at 78.

¹⁶¹ *Id.*

¹⁶² See Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 26; WINDER & NUNES, *supra* note 129, at 30–32; see also Coker, *Crime Logic*, *supra* note 11, at 192; Goodmark, *supra* note 12, at 97.

¹⁶³ WINDER & NUNES, *supra* note 129, at 30–31.

¹⁶⁴ *Id.* at 31.

¹⁶⁵ Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 26. Because the control group of convicted offenders who did not participate in conferencing is made up of persons who were eligible for conferencing but chose not to participate, it could be the case that the

Comprehensive studies on recidivism note the difficulty in obtaining clear data, as many restorative justice programs define recidivism differently.¹⁶⁶ Despite this limitation, a meta-analysis pooling thirty-one studies on restorative justice programs found twenty-six studies reporting lower rates of recidivism for offenders who completed restorative justice programs versus offenders who did not.¹⁶⁷ Nine of these studies produced results that were statistically significant, and the comprehensive analysis of these studies provided “moderate support” for the effectiveness of restorative justice programs.¹⁶⁸ The meta-analysis study concluded that “restorative justice programs have statistically significant lower subsequent arrest rates compared to their control counterparts.”¹⁶⁹ Other general studies on re-offense suggest that restorative justice conferencing may in fact be more effective in deterring future crime by offenders charged with violent offenses versus non-violent offenses.¹⁷⁰

Although evaluation across the United States of various restorative justice models is still widely varied and limited in character and quantity, available studies show promising results.¹⁷¹ These studies demonstrate restorative justice’s potential viability as a legitimate alternative to prosecution and incarceration to respond to gender-based crimes.¹⁷²

2. Massachusetts and the Current State of the Restorative Justice Program

Massachusetts currently employs a pre-conviction restorative justice conferencing framework which allows for the facilitation of meetings among victims, offenders, and other community members.¹⁷³ The restorative justice program provides an opportunity for defendants to have charges against them dropped upon completion of conferencing and fulfillment of obligations agreed upon during conferencing, subject to the judge’s discretion.¹⁷⁴ As such,

sample of conferencing participants in this study reflects those persons who were already disinclined to re-offend. *Id.*

¹⁶⁶ See Ernest, *supra* note 125, at 32.

¹⁶⁷ *Id.* at 73–75.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 75.

¹⁷⁰ See Coker, *Crime Logic*, *supra* note 11, at 192.

¹⁷¹ See, e.g., Walker & Hayashi, *Pono Kaulike*, *supra* note 22, at 20–21; Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 26; WINDER & NUNES, *supra* note 129, at 12–18; Coker, *Crime Logic*, *supra* note 11, at 192; Goodmark, *supra* note 12, at 97.

¹⁷² See Walker & Hayashi, *Pono Kaulike*, *supra* note 22, at 20.

¹⁷³ MASS. GEN. LAWS ch. 276B, §§ 1–5 (2022).

¹⁷⁴ ch. 276B, § 2 (“Restorative justice may be a final case disposition, with judicial approval. If a juvenile or adult defendant successfully completes the community-based restorative justice program, the charge shall be dismissed.”).

defendants participating in restorative justice conferences can avoid incarceration entirely and instead contribute to justice and healing.¹⁷⁵

Chapter 276B of the Massachusetts General Laws outlines the statutory framework for restorative justice conferences.¹⁷⁶ The restorative justice program is an entirely voluntary process and is made available to all juveniles and adults meeting the statutory criteria for eligibility.¹⁷⁷ Section 1 of chapter 276B defines “restorative justice” as:

[A] voluntary process whereby offenders, victims and members of the community collectively identify and address harms, needs and obligations resulting from an offense, in order to understand the impact of that offense; provided, however, that an offender shall accept responsibility for their actions and the process shall support the offender as the offender makes reparation to the victim or to the community in which the harm occurred.¹⁷⁸

Upon successful completion of a restorative justice program, charges against the defendant will be dismissed; importantly, the completion of such a program also cannot be used as evidence against a defendant in current or subsequent legal proceedings.¹⁷⁹ However, the Massachusetts restorative justice statute excludes defendants charged with gender-based crimes.¹⁸⁰ As the next Part will argue, the exclusion of gender-based crimes should be remedied. Community groups have recently called for the expansion of pre-trial diversion programs, including restorative justice conferencing, in Massachusetts,¹⁸¹ and such an expansion should extend to gender-based crimes. Offering restorative justice programs to victims of gender-based crimes may very well achieve the empowerment and safety aims that prosecution and incarceration policies have sought for decades.

¹⁷⁵ ch. 276B. Juvenile offenders are also offered the opportunity to participate in restorative justice conferencing through the juvenile diversion program. MASS. GEN. LAWS ch. 276A, § 2. While eligibility to youthful offenders is also restricted for those charged with gender-based crimes, the particularities of the juvenile justice system in Massachusetts are beyond the scope of this Note.

¹⁷⁶ ch. 276B, §§ 1–5.

¹⁷⁷ ch. 276B, § 2.

¹⁷⁸ ch. 276B, § 1.

¹⁷⁹ ch. 276A, § 7; ch. 276B, § 4.

¹⁸⁰ See ch. 276B, § 3.

¹⁸¹ See BOS. BAR ASS'N, NO TIME TO WAIT: RECOMMENDATIONS FOR A FAIR AND EFFECTIVE CRIMINAL JUSTICE SYSTEM 10–12 (2017).

II. ARGUMENT

A. *Restorative Justice May Offer Better Outcomes*

1. Victim Empowerment and the Underreporting Dilemma

A perennial issue of gender-based crime is underreporting.¹⁸² Despite the emergence of domestic and sexual violence legislation and the adoption of more stringent prosecutorial frameworks, gender-based crime on the whole remains drastically underreported.¹⁸³ Fewer than one-third of sexual assaults are ultimately reported to law enforcement,¹⁸⁴ and an estimated 46% of domestic battery incidents go unreported as well.¹⁸⁵ In 2020, Massachusetts Attorney General Maura Healey and Suffolk County District Attorney Rachael Rollins expressed concern at the drop in calls to police for intimate partner violence during the COVID-19 pandemic, stating that the dip in reports was “not a realistic reflection of the violence occurring behind closed doors.”¹⁸⁶

Reasons for victims’ hesitation in bringing claims of sexual or domestic violence vary widely, from legal concerns—including immigration, criminal prosecution, and custody matters—to matters of financial, physical, or emotional safety.¹⁸⁷ Whatever the specific reasons a particular victim may have for not coming forward with a report of gender-based crime, the underlying hindrance for many victims is under-confidence in the system’s ability to address these situations.¹⁸⁸ The criminal justice system lacks an ability to address collateral concerns attached to the reporting and prosecution process.¹⁸⁹ Developments in the criminal justice system’s responses to gender-based crime remain ignorant of many aspects of racial, legal, and socioeconomic factors which influence victims’ willingness to report.¹⁹⁰ Women of color feel both that the system refuses to take their claims of sexual and domestic violence seriously

¹⁸² See Lehner, *supra* note 11, at 208–09.

¹⁸³ See LANGTON ET AL., *supra* note 65, at 4; see also Lehner, *supra* note 11, at 208–09.

¹⁸⁴ Lehner, *supra* note 11, at 208–09.

¹⁸⁵ LANGTON ET AL., *supra* note 65, at 6.

¹⁸⁶ Stephanie Ebbert, *When is a drop in domestic violence bad news?*, BOS. GLOBE (May 12, 2020, 6:31 PM), <https://www.bostonglobe.com/2020/05/12/metro/when-is-drop-domestic-violence-bad-news/>. The drop in reported incidents during March and April of 2020 was attributed to the COVID-19 lockdown measures in Massachusetts, which are believed to have forced many domestic abuse victims into unstable housing situations with abusive partners. *Id.* While almost certainly exacerbating pre-existing circumstances impacting victims’ access or decision to report incidences of domestic or sexual violence, the stay-at-home orders should not themselves be viewed as standalone barriers to reporting.

¹⁸⁷ See Bailey, *supra* note 66, at 1791–1801; Lehner, *supra* note 11, at 207–08.

¹⁸⁸ See Lehner, *supra* note 11, at 207–08.

¹⁸⁹ See Coker, *Crime Logic*, *supra* note 11, at 155, 188; Coker, *Crime Control*, *supra* note 11, at 802–05.

¹⁹⁰ See Coker, *Crime Control*, *supra* note 11, at 802–05; Hanna, *supra* note 3, at 1880–81; Goodmark, *supra* note 12, at 73.

and that there is little reason to have faith in the system of punishment that is often wielded against them.¹⁹¹ Furthermore, no-drop policies are rarely accompanied by parallel civil programs that aid victims in addressing other legal aspects of their situation with an abuser.¹⁹²

No-drop policies also appear to fail to incentivize victims to bring claims forward. In fact, hard no-drop policies may actually deter victims from coming forward by virtue of their coercive nature.¹⁹³ A victim who is aware that they may be forced to move forward with a case even after they have changed their mind—and may even face civil or criminal penalties if they fail to cooperate—may opt not to initiate an action at all.¹⁹⁴ Moreover, no-drop policies do not seem to have influenced the attitudes of players in the system towards victims that do report; many victims cite dismissiveness or outright hostility from law enforcement officers and prosecutors as reasons for being hesitant to report gender-based crimes.¹⁹⁵

Where no-drop policies fail to adequately address the aspects of the system that disempower victims, restorative justice offers positive alternatives. First, restorative justice programs yield high satisfaction rates from participants, indicating that individual victim's empowerment is more readily achieved through this route.¹⁹⁶ Restorative justice programming also lends itself to more flexible dispositions of cases that leave room for parties to address their own individual circumstances, including legal and financial considerations.¹⁹⁷ Flexibility to employ different organizational features, such as pre-screening processes or alternative participation options, to account for varying comfort levels of victims is another advantage of restorative justice practice.¹⁹⁸ Restorative justice models, therefore, contemplate a humane alternative to the aggressive prosecutorial approach, which may more effectively reduce barriers to reporting for victims.

Proponents of restorative justice programming argue that the higher levels of satisfaction reported by victims participating in conferencing is the result of victims having more agency in the process of justice.¹⁹⁹ Victims not only decide whether or not to pursue conferencing in lieu of any prosecution, but they may

¹⁹¹ See Goodmark, *supra* note 12, at 73; Hanna, *supra* note 3, at 1880–81.

¹⁹² See Bailey, *supra* note 66, at 1791–1801.

¹⁹³ See Goodmark, *supra* note 12, at 72.

¹⁹⁴ See *id.*

¹⁹⁵ See Lehner, *supra* note 11, at 207; see also Coker, *Crime Logic*, *supra* note 11, at 155.

¹⁹⁶ See discussion *supra* Section I.B.1.

¹⁹⁷ See Bailey, *supra* note 66, at 1807; Goodmark, *supra* note 12, at 94.

¹⁹⁸ See Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 25; see also Coker, *Crime Logic*, *supra* note 11, at 194–95; Lyle Keanini, Comment, *ADR in Hawai'i Courts: The Role of Restorative Justice Mediators*, 12 ASIAN-PAC. L. & POL'Y J. 174, 175–77 (2011).

¹⁹⁹ See Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 24–25; see also Coker, *Crime Logic*, *supra* note 11, at 195; Goodmark, *supra* note 12, at 94; WINDER & NUNES, *supra* note 129, at 24.

also decide the degree to which they wish to interact with offenders, and may give substantive input as to the appropriate measures for addressing the harm.²⁰⁰ Resolution agreements resulting from conferencing may include obligations of the offender to complete anger management or abuse prevention programs, and on-boarding procedures for some programs offer comprehensive legal and social services for victims.²⁰¹ Unlike the adversarial trial process, restorative justice requires an offender to admit responsibility in order to participate in conferencing, allowing victims to receive direct acknowledgement and validation of their experiences and avoiding the problem of institutional hostility or dismissiveness entirely.²⁰²

No-nonsense legislation and no-drop prosecution policies give players in the system and victims of violent crime fewer “outs,” with the hope that increased prosecution will reinvigorate confidence in the system.²⁰³ But these policies are deficient in addressing the underlying structural issues that prevent victims from feeling empowered to come forward, and in fact the policies themselves largely undermine and disempower victims by their coercive nature.²⁰⁴ Restorative justice conferences, on the other hand, do not suffer from these deficiencies, precisely because they can be structured to meet the specific needs of a community, a victim, or an offender.²⁰⁵ Victims remain in control of the process and outcomes and can be provided with resources beyond the criminal legal system to confront overlapping issues concerning one particular instance of violence.²⁰⁶ Restorative justice offers the most direct answers regarding victim’s empowerment and persistent underreporting.

2. Curbing Recidivism and Protecting Public Safety

Restorative justice programs are also a viable alternative to aggressive prosecution and incarceration strategies for decreasing recidivism, or reducing domestic and sexual violence more broadly. The feminist movement towards criminalizing gender-based violence, while offering some benefits to victims,²⁰⁷ has generally failed to reduce cases of re-offense.²⁰⁸ Incarceration simply does

²⁰⁰ See Gonzalez, *supra* note 20, at 1180; see also Ernest, *supra* note 125, at 9; Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 24–25; Coker, *Crime Logic*, *supra* note 11, at 193–94.

²⁰¹ See SHANNON L. SILVA ET AL., COLO. RESTORATIVE JUST. COORDINATING COUNCIL, STATE OF THE STATE: RESTORATIVE JUSTICE IN COLORADO 13 (2019); see also Coker, *Crime Logic*, *supra* note 11, at 191.

²⁰² See SILVA ET AL., *supra* note 201, at 1; MASS. GEN. LAWS ch. 276B § 1 (2022).

²⁰³ See Maalouf, *supra* note 3, at 308–09.

²⁰⁴ See Coker, *Crime Logic*, *supra* note 11, at 155; Coker, *Crime Control*, *supra* note 11, at 807.

²⁰⁵ See discussion *supra* Section I.B.1.

²⁰⁶ See Coker, *Crime Logic*, *supra* note 11, at 188–89.

²⁰⁷ See Corsilles, *supra* note 10, at 73–74.

²⁰⁸ See ALPER & DUROSE, *supra* note 84, at 1; see also Payne, *supra* note 84, at 32.

not effectively respond to the structural factors which influence the propensity for gender-based crime; in fact, incarceration may increase the likelihood of re-offense.²⁰⁹

The rollout of no-drop prosecution policies and the subsequent increase in convictions for gender-based crimes have done little to dampen the prevalence of gender-based crime overall.²¹⁰ Hyper-fixation on individual accountability for gender-based crime, which focuses on jail time as the primary remedy, ignores the socio-economic, cultural, and community factors that influence propensities for committing gender-based offenses.²¹¹ Furthermore, some evidence suggests that incarceration itself contributes to the destabilization of communities and intensifies factors correlating to recidivism.²¹² Prioritizing prosecution and incarceration as a primary response to gender-based crime is therefore both ineffective and counterproductive.

Understanding this, it is imperative to see how restorative justice fares as an alternative to aggressive prosecution. Because restorative justice is centered around a philosophy of individual and community healing, it has the potential to acknowledge and respond to the structural factors that contribute to cycles of violence.²¹³ In fact, many restorative justice programs do report decreased rates of recidivism in comparison to offenders who were incarcerated.²¹⁴ Some studies also suggest that restorative justice programs may be more effective at reducing the likelihood of re-offense for violent offenders than for non-violent offenders.²¹⁵

Restorative justice advocates argue that the observed reductions in recidivism are attributable to several consequences of restorative justice practice.²¹⁶ First, participation in conferencing has been shown in some cases to increase an offender's likelihood of compliance with restitutive measures, including completion of anger management or abuse prevention programs and compliance with stay-away or no-contact orders.²¹⁷ The effect of this increased self-accountability may in turn lead to a reduced risk of re-offense. Second, restorative justice programming allows offenders to avoid the collateral consequences of imprisonment, which increase the likelihood of re-offense.²¹⁸

²⁰⁹ See Goodmark, *supra* note 12, at 84–88; Coker, *Crime Logic*, *supra* note 11, at 189; Bailey, *supra* note 66, at 1807.

²¹⁰ See Goodmark, *supra* note 12, at 82–92.

²¹¹ See *id.*

²¹² See discussion *supra* Section I.A.2.

²¹³ See Ernest, *supra* note 125, at 26.

²¹⁴ See Coker, *Crime Logic*, *supra* note 11, at 189, 192; Walker & Hayashi, *Pono Kaulike*, *supra* note 22, at 21.

²¹⁵ See Coker, *Crime Logic*, *supra* note 11, at 189, 192.

²¹⁶ See *id.* at 189; Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 24; Goodmark, *supra* note 12, at 94.

²¹⁷ See Coker, *Crime Logic*, *supra* note 11, at 192.

²¹⁸ See Goodmark, *supra* note 12, at 84–90.

Because restorative justice emphasizes healing rather than punishment, neither communities nor offenders are destabilized to the extent they would otherwise be in cases leading to incarceration.²¹⁹

Rather than simply removing bad actors from the community and hoping that they will have learned their lesson upon release, restorative justice aims to search for solutions out in the open, with the input and cooperation of all stakeholders.²²⁰ The use of restorative justice programs also should not be viewed as the foreclosure of other avenues to hold offenders accountable and ensure victim safety; restorative justice programs may still allow for the use of sex offender registries, mandated entry into recovery or batterer programs, and civil no-contact or restraining orders.²²¹ Restorative justice merely seeks to offer more comprehensive solutions.²²²

B. *Building Out Chapter 276B: How Massachusetts Can Craft an Effective Restorative Justice Program for Gender-Based Criminal Offenders*

Massachusetts has already begun to reap the benefits of implementing a restorative justice program: in 2018, Massachusetts had the lowest rate of incarceration in the United States, down 5.4% from the previous year.²²³ Success in reducing the state's prison population was largely attributed to sweeping reforms in the legislature regarding bail, expanded expungement for low-level marijuana offenses, and juvenile diversion programs.²²⁴ Among the recent reforms was the enactment of chapter 276B in 2018.²²⁵

The language of chapter 276B lays a fairly standard foundation for restorative justice practice.²²⁶ The exclusion of gender-based crime defendants from eligibility under chapter 276B was clear in each of the five Massachusetts House and Senate bills which culminated in the 2018 criminal justice reform act.²²⁷ Given the number of studies that confirm that restorative justice programs may have an even more significant impact on violent offenders than non-violent offenders, such a restriction seems to be in tension with pushing the state to reach

²¹⁹ See *id.* at 84–88.

²²⁰ See generally discussion *supra* Section I.B.1.

²²¹ See MASS. GEN. LAWS ch. 276B, § 2 (2022).

²²² See generally discussion *supra* Section I.B.1.

²²³ See Lannan, *supra* note 28.

²²⁴ See *id.*

²²⁵ See ch. 276B.

²²⁶ See *id.* at § 1.

²²⁷ An Act relative to criminal justice reform, H. 4043, 190th Leg. (Mass. 2017); An Act relative to criminal justice reform, H. 4011, 190th Leg. (Mass. 2017); An Act relative to criminal justice reform, S. 2170, 190th Leg. (Mass. 2017); An Act relative to criminal justice reform, S. 2185, 190th Leg. (Mass. 2017); An Act relative to criminal justice reform, S. 2200, 190th Leg. (Mass. 2017).

its full potential in criminal justice reform.²²⁸ Available details of the legislative history of the Act do not reveal whether there was specific discussion regarding the decision to exclude this class of defendants from eligibility under chapter 276B, however it does appear from the bill history that several proposed amendments to the omnibus legislation were made with a specific eye towards increasing protections for victims of gender-based crimes.²²⁹

Whatever the reasons for precluding participation by defendants charged with sexual assault or domestic battery, the need for expansion is obvious. Despite the criminal justice reforms, total sexual assaults in Massachusetts increased in 2018, before falling back to pre-reform levels in 2019.²³⁰ Reported aggravated assaults saw only slight decreases from 2017 to 2018 as well.²³¹ The 2017 Domestic Violence Law Enforcement Guidelines published by the Massachusetts Executive Office of Public Safety and Security explicitly references underreporting of gender-based crimes as a prevalent issue and cites retraumatization through the legal system and increased risk of danger as factors influencing victim cooperativeness.²³² Additionally, as of 2019, the Massachusetts Executive Office of Public Safety and Security still listed recidivism of domestic and sexual batterers as a primary area of focus for the state.²³³

In light of all this, it is difficult to understand why Massachusetts remains intent on ignoring the elephant in the room: the present availability of chapter 276B. The language of chapter 276B seems to outline a standard restorative

²²⁸ See Coker, *Crime Logic*, *supra* note 11, at 189, 192.

²²⁹ See *Amendment H.4011*, HOUSE COMM. ON WAYS AND MEANS, <https://malegislature.gov/Bills/190/H4011/Amendments/House.gov> (last visited Jan. 8, 2023); *Bill 2.2185*, SENATE COMM. ON WAYS AND MEANS, <https://malegislature.gov/Bills/190/S2185/Amendments/Senate?pageNumber=2&direction=&sortColumn=&keyword=> (last visited Jan. 8, 2023). This non-exhaustive list of proposed amendments includes those which were adopted, rejected, or withdrawn.

²³⁰ *Violent Crime 2019: Massachusetts*, MASS. CRIME STAT., <https://masscrime.chs.state.ma.us/tops/report/violent-crimes/massachusetts/2019> (last visited Jan. 8, 2023). The data presented in this survey only reflects *reported* sexual assaults. *Id.* It is possible that 2018 criminal justice reforms, including passage of chapter 276B, contributed to increased reporting rather than an actual increase in violence; even so, that reports of sexual assault fell to pre-2018 levels in 2019 suggests that exclusion of violent offenders from chapter 276B caused victims to retreat once again from reporting incidents. *See id.*

²³¹ *Id.* Approximately 25.7% of aggravated assaults show an “intimate” association between victim and offender, a number which is consistent over several years and is often used as an imperfect proxy for domestic violence crime overall. *Id.*

²³² CHARLES D. BAKER ET AL., MASS. EXEC. OFF. OF PUB. SAFETY AND SEC., DOMESTIC VIOLENCE LAW ENFORCEMENT GUIDELINES 17 (2017).

²³³ See CHARLES D. BAKER ET AL., FEDERAL FISCAL YEAR 2019 MASSACHUSETTS APPLICATION AND STRATEGIC PLAN 12–15 (2019). The report recommends several expansions of the law in this area, but notably absent from the recommendations is consideration for the expansion of chapter 276B. *Id.*

justice conferencing model, similar even to the statutory frameworks of jurisdictions that open restorative justice practices to sexual and domestic offenders.²³⁴ Lifting the statute's restrictions on gender-based criminal offenders' participation in restorative justice programs and conferences would require little overhaul of the statute itself, and in practice would require only two major efforts: the redirection of resources to ensure participant safety throughout conferencing and the examination of community programs and batterer intervention networks to provide substantive remedial avenues for offenders post-conferencing. Both of these changes can be easily implemented.

1. Ensuring Safety Throughout the Process

To expand eligibility for chapter 276B restorative justice conferencing to include sexual assault and domestic violence defendants, Massachusetts lawmakers would first have to ensure that there are adequate safety measures in place to protect all participants. This is both an obvious practical necessity as well as a measure which would encourage and empower victims to come forward without needing to resort to the coercive tactics of hard no-drop policies. Safety includes two important dimensions: physical safety and emotional or mental protection. Ensuring physical safety likely entails reliance on currently available protection measures in Massachusetts, while emotional and mental protection can be built out as a programmatic feature of the restorative justice program that draws on methods employed by other successful restorative justice programs.²³⁵

Safeguarding the physical well-being of victims of gender-based crime in advance of, and over the course of, participation in restorative justice conferences need not require much more than the safety measures currently available to victims of gender-based violence through Massachusetts's criminal and civil avenues.²³⁶ Section 2 of chapter 276B itself notes that diversion onto the restorative justice track does not preclude any pre-arraignment law enforcement-based programs or other programs, which includes steps taken to ensure victim safety.²³⁷ Chapters 209A and 258E of the Massachusetts General Laws allow victims to seek temporary restraining orders or harassment prevention orders against alleged abusers.²³⁸ Because chapter 276B allows a judge to approve participation in a restorative justice program before arraignment, Massachusetts could institute an automatic screening for the appropriateness of issuing a chapter 209A or chapter 258E order against the

²³⁴ See Wallker & Hayashi, *Reducing Violence*, *supra* note 134, at 24–25.

²³⁵ See MASS. GEN. LAWS ch. 276, §§ 42A, 57, 58, 58A, 58B, 87 (2022) (existing measures for physical safety); Coker, *Crime Logic*, *supra* note 11, at 201 (potential measures for emotional safety).

²³⁶ See ch. 276, §§ 42A, 57, 58, 58A, 58B, 87; ch. 276B.

²³⁷ ch. 276B, § 2.

²³⁸ MASS. GEN. LAWS chs. 209A, 258E.

defendant upon release from custody.²³⁹ Orders under chapters 209A and 258E allow judges to impose additional restrictions on the party against whom the order is sought, including surrendering of firearms or vacating the victim's residence.²⁴⁰

Additionally, courts may attempt to ensure victims' safety prior to restorative justice conferencing by determining other conditions for release on bail post-arraignment.²⁴¹ Several conditions of release could be useful to prevent the defendant from acting violently toward a victim leading up to the actual restorative justice conference.²⁴² These conditions may include restriction from visiting certain areas or buildings;²⁴³ electronic monitoring of the defendant's location via ankle monitor; or release into the care or supervision of a friend, family member, or community program manager.²⁴⁴ The use of any of these measures, or any combinations of them, could be effective in protecting victims in advance of participation in a restorative justice conference. To be sure, such measures do not guarantee compliance; however, these measures are in line with those imposed on defendants not admitted to restorative justice conferences, and therefore it is unlikely that there is any greater chance of noncompliance in the restorative justice context.

Apart from precautions to protect victims' physical well-being in advance of restorative justice conferencing, Massachusetts should also consider the implementation of programmatic features under chapter 276B to safeguard the mental and emotional well-being of all parties. Here too, there are varying methods for protecting the mental health of restorative justice participants, both as features of preparation for the conferences as well as alternative conferencing structures that assess victims' level of comfort and degree of participation.²⁴⁵ It is important to emphasize that mental readiness for participation in restorative justice programs should be assessed for all parties involved, including the defendant, the victim, and other community members involved in the process. Restorative justice is grounded in the assumption that the process is entirely

²³⁹ See ch. 276, §§ 42A, 57, 58, 58A, 58B, 87. Massachusetts bail statutes already allow judges to impose conditions of release that coordinate with pre-existing 209A or 258E orders, and additional no-contact orders and restrictions are almost always imposed on defendants charged with violent crimes. See *id.*

²⁴⁰ ch. 209A, § 3B.

²⁴¹ See ch. 276, §§ 42A, 57, 58, 58A, 58B, 87; see also ch. 276B, § 2. Chapter 276B allows defendants to be placed into a restorative justice program at any stage in the process. ch. 276B, § 2. Pre-arraignment is the most beneficial time for placement for a defendant, as charges are not placed on one's record until the arraignment hearing. *Id.*

²⁴² See ch. 276, §§ 42A, 57, 58, 58A, 58B, 87.

²⁴³ Such a condition may be characterized as a requirement to abide by a standing restraining order or harassment prevention order.

²⁴⁴ ch. 276, §§ 42A, 57, 58, 58A, 58B, 87.

²⁴⁵ See Coker, *Crime Logic*, *supra* note 11, at 191; Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 24–25.

voluntary, so it is imperative to determine a defendant's amenability to participation as well.²⁴⁶

Massachusetts already provides victims of violent crimes with a victim witness advocate (VWA) to help them navigate the criminal justice process and direct them towards additional resources for managing the overlapping criminal and civil facets of an abusive situation.²⁴⁷ The role of VWAs already includes many responsibilities which could be paired with preparation for restorative justice conferencing.²⁴⁸ VWAs may accompany victims to court proceedings, aid in crisis interventions, make referrals to community resource programs for victims, and facilitate community round tables.²⁴⁹ With a few adjustments, these same VWAs are useful actors in the facilitation of restorative justice conferencing: they might conduct preliminary safety assessments with victims, help coordinate who would accompany the victim to conferences, help victims set reparations expectations for the conferences, or direct victims to resources to create a conferencing game plan.²⁵⁰ Similar evaluative screening and planning procedures for defendants could be coordinated with appointed or retained counsel.

Another consideration for protecting the mental health of participants lies in how the restorative justice conferences themselves are structured, including whether or not the victim and offender will participate in face-to-face conferencing. Hawaii's Pono Kaulike restorative justice conferencing program provides alternate tracks for participation, including cases where the victim chooses not to attend conferencing directly with the offender or utilizes a victim surrogate to attend conferencing in their stead.²⁵¹ This kind of conferencing structure allows offenders to still engage with community members, take responsibility for their wrongful acts, and come to an agreement about completing doable remedial requests without compromising a victim's feeling of safety.²⁵² Each victim therefore retains their agency in engagement, and still has access to a form of justice on their own terms.²⁵³

Each proposed safety precaution could help ensure that the restorative justice conferencing process moves smoothly for all parties involved; furthermore, these precautions serve the empowerment function of victim advocacy by allowing the victim to retain control over their participation, without inhibiting a defendant's access to non-carceral justice. What's more, the framework for implementation of each of these features is already at play elsewhere in

²⁴⁶ See ch. 276B, § 1.

²⁴⁷ *Victim Witness Advocate*, MIDDLESEX CNTY. DIST. ATT'Y'S OFF. (Oct. 2018), <https://www.middlesexda.com/careers/pages/victim-witness-advocate>.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ See *id.*; see also Coker, *Crime Logic*, *supra* note 11, at 196.

²⁵¹ See Walker & Hayashi, *Reducing Violence*, *supra* note 134, at 24–25.

²⁵² See *id.*

²⁵³ See *id.*

Massachusetts's legal scheme, so redirection of resources towards creating these safeguards does not overly burden the Commonwealth. There is no need to reinvent the wheel; rather, the mere refocusing of preexisting mechanisms to aid in conferencing suffices to make restorative justice a viable option in cases of gender-based violence.

2. Identifying Post-Conferencing Tools to Promote Comprehensive Success

The success of any individual restorative justice conference should be assessed in part by how it influences a defendant's behavior after the fact. Restorative justice conferences are important tools for reaching agreements regarding the conditions and actions necessary to repair the harm caused (to the extent that this is possible).²⁵⁴ Indeed, chapter 276B itself states that a defendant's case may only be dismissed upon proof of completion of terms reached at the conference.²⁵⁵ So, it is essential both that restorative justice conferences present appropriate options to consider as remedial measures to defendants and community members, and that Massachusetts is equipped with an adequate enforcement apparatus to promote full compliance with the agreed-upon terms.

Section 5 of chapter 276B shows that Massachusetts is well-prepared already to evaluate its restorative justice programs, by creating an advisory committee that reviews programs and reports back to the governor and the state legislature.²⁵⁶ Section 5(b) states that members of the advisory committee may assist or monitor all restorative justice programs in which defendants participate.²⁵⁷ This function includes a fair amount of control over the structure of conferences and the availability of conditions to which defendants and the community may agree as remedial requirements. The most common types of remedies agreed to through restorative justice conferences are restitution, completion of a batterer intervention program, and future compliance with stay-away or restraining orders by victims.²⁵⁸ The advisory committee has the responsibility to approve the programs to which a gender-based criminal offender may be admitted as part of the restorative justice process.²⁵⁹ It also has the responsibility to ensure that any restitution ordered is reasonable and enforceable using current enforcement mechanisms.²⁶⁰

Massachusetts already employs several different kinds of programs for defendants, particularly for those involved in sexual or domestic violence

²⁵⁴ See generally Ernest, *supra* note 125.

²⁵⁵ MASS. GEN. LAWS ch. 276B, § 2 (2022).

²⁵⁶ *Id.* at § 5.

²⁵⁷ *Id.* at § 5(b).

²⁵⁸ See Keanini, *supra* note 198, at 176–77; Coker, *Crime Logic*, *supra* note 11, at 191.

²⁵⁹ ch. 276B, § 5.

²⁶⁰ *Id.*

disputes.²⁶¹ The Massachusetts Intimate Partner Abuse Education Program (IPAEP) certifies and monitors abuse education and intervention programs under guidelines devised by the Massachusetts Department of Public Health.²⁶² The approved programs have been utilized in conjunction with chapter 209A restraining orders, chapter 258E harassment prevention orders, and as conditions in family law matters regarding child custody.²⁶³ The list of approved programs provided by IPAEP should be a go-to resource for restorative justice conference facilitators seeking to direct defendants to training under conference agreements.

Massachusetts's probation system also houses many of the necessary mechanisms for enforcement to ensure that defendants comply with all conditions agreed upon during the restorative justice community-based conferences.²⁶⁴ Terms of probation in the Commonwealth often include monitored completion of community-based programs, payment of restitution, and continued compliance with location restrictions or no-contact orders with victims.²⁶⁵ Utilizing this same structure in the context of restorative justice programs for gender-based criminal offenders is hardly any leap at all, and in fact would be similar to any probation conditions assessed for a defendant who would otherwise take a plea deal under a mandatory prosecution regime.²⁶⁶ Once again, the necessary shifts to be made to expand chapter 276B's restorative justice programming to include domestic and sexual offenders merely require the redirection of resources to ensure safety and completion under the preexisting structure.

CONCLUSION

The aims and goals of victims' rights advocacy have hardly changed in the decades since no-drop prosecution policies came into public consciousness: we still want to empower victims, promote healing, and hold offenders accountable. What has changed, almost assuredly for the better, are our views about how best to achieve each of those goals. While public support for hyper-criminalization and mass incarceration continues to wane, the possibilities for seeking justice using alternative means become more attractive. Even better, these alternative

²⁶¹ See *Intimate Partner Abuse Education Services*, MASS.GOV, <https://www.mass.gov/service-details/intimate-partner-abuse-education-program-services>, (last visited Jan. 8, 2023).

²⁶² See *id.*

²⁶³ See *id.*; GUIDELINES AND STANDARDS FOR THE CERTIFICATION OF INTIMATE PARTNER ABUSE EDUCATION PROGRAMS, EXEC. OFF. OF HEALTH & HUM. SERVS. 2 (2020) ("Programs certified by the Department may serve court-ordered and non-court-ordered individuals who abuse."); see generally MASS. GEN. LAWS chs. 209A, 258E (2022).

²⁶⁴ See *Learn About the Massachusetts Probation Service*, MASS.GOV (Apr. 25, 2018), <https://www.mass.gov/info-details/learn-about-the-massachusetts-probation-service>; *Intimate Partner Abuse Education Services*, *supra* note 261.

²⁶⁵ See *Learn About the Massachusetts Probation Service*, *supra* note 264.

²⁶⁶ See *id.*

means seem to become more and more possible and effective. Restorative justice reconfigures our ideas about how best to empower victims, promote accountability for wrongdoers, and repair communities harmed by cycles of violence.

Massachusetts has already begun a robust embrace of restorative justice and its potential for new kinds of justice.²⁶⁷ Chapter 276B speaks into existence a world where retributive punishment need not be our knee-jerk reaction to criminal activity. Extending that world to include domestic and sexual offenders is the next logical and necessary step in divesting from incarceration as our primary means of dealing with criminal behavior. All the necessary tools and systems are already in place for Massachusetts to take this step. It need only take it.

²⁶⁷ See MASS. GEN. LAWS ch. 276B (2022).