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EXAMINING THE VALUE-ADD OF NON-ADVERSARIAL PROCESSES IN THE IMMEDIATE AFTERMATH OF POLICE SHOOTINGS

KATELYN ROWE*

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I. INTRODUCTION

The death toll of African American civilians killed by law enforcement officials has steadily increased over recent years. Several police shootings and incidents of excessive force have received significant media coverage, spurred nationwide protests, and contributed to the formation of the Black Lives Matter social movement.¹ At the same time, the legal community and other stakeholders, such as law enforcement agencies and civilian oversight mechanisms, have relied on adversarial processes to punish the individual officers responsible for unlawful civilian deaths.² For example, a law enforcement agency may initiate an internal investigation against the responsible officers, a local prosecutor's office may file criminal charges, or the victim's family members may hire a lawyer to initiate civil lawsuit proceedings.

These different types of adversarial processes each have inherent shortcomings.³ In some instances, a plaintiff's lawyer may be unable to secure a financial remedy for the victim's family due to doctrinal constraints in the governing case law. Similarly, the final outcome of the civil or criminal proceedings against an officer may not actually contribute to systemic police reform. When police officers are not held accountable for misconduct, this undermines public confidence and engenders distrust between police and the communities that they serve.

¹ There have been several high-profile police killings of unarmed African American civilians over the past few years. See, e.g., Alan Binder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <http://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html> (recounting the police shooting of Walter Scott, an unarmed African American male who was shot multiple times in the back as he ran away from a police officer); Emily Brown, *Timeline: Michael Brown shooting in Ferguson, Mo.*, USA TODAY (Aug. 10, 2015), <http://www.usatoday.com/story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827/> (recounting the police shooting of Michael Brown, an unarmed African American male who was shot at least six times); Richard Fausset, Richard Perez-Pena & Campbell Robertson, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), <https://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html?mcubz=3> (recounting the police shooting of Alton Sterling, an African American male who was shot in the chest while being restrained on the ground); Vera Haller, *New Yorkers Gather for Anniversary of Eric Garner's Death*, L.A. TIMES (July 17, 2015), <http://www.latimes.com/nation/nationnow/la-na-garner-anniversary-20150717-story.html> (recounting the police killing of Eric Garner, an unarmed African American male who died as a result of a police chokehold); *Freddie Gray's Death in Police Custody - What we Know*, BBC NEWS (May 23, 2016), <http://www.bbc.com/news/world-us-canada-32400497> (recounting the police shooting of Freddie Gray, an African American male who died from injuries sustained while in police custody).

² See *infra* Part II.

³ See *infra* notes 11-15.

Existing scholarly literature that critiques adversarial processes has given way to a growing body of literature that recognizes the value-add of *non*-adversarial processes as a means of building police-community trust.⁴ Non-adversarial processes are inherently collaborative and emphasize problem solving.⁵ Scholars and practitioners have unanimously agreed that non-adversarial processes such as community policing, procedural justice, and police-community partnerships are crucial for building trust between police and the communities that they serve.⁶

Interestingly, the existing scholarly literature does not discuss or examine how non-adversarial processes can be utilized as a response to police shootings. Mediation and restorative justice are not viewed as tools that can salvage police-community relationships when public confidence drops after a police shooting. This dearth of literature stems from the conclusion that police excessive force allegations should not be resolved through traditional mediation.⁷ Instead, scholars and practitioners defer to traditional adversarial processes to secure police accountability for excessive force.⁸

This Article raises a slightly different perspective: that non-adversarial processes can be used in the immediate aftermath of police shootings, alongside adversarial processes, to build police-community trust. In order to fill the existing literature gap, this Article examines two case studies in which non-adversarial processes have been used in the immediate aftermath of police shootings. First, this Article highlights the use of police-community dialogue and mediation that has been performed by the Department of Justice's Community Relations Service ("CRS") branch. Second, this Article discusses the use of restorative circles in Seattle following the police shooting of Native American wood carver John T. Williams in 2010.

Importantly, these case studies are wholly different than the current police-civilian mediation programs that receive referrals from civilian review boards and resolve less serious allegations of police misconduct.⁹ This Article's case studies should inform practitioners such as public

⁴ See *infra* Part III.

⁵ See *id.*

⁶ This was emulated in the recent report from President Obama's Task Force on 21st Century Policing. See THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, THE FINAL REPORT 1 (2015) [hereinafter 21ST CENTURY POLICING FINAL REPORT].

⁷ See *infra* Part III(d), (e).

⁸ See *infra* Part III(d).

⁹ See BRIAN BUCHNER ET AL., OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, EVALUATION OF A PILOT COMMUNITY POLICING PROGRAM: THE PASADENA POLICE-COMMUNITY MEDIATION AND DIALOG PROGRAM 23 (2008) (discussing the viability of a police-civilian mediation program that only resolved allegations involving "police tactics, police procedure, quality of service, and rudeness or discourtesy").

interest lawyers, restorative justice facilitators, and mediators about how non-adversarial processes can be implemented in the immediate aftermath of police shootings. For example, restorative justice processes can prioritize dialogue spaces that are more flexible than traditional mediation, but still embody important non-adversarial principles such as confidentiality and collaborative problem solving.

Part II of this Article will briefly review the main criticisms of the adversarial processes that the legal community primarily relies on to punish and deter police misconduct. Part III will highlight the existing literature on non-adversarial processes that the legal community should reexamine to better understand the positive effects that stakeholders can have on police-community trust. Special attention will be paid to the non-adversarial processes of mediation and restorative justice, which may be particularly useful for building police-community trust after police shootings.

Part IV will present two case studies in which non-adversarial processes were used in the immediate aftermath of police shootings. First, Part IV will review CRS's work, which includes responding to police shootings and facilitating dialogue and mediation to reduce police-community tensions. This section is based primarily on CRS annual reports and publications because there is no existing scholarly discourse that details CRS's work. Part IV will also highlight the restorative circles that were used following the police shooting of John T. Williams in Seattle in 2010. Because there is very little literature on the Seattle case study, this Article supplements the existing literature with personal interviews I conducted with the two restorative circle facilitators, Andrea Brenneke and Susan Partnow.

Finally, Part V will advocate that scholars and stakeholders should examine, and consider replicating, these case studies in the future. This Article does not contend that non-adversarial processes should wholly replace adversarial processes. Rather, this Article advocates that there is real value added by carving out limited dialogue spaces in which community members and police officials can identify, discuss, and respond to problems or tensions that have surfaced after police shootings. These dialogue spaces can be an important step toward restoring (or in some cases, actually creating) working relationships between community members and police officials.

II. CRITICISMS OF ADVERSARIAL PROCESSES

In the immediate aftermath of police shootings and other forms of police misconduct, the legal community and other stakeholders will use adversarial processes to punish wrongdoers and deter future unlawful actions.¹⁰ Adversarial processes occur when (1) a victim's family hires a

¹⁰ See Kami C. Simmons, *The Politics of Policing: Ensuring Stakeholder*

lawyer to file an excessive force claim pursuant to 24 U.S.C. § 1983,¹¹ (2) a victim's family files a complaint with a civilian oversight mechanism,¹² (3) a victim's family files a complaint with the law enforcement's Internal Affairs Department,¹³ (4) federal prosecutors indict officers pursuant to 18 U.S.C. § 242 (deprivation of rights under color of law),¹⁴ or when (5) the Department of Justice investigates or files a lawsuit against a police agency pursuant to 42 U.S.C. § 14141 for patterns of biased policing and/or excessive force.¹⁵ Each of these adversarial processes has inherent shortcomings that have already been thoroughly discussed within a

Collaboration in the Federal Reform of Local Law Enforcement Agencies, 98 J. CRIM. L. & CRIMINOLOGY 489, 497 (2008) (noting that the primary goals of adversarial processes include "detering police misconduct by making illegally obtained evidence unavailable, punishing individual wrongdoers, or imposing financial consequences upon the [police agency] for abuses").

¹¹ For a discussion of the shortcomings of § 1983 litigation, see Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 914-15 (2015); Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. REV. 889, 910 (2010).

¹² For a discussion of the shortcomings of the citizen review board complaint process, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 539 (2004); Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 664 (2004).

¹³ For a discussion of the shortcomings of the Internal Affairs complaint process, see SAMUEL WALKER, CAROL ARCHBOLD & LEIGH HERBST, U.S. DEP'T OF JUSTICE, *MEDIATING CITIZEN COMPLAINTS AGAINST POLICE OFFICERS: A GUIDE FOR POLICE AND COMMUNITY LEADERS* 11 (2002); Armacost, *supra* note 12, at 537-38.

¹⁴ For a discussion of the shortcomings of § 242 prosecutions, see John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 808-09; Simmons, *supra* note 10, at 502; Paul Lewis, *Federal Officials may Use Little-Known Civil Rights Statute in Police Shooting Cases*, GUARDIAN (Dec. 24, 2014), <http://www.theguardian.com/us-news/2014/dec/24/federal-review-michael-brown-eric-garner-crawford-hamilton> ("[E]xperts caution that while DOJ and FBI bring dozens of 'color of law' cases to court each year . . . it is uncommon for prosecutions to be brought in police shooting cases . . . [because they] are harder to prove than other times of deprivation.").

¹⁵ For a discussion of the shortcomings of Department of Justice investigations, see ROBERT WASSERMAN & ZACHARY GINSBURG, U.S. DEP'T OF JUSTICE, *BUILDING RELATIONSHIPS OF TRUST: MOVING TO IMPLEMENTATION* 15 (2014); Rachel Harmon, *Promoting Civil Rights through Proactive Policing Reform*, 62 STAN. L. REV. 1, 3 (2009); Sarah Childress, *Policing the Police: How the DOJ Reforms a Police Department Like Ferguson*, PBS (Mar. 4, 2015), <http://www.pbs.org/wgbh/frontline/article/how-the-doj-reforms-a-police-department-like-ferguson/> ("Even the Justice Department admits flaws in the process. It's expensive and can take years to fulfill an agreement. In Los Angeles, which is widely considered the most successful test case, it took more than a decade for the police to complete the required reforms, at a cost of \$15 million. And the DOJ's process for choosing departments to investigate . . . can make the law feel haphazardly applied.").

substantial body of scholarly literature.¹⁶ Therefore, this section will only speak briefly about some of the general critiques of adversarial processes.

Scholars and practitioners critique adversarial processes for several reasons. First, adversarial processes secure financial remedies for only a small percentage of excessive force victims.¹⁷ For example, Ryan P. Hatch critiques § 1983 lawsuits as “costly, slow, and relatively inefficient.”¹⁸ In addition, plaintiffs “must clear several other hurdles” such as defeating pre-trial motions of qualified immunity and overcoming a jury’s sympathy for, and deference to, police officer defendants.¹⁹

Second, adversarial processes often fall short in securing larger police accountability or commitment to systemic reform.²⁰ Kami Chavi Simmons argues that adversarial processes are inefficient at securing reform “address[ing] systemic police misconduct” because they are “retrospective and individual-focused.”²¹ Similarly, Barbara Armacost argues that “citizen review boards provide only a limited vehicle for . . . systemic reform . . . [because] its disciplinary origins have constrained the potential reformative effects of civilian review.”²² Citizen review boards typically have “incident-specific origins,” so many of them “fail to take the additional steps of analyzing the policies that may have led to the incidents, identifying patterns of similar conduct, and asking what could be done to prevent such incidents in the future.”²³

Third, adversarial processes work towards punitive sanctions, which have a limited ability to deter future bad actions.²⁴ Scholar Tom Tyler argues that the potential of future punishment has a small impact on individual behavior and “experiencing punishment is also a minimal contributor to subsequent criminal actions.”²⁵

Finally, adversarial processes are not intended to nurture trust, problem-solve, or foster police-community relationships.²⁶ For example, because

¹⁶ See *supra* notes 10-15.

¹⁷ See Telephone Interview with Andrea Brenneke, Attorney and Facilitator of Seattle Restorative Circle, (June 25, 2016) (on file with the author).

¹⁸ Ryan P. Hatch, Note, *Coming Together to Resolve Police Misconduct: The Emergence of Mediation as a New Solution*, 21 OHIO ST. J. DISP. RESOL. 447, 458 (2006).

¹⁹ *Id.* at 459.

²⁰ Simmons, *supra* note 10, at 495.

²¹ *Id.*

²² Armacost, *supra* note 12.

²³ *Id.* at 540.

²⁴ See Tom R. Tyler, *Trust in the Twenty-First Century* in INTERDISC. PERSP. ON TRUST 204 (Ellie Shockley et al. eds., 2016).

²⁵ *Id.*

²⁶ See CAROLINE G. NICHOLL, U.S. DEP’T OF JUSTICE, COMMUNITY POLICING, COMMUNITY JUSTICE, AND RESTORATIVE JUSTICE: EXPLORING THE LINKS FOR THE DELIVERY

civilian review boards are typically formed “from circumstances in which citizens and police are already at odds with one another,” Armacost believes that “police have viewed citizen review boards with defensiveness and suspicion.”²⁷

Overall, these criticisms should not be read as a call to abandon adversarial processes altogether. Rather, scholars and practitioners alike should continue to critique and reform these processes so that they are better positioned to secure police accountability.

III. THE POTENTIAL VALUE-ADD OF NON-ADVERSARIAL PROCESSES

Scholars such as Caroline Nicholl have argued that non-adversarial processes should be implemented *alongside* adversarial processes, not replace them.²⁸ Nicholl stresses that “it would be an error to assume that restorative justice is a *soft option* or is intended to replace the criminal justice system.”²⁹

Non-adversarial processes are inherently collaborative³⁰ and emphasize problem solving.³¹ In addition, non-adversarial processes recognize the importance of legitimacy and trust.³² President Obama’s Task Force on 21st Century Policing concluded that police-community trust “is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.”³³ At this point in time, scholars and law enforcement professionals unanimously agree that legitimacy and trust are crucial for effective policing and sustainable police-community relations.³⁴

OF A BALANCED APPROACH TO PUBLIC SAFETY 47 (2000); Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307, 308 (2006).

²⁷ See Armacost, *supra* note 12.

²⁸ See, e.g., Nicholl, *supra* note 26, at 93.

²⁹ *Id.*

³⁰ *Id.* at 124-25.

³¹ See, e.g., Kimberlee E. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 581 (1997) (“The litigation system, based on the win-lose dichotomy, encourages an adversarial approach. Conversely, mediation relies on an interest-based collaborative approach to problem solving.”).

³² See TOM R. TYLER, U.S. DEP’T OF JUSTICE, LEGITIMACY AND PROCEDURAL JUSTICE: A NEW ELEMENT OF POLICE LEADERSHIP 8 (Craig Fisher ed., 2014); Tracey L. Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 658 (2009). See generally Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 238 (2008).

³³ 21ST CENTURY POLICING FINAL REPORT, *supra* note 6, at 1.

³⁴ See *id.*; Ready, Set, Engage! Ideas and Options for Community Engagement and

Understanding the differences between various non-adversarial processes first requires an understanding of the interplay between legitimacy and trust, which all non-adversarial processes seek to promote. Tyler argues that legitimacy “reflects the willingness of residents to defer to the law and to police authority” and “their sense of obligation and responsibility to accept police authority.”³⁵ Similarly, scholar Tracey L. Meares defines legitimacy as “an amalgamation of perceptions that individuals hold regarding the law and authorities that enforce it.”³⁶

Police lawfulness “is defined by the text of laws and by administrative and regulatory standards,” whereas police legitimacy “lies within the perceptions of the public.”³⁷ Thus, residents’ perceptions of police legitimacy are wholly different than whether residents believe that police officers have acted lawfully.³⁸ Tyler emphasizes that if police agencies do not have legitimacy in the eyes of the communities they serve, those communities will not trust them.³⁹ If communities do not trust their police agencies, then they are less likely to cooperate.⁴⁰

Robert Wasserman and Zachary Ginsburg have outlined several indicators of levels of trust and legitimacy.⁴¹ These indicators include:

- “The volume of tips, leads, and other information provided by community members—a high frequency of voluntary community calls to police agencies, particularly regarding crimes and community threats, indicates a high degree of trust;
- The degree to which neighborhood leaders (religious, civic, business, etc.) keep in touch with police leadership; and

Partnership Building, DISPATCH (June 2016), http://cops.usdoj.gov/html/dispatch/06-2015/community_engagement_and_partnership_building.asp (“One of the most critical components of effective law enforcement is the establishment and maintenance of public trust. Though vital to public safety, its existence is often taken for granted.”).

³⁵ See TYLER, *supra* note 32, at 9; Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 313 (2009).

³⁶ Meares, *supra* note 32, at 657.

³⁷ See TYLER, *supra* note 32, at 14.

³⁸ See *id.* at 11-12.

³⁹ *Id.*; see also WASSERMAN & GINSBURG, *supra* note 15, at 9-10.

⁴⁰ WASSERMAN & GINSBURG, *supra* note 15, at 9-10 (“Without legitimacy, there is no trust; without trust, community members will not help police officers solve problems in their neighborhoods or share information with police officers about crime, violence, and suspicious activities.”); see also Tyler, *supra* note 24, at 206 (“[T]rust is the social motivation most central to proactive cooperation.”).

⁴¹ See WASSERMAN & GINSBURG, *supra* note 15, at 10.

- The rapport that a particular department enjoys within a given neighborhood among ordinary citizens.”⁴²

Obama’s Task Force on 21st Century Policing endorsed the use of non-adversarial processes to sustain legitimacy and trust.⁴³ The Task Force called on law enforcement agencies to build legitimacy and trust, “both within agencies and with the public,” by “embrac[ing] a guardian—rather than a warrior—mindset.”⁴⁴ In addition, the Task Force encouraged law enforcement agencies to “involve the community in the process of developing and evaluating policies and procedures,” thereby “achiev[ing] external legitimacy.”⁴⁵ The Task Force specifically promoted the use of community policing, procedural justice, police-community engagements, and “[j]oint community and law dialogues and truth telling,” which are detailed in the following subsections.⁴⁶

A. Community Policing as a Non-Adversarial Process

Scholars Samuel Walker, Carol Archbold, and Leigh Herbst argue that community policing should emphasize the creation of “close working relationships with community residents, develop partnerships on specific issues or problems, and work to overcome the alienation and distrust of police that often manifest themselves in citizen complaints.”⁴⁷ Thus, community policing embodies the principle of policy-community reciprocity and constitutes a non-adversarial approach.⁴⁸

The Community Oriented Policing Services (“COPS”) branch of the U.S. Department of Justice defines community policing based on three components: community partnerships, organizational transformation, and problem solving.⁴⁹ First, community policing acknowledges that law enforcement officials need help from community members to solve crimes

⁴² *Id.*

⁴³ See 21ST CENTURY POLICING FINAL REPORT, *supra* note 6, at 1. This report constitutes a culmination of recommendations and action items that scholars, practitioners, and law enforcement professionals all agree on.

⁴⁴ See *id.* (calling on law enforcement agencies to “establish a culture of transparency and accountability to build public trust and legitimacy,” which “is critical to ensuring decision making is understood and in accord with stated policy”).

⁴⁵ *Id.* at 15.

⁴⁶ *Id.*

⁴⁷ WALKER, ARCHBOLD & HERBST, *supra* note 13, at 12.

⁴⁸ See *id.*; Simmons, *supra* note 10, at 527.

⁴⁹ CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, COMMUNITY POLICING DEFINED 1 (2014).

and address other public safety concerns.⁵⁰ Police agencies should form community partnerships to improve public trust and use collaborative problem solving as a means to resolve public safety concerns.⁵¹ Police agencies can form partnerships with a variety of different actors, including community members and community groups, nonprofit organizations (e.g., victims groups, religious groups, advocacy groups), media, private businesses, and other government agencies (e.g., schools, health and human services, nearby law enforcement agencies).⁵²

Second, a police agency must institutionalize community policing into its organizational structure.⁵³ Organizational transformation requires a policy agency to change internal culture to “[support] a proactive orientation that values systematic problem solving and partnerships.”⁵⁴ Police unions and other labor groups should be included in making these changes a reality.⁵⁵ As a starting point, police agencies should draft a written statement that outlines their commitment to community policing. This should include a strategic plan that individual officers are “well-versed in . . . [and can] give examples of their efforts that support the plan.”⁵⁶ For organizational transformations to become fully realized, police leaders must “support and articulate a commitment to community policing as the predominant way of doing business.”⁵⁷

Third, community policing encourages officers to engage in more nuanced problem solving.⁵⁸ This requires officers to break away from narrow assumptions about what their role is in responding to public safety complaints.⁵⁹ For example, officers should adopt the view that arrests are just “one of a wide array of potential responses” to establish control during a civilian interaction.⁶⁰ One useful problem-solving model that officers can rely on is “SARA” (scanning, analysis, response, assessment).⁶¹

There is no existing scholarly literature that details the use of community policing within the context of police shootings. This is likely because community policing is viewed as a preventative tool that is intended to reduce the likelihood of police shootings and other incidents of excessive

⁵⁰ *Id.* at 2.

⁵¹ *Id.*

⁵² *Id.* at 2-3.

⁵³ *Id.* at 4.

⁵⁴ *Id.* at 5.

⁵⁵ *Id.*

⁵⁶ *Id.* at 6.

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 10.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

force from occurring in the first place.

B. *Procedural Justice as a Non-Adversarial Process*

Obama's Task Force on 21st Century Policing defines procedural justice based on four main principles: (1) "treating people with dignity and respect," (2) "giving individuals a 'voice' during encounters," (3) "being neutral and transparent in decision making," and (4) "conveying trustworthy motives."⁶²

The first principle of procedural justice is dignity and respect.⁶³ Tracey L. Meares and Tom R. Tyler argue that when an officer engages with a civilian, that civilian will be highly conscious of whether or not the officer is polite and respectful of their rights.⁶⁴ Because people expect officers to treat them with respect, Tyler has found that people "react very negatively to dismissive or demeaning interpersonal treatment."⁶⁵ Greg Berman and Emily Gold LaGratta believe procedural justice is important because it encourages officers to make eye contact and avoid using police shorthand, legal jargon, swear words, or derogatory slurs when interacting with civilians.⁶⁶ In addition, Berman and LaGratta endorse procedural justice because it requires officers to give a clear, concise explanation of why they have stopped a civilian.⁶⁷

The second principle of procedural justice is participation.⁶⁸ Meares and

⁶² See 21ST CENTURY POLICING FINAL REPORT, *supra* note 6, at 10 (citing Lorraine Mazerolle et al., *Legitimacy in Policing: A Systematic Review*, 1 CAMPBELL SYSTEMATIC REVIEWS 1,9 (2013)).

⁶³ TYLER, *supra* note 32, at 10; see Tracey L. Meares, *The Good Cop: Knowing the Difference between Lawful or Effective Policing and Rightful Policing — And Why it Matters*, 54 WM. & MARY L. REV. 1865, 1876 (2013).

⁶⁴ TYLER, *supra* note 32, at 10

⁶⁵ See *id.*; see also Kate Mather, *LAPD Urges Officers to be Community Guardians, not Warriors on Crime*, L.A. TIMES (Aug. 21, 2015), <http://www.latimes.com/local/crime/la-me-warrior-guardians-20150821-story.html> ("[P]ublic perceptions of police can be influenced by the way officers treat residents during their daily work. [Deputy Chief Bill] Scott warned one group assembled at a department pistol range that the brash attitudes some officers have — 'I'm the cop, you're not' — can appear disrespectful. 'That's one of the biggest problems that we have,' he said. 'How we talk to people.'").

⁶⁶ See GREG BERMAN & EMILY G. LAGRATTA, CTR. FOR COURT INNOVATION, POLICE & COMMUNITY: STRENGTHENING LEGITIMACY 3 (2014); see also Mather, *supra* note 65 (detailing Los Angeles Police Department's "Preservation of Life" Training, which infused procedural justice principles and covered issues such as "the way officers should interact with people who are mentally ill, how they can build community trust, when they are permitted to curse while dealing with the public and why they should avoid walking with a swagger.").

⁶⁷ See BERMAN & LAGRATTA, *supra* note 66.

⁶⁸ See Meares, *supra* note 63, at 1875; TYLER, *supra* note 32, at 9-10.

Tyler argue that when an officer engages a civilian, whether during a routine traffic stop or a noise complaint, that civilian will want to have the opportunity to explain their side of the story regarding the incident in question.⁶⁹ Meares has found that civilians have higher levels of satisfaction during police encounters if civilians are afforded a voice and can explain their perspective.⁷⁰ This desire for civilian participation exists “both when policies are being developed and when officers implement them on the street.”⁷¹

The third principle of procedural justice is that civilians should perceive law enforcement officials to have engaged in fair decision-making.⁷² To determine if law enforcement officers are acting fairly, Meares argues that civilians will evaluate the neutrality, consistency, transparency, and factuality of police decision-making.⁷³

The fourth and final principle of procedural justice is trustworthy motives.⁷⁴ Tyler has found that people “react favorably when they believe that the authorities with whom they are interacting are benevolent and caring, and are sincerely trying to do what is best for the people with whom they are dealing.”⁷⁵ Tyler stresses that police officers can communicate benevolence and care for the community by utilizing active listening techniques when civilians provide narratives about an incident in question.⁷⁶ Police officers can also convey trustworthiness by explaining their actions.⁷⁷

Civilians are more likely to comply with a police officer’s commands when these four principles are satisfied.⁷⁸ This increased compliance stems from the public’s perception that the police are acting in a procedurally just manner and therefore the police’s authority is legitimate.⁷⁹ In this respect, procedural justice has “emerged as [a] promising strateg[y] for police departments to increase trust and minimize confrontation.”⁸⁰

⁶⁹ See Meares, *supra* note 63, at 1875; TYLER, *supra* note 32, at 9-10.

⁷⁰ See Meares, *supra* note 63, at 1875.

⁷¹ TYLER, *supra* note 33, at 9-10 (“People are interested in having an opportunity to tell their story or state their case; that is, they want to have a voice.”).

⁷² See Meares, *supra* note 63, at 1875; see also TYLER, *supra* note 33, at 10.

⁷³ Meares, *supra* note 63, at 1875.

⁷⁴ *Id.* at 1876.

⁷⁵ TYLER, *supra* note 32, at 10; see also Meares, *supra* note 63, at 1876 (“They want to trust that the motivations of the authorities are sincere, benevolent, and well intentioned.”).

⁷⁶ See TYLER, *supra* note 32, at 10.

⁷⁷ *Id.*

⁷⁸ *Id.* at 10-11.

⁷⁹ *Id.*

⁸⁰ POLICYLINK & ADVANCEMENT PROJECT, ENGAGING COMMUNITIES AS PARTNERS: STRATEGIES FOR PROBLEM SOLVING 11 (2014) [hereinafter ENGAGING COMMUNITIES].

There is no existing literature that details the use of procedural justice in the immediate aftermath of police shootings. Like community policing, procedural justice is a preventative tool that helps de-escalate tensions in police-civilian interactions and circumvent the need for force.⁸¹

C. Building Police-Community Partnerships as a Non-Adversarial Process

Police-community partnerships encourage police officers “to engage in nuts and bolts neighborhood problem solving.”⁸² These partnerships often require police to address histories of biased policing in communities of color.⁸³ Police officers can most effectively address these histories by engaging with community leaders who are willing to have constructive conversations with the officers.⁸⁴ However, Wasserman and Ginsburg recognize that prior instances of police misconduct may serve as a barrier to building community trust in police agencies.⁸⁵ Therefore, it is important for police agencies to “understand that historical perceptions about police tactics and actions are difficult to change when they are part of a community’s historical lore.”⁸⁶ For these reasons, building police-community partnerships “requires a policing perspective that goes beyond the standard law enforcement focus.”⁸⁷

Obama’s Task Force on 21st Century Policing called on law enforcement agencies to build partnerships with community members as a way of increasing public trust.⁸⁸ Police-community partnerships are especially important in neighborhoods that are heavily affected by crime.⁸⁹ The Task Force recommended several different types of police-community partnerships, including: (1) trust-building partnerships, (2) “joint community and law dialogues and truth telling, as well as community and law enforcement training in procedural justice and bias,” (3) community involvement “in the process of developing and evaluating policies and procedures,” and (4) “residency incentive programs such as Resident Officer Programs.”⁹⁰

⁸¹ *Id.*

⁸² *Id.* at 13.

⁸³ *Id.* at 16.

⁸⁴ *Id.*

⁸⁵ WASSERMAN & GINSBURG, *supra* note 15, at 10.

⁸⁶ *Id.*

⁸⁷ ENGAGING COMMUNITIES, *supra* note 80, at 13.

⁸⁸ 21ST CENTURY POLICING FINAL REPORT, *supra* note 6, at 2.

⁸⁹ *Id.*

⁹⁰ *Id.* at 15; see also JAMES K. STEWART ET AL., U.S. DEP’T OF JUSTICE, COLLABORATIVE REFORM PROCESS: A REVIEW OF OFFICER-INVOLVED SHOOTINGS IN THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT 116 (2013) (arguing that under the collaborative reform

Police agencies around the country have developed programs such as Cops and Clergy, Citizens on Patrol Mobile, Students Talking It Over with Police, Coffee with a Cop (and Sweet Tea with the Chief), and the West Side Story Project.⁹¹ One example of a well-documented police-community partnership is the Massachusetts Bay Transit Authority's "StopWatch" unit, which was developed to build relationships with young people.⁹² Each week, "[y]outh-serving stakeholders collectively attend[ed] different StopWatch locations" to meet with young people and "offer services, if needed."⁹³ Stakeholders include Boston police officers, assistant principals, probation officers, and youth-serving organizations.⁹⁴ StopWatch's work has corresponded with a sharp decrease in Transit Authority's youth arrest rates.⁹⁵

Another form of police-community partnership is the use of joint police-community dialogues to inform the structure and content of police training. An instructive case study here is the community involvement in the creation and instruction of a new police-training curriculum for the Oakland Police Department.⁹⁶ Oakland community and clergy leaders participated in

model, the Las Vegas Metropolitan Police Department "should work with community leaders and other stakeholders to establish mutual expectations and a process for the release of information to the public following an [officer involved shooting]".

⁹¹ 21ST CENTURY POLICING FINAL REPORT, *supra* note 6, at 15. For background information on "Coffee with a Cop," see COFFEE WITH A COP, <http://coffeewithacop.com/> (last visited Sept. 16, 2017). For background information on "Cops and Clergy," see *About us: Philosophy and System*, COPS & CLERGY NETWORK, <http://copsclergy.network.org/about-us/> (last visited Sept. 16, 2017). For background information on "Citizens on Patrol Mobile," see, e.g., *Citizens on Patrol Mobile*, CITY OF ARLINGTON, TX, <http://www.arlington-tx.gov/apdvolunteer/citizens-on-patrol/citizens-on-patrol-mobile/> (last visited Sept. 16, 2017). For background information on "Students Talking It Over with Police," see Ashley Luthern, *Milwaukee Police Program for Teens to be Duplicated in Other Cities*, J. SENTINEL (Aug. 21, 2015), <http://www.jsonline.com/news/crime/milwaukee-police-program-for-teens-to-be-duplicated-in-other-cities-b99561567z1-322569781.html>; *About S.T.O.P.*, 2015 S.T.O.P. AWARDS, <http://www.stopawards.com/about-stop/> ("STOP has been evaluated several times by the University of Wisconsin-Milwaukee. In its surveys, 98% of participants reported the program made them feel better about the police, and 88% said their concerns about police were addressed during the program."). For background information on "West Side Story Project," see PAMELA BEAL & LIZA COMTOIS, U.S. DEP'T OF JUSTICE, WEST SIDE STORY PROJECT TOOLKIT 10 (2010).

⁹² See ENGAGING COMMUNITIES, *supra* note 80, at 9.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See DANIELA GILBERT, STEWART WAKELING & VAUGHN CRANDALL, CAL. P'SHIP FOR SAFE CMTYS., PROCEDURAL JUSTICE AND POLICE LEGITIMACY: USING TRAINING AS A FOUNDATION FOR STRENGTHENING COMMUNITY-POLICE RELATIONSHIPS 11 (Julia Reynolds ed., 2015).

workshops to create a police-training curriculum.⁹⁷ The presence of community members “generated several pointed, spirited discussions” that “enrich[ed] the dialogue” and made Oakland’s training curriculum unique among programs of its kind.⁹⁸

Community and clergy leaders stressed the value of tailoring the police training in a way that was conscientious of the local history.⁹⁹ As a result, the police-training curriculum incorporated “archival film footage on the racial legacy of policing in Oakland.”¹⁰⁰ The curriculum also allowed community leaders to serve as instructors and share their personal experiences with police officers.¹⁰¹ This encouraged an “explor[ation of] the distrust communities of color often have of the police.”¹⁰²

Oakland’s new training curriculum was extremely well-received by officers.¹⁰³ Officers who participated in the training consistently rated it “‘Excellent’ (60%) or ‘Very Good’ (27%) and 98% of participants rate it ‘Excellent’, ‘Very Good’, or ‘Good.’”¹⁰⁴ Several officers even suggested that the training should include more community involvement in the future.¹⁰⁵ This police-community partnership is a compelling example of the far-reaching effects that non-adversarial processes can have.

One final example of police-community partnerships is the use of resident officer programs in which law enforcement officers live in public housing neighborhoods and perform previously agreed upon public safety duties.¹⁰⁶ One example of this is the Community Safety Partnership in Watts, Los Angeles.¹⁰⁷ For this partnership, 45 officers from the Los Angeles Police Department were assigned to three housing projects in Watts for a five-year period.¹⁰⁸ Officers would “provide safe passages for students going to and from school, participate in community safety initiatives, and support positive youth outcomes.”¹⁰⁹ Officers would also “show up to community events such as basketball tournaments and food drives.”¹¹⁰

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 10-11.

¹⁰² *Id.* at 10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 21ST CENTURY POLICING FINAL REPORT, *supra* note 6, at 15.

¹⁰⁷ See ENGAGING COMMUNITIES, *supra* note 80, at 14.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 15.

¹¹⁰ *Id.*

Police-community partnerships represent “intentional efforts to build trust and collaborate,” and therefore are non-adversarial approaches.¹¹¹ While community policing and procedural justice are typically preventative tools, stakeholders *can* and *should* respond to police shootings by either forming police-community partnerships or relying on existing ones to maintain open lines of communication and transparency. There is a definite need for additional discourse on the successes, failures, and shortcomings of existing police-community partnerships. This information should be made widely accessible and formatted in a way that is instructional for local community leaders and organizations in the beginning stages of formulating partnerships.

D. *Current Lack of Literature on the Use of Non-Adversarial Processes in the Immediate Aftermath of Police Shootings*

The existing literature on non-adversarial processes does not discuss the use of non-adversarial processes in the immediate aftermath of police shootings. Community policing and procedural justice are utilized *to prevent* police-civilian interactions from escalating to a point where officers use excessive force. There is no discussion of how these processes can be implemented *to respond* to an excessive force incident that has already occurred. Similarly, police-community partnerships *could* be created in response to a police shooting, but the literature does not discuss how partnerships could be used to build trust that has been eroded by police shootings, or how partnerships may be undermined by such incidents.

The furthest scholars have gone is to recognize that police-civilian mediation programs should not be used to resolve excessive force allegations.¹¹² Scholars such as Samuel Walker and Vivian Berger have long contended that excessive force allegations are not appropriate for police-civilian mediation.¹¹³ Because excessive force allegations may subject officers to criminal liability, these incidents are automatically deemed “too serious of an issue for mediation.”¹¹⁴ Although mediation is

¹¹¹ *Id.* at 13-15.

¹¹² See WALKER, ARCHBOLD & HERBST, *supra* note 13, at vii; Vivian Berger, *Civilians Versus Police: Mediation Can Help to Bridge the Divide*, 16 NEGOT. J. 211, 215 (2000); Buchner et al., *supra* note 9, at 7; Hatch, *supra* note 18, at 477 (noting that “[c]ommentators generally agree that any allegation which, if sustained, exposes an officer to criminal liability should not be mediated”).

¹¹³ See WALKER, ARCHBOLD & HERBST, *supra* note 13, at vii (“[A] broad consensus of opinion exists among experts in the field that not all citizen complaints should be mediated, especially use of force complaints.”); Berger, *supra* note 112 (“Allegations of excessive force resulting in injury or property damage are not candidates for mediation; nor are charges against an officer who has appeared in a mediation within the preceding nine months.”).

¹¹⁴ Hatch, *supra* note 18, at 477.

championed as a non-adversarial process that effectively builds police-community trust, scholars believe this process should only be used in certain limited circumstances. They would rather defer to adversarial processes to resolve allegations of police excessive force.

Herein lies the importance of examining the use of mediation and restorative justice processes in the immediate aftermath of police shootings. When implemented for the limited purpose of facilitating carefully directed dialogue between opposing sides, mediation and restorative justice have the potential to restore a police department's legitimacy in the eyes of the victim's family and community members.

E. Mediation as a Non-Adversarial Process

Mediation is a safe environment in which opposing parties engage in face-to-face dialogue for the purpose of resolving a dispute.¹¹⁵ In the context of police complaints, mediation asks the complainant and accused police officer(s) to "meet face-to-face, in an attempt to informally resolve their disputed complaint."¹¹⁶ Successful mediation is contingent on voluntary participation from both parties.¹¹⁷ Walker, Archbold, and Herbst have found that mediation is "intended to develop mutual understanding between the conflicting parties."¹¹⁸ Moreover, mediation allows the participants to engage in collaborative problem solving and have "control over the final resolution of the problem."¹¹⁹ For these reasons, Walker, Archbold, and Herbst believe that mediation constitutes a non-adversarial process.¹²⁰

Mediation can bring both sides a sense of empowerment and recognition.¹²¹ In this way, Robert Baruch Bush and Joseph Folger believe that mediation has transformative value.¹²² For example, mediation empowers individuals by teaching them how to "better listen, communicate, organize, and analyze issues, present arguments, brainstorm and evaluate alternative solutions."¹²³ Mediation allows an individual to "voluntarily

¹¹⁵ See WALKER, ARCHBOLD & HERBST, *supra* note 13, at 2.

¹¹⁶ Elizabeth C. Bartels & Eli B. Silverman, *An Exploratory Study of the New York City Civilian Complaint Review Board Mediation Program*, 28 POLICING 619, 620 (2005).

¹¹⁷ Berger, *supra* note 112; WALKER, ARCHBOLD & HERBST, *supra* note 13, at 17.

¹¹⁸ WALKER, ARCHBOLD & HERBST, *supra* note 13, at 2.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 73.

¹²¹ See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION*, at XVI (Jeffrey Z. Rubin ed., 1st ed. 1994).

¹²² *Id.* at 84.

¹²³ *Id.* at 86.

choose to become more open, attentive, sympathetic, and responsive” to the opposing party.¹²⁴ Walker, Archbold, and Herbst believe that complainants will benefit from mediation by developing a “better understanding of policing.”¹²⁵ Officers benefit because they have the “opportunity to explain [their] actions” to the complainant.¹²⁶ This fosters an appreciation for the opposing party’s perspective of the dispute, which is typically absent from adversarial processes.¹²⁷

Several empirical studies performed over the past decade have also reaffirmed the added value of mediation.¹²⁸ Jon L. Proctor, Richard Rosenthal, and AJ Clemmons found that complainants and officers alike have higher satisfaction rates when they participate in mediation instead of a formal complaint process.¹²⁹ Elizabeth C. Bartels and Eli B. Silverman expressed similar findings.¹³⁰

Despite unanimous support for mediation of police complaints within scholarly literature, few police complaint mediation programs actually exist in the United States.¹³¹ The last survey of existing mediation programs was performed in 2002, and only 16 programs existed at that time.¹³² As of

¹²⁴ *Id.* at 89.

¹²⁵ WALKER, ARCHBOLD & HERBST, *supra* note 13, at 5.

¹²⁶ *Id.*

¹²⁷ See BARUCH BUSH & FOLGER, *supra* note 121.

¹²⁸ See e.g., Lonnie M. Schaible et al., *Denver’s Citizen/Police Complaint Mediation Program: Officer and Complainant Satisfaction*, 24 CRIM. JUST. POL’Y REV. 626, 627 (2012) (“Some published studies have evaluated police mediation . . . finding higher levels of satisfaction with mediation relative to traditional processes”).

¹²⁹ JON L. PROCTOR, RICHARD ROSENTHAL & AJ CLEMMONS, DENVER’S CITIZEN/POLICE COMPLAINT MEDIATION PROGRAM: A COMPREHENSIVE EVALUATION 1 (2009) (“Results showed higher satisfaction rates among both officers and complainants who participated in mediation compared to those who went through the formal investigation process.”).

¹³⁰ Bartels & Silverman, *supra* note 112, at 627-28 (“This study overall found higher levels of satisfaction expressed by mediation complainants, as compared to full investigation complainants. . . . We [also] found high ratings of satisfaction among police officers who had participated in [Civilian Complaint Review Board] mediation.”).

¹³¹ *Id.* at 621 (“Sixteen police complaint mediation programs exist[ed] in the United States” as of 2005 and “these programs only handle a small percentage of their agency’s total number of complaints.”); Samuel Walker & Carol Archbold, *Mediating Citizen Complaints against the Police: An Exploratory Study*, 2000 J. DISP. RESOL. 231, 231 (“[T]here is no published research on the mediation of police complaints in the United States.”). This is sharply juxtaposed with the Canada and the United Kingdom, where “[i]nformal resolution of complaints is virtually universal in complaint procedures . . .” *Id.*

¹³² WALKER, ARCHBOLD & HERBST, *supra* note 13. The cities with mediation programs for police complaints were: Albuquerque, New Mexico; Berkeley, California; Boise, Idaho; Boulder, Colorado; Dover, Delaware; Kansas City, Missouri; Milwaukee, Wisconsin; Minneapolis, Minnesota; New Haven, Connecticut; New York, New York; Portland, Oregon; Rochester, New York; San Francisco, California; Santa Cruz, California; Syracuse,

2015, New York City's Civilian Complaint Review Board mediation program completed 205 mediations – the highest number of mediated cases by any program.¹³³ The next highest was San Francisco's Office of Citizen Complaints, which completed 45 mediations, and Washington D.C.'s Office of Police Complaints, which completed 42 mediations.¹³⁴

None of these completed mediations concerned an excessive force claim because these incidents are automatically deemed ineligible for mediation.¹³⁵ There is unanimous agreement amongst scholars and practitioners alike that excessive force cases should not be mediated.¹³⁶ This restriction appears to be limited to traditional mediation, which is wholly different than the mediation and dialogue that CRS facilitates. Traditional mediation programs seek to resolve individual civilian complaints of police misconduct, whereas CRS performs mediations for the purpose bringing police and community actors together to foster working relationships and build trust.

F. *Restorative Justice as a Non-Adversarial Process*

Current restorative justice processes are based on the conflict resolution and traditional peacemaking practices that Maoris, Aborigines, and First Nations people have used for several hundred years.¹³⁷ There is no clear-cut, universally accepted definition of restorative justice.¹³⁸ Many scholars define restorative justice by explaining what it is not.¹³⁹ For example, scholars have defined restorative justice by contrasting it with retributive justice.¹⁴⁰ Other scholars define restorative justice by outlining a set of principles or characteristics that embody restorative justice.¹⁴¹ Some authors define restorative justice in terms of reintegrative shaming.¹⁴² For

New York; Washington, D.C. *Id.* at 41. There is no existing directory for United States mediation programs. *Id.*

¹³³ NICHOLAS E. MITCHELL, DENVER OFFICE OF THE INDEP. MONITOR, 2015 ANNUAL REPORT 44-45.

¹³⁴ *Id.*

¹³⁵ ENGAGING COMMUNITIES, *supra* note 80.

¹³⁶ *Id.*

¹³⁷ Nicholl, *supra* note 26, at 95.

¹³⁸ Donald J. Schmid, *Restorative Justice: A New Paradigm for Criminal Justice Policy*, 34 VICT. U. WELLINGTON L. REV. 91, 93 (2002).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 152 (2002) (arguing that restorative justice processes “ought to prevent crime more effectively than retributive practices” in part because “reintegrative shaming, or disapproval of the act within a continuum of respect for the offender and terminated by rituals of forgiveness,

example, Tyler argues that the main goal of restorative justice is to “encourage feelings of shame regarding one’s bad acts, [accept] responsibility, and sincerely apologiz[e].”¹⁴³

According to Howard Zehr and Harry Mika, restorative justice processes incorporate three basic principles.¹⁴⁴ First, restorative justice conceptualizes crime as a “breach of human relationships and only secondarily a violation of the law.”¹⁴⁵ Second, the offender is obligated to make amends to the victim, the victim’s family, and the affected community.¹⁴⁶ Third, the victim and the offender’s personal needs should both be addressed during restorative justice processes.¹⁴⁷ Restorative justice processes address the needs of each group without prioritizing any particular stakeholder’s interests above the rest.¹⁴⁸ This includes addressing the “harm to the victim personally, harm to the offender him or herself, and harm to the community as a whole. . . .”¹⁴⁹ Similarly, Caroline Nicholl argues that restorative justice processes prioritize “repair[ing] harms and relationships to strengthen social bonds, improv[ing] victims’ recovery, and minimiz[ing] the incapacitation of offenders.”¹⁵⁰

Many different processes fall under the umbrella of restorative justice, including victim-offender reconciliation and mediation, community and group conferencing, sentencing circles, and healing circles.¹⁵¹ While each process is unique in its structure and objectives, most restorative justice processes emphasize face-to-face dialogue between victims and offenders.¹⁵² Restorative justice encourages “the participation of ordinary people to confront and solve problems,” including community members who may have been affected by the offender’s wrongdoing.¹⁵³ The

prevents crime.”); Tyler, *supra* note 24, at 315.

¹⁴³ Tyler, *supra* note 24, at 315.

¹⁴⁴ HARRY MIKA & HOWARD ZEHR, FUNDAMENTAL CONCEPTS OF RESTORATIVE JUSTICE 1 (1997).

¹⁴⁵ Erik Luna, *Reason and Emotion in Restorative Justice* (Lecture at Vict. U. of Wellington, July 5, 2000), transcript available at <http://www.scoop.co.nz/stories/GE0007/S00014.htm>.

¹⁴⁶ MIKA & ZEHR, *supra* note 144.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Schmid, *supra* note 138, at 94.

¹⁵⁰ Nicholl, *supra* note 26, at 95.

¹⁵¹ For background information on the variety of different restorative justice processes that exist, UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 13-31 (2006).

¹⁵² Emily Gaarder, *Lessons From a Restorative Circles Initiative For Intimate Partner Violence*, 3 RESTORATIVE JUST. 342, 343 (2015); see also HANDBOOK OF RESTORATIVE JUSTICE xxi (Gerry Johnstone & Daniel W. Van Ness, eds., 2007).

¹⁵³ See Gaarder, *supra* note 152.

dialogue is usually “guided by values such as respect and non-violence,” and there is a neutral facilitator present.¹⁵⁴

Restorative justice processes are typically recommended for juvenile offenders, or for cases involving non-violent offenses such as property damage or petty theft.¹⁵⁵ However, Zehr emphasizes that restorative justice processes “are [currently] available in some communities for the most severe forms of criminal violence: death from drunken driving, assault, rape, even murder.”¹⁵⁶ “[E]xperience has shown that restorative approaches may have the greatest impact in more severe cases.”¹⁵⁷ This assessment is promising for the use of restorative justice processes in response to police shootings.

Ultimately, restorative justice processes aim to create “conditions for mutual understanding and collaborative action, rather than seeking to exclude or punish any of the parties to the conflict.”¹⁵⁸ Restorative justice processes are therefore non-adversarial and akin to mediation. Like mediation programs, “many restorative justice programs are designed around the possibility of a facilitated meeting or encounter between those harmed and those who caused harm, as well as perhaps some family and community members.”¹⁵⁹ Both mediation and restorative justice value empowerment of the victim that is lacking in traditional adversarial approaches.¹⁶⁰

However, there are some distinct differences between mediation and restorative justice processes.¹⁶¹ Restorative justice processes “are important even when an offending party has not been identified or apprehended or when a party is unwilling or unable to meet.”¹⁶² Mediation is wholly different because it requires both sides to be present. Zehr also argues that unlike in mediation, some restorative justice processes require

¹⁵⁴ *Id.*

¹⁵⁵ HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE: REVISED AND UPDATED 6 (2015).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 17.

¹⁵⁸ Mikhail Lyubansky & Dominic Barter, *A Restorative Approach to Interpersonal Racial Conflict*, 23 PEACE REV. 37, 38 (2011).

¹⁵⁹ ZEHR, *supra* note 155, at 15.

¹⁶⁰ See *id.* at 22-23; see also JOSEPHINE DOBRY, RESTORATIVE JUSTICE AND POLICE COMPLAINTS: A REPORT BY THE INDEPENDENT POLICE COMPLAINTS AUTHORITY 41 (2001) (“[A] formal mediation may achieve the same result as a restorative conference . . . many of the fundamental techniques such as listening and asking open-ended questions are the same . . .”); Hatch, *supra* note 18, at 462.

¹⁶¹ ZEHR, *supra* note 155, at 15.

¹⁶² *Id.*

that the offender admit some amount of wrongdoing.¹⁶³ This distinction makes restorative justice processes more fluid than traditional mediation, and therefore potentially valuable in the immediate aftermath of police shootings.

There is no existing literature on the use of restorative justice processes to resolve more serious police complaints in the United States.¹⁶⁴ This lack of research is particularly interesting in light of the recent “growth of interest internationally in the design of police complaint systems.”¹⁶⁵ The majority of literature on restorative justice processes says that police officers are actors who can (1) refer disputes to restorative justice programs for resolution, or (2) apply restorative justice principles when they are on-duty and must resolve disputes between civilians.¹⁶⁶ In contrast, the Seattle case study demonstrates that restorative justice processes can be crafted to fit the unique needs of more serious allegations of excessive force without jeopardizing any ongoing criminal or civil proceedings.

IV. TWO CASE STUDIES THAT DEMONSTRATE THE VALUE-ADD OF NON-ADVERSARIAL PROCESSES IN THE IMMEDIATE AFTERMATH OF POLICE SHOOTINGS

The following two case studies are instructive on the value added by

¹⁶³ *Id.* at 15-16.

¹⁶⁴ Richard Young et al., *Informal Resolution of Complaints against the Police: A Quasi-Experimental Test of Restorative Justice*, 5 CRIM. JUST. 279, 280 (2005).

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., PAUL McCOLD & BENJAMIN WACHTEL, RESTORATIVE POLICING EXPERIMENT: THE BETHLEHEM PENNSYLVANIA POLICE FAMILY GROUP CONFERENCING PROJECT 1- 6 (1998), <http://www.iirp.edu/pdf/BPD.pdf> (describing police conferencing practices in Bethlehem, Pennsylvania); MINISTRY OF JUSTICE, RESTORATIVE JUSTICE: BEST PRACTICE IN NEW ZEALAND 14 (2011) (“Professionals’ – police officers, probation officers, and defence counsel – may attend a restorative justice conference, but on a carefully prescribed basis.”); CHARLES POLLARD, INT’L INSTITUTE FOR RESTORATIVE PRACTICES, RESTORATIVE JUSTICE AND POLICE COMPLAINTS (2000), http://www.iirp.edu/article_detail.php?article_id=NDk5 (noting that prior to implementing restorative justice principles in their cautioning system, the Thames Valley Police Department found that “the needs of the victim of the offence were almost never considered, apart from passing on rudimentary information about what had happened.”); Leanne F. Alarid & Carlos D. Montemayor, *Implementing Restorative Justice in Police Departments*, 13 POLICE PRAC. & RES. 450, 450 (2012) (“Restorative justice can be integrated into some police practices when responding to calls for service involving individuals who are mentally ill and in domestic violence situations.”); L. Tomas Winfree, Jr., *New Zealand Police and Restorative Justice Philosophy*, 50 CRIME & DELINQ. 189, 193 (2004) (noting that prior to the implementation of restorative justice principles in their cautioning system, the Thames Valley Police Department hardly considered victims’ needs, only providing them with “rudimentary information” about the outcome).

using non-adversarial processes in the immediate aftermath of police shootings. The first case study details the Community Relations Service's ("CRS") work. Because there is no existing scholarly discourse on CRS, this case study is based on CRS Annual Reports and publications. The second case study details the use of restorative circles in the immediate aftermath of a police shooting in Seattle in 2010. This case study has been described in full detail in one article that was written by Andrea Brenneke, a lawyer and co-facilitator of the restorative circles.¹⁶⁷ This article has been summarized and recounted by various news outlets, but there is no scholarly discourse analyzing the Seattle restorative circle. In light of the minimal literature on this case study, this Article has supplemented the existing literature with personal interviews that I conducted with the two restorative circle facilitators, Andrea Brenneke and Susan Partnow.

A. Case Study One: Community Relations Service's Use of Mediation and Dialogue in the Immediate Aftermath of Police Shootings

CRS is a federal agency that helps communities resolve conflicts based on race, color, and national origin.¹⁶⁸ The agency has a fifty person staff and an annual budget of \$12 million.¹⁶⁹ CRS frequently responds to volatile situations that arise from police misconduct.¹⁷⁰ While CRS does not have investigative authority, it frequently sends trained mediators to local communities in crisis.¹⁷¹ These mediators provide conciliation services that include conflict mediation, dialogue facilitation, and any necessary consultations or "know your rights" trainings.¹⁷² CRS also runs a two-day Law Enforcement Mediation Program that "strengthens the problem-solving and mediation skills of law enforcement officers and commanders who serve racially diverse communities."¹⁷³

In the immediate aftermath of a police shooting, CRS mediators will

¹⁶⁷ See *infra* note 214.

¹⁶⁸ CMTY. RELATIONS SERVS., U.S. DEP'T OF JUSTICE, 2014 ANNUAL REPORT 70 (2015) [hereinafter CRS 2014].

¹⁶⁹ See David Hunn, *The Justice Department's Soft Side: How One Federal Agency Hopes to Change Ferguson*, ST. LOUIS POST (Oct. 12, 2014), http://www.stltoday.com/news/local/govt-and-politics/the-justice-department-s-soft-side-how-one-federal-agency/article_591a2e64-7dd1-5008-b300-0ab9ad8b9168.html.

¹⁷⁰ See CRS 2014, *supra* note 168, at 70; see also CMTY. RELATIONS SERVS., U.S. DEP'T OF JUSTICE, 2010 ANNUAL REPORT 25 (2011) ("The most intense casework tends to involve police excessive use of force, major demonstrations and counter-demonstrations, major school disruptions, and hate incident activity") [hereinafter CRS 2010].

¹⁷¹ See Hunn, *supra* note 169.

¹⁷² See CMTY. RELATIONS SERVS., U.S. DEP'T OF JUSTICE, 2012 ANNUAL REPORT 1 (2013) [hereinafter CRS 2012].

¹⁷³ *Id.*

meet with police and community stakeholders to learn about concerns from each group and assess the local climate.¹⁷⁴ They will use either formal mediation or informal conciliation sessions to allow local stakeholders to develop a strategy for how to reduce police-community tensions.¹⁷⁵ Through these processes, “CRS channels community tensions and anger into a constructive discussion of other issues that often surface after a use of excessive force incident.”¹⁷⁶ In this respect, CRS embraces non-adversarial processes to build police-community trust.

CRS argues that its mediators are “a good choice to resolve community racial conflict” because they are federally funded and therefore “are able to ensure their impartiality in helping to resolve conflicts on Federal, State, and local levels.”¹⁷⁷ CRS’s goal “isn’t to make arrests or file lawsuits, but to give all sides a private place to talk and ideally solve their own problems.”¹⁷⁸

In addition, CRS may be considered a good choice for resolving community tensions because it has “broad authority to act in secrecy” under current federal law.¹⁷⁹ For example, CRS staff are shielded from testifying about their work or submitting work related documents for evidentiary purposes in court proceedings.¹⁸⁰

In the immediate aftermath of a police shooting, there are typically several “flash points” that can each spur additional police-community conflict.¹⁸¹ These flashpoints include: (1) the initial incident, (2) the initial law enforcement response, (3) media coverage of the incident, (4) protests, rallies, and/or marches held in response to the incident, (5) investigations of the incident, (6) when investigation results are shared with the public, (7) collateral incidents, and (8) trial or court decisions regarding the initial incident.¹⁸² Throughout each of these flashpoints, CRS has the ability to “[resolve] spontaneous conflicts ‘on the ground’” by “serving as an impartial resource for all parties.”¹⁸³

During the initial incident, CRS encourages officers directly involved in

¹⁷⁴ See CMTY. RELATIONS SERVS., U.S. DEP’T OF JUSTICE, 2011 ANNUAL REPORT 8 (2012) [hereinafter CRS 2011].

¹⁷⁵ *Id.* at 7.

¹⁷⁶ See CMTY. RELATIONS SERVS., U.S. DEP’T OF JUSTICE, PERCEIVED EXCESSIVE USE OF FORCE: ADDRESSING COMMUNITY RACIAL TENSIONS (2014) [hereinafter CRS: PERCEIVED EXCESSIVE USE OF FORCE].

¹⁷⁷ See CRS 2010, *supra* note 170, at 25.

¹⁷⁸ See Hunn, *supra* note 169.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See CRS: PERCEIVED EXCESSIVE USE OF FORCE, *supra* note 176, at 1.

¹⁸² *Id.* at 1-4.

¹⁸³ *Id.* at 4.

the incident to leave the scene immediately because this will help reduce tensions at the site.¹⁸⁴ CRS suggests that officers leave contact information because this action will “[demonstrate] concern and may lead to cooperation and open communication.”¹⁸⁵

CRS urges journalists to write anti-inflammatory press announcements that “avoid derogatory remarks about a suspect, victim, or community.”¹⁸⁶ In addition, the police department should not make “[p]remature unsubstantiated judgment[s] of police actions” because this may “undermine the public’s perception of fairness and objectivity.”¹⁸⁷ CRS explains that “[a]n expression of concern by officials about the loss of life, directly communicated to members of the victim’s family and community leader, can help minimize community tensions.”¹⁸⁸

CRS notes that community reactions to flashpoints “will be influenced by other variables, such as the existing climate of police community relations, the nature and circumstances of the use of force incident, media coverage, and rumors.”¹⁸⁹ With this in mind, CRS believes that attention should be paid to both (1) the circumstances of the incident in question and (2) any larger community concerns that may be aggravated by the incident and cause additional community frustration.¹⁹⁰ After a police shooting, CRS suggests creating a community leadership coalition to determine the best means of improving police-community relations moving forward.¹⁹¹ During this period, public discussions are essential to receiving community input.¹⁹²

In 2014 alone, CRS assisted local communities with “79 Police-Community Relations cases, 88 Conflict Over Excessive Use of Force/Police Misconduct cases, 17 Community Policing Conflict cases, and 67 Biased-Based Policing/Racial Profiling cases.”¹⁹³ This was more than CRS’s caseload in both 2013 and 2012, and is indicative of the ever-increasing importance of using non-adversarial processes to build police-

¹⁸⁴ *Id.* at 2.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.* at 4.

¹⁹² *See id.* “Communities should know the various options that are available at the Federal, State, and local levels to address concerns over police use of force, and allegations of excessive use of force.” *Id.* CRS suggests that “[a]n explanation of the resources allocated to the investigation, as well as the limitations of the law, helps to alleviate a potentially destructive community reaction.” *Id.* at 3.

¹⁹³ *See* CRS 2014, *supra* note 168, at 21.

community trust.¹⁹⁴

To further contextualize CRS's work, two incidents are instructive: the Michael Brown shooting and the Eric Garner chokehold incident.¹⁹⁵ Michael Brown was an unarmed eighteen-year-old black male who was shot at least six times by a police officer in Ferguson, Missouri.¹⁹⁶ Within twenty-four hours of the police shooting, two CRS staff members were on site in Ferguson.¹⁹⁷ CRS staff identified local community leaders and connected them with law enforcement officials in order to measure community tension.¹⁹⁸ CRS's main goal in the aftermath of the police shooting was to "develop viable measures to increase the level of mutual trust and respect between police and minority communities."¹⁹⁹ To accomplish this, CRS staff facilitated town hall meetings and community dialogues that were "non-sensationalized environment[s]."²⁰⁰ This enabled community members to express their frustrations about the shootings.²⁰¹ One result of CRS's work was the creation of a problem-solving coalition that consisted of "local elected and government agency officials, community leaders, law enforcement executives, school administrators, and faith-leaders."²⁰²

In light of the significant public demonstrations that resulted from the Michael Brown shooting, CRS sent additional staff members to provide self-marshall services.²⁰³ CRS staff wanted to prevent violent outbursts during the protests and also protect protesters' First Amendment rights.²⁰⁴ Additionally, CRS staff went to local schools to manage Student Problem Identification and Resolution of Issues Together ("SPIRIT") programs, which aimed to ease youth tension after the shooting and subsequent

¹⁹⁴ In 2013, CRS assisted local communities with "57 Police-Community Relations cases, 36 Conflict Over Excessive Use of Force/Police Misconduct cases, 19 Community Policing Conflict cases, and 49 Biased Based Policing/Racial Profiling cases. CMTY. RELATIONS SERVS., U.S. DEP'T OF JUSTICE, 2013 ANNUAL REPORT 23 (2014) [hereinafter CRS 2013]. In 2012, CRS assisted local communities with "67 Police-Community Relations cases, 40 Conflict Over Excessive Use of Force/Police Misconduct cases, 16 Community Policing Conflict cases, and 48 Biased-Based Policing/Racial Profiling cases. See CRS 2012, *supra* note 172, at 4.

¹⁹⁵ See CRS 2014, *supra* note 168.

¹⁹⁶ See Brown, *supra* note 1.

¹⁹⁷ See CRS 2014, *supra* note 168, at 30.

¹⁹⁸ See *id.* at 31.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 30.

²⁰¹ See *id.*

²⁰² *Id.*

²⁰³ See *id.*

²⁰⁴ See *id.*

protests.²⁰⁵ CRS staff also facilitated dialogues between local community members and Department of Justice officials “to ensure that the concerns and feelings of the community were voiced to national leaders.”²⁰⁶

Another documented example of CRS’s work happened after the Eric Garner chokehold incident. Eric Garner was an unarmed 43-year-old black male who died in police custody after being placed in a chokehold.²⁰⁷ CRS sent staff members to Staten Island, New York immediately after the incident to provide a variety of services.²⁰⁸ CRS maintained “a federal presence and onsite mediation at a local vigil” for African American and Hispanic community leaders.²⁰⁹ CRS staff also conducted self-marshall services for civilian protestors.²¹⁰ Finally, CRS trained African American community leaders (who would later train others) on how to facilitate productive racial dialogues, thereby “[improving] race relations and police services in minority communities.”²¹¹

The Michael Brown shooting and the Eric Garner chokehold incident are just two of many incidents that CRS has responded to over the past several years. Scholars should begin to examine the full contours of CRS’s work and discuss the efficacy of this particular non-adversarial approach that combines mediation, dialogue, and training to meet the unique needs of each community impacted by a police shooting.

An immediate takeaway from CRS’s work is that three principles are crucial for non-adversarial processes to be successful: flexibility, voluntariness, and collaboration. CRS’s work embodies flexibility because staff members employ different services to each new incident. Voluntariness is essential because staff members recognize that community members and law enforcement officials alike must willingly participate in “non-sensationalized” dialogues. CRS’s initiatives focus on collaborative problem solving that is not captured or completed within a single, isolated event. Staff members will stay for several weeks after an incident to monitor community tensions, even returning during later flashpoints (e.g., criminal proceedings for officers involved in the shooting).²¹² Essentially,

²⁰⁵ See *id.*

²⁰⁶ *Id.*

²⁰⁷ See Haller, *supra* note 1.

²⁰⁸ See CRS 2014, *supra* note 168, at 37.

²⁰⁹ *Id.*

²¹⁰ See *id.*

²¹¹ *Id.*

²¹² Following the police shooting of Oscar Grant, a young unarmed African American male, CRS sent staff members to provide on-site conciliation services during the trial. See CRS 2010, *supra* note 170, at 17 (“As the trial was carried out and jury deliberations were anticipated, CRS assisted municipal officials, law enforcement, and community organizations with preparations and actions to prevent and reduce violence in the event of an

CRS has recognized that non-adversarial processes must be continuously implemented because police-community trust is not a constant.

B. Case Study Two: Use of Restorative Circles in the Immediate Aftermath of Police Shooting in Seattle

In 2010, a police officer shot and killed John T. Williams, a First Nations wood carver, in Seattle, Washington.²¹³ The police shooting revealed the “lack of trust between the police department, the Native American community, economically marginalized communities, and the broader community.”²¹⁴ In the weeks following the shooting, the eldest living brother of John T. Williams, Rick Williams, served as the family spokesperson and reported “increased scrutiny and harassment by bicycle patrol officers where [the First Nations wood carvers] worked.”²¹⁵ One police officer told Rick Williams, “You people need to learn how to obey the law.”²¹⁶ A teenager from the Williams family asked another officer, “I am a carver and these are my tools. If I have this knife, will you shoot me, too?”²¹⁷ The officer countered, “You don’t want to test that theory now, do you?”²¹⁸ The shooting, combined with the ensuing increase in police scrutiny and harassment, made the First Nations wood carvers fear for their safety.²¹⁹ Local community members responded with emotional public demonstrations and community meetings.²²⁰

During this period, the Williams family’s lawyer, Andrea Brenneke, began brainstorming possible ways to alleviate the strained police-community relations.²²¹ Brenneke met with an assistant chief from the

unpopular verdict”).

²¹³ See Andrea Brenneke, *A Restorative Circle in the Wake of a Police Shooting*, TIKKUN (Feb. 1, 2012), <http://www.tikkun.org/nextgen/a-restorative-circle-in-the-wake-of-a-police-shooting>.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*; see also Telephone Interview with Andrea Brenneke, *supra* note 17. Brenneke notes that if the restorative circle had not come to fruition, it is possible that the First Nations community might have left Seattle and gone to British Columbia due to their fear for personal safety. *Id.*

²²⁰ Mikhail Lyubansky & Carla D. Hunter, *Toward Racial Justice*, in *TOWARD A SOCIALLY RESPONSIBLE PSYCHOLOGY FOR A GLOBAL ERA* 198 (Elena Mustakova-Possardt et al. eds., 2014); see also Brenneke, *supra* note 213; Telephone Interview with Andrea Brenneke, *supra* note 17.

²²¹ See Brenneke, *supra* note 213.

Seattle Police Department, but the meeting was to no avail.²²² Brenneke and Rick Williams eventually decided to use a restorative circle to bring members of the Williams family and the community together with Seattle Police Department officials to discuss the underlying tensions that had surfaced after the shooting.²²³ A restorative circle is a unique dialogue model that “is structured to support mutual understanding and is designed to lead to voluntary acts offered to repair the harm and/or to restore and heal the relationship.”²²⁴ While a restorative circle may be quickly labeled as naïve or irresponsible—especially in the immediate aftermath of a police shooting—this assumption “erroneously assumes that the only harm done is to the deceased.”²²⁵ The shooting had “ripples of harm that reach[ed] far beyond the obvious target” and affected both the First Nations community and the Seattle Police Department.²²⁶ Brenneke recognized this and offered to serve as a restorative circle facilitator with Susan Partnow, co-founder of Seattle Restorative Justice.²²⁷ The Seattle Police Chief John Diaz immediately agreed to attend.²²⁸

Brenneke worked with Rick Williams to choose the appropriate contours of the restorative circle.²²⁹ The main purpose would be building trust and relationships.²³⁰ Due to the ongoing use-of-force investigation, the officer involved in the shooting did not participate in the restorative circle.²³¹ All parties agreed that the actual incident in question would not be discussed during the restorative circle.²³² Instead, they aimed to resolve the recent police harassment and disrespect that the Williams family had suffered after the shooting.²³³ All participants would also sign a confidentiality agreement so that they could speak freely without fear of their statements being used against them during criminal or civil proceedings.²³⁴ Because the dialogue was limited in this way, there was no resistance from the

²²² *Id.*

²²³ *Id.*

²²⁴ Lyubansky & Hunter, *supra* note 220, at 199.

²²⁵ *Id.*

²²⁶ See Brenneke, *supra* note 213.

²²⁷ *Id.*; see also Telephone Interview with Susan Partnow, Co-Founder at Seattle Restorative Justice and Facilitator of Seattle Restorative Circle (May 20, 2016) (on file with the author).

²²⁸ See Brenneke, *supra* note 213; Telephone Interview with Andrea Brenneke, *supra* note 17; Telephone Interview with Susan Partnow, *supra* note 227.

²²⁹ See Brenneke, *supra* note 213.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ See Telephone Interview with Andrea Brenneke, *supra* note 18.

police union, or from the lawyers involved in the criminal and civil proceedings.²³⁵

The restorative circle was held one month after the shooting and ran for over three hours.²³⁶ It occurred at a sacred space created for traditional Native American healing circles.²³⁷ The participants were John T. Williams' brothers, Police Chief Diaz, Sergeant Fred Ibuki (an officer who Rick Williams personally knew and trusted), two service providers who work with urban Native Americans, a family friend, one of the Williams family lawyers, three police supervisors of the officers involved in the shooting, and the civilian chair of the Office of Professional Accountability.²³⁸

During the restorative circle, each participant had the opportunity to explain his or her emotional response to the shooting.²³⁹ The carvers "expressed anger over what they perceived to be a lack of respect shown by newer officers for First Nations/Native American people, other minorities, and the homeless."²⁴⁰ The police supervisors and other law enforcement officials in attendance "seemed moved by what they heard."²⁴¹ One officer said that it was "helpful to see other carvers share their hurt/pain" because this gave him "a deeper appreciation of what they do and its challenges."²⁴² Co-Facilitator Partnow noted that Chief Diaz did not "duck out" of the meeting at any point and remained "fully respectful and engaged."²⁴³

At the end of the restorative circle, the participants suggested solutions on how to move forward.²⁴⁴ These suggestions were consolidated into an action plan that was eventually publicly distributed.²⁴⁵ Chief Diaz pledged to review the department's use of force training and policies.²⁴⁶ In

²³⁵ *Id.*

²³⁶ *See Brenneke, supra* note 214.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Telephone Interview with Susan Partnow, *supra* note 228.

²⁴⁴ *See Brenneke, supra* note 214.

²⁴⁵ *Id.*; *see also* Steve Miletich, *Extraordinary Meeting Followed Carver's Fatal Shooting by Seattle Officer*, SEATTLE TIMES (Feb. 2, 2011), <http://www.seattletimes.com/seattle-news/extraordinary-meeting-followed-carvers-fatal-shooting-by-seattle-officer/> ("The memo on the meeting between the Williams family and police officials was released after months of discussions between The Times and the Police Department over a public-disclosure request seeking correspondence related to the shooting").

²⁴⁶ *See Brenneke, supra* note 214.

addition, Chief Diaz pledged to get to know Rick Williams and spend time at the waterfront in order to see what it was like to be a carver.²⁴⁷ Sergeant Ibuki agreed to serve as a point of contact for the Williams family in case any new conflicts or issues arose.²⁴⁸ The supervising officers discussed the restorative circle at roll call and informed other officers about the key points of the action plan.²⁴⁹ Several weeks later, the same group of participants attended a post-circle meeting where “[e]veryone had a sense of connection to one another and increased trust resulting from the . . . ongoing contacts and relationships that had developed in the intervening months.”²⁵⁰

In reflecting on the success of the restorative circle, Brenneke and Partnow indicated that it did not have the longevity that they had hoped for.²⁵¹ Partnow stated that it was a “great start,” but “not this beautiful ongoing thing” she had envisioned.²⁵² The DOJ investigation of the Seattle Police Department left little “room for creativity” so the department was not in a position to adopt a formal restorative circle process.²⁵³ This was unfortunate because the department responded positively to the restorative circle and expressed interest in replicating it in the future.²⁵⁴ Interestingly, many of the recommendations made during the restorative circle regarding police training were incorporated into the DOJ’s department investigation, indicating the value-add of non-adversarial processes operating alongside adversarial ones.²⁵⁵

Brenneke and Partnow also emphasized that restorative circles and other restorative processes will not be successful in building police-community trust if they are implemented once and never revisited again.²⁵⁶ Brenneke stressed that restorative justice “is about engaging conflict, not about resolving conflict.”²⁵⁷ This means that a single restorative circle is just one step towards identifying everyone’s needs, and there must be follow-up dialogue in order for trust to develop and relationships to solidify.²⁵⁸

²⁴⁷ Telephone interview with Susan Partnow, *supra* note 228.

²⁴⁸ See Brenneke, *supra* note 214.

²⁴⁹ *Id.*

²⁵⁰ *Id.* Rick Williams and other community members also “undertook another community healing process” by carving and raising a totem pole to honor John T. Williams. *Id.*

²⁵¹ See Telephone interview with Andrea Brenneke, *supra* note 18; Telephone interview with Susan Partnow, *supra* note 228.

²⁵² Telephone interview with Susan Partnow, *supra* note 228.

²⁵³ See Telephone interview with Andrea Brenneke, *supra* note 18.

²⁵⁴ *Id.*

²⁵⁵ *Id.* Telephone interview with Susan Partnow, *supra* note 228.

²⁵⁶ See Telephone interview with Andrea Brenneke, *supra* note 18.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

Partnow recognized that participating in the restorative circle helped her “understand how dangerous it is for all of us when there is so little trust and mutual understanding.”²⁵⁹ Following the shooting, Partnow emphasized that the police “were dangerous because they didn’t feel trusted.”²⁶⁰ Partnow characterized the restorative circle as an “awakening moment” about the importance of dialogue when there is so little trust between police and the community that they serve.²⁶¹ Together, Brenneke and Partnow’s reflections indicate the importance of using non-adversarial processes on a continual basis after a police shooting.

V. KEY TAKEAWAYS FOR CONSIDERATION WHEN IMPLEMENTING NON-ADVERSARIAL PROCESSES IN THE IMMEDIATE AFTERMATH OF POLICE SHOOTINGS

These case studies demonstrate that non-adversarial processes can be used in the immediate aftermath of police shootings, alongside adversarial processes, to build police-community trust. In the case of CRS, it is necessary for scholars to perform additional research on CRS’s work to determine its efficacy. Although CRS operates with some degree of secrecy, it may be possible for scholars to interview CRS mediators about which non-adversarial processes have been used most frequently and have exhibited success. Scholars should also interview community leaders and police agencies that have had direct contact with CRS.

The Seattle restorative circle exemplifies that non-adversarial processes can be implemented to address police-community trust that has been eroded by a police shooting. Brenneke stressed that during the post-circle meeting, “[e]veryone had a sense of connection to one another and increased trust resulting from the . . . ongoing contacts and relationships that had developed in the intervening months.”²⁶² Although the restorative circle did not have the longevity that Brenneke and Partnow had hoped for, this case study demonstrates that non-adversarial processes can in fact be implemented post-shooting. Public interest lawyers, restorative justice facilitators, and mediators can all glean insights from this case study.

Moving forward, it is crucial to better understand how restorative circles and other restorative justice processes can operate within larger advocacy efforts for systemic police reform. Under the current constraints of § 1983 litigation and civilian complaints, there are many civilians who are victims of police excessive force but ultimately cannot obtain adequate relief via the

²⁵⁹ See Telephone interview with Susan Partnow, *supra* note 228.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Brenneke, *supra* note 214.

courts or civilian oversight mechanisms.²⁶³ These civilians may benefit from participating in non-adversarial processes.

There are several takeaways from CRS and the Seattle restorative circle case studies that may guide stakeholders:

Voluntariness. Participation in any restorative justice process, mediation, or dialogue should not be coerced. Restorative justice processes may not be the right fit for every community because of the needs of the victim's family and willingness of police departments to meaningfully participate in dialogue. Where restorative justice processes are appropriate, it is crucial to remember that a dialogue's success is contingent on securing active participation from key stakeholders on both sides. This primarily includes, but is not limited to, the victim's family members, community representatives or leaders, and possibly social services providers like in the Seattle restorative circle. In addition, there must be participation or endorsement from law enforcement agency leadership (e.g. the Chief and command staff), union representatives, and the law enforcement agency's legal counsel.

Flexibility and Confidentiality. Restorative justice processes used in the immediate aftermath of a police shooting must be more flexible than traditional mediation. Flexibility is important in two respects. First, participants must be willing to limit dialogue to specific topics that may exclude a discussion of liability or the factual allegations concerning the incident. The Seattle case study was made possible largely because the participants did not discuss the actual shooting incident and instead focused on the subsequent police-community tensions that had arisen. Participants should consider CRS's flashpoint timeline as a possible resource in selecting discussion topics. For example, dialogue might focus on how officers interacted with communities during protests, rallies, and/or marches organized post-shooting.

Second, participants should be flexible if the police department decides to prohibit the attendance of the officer(s) responsible for the shooting. While traditional mediation would require both sides to be present, this may not be possible in the aftermath of police shootings due to ongoing adversarial processes. In these instances, it is important to remember that participants can still have meaningful dialogue and create robust action plans even when the officer(s) involved in the incident are not present.

²⁶³ See Blum, *supra* note 12, at 913-14 ("There is a growing consensus among practitioners, scholars, and judges that Section 1983 is no longer serving its original and intended function as a vehicle for remedying violations of constitutional rights, that it is broken in many ways, and that . . . barriers erected by the Supreme Court will hinder a plaintiff's ability to seek redress."); Livingston, *supra* note 13, at 656 ("The fact is that even the most aggressive complaint investigation will fail to resolve many complaints one way or another.").

Confidentiality is also an important factor for the success of any restorative justice process. Participants, especially law enforcement officials, may be more likely to have an honest, open dialogue if they feel assured that their statements will not be used against them in a later legal proceeding. For the sake of transparency, however, the final action plan should be circulated to local news and/or community organizations because this may encourage non-participants to view law enforcement officials with renewed legitimacy.

Follow-up. Restorative justice processes will not be successful if they are used once as a quick fix and never revisited again. Restorative justice processes should be viewed as continuous and involve follow-up long after the initial dialogue has been completed. It is important to view restorative justice processes this way because building trust and legitimacy is an ongoing responsibility for both police and community members.

VI. CONCLUSION

Before stakeholders replicate the Seattle restorative circle, or conduct dialogue spaces like CRS, it is important to acknowledge one basic conclusion drawn from these case studies: non-adversarial processes can and should be implemented alongside adversarial processes in the immediate aftermath of police shootings. This is important not only because adversarial processes often fail to meet the unique needs of victims' families, but also because adversarial processes are not designed to build trust and legitimacy, which is essential in the aftermath of these emotionally-charged incidents.