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The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice

THE OVERLOOKED VICTIM RIGHT: ACCORDING VICTIM-SURVIVORS A
RIGHT OF ACCESS TO RESTORATIVE JUSTICE

LYNN S. BRANHAM*

ABSTRACT

In recent years, states have accorded victim-survivors more expansive legal rights and made it easier for them to invoke those rights. Conspicuously absent from the litany of victims' rights enumerated in the law is the right to be afforded access to restorative justice processes. This Article challenges this systemic failure to understand and respond to the full spectrum of victim-survivors' needs. First, the Article provides three examples of core needs of victim-survivors that are largely disregarded by criminal justice systems and profiles how restorative justice equips criminal justice systems to better meet those needs. The Article then spotlights pertinent research confirming the benefits that redound to victim-survivors who participate in restorative processes. The Article concludes with a call for the law to accord victim-survivors a new right—a right of access to restorative justice processes—the need for which criminal justice systems have overlooked for far too long.

INTRODUCTION

In the mid-1990s, I spearheaded an effort to garner the American Bar Association's (ABA) support for the integration of restorative justice into criminal justice systems. Restorative justice focuses both on meeting the needs of people harmed by a crime and providing an opportunity for the person responsible for causing that harm (the responsible party) to grasp its adverse impact and assume responsibility for allaying it. Restorative justice also provides an opportunity to heal and repair relationships fractured by a crime.

Restorative justice conferences (RJCs) constitute one of the primary means of delivering restorative justice in this country.¹ During a restorative justice conference, a trained facilitator fosters a dialogue between the victim-survivor and responsible party about the injurious effects of the crime and what the responsible party needs to do to ameliorate them. Close family members, friends, or other supporters of the victim-survivor and the responsible party also participate in this facilitated exchange.² These supporters, comprising what are also called "communities of care," lend perspective during the RJC regarding the crime's adverse impact and how

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1. TED WACHTEL, DEFINING RESTORATIVE 2, 6-7 (2016).
2. *Id.* at 2.

the responsible party can best remediate that harm.³ At the end of the RJC, the facilitator typically records the agreed-to reparative steps in a written document signed by all the RJC participants.

Initially, the initiative to secure the ABA's endorsement of restorative justice faced a groundswell of opposition. Prosecutors, defense attorneys, judges, and others inured to the day-to-day workings of the criminal justice system were united in their opposition to this departure from the status quo. But then something happened: these ABA criminal justice leaders heard from a beneficiary of restorative justice.⁴

The beneficiary was the father of a young woman who had been raped and murdered. The ABA leaders first heard the victim's father describe his unrelenting pain following his daughter's murder. The father then recounted to his subdued and somber audience the turning point in his pain: when he was afforded the opportunity to participate in restorative dialogues, facilitated by a restorative justice expert, with the person who had murdered his daughter. These encounters enabled the father to describe the after-effects of his daughter's murder to the person who had taken her life, including debilitating sorrow and suffering that did not abate as time passed. Through these conversations, the father was also able to secure answers to questions about his daughter's death that had haunted him for years. Additionally, the facilitated dialogues gave the father the chance to relate what he most wanted the person responsible for his daughter's death to do to bring him some solace.

That day, the ABA's Criminal Justice Section Council unanimously approved the resolution calling on federal, state, territorial, and local governments to integrate victim—offender mediation, the then-prevailing restorative justice mechanism,⁵ into their criminal justice systems.⁶ The House of Delegates, the ABA's official policymaking body, quickly followed suit, endorsing the utilization of victim-offender mediation to import restorative justice into criminal justice systems.⁷

What accounted for the sudden shift within the ABA from resolute opposition to restorative justice to unanimous support for what had been decried as an almost heretical proposal for change in the functioning of

3. *Id.* at 3-4, 7.

4. The events recounted occurred at a meeting of the ABA's Criminal Justice Section Council in which the author also participated. The meeting was held on April 23-24, 1994. *See* Criminal Justice Section, ABA, *Report to the House of Delegates* [hereinafter *Criminal Justice Section Report*] general information form 1 (1994), https://www.americanbar.org/content/dam/aba/directories/policy/annual-1994/1994_am_101b.pdf.

5. *See* WACHTEL, *supra* note 1, at 2-3 (explaining that restorative justice conferences, which integrate "communities of care" into the restorative process, are increasingly being used to implement restorative justice worldwide).

6. *See* Criminal Justice Section Report, *supra* note 4, at 1.

7. *See* ABA Policy Related to Criminal Justice, ABA 42 (2020), <https://www.americanbar.org/content/dam/aba/administrative/crsj/criminal-justice.pdf>.

criminal justice systems? The answer is quite simple. A father who had suffered incalculably from his daughter's murder had told the ABA's criminal justice leaders that he needed restorative justice. His words had a profound effect on those in the room, including me. No one had the audacity or, it appeared, the desire to tell this father that that was not what he needed or that his need and the parallel need of other victim-survivors were irrelevant to the functioning of criminal justice systems.

However, criminal justice policymakers across the country send that implicit message to victim-survivors today by continuing to deprive them of the opportunity for restorative justice. The purpose of this article is to challenge this indifference to the full spectrum of victim-survivors' needs. The article posits that not only should justice officials afford victim-survivors the opportunity to have access to restorative justice but also that the *right* of victim-survivors to this access should be enshrined in the law. First, the article provides three examples of core needs of victim-survivors that are largely disregarded by criminal justice systems and profiles how restorative justice equips criminal justice systems to better meet those needs. Next, the article spotlights particularly pertinent research findings that have confirmed the benefits that redound to victim-survivors who participate in restorative processes, once they are made available to them. The article then concludes with a call for the law to accord victim-survivors a new right—a right of access to restorative justice processes—the need for which criminal justice systems have overlooked for far too long.

I. RESTORATIVE JUSTICE ADDRESSES VICTIM-SURVIVORS' UNMET NEEDS

What began as a nascent victims' rights movement in the 1970s has had a discernible impact on criminal justice policies, procedures, and practices across the country.⁸ All of the states now have statutes, constitutional provisions, or both that extend rights and protections to victim-survivors.⁹ The rights accorded vary by jurisdiction.¹⁰ Examples of prototypical rights include the right (1) to be notified of certain court dates, (2) to tender information to be considered at sentencing about the crime's impact on the victim, (3) to be apprised when a defendant sentenced to prison becomes eligible for parole, and (4) to provide information to the parole board to be considered when making its parole-release decision.

While the extension of these rights to victim-survivors is laudable,

8. Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Mexico's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 103, 105 (2020).

9. *Id.* at 105.

10. See *VictimLaw*, OFFICE OF JUSTICE PROGRAMS, <https://victimlaw.org/victim-law/start.do> (last visited August 4, 2021) (providing a database of the rights of victim-survivors in federal, state, territorial, and tribal jurisdictions, including the sources of those rights).

criminal justice systems in the United States currently leave victim-survivors with some of their most basic needs unmet or only partially met. Below is an overview of three of these interrelated needs—the need for information from the responsible party, the need to “feel heard” by this person, and the need for a role in determining what the responsible party needs to do to “right the wrong” to the victim-survivor. This section also elucidates how restorative justice fills the void in meeting each one of these needs.

A. Need for Information from the Responsible Party

1. The Need

Victim-survivors have informational needs. The law depicts and responds to those needs in different ways. Some statutory and constitutional provisions provide for the tendering of information to victim-survivors about their legal rights and remedies and the support services and benefits available to them.¹¹ Others mandate that victim-survivors be apprised of significant developments in the criminal case, including its outcome.¹² These and other informational tidbits can help alleviate some of victim-survivors’ stress resulting from the complexities of, and delays in, a criminal case.

According victim-survivors such legal protections, however, does not satisfy their core informational needs. For example, victim-survivors often want to know what animated the crime—why a person committed it.¹³ When the perpetrator of the crime is a stranger, victim-survivors may want to know more about the person who harmed them.¹⁴ Additionally, victim-survivors yearning for a sense of safety after a crime commonly want feedback that will help them gauge whether the responsible party will victimize them again.¹⁵ And they may have questions about what transpired during the crime.¹⁶

11. *See id.* (providing a link to a topical search that produces a list of jurisdictions providing victim-survivors these protections).

12. *See id.*

13. JO-ANNE WEMMERS & MARISA CANUTO, VICTIMS’ EXPERIENCES WITH, EXPECTATIONS AND PERCEPTIONS OF RESTORATIVE JUSTICE: A CRITICAL REVIEW OF THE LITERATURE 26 (2002). *See also* Mark Austin Walters, *I Thought “He’s a Monster” . . . [But] He was Just . . . Normal’: Examining the Therapeutic Benefits of Restorative Justice for Homicide*, 55 BRIT. J. CRIMINOLOGY 1207, 1215 (2015) (discussing the importance to two sisters of a murder victim of learning whether he had been killed because he was gay).

14. WEMMERS & CANUTO, *supra* note 13, at 5 (citing victim-survivors’ feedback that they wanted to know what the person who committed the crime “was like”).

15. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 28 (2019) (noting from conversations with hundreds of victim-survivors that they seek “reason to believe they will be safe,” not just in the short term but over the long term, from the person who harmed them). *See also* CATHERINE BARGEN, AARON LYONS & MATTHEW HARTMAN, CRIME VICTIMS’ EXPERIENCES OF RESTORATIVE JUSTICE: A LISTENING PROJECT 21 (2019) (quoting a victim-survivor expressing the desire to feel safe that spurs some victim-survivors’ participation in a restorative justice process: “I want to be able to look at them in the street and not feel scared.”).

16. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE, REVISED AND UPDATED

Criminal justice norms presently leave these and other victim-survivors' questions largely unanswered. Although victim-survivors can pick up bits of information about the offense and the person who committed it by attending the criminal proceedings, the often-cryptic information relayed to the courts is neither intended nor attuned to meet the victim-survivors' informational needs. Rather, the information being funneled to the courts is designed to aid and influence their decision-making, not to aid victim-survivors who may be grappling with questions triggered by a crime.

Further compounding the difficulty of meeting victim-survivors' informational needs in conventionally operating criminal justice systems is that while there are commonalities in the general *types* of basic crime-related information that many victim-survivors want, the informational needs of one victim will not mirror those of another victim. For example, some victim-survivors afforded the opportunity to engage in a facilitated restorative dialogue with the person who burglarized their home might want to know whether the responsible party was struggling with a substance-abuse problem and if or how that problem contributed to the decision to commit the crime. This feedback, however, might be inconsequential to other burglary victims who are much more concerned with finding out why their home was targeted for the burglary. In short, the informational needs of any one victim about a crime and the person who committed it are *sui generis*, unlike those of any other victim.

2. Meeting the Need Through Restorative Justice

Victim-survivors cite their unaddressed informational needs among their chief reasons for wanting to participate in a restorative process with the person who caused them harm.¹⁷ In a seminal study conducted by a team of criminologists led by Dr. Joanna Shapland (Shapland study), for example, victim-survivors reported that their desire to have "some questions about the offense answered" was a principal reason why they had opted to participate in a restorative justice process.¹⁸ Other victim-survivors, moreover, have confirmed in interviews conducted after their participation in a restorative process that during the process they received the sought-after answers to their questions.¹⁹

Restorative justice processes are structured to maximize their effectiveness in meeting victim-survivors' currently unfulfilled informational

22 (2015).

17. See, e.g., BARGEN, LYONS & HARTMAN, *supra* note 15, at 14.

18. JOANNA SHAPLAND, GWEN ROBINSON & ANGELA SORSBY, RESTORATIVE JUSTICE IN PRACTICE: EVALUATING WHAT WORKS FOR VICTIMS AND OFFENDERS 90-91, 93 (2011).

19. Shirley Jülich & Fiona Landon, *Achieving Justice Outcomes: Participants of Project Restore's Restorative Processes*, in RESTORATIVE RESPONSES TO SEXUAL VIOLENCE 199-200 (Estelle Zinsstag & Marie Keenan eds., 2017).

needs. Facilitators intentionally leave space and time for the victim-survivors to raise questions to which they want or need a response. In addition, facilitators pose questions to the responsible party to ferret out the answers to some of the questions victim-survivors commonly struggle with. Questions such as, “What happened?” and “What were you thinking about at the time?” prompt responses from the responsible party that fill in blanks about the crime that may be vexing the victim.²⁰ If left unfilled, these informational gaps can make it difficult for victims to construct a narrative of the crime that makes sense to them.²¹ These reconstructed narratives made possible through the information and insights acquired during the restorative process, in turn, make it easier for victims to move forward after a crime.²² As one victim-survivor who participated in a restorative justice process noted, “[U]nderstanding what led to [the crime], where this person came from, what was happening afterward, it helped me understand and emotionally process what had happened.”²³

Another victim-survivor’s account of a restorative justice process with her brother who had sexually abused her further illustrates how such a process can cathartically transform a victim’s narrative about a crime. The fourteen-year-old victim related:

[His] apology didn’t really do much, it didn’t uplift me, but when he told me he was abused, that was it, I was like, it was like this massive weight off my shoulders, it was like, ah, I can see why you did it. . . that’s what I could never figure out, why me?²⁴

Because of the restorative encounter, this victim’s personal narrative about the sexual abuse shifted in a way that unburdened her—to one captured in the phrase “Hurt people hurt people.”²⁵ Similarly, the answers other victim-survivors secure to their crime-related questions during a restorative process can play a critical role in helping them “make sense of and integrate their pain.”²⁶

B. Need to Feel Heard by the Person Who Harmed the Victim-Survivor

20. *Restorative Conference Facilitator Script*, IIRP GRADUATE SCH. (April 20, 2010), <https://www.iirp.edu/news/restorative-conference-facilitator-script>.

21. SERED, *supra* note 15, at 24.

22. *See id.* at 25. *See also* Antony Pemberton, Pauline GM Aarten & Eva Mulder, *Stories as Property: Narrative Ownership as a Key Concept in Victims’ Experiences with Criminal Justice*, 19(4) CRIMINOLOGY & CRIM. JUST. 404 *passim* (2019) (discussing the role of victim-survivors’ narratives in promoting their healing and helping them move forward after a crime).

23. BARGEN, LYONS & HARTMAN, *supra* note 15, at 15.

24. SHIRLEY JEAN JÜLICH, *BREAKING THE SILENCE: RESTORATIVE JUSTICE AND CHILD SEXUAL ABUSE* 226 (2001), available at https://mro.massey.ac.nz/bitstream/handle/10179/2110/02_whole.pdf?sequence=1&isAllowed=y.

25. SERED, *supra* note 15, at 24.

26. *Id.* *See also* BARGEN, LYONS & HARTMAN, *supra* note 15, at 15 (summarizing another victim’s account of the personal impact of information procured during a restorative justice process: “I don’t think I would have had closure without understanding who this guy was and what had happened, and I had no idea until the dialogue.”).

1. The Need

For many victim-survivors, it is not enough to propound questions to the person whose criminal conduct has harmed them. These victim-survivors also want to relate information to this person, such as how the crime impacted them. Some might rejoin that tendering a victim impact statement can meet this need. It cannot. A victim impact statement is a written or verbal statement that recounts to the court how a crime adversely affected the victim. However, victim-survivors' unaddressed need entails more than providing feedback *to* the responsible party via a victim impact statement submitted to the court at sentencing. Rather, this need is for an avenue to communicate *with* the person who harmed the victim about what the victim considers important about the crime, its effects, and what the victim needs from the responsible party to move forward after the crime.

Different terms have been used to capture victim-survivors' unmet need to communicate directly with the responsible party. Criminologist Howard Zehr, for example, has described this need as the need for "truth-telling."²⁷ Others have spoken of victim-survivors' need to have the opportunity to tell their "stories."²⁸ While the terminology used to describe this unaddressed need may vary, those striving to meet this need should be mindful that victim-survivors need more than just an opportunity to relate what happened to them during the crime and how they were affected by it. In other words, reciting a speech to the person who committed the crime will not suffice. In addition to the opportunity to share what they experienced and their feelings during and after the crime, many victim-survivors need an assurance that the responsible party has listened to them and gained a better understanding of how the crime has affected them. In short, victim-survivors need to feel "heard."²⁹

2. Meeting the Need Through Restorative Justice

In interviews, victim-survivors have revealed that they want the opportunity to participate in a restorative justice process to fulfill their need for an interchange with the responsible party.³⁰ In the Shapland study, one of the principal reasons victim-survivors cited for their participation in a restorative justice conference was to "express" their "feelings and speak directly to the other person"—the person who committed the crime.³¹ Other studies have confirmed that restorative justice meets this expressed

27. ZEHR, *supra* note 16, at 22.

28. See, e.g., Nikki Godden-Rasul, *Repairing the Harms of Rape of Women Through Restorative Justice*, in RESTORATIVE RESPONSES TO SEXUAL VIOLENCE, *supra* note 19, at 20 (referring to victim-survivors' need to tell their stories in their own words).

29. See Mara Schiff, *Satisfying the Needs and Interests of Stakeholders*, in HANDBOOK OF RESTORATIVE JUSTICE 232 (Gerry Johnstone & Daniel W. Van Ness eds., 2007).

30. See SHAPLAND, ROBINSON & SORSBY, *supra* note 18, at 90-91 (relating primary reasons victim-survivors cited during interviews for wanting to participate in a restorative justice process).

31. *Id.*

need to communicate with the responsible party. For example, when a Canadian research team conducted listening sessions with victim-survivors about their experience with restorative justice, one participant related a frequently expressed view: “I was really able to express myself . . . having the space to be asked the questions so s/he could really hear how deep the [impact] went.”³² Another noted, “The most meaningful and important thing for me was having an opportunity to talk to the [offender] and to tell them what their actions cost me.”³³

Several features of a restorative justice process account for why it is so well suited to meet victim-survivors’ largely overlooked need to communicate *with* the person responsible for causing them harm. One is the role the facilitator performs during the process. Through questions posed to victim-survivors, the facilitator enables them to candidly share their emotions and losses stemming from the crime. Questions such as, “How do you feel about what happened?” and “What has been the hardest thing for you?” make it possible for victim-survivors to share their anger, sadness, fear, disappointment, sense of betrayal, grief, physical pain or debilitation, financial trouble, and other adverse effects of the crime.³⁴

Another reason why a restorative process is particularly well equipped to fill the void in meeting victim-survivors’ need to share their “truth” with the responsible party is that the two are conversing face to face. This direct encounter allows victim-survivors to see and hear—through the facial expressions, the body language, and the tone and content of the responsible party’s verbal responses—the impact of their words. Victim-survivors, therefore, have the chance to receive the longed-for assurance that they have been “heard.”

The values inherent in restorative justice also help create an environment conducive to the open and constructive sharing of what may be a victim’s intense emotions. One of these “core” values is respect for every person regardless of what they have done, what they have experienced, or who they are.³⁵ Dr. Zehr highlighted the importance of respect in restorative justice when he said: “If I had to put restorative justice into one word, I would choose respect: respect for all—even those who are different from

32. BARGEN, LYONS & HARTMAN, *supra* note 15, at 23.

33. *Id.*

34. See *Restorative Conference Facilitator Script*, *supra* note 20.

35. See MINISTRY OF JUSTICE, RESTORATIVE JUSTICE: BEST PRACTICE IN NEW ZEALAND 32 (2011), <https://www.justice.govt.nz/assets/Documents/Publications/RJ-Best-practice.pdf>. See also UNITED NATIONS OFFICE ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 5-6 (2d ed. 2020), https://www.unodc.org/documents/justice-and-prison-reform/20-01146_Handbook_on_Restorative_Justice_Programmes.pdf?fbclid=IwAR3XCWwiLHIO_AHCj72i1fttKH6d5VrzlwZbeuCsWSbELnw2FNivWS4Mgp0 (noting that “respect and dignity for all involved” is a value and guiding force in restorative justice); ZEHR, *supra* note 16, at 47 (describing respect as a “supremely important” value of restorative justice).

us.”³⁶ The sense of respect for all present that pervades the atmosphere of a restorative process fosters communication between the participants. Victim-survivors can share their thoughts and feelings about the crime without pent-up emotions, theirs or others’, erupting into yelling or the name-calling or other caustic comments that stymie communication.

*C. Need for a Role in Determining What the Responsible Party Needs to Do to “Right the Wrong” to the Victim-Survivor*³⁷

1. The Need

Despite the steps that have been taken to accord victim-survivors legal rights,³⁸ they still largely remain on the sidelines, only watching the progression of a case and awaiting its disposition. While they may be allowed to tender their views at certain junctures of a criminal case, such as through victim impact statements at a sentencing hearing, they have no decision-making authority, even on issues that pertain directly to them.

If we were not so acclimated to this convention, we might be struck with how patronizing it is to victim-survivors. Others, such as a prosecutor negotiating a plea agreement that includes a restitution requirement or a legislature enacting a restitution statute,³⁹ define and prioritize a victim-survivor’s needs stemming from the crime, if attention is even focused on the victim-survivor’s needs at all. And others, not the victim-survivor, decide whether the person who committed the crime will be responsible for meeting any identified need. This arrogated authority to determine what a victim-survivor most needs from the responsible party typically and narrowly focuses on pecuniary restitution for the losses the victim-survivor suffered as a result of the crime; the less tangible, but no less important, needs of victim-survivors are usually ignored.⁴⁰ And even with financial reparations, the victim-survivor still has, as the Supreme Court recognized in *Kelly v. Robinson*, “no control over the amount of restitution ordered or over the decision to award restitution.”⁴¹

36. ZEHR, *supra* note 16, at 47.

37. See Christopher Bennett, *Satisfying the Needs and Interests of Victims*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 29, at 250-53 (arguing that the language of restorative justice should focus on “righting wrongs,” not “repairing harms,” because regardless of any tangible or emotional harm a crime causes, it inflicts a “moral injury” that “consists in being treated as if you do not really count”).

38. See *supra* notes 8-10 and accompanying text.

39. See, e.g., Mandatory Victims Restitution Act, 18 U.S.C. § 3663A (2020) (requiring sentences for specified federal crimes to include restitution).

40. See Heather Strang, Lawrence W. Sherman, Evan Mayo-Wilson, Daniel Woods & Barak Ariel, *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*, 9 (1) CAMPBELL SYSTEMATIC REV. 1, 39 (2013), <https://onlinelibrary.wiley.com/doi/full/10.4073/csr.2013.12> (referring to meta-analysis’s findings that confirmed that “courts often neglect the non-material dimensions of victimi[z]ation”).

41. *Kelly v. Robinson*, 479 U.S. 36, 52 (1986) (holding that a restitution obligation is not dischargeable in a bankruptcy proceeding).

This *modus operandi* of criminal justice systems is problematic because treating restitution as victim-survivors' primary need vis-à-vis the person who harmed them does not correspond with what many victim-survivors report are their dominant needs.⁴² There are three reasons for this discordance.

First, victim-survivors may have multiple, crime-caused needs that they want the responsible party to play a role in addressing. For example, a victim-survivor might indeed want monetary compensation for medical expenses incurred after being assaulted by a drunken friend. But to satisfy an additional, and perhaps even greater, need for inner healing after the assault, the victim-survivor might want the friend to get help for the alcoholism that has caused the friend's life to unravel and resulted in the assault. Alternatively, in addition to restitution, the victim-survivor might want affirmation and reassurance that the victim-survivor is not responsible for the crime. The need for such reassurance often arises because many victim-survivors blame themselves for the crime.⁴³

Second, victim-survivors are not homogeneous, and neither are their needs. Therefore, when considering how victim-survivors' needs can be met, they cannot be lumped together, as criminal justice systems are prone to do.⁴⁴ While one victim-survivor might, for example, only want monetary compensation for property taken and physical injuries sustained during a robbery, the victim of a similar crime might most want to feel safe—to receive some form of reassurance from the responsible party to dissipate the victim-survivor's fear of being the target of a future crime. To move forward after the crime, still another robbery victim might want and need to be freed from anger that has festered since the crime. One woman's account of her experience in a restorative process illustrates this form of emotional healing that such a process can bring. After participating in a restorative process with the person who killed her son and husband when driving under the influence of alcohol and marijuana, she wrote, "Hate left me that day."⁴⁵

Third, when criminal justice systems vest others with the authority to decide what a victim-survivor's needs are and how, if at all, they will

42. See Strang, Sherman, Mayo-Wilson, Woods & Ariel, *supra* note 40, at 36 (relating research findings showing that while securing material recompense for the harm a crime inflicted can be a "significant part of a restorative process," "material restoration" is not of "primary importance" to most victim-survivors).

43. Lawrence W. Sherman, Heather Strang, Caroline Angel, Daniel Woods, Geoffrey C. Barnes, Sarah Bennett & Nova Inkpen, *Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials*, 1 J. EXPER. CRIMINOLOGY 367, 368 (2005) (referring to victims' "common tendency to blame themselves for having somehow caused the crime").

44. Cf. Godden-Rasul, *supra* note 28, at 21 (noting a "problem" of criminal justice — its creation of a "category of 'rape victims', eliding differential experiences").

45. Amy Holloway & Gale Burford, "Hate Left Me That Day": *Victim Offender Dialogue in Vermont*, in RESTORATIVE JUSTICE TODAY 145, 145-49 (Katherine S. van Wormer & Lorenn Walker eds., 2013).

be met, they marginalize victim-survivors and ignore something essential to them—to feel re-empowered.⁴⁶ Many victim-survivors feel disempowered by the crime, and they want to regain a sense of control over their lives, which they lost as a result of the crime. To do this, victim-survivors want to make decisions about how to address their crime-related problems.⁴⁷ They want to identify the crime's adverse effects on them and help decide what reparative steps the responsible party will take to remove or dissipate those negative effects.⁴⁸ However, criminal justice systems currently do not offer victim-survivors this chance for re-empowerment.

2. Meeting the Need Through Restorative Justice

Victim-survivors have reported that one of the chief reasons they participate in a restorative process, when given the opportunity, is to help shape the response to a crime.⁴⁹ Note that the reference is to victim-survivors *helping* shape the response to a crime. The agreement participants enter into at the end of a restorative justice process may not necessarily constitute the sole response to the crime. Sometimes, for example, a judge will sentence the responsible party to a period of confinement or community supervision. But regardless of the systemic response to a crime, restorative justice offers victim-survivors something many of them want and currently do not receive—a chance to decide what they want and need the responsible party to do to amend the personal harm the crime caused.

This opportunity empowers victim-survivors. During a restorative justice conference, for example, the facilitator's questions enable a victim-survivor to not only explain to the responsible party the crime's injurious effects but also to identify what the victim-survivor wants the responsible party to do to "make things right."⁵⁰ And because the victim-survivor must concur in any decisions made during a restorative justice conference regarding the reparative steps the responsible party will take to rectify the wrong,⁵¹ the agreement stage of the conference further fortifies this sense of empowerment. Thus, while criminal justice systems are still mostly unresponsive to the disempowering effects of a crime on victim-survivors, restorative justice processes are tailored to meet their need to feel re-empowered.

46. ZEHR, *supra* note 16, at 22-23.

47. See SHAPLAND, ROBINSON & SORSBY, *supra* note 18, at 91-92.

48. HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 194 (2005).

49. See SHAPLAND, ROBINSON & SORSBY, *supra* note 18, at 91-92.

50. See WACHTEL, *supra* note 1, at 7 (listing "restorative questions" for facilitators to pose to victim-survivors during a restorative justice conference, including "What do you think needs to happen to make things right?").

51. TED WACHTEL, TERRY O'CONNELL & BEN WACHTEL, RESTORATIVE JUSTICE CONFERENCING: REAL JUSTICE & THE CONFERENCING HANDBOOK 217 (2010).

Restorative justice processes' evolving and dynamic nature contributes to their ability to enable victim-survivors to craft a response to the crime-related harm they suffered in a way that best meets their needs. Because participants openly share their experiences, feelings, and perspectives during a restorative justice conference, victim-survivors' views regarding their crime-generated needs and how they want the responsible party to meet them may change during the conference. The dialogue may unveil dimensions of the harm or attributes of the responsible party that victim-survivors were unaware of before the conference. Those revelations may, in turn, prompt victim-survivors to realize they need something more or different from the responsible party than they had initially thought at the outset of the restorative process. For example, victim-survivors commonly realize for the first time that it is important to them that others do not endure similar trauma.⁵² And they may then decide that to move forward from the crime, they need the responsible party to take certain prescribed steps, such as receiving anger-management counseling, working with a mentor, or getting treatment for a substance-use disorder, to diminish the risk of victimizing others in the future.

II. RESEARCH FINDINGS ON RESTORATIVE JUSTICE'S POSITIVE EFFECTS ON VICTIM-SURVIVORS

Researchers have confirmed that victim-survivors benefit when afforded the opportunity to participate in a restorative justice process. Two of the primary ways in which restorative justice positively impacts victim-survivors include (1) victim-survivors are more satisfied with the criminal justice system, and (2) victim-survivors feel more emotionally restored.

A. Greater Satisfaction with the Justice System

Numerous studies have determined that victim-survivors participating in restorative justice processes are highly satisfied with those processes.⁵³ Additionally, researchers have found that victim-survivors participating in restorative justice processes are more satisfied with the criminal justice system than victim-survivors whose cases are processed through the system in the traditional way.⁵⁴ Studies use different criteria to

52. Writing about her experience working with victim-survivors of violent crimes as the director of Common Justice, a victim-service and alternative-to-incarceration program that includes a restorative justice component, Danielle Sered observed: "We have talked with hundreds of survivors at Common Justice, and there is only one thing that has been important to all of them . . . [E]very single survivor we have spoken to has wanted one thing: *to know that the person who hurt them would not hurt anyone else*." SERED, *supra* note 15, at 29-30. See also Heather Strang, *Is Restorative Justice Imposing Its Agenda on Victims?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 95, 101 (Howard Zehr & Barb Toews eds., 2004) (noting that "victims care immensely that others will not have to endure what they have experienced").

53. See Daniela Bolívar, Inge Vanfraechem & Ivo Aertsen, *General Introduction*, in VICTIMS AND RESTORATIVE JUSTICE 2 (Inge Vanfraechem, Daniela Bolívar & Ivo Aertsen eds., 2015).

54. See, e.g., Strang, Sherman, Mayo-Wilson, Woods & Ariel, *supra* note 40, at 40-41. Ten studies met the stringent criteria for inclusion in this meta-analysis Dr. Strang and her research team

measure victim-survivors' satisfaction with the justice system. Common outcome measures include satisfaction with the way they were treated, satisfaction with the response to the crime, belief that the criminal justice process was fair, and more positive perception of the criminal justice system.⁵⁵ Whatever the outcome measure, victim-survivors participating in restorative justice processes report more positive outcomes than those in a control group.⁵⁶

B. Emotional Restoration

Another key research finding is that restorative justice processes are more successful than traditional criminal court processes in bringing "emotional restoration" to victim-survivors.⁵⁷ Emotional restoration can be measured in different ways. One meta-analysis of restorative justice conferences, for example, included the following indicators of emotional restoration: feeling safe because the fear of being victimized again by the responsible party was eliminated; no longer apprehending that the responsible party would victimize someone else; and receiving what the victim-survivor perceived as a sincere apology from the responsible party.⁵⁸ Regardless of the metric used for emotional restoration, victim-survivors participating in RJC's reported greater emotional restoration than their counterparts who lacked that opportunity.⁵⁹ Self-blame for the crime was the only measure of emotional restoration that did not consistently reveal any difference between victim-survivors whose cases were processed conventionally and those who participated in a restorative justice conference.⁶⁰

Equally significant are the research findings that show that the benefits of restorative justice conferences persist in diminishing the emotional harm of a crime over time. One notable study collected feedback from victim-survivors who had participated in restorative justice conferences or had their cases assigned to the courts ten years earlier.⁶¹ The results provided what one of the researchers termed "a strong indication of the

conducted on the effects of restorative justice conferences. *Id.* at 12, 20-21. For a study to be included in the meta-analysis, for example, the participants in the restorative justice conferences, both the victim-survivors and those perpetrating crimes against them, must have been randomly assigned (or in the case of victim-survivors, quasi-randomly assigned) to them after consenting to such participation if selected. *Id.* at 12.

55. *Id.* at 40-41.

56. *Id.*

57. See, e.g., Strang, Sherman, Mayo-Wilson, Woods & Ariel, *supra* note 40, at 37-39.

58. *Id.* at 36-39.

59. *Id.* at 37-39.

60. *Id.* at 36-37.

61. See Heather Strang, *Conferencing and Victims*, in *CONFERENCING AND RESTORATIVE JUSTICE: INTERNATIONAL PRACTICES AND PERSPECTIVES* 83, 92-95 (Estelle Zinsstag & Inge Vanfraechem eds., 2012).

extraordinary capacity RJC has for resolving the emotional harm that victim-survivors suffer, especially victims of violence.”⁶² The victim-survivors assigned to RJC were less anxious that they would be repeat crime victims.⁶³ In addition, when asked, “Would you say that you are sometimes afraid to do things because you might be the victim of crime again?” they reported being less likely to refrain from doing something they wanted to do out of fear of being a crime victim again.⁶⁴ The RJC-assigned victim-survivors were also much less likely than their court-assigned counterparts to feel bitter about how the justice system had treated them.⁶⁵ Those who had participated in a restorative justice conference were, moreover, less likely after the ten-year interval to report wanting to exact revenge against the person who had harmed them, with the contrast in vengeful feelings especially marked for victim-survivors of violent crimes.⁶⁶

III. ACCORDING VICTIM-SURVIVORS A RIGHT OF ACCESS TO RESTORATIVE JUSTICE

If those wedded to the status quo in the delivery of justice were to delve more deeply into the unmet needs and desires of victim-survivors, they would find that many victim-survivors do not share their preference for an adversarial mode of justice. The insights gained from listening to and learning about victim-survivors would point in one direction—to according victim-survivors a general right of access to restorative justice. Victim-survivors could then decide for themselves whether to invoke this right.

A. Listening to What Victim-Survivors Want and Need: Access to Restorative Justice

Since 2008, there has been a “new wave” of state constitutional amendments according victim-survivors more expansive legal rights and making it easier for them to invoke those rights.⁶⁷ Conspicuously absent

62. *Id.* at 95.

63. Dr. Strang described the difference in anxiety levels as “astonishing,” with 21% of the RJC participants reporting they were still anxious compared to 45% of the victim-survivors in the control group. *Id.* at 94.

64. While this difference was manifest whether the crimes in question were violent or property crimes, the difference was particularly stark in the violent-crime context. Eighteen percent of the RJC-assigned victim-survivors of violent crimes reported being afraid of being victimized again if they did what they wanted to do, while 41% of those assigned to the courts reported experiencing such fear. *Id.*

65. A majority (74%) of the RJC-assigned victim-survivors reported not feeling bitter about their treatment by the criminal justice system, while only 39% of the court-assigned victim-survivors harbored no bitterness. *Id.*

66. When asked if “you would do some harm to your offender if you got the chance,” 20% of the court-assigned victim-survivors responded yes, compared to 7% of the RJC-assigned victim-survivors. *Id.* When narrowed to victim-survivors of violent crimes, 45% of the court-assigned victim-survivors felt vengeful compared to 9% of the RJC-assigned victim-survivors. *Id.* at 94-95.

67. Cassell & Garvin, *supra* note 8, at 101, 106.

from the litany of victims' rights enumerated in these amendments is the right to be afforded access to restorative justice processes. These more recent as well as earlier constitutional amendments intended to protect victims' rights seem predicated on the assumption that victim-survivors prefer to seek justice in an adversarial setting. For three reasons, this assumption is erroneous.

First, the supposition that victim-survivors prefer a traditional criminal justice forum is grounded on a one-size-fits-all perception of victim-survivors. Some victim-survivors, it is true, want the criminal justice system to handle the matter completely, leaving them no role or a peripheral role in the process. Other victim-survivors, however, want to participate in a restorative justice process. In fact, many victim-survivors in the United States have demonstrated this desire by choosing, when given the opportunity, to participate in a restorative process with the person who harmed them.⁶⁸

Second, the conjecture that victim-survivors are universally not interested in participating in a restorative justice conference ignores what victim-survivors themselves have said about their unmet needs. This article highlights several of these unmet needs, showing how restorative justice fills the void in meeting them. These needs include (1) the need for answers to nagging questions that only the person who committed the crime can answer,⁶⁹ (2) the need to have a direct exchange *with* the responsible party to share the crime's impact on the victim-survivor and give other pertinent feedback as the dialogue unfolds,⁷⁰ and (3) the need to have some decision-making role in determining what the responsible party needs to do to "right the wrong" the victim-survivor has suffered personally.⁷¹

Third, the assumption that victim-survivors uniformly prefer that their cases be processed in the traditional way, devoid of an opportunity for a restorative dialogue with the person who harmed them, is belied by the research on benefits victim-survivors reap from participating in a restorative process. As discussed in this article, victim-survivors are more satisfied with the justice system when it includes a restorative component.⁷² When afforded the chance to participate in a restorative justice conference, many of them also experience what can be a long-lasting diminution in the emotional harm a crime inflicted on them.⁷³

68. PAUL KENNY & LIAM LEONARD, *THE SUSTAINABILITY OF RESTORATIVE JUSTICE* 138 (2014).

69. *See supra* notes 13-26 and accompanying text.

70. *See supra* notes 27-36 and accompanying text.

71. *See supra* notes 37-52 and accompanying text.

72. *See supra* notes 54-56 and accompanying text.

73. *See supra* notes 57-66 and accompanying text.

B. Creating a Right of Access to Restorative Justice for Victim-Survivors

Through their words and actions highlighted throughout this article, victim-survivors have revealed more than that traditionally functioning criminal justice systems are still not victim-oriented; they have also confirmed that the law should accord them a *right* of access to restorative justice. First, by electing to participate in a restorative process, many victim-survivors have demonstrated they want this access. Second, victim-survivors have told those willing to listen that criminal justice systems habituated to past practices have failed to meet their core needs and that restorative justice processes meet those needs. And third, victim-survivors have reported reaping benefits from participating in a restorative justice process, including satisfaction with the justice system and emotional restoration, that often elude them in the strictly adversarial mode of justice that is the norm in this country.

By making access to restorative justice a legal right, the opportunity to participate in a restorative justice process would no longer hinge on the personal preferences and predilections of the government officials deciding whether to incorporate restorative justice into criminal justice systems. As is true with most legal rights, however, victim-survivors' right of access to restorative justice would not be absolute. In other words, a victim-survivor would not have an unconditional right to engage in a facilitated dialogue with the person responsible for the crime.

One limitation on the scope of the right stems from what is considered a touchstone of restorative justice: participation in a restorative process should be voluntary.⁷⁴ Forcing the responsible party to participate can lead to repeat victimization, exacerbating the crime's harm when it becomes apparent to the victim-survivor that the other party is a begrudging participant in the process, has no regrets about committing the crime, and has no intention of willingly assuming responsibility to remedy the harm or alleviate any suffering it caused.⁷⁵ Therefore, even if the law accords victim-survivors a right of access to restorative justice and a victim-survivor wants to participate in a restorative process with the person who perpetrated the crime, that hope might not come to fruition if the process itself would flout the core requirement of restorative justice that participation be voluntary.

That, of course, would not foreclose offering a victim-survivor an opportunity to participate in some other, though less-preferred, restorative

74. See e.g., Economic and Social Council Res. 2002/12 (July 24, 2002).

75. See W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM J. OF TRIAL ADVOC. 501, 514-15 (2008) (describing how such compelled participation in a restorative justice process "can and does lead to revictimization" as the "hostile attitudes" of those forced to participate become evident to victim-survivors).

process, such as one with family members of the person who committed the crime, someone who has committed a comparable crime, or other surrogates.

The screening that occurs in advance of a restorative process to determine a person's readiness for the restorative encounter might also lead to curtailment of a victim-survivor's general right of access to restorative justice.⁷⁶ For example, a person who committed a crime but denied during the screening process any wrongdoing would not be eligible to participate in a restorative process.⁷⁷ A *raison d'être* of restorative justice is to make possible the "righting of the wrong" done to the victim-survivor, something that cannot happen in the face of such a denial. And if an enraged victim-survivor expressed a desire to participate in a restorative justice conference so the victim-survivor could yell epithets at the responsible party, the victim-survivor would be disqualified from participating in a process whose governing ethos is respect.

IV. CONCLUSION

This article has called for the law to accord victim-survivors the long-overlooked right of access to restorative justice. Not all victim-survivors will avail themselves of this newly bestowed right. Not all victim-survivors invoke other of their legal rights. Legal rights can be waived. But the essential point is that if a victim right to restorative justice is embedded in the law, as called for in this article, victim-survivors will be able to decide whether they want to participate in a restorative dialogue with the person who harmed them. That determination will no longer be made by others. Not by legislators. Not by criminal justice officials. Not even by those who advocate for victims' rights. The decision will be made by victim-survivors. As it should be.

76. See SCOT. GOV'T, GUIDANCE FOR THE DELIVERY OF RESTORATIVE JUSTICE 17-18 (2017) (listing classic screening criteria including "whether and to what extent the person who has harmed is prepared, at this stage, to be accountable for their actions" and the extent to which the restorative justice process poses "a risk of emotional and physical harm to any participant").

77. See Wachtel, O'connell, & Wachtel, *supra* note 51, at 180 (noting that to participate in a restorative justice conference, the person who caused harm must admit committing the offense).