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Thalia González

*Georgetown University Law Center and Occidental College*

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## THE LEGALIZATION OF RESTORATIVE JUSTICE: A FIFTY-STATE EMPIRICAL ANALYSIS

Thalia González\*

### *Abstract*

*This Article addresses the increasing formal legal nature of restorative justice in the United States. Over the last three decades, a substantial body of research has demonstrated the ways in which restorative justice offers an alternative societal response to crime and harm. It has also examined how restorative justice empowers individuals and groups to address violence, respond to social, political and economic injustice, and engage in resistance to existing structural inequities. Yet a prominent gap in the field exists: a comprehensive theoretical and empirical examination of the codification of restorative justice in state law. Studies of this nature are essential given restorative justice's proliferation in formal law, as well as operationalization within multiple public systems. Drawing on data from an original 50-state analysis, this Article argues that the current degree of legal internalization of restorative justice indicates the emergence of a new legal norm. These findings call for a critical reexamination of current perceptions of restorative justice normatively and empirically. Beyond provoking new directions in research, these findings should be of significant interest to reformists seeking to advance laws, policies, and systems that promote fairness, equity, and justice and to practitioners who increasingly interact with formal restorative processes. The internalization and diffusion of restorative justice in state law has heightened the need for judges, attorneys, and advocates to not only understand restorative justice theoretically, but pragmatically as they must now make decisions regarding the use of restorative justice at different stages of legal processes.*

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\* © 2019 Thalia González. Thalia González is a Senior Scholar in the Center on Poverty and Inequality at Georgetown University Law Center and an Associate Professor at Occidental College. I wish to thank Annalise Butth, Scott Cummings, Lydia Nussbaum, and Beth Mertz, for their review and comments in preparation of this Article. I wish to acknowledge Teagan Langseth-Depaolis, Owen Keith and Mackenna Wenzl for their invaluable research assistance for this project. I also wish to thank the editors of *Utah Law Review* for their editorial guidance and preparation of this Article.

## INTRODUCTION

Beginning in the 1970s, restorative justice gained attention with reformists seeking more holistic remedies to address harm, conflict, and crime, while simultaneously increasing individual accountability without reliance on conventional punitive approaches in the criminal justice system.<sup>1</sup> Like many reform movements, the restorative justice movement has focused on contrasting its values and principles with those of the status quo.<sup>2</sup> Early restorative justice practices were largely variants of victim-offender mediation<sup>3</sup> and family group conferencing<sup>4</sup> models used in juvenile justice and child welfare settings. In the 1990s, American criminologist Howard Zehr published a seminal work in the field that grounded the identity of restorative justice as distinctly legal.<sup>5</sup> In *Changing Lenses*, Zehr

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<sup>1</sup> See, e.g., Paul McCold, THE RECENT HISTORY OF RESTORATIVE JUSTICE: MEDIATION, CIRCLES AND CONFERENCING, in HANDBOOK OF RESTORATIVE JUSTICE 23, 35–41 (Dennis Sullivan & Larry Tifft eds., 2007); Mark S. Umbreit & Marilyn Peterson Armour, *Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community*, 36 WASH. U. J.L. & POL'Y 65, 65 (2011) [hereinafter Umbreit & Armour, *Restorative Justice and Dialogue*]; DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 22–26 (3d ed. 2006); Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 519 (2007) [hereinafter Umbreit et al., *Restorative Justice: An Empirically Grounded Movement*].

<sup>2</sup> There is no universal definition of restorative justice; however, there is general consensus within the literature on a set of values and principles. See, e.g., VAN NESS & STRONG, *supra* note 1, at 4150. For purposes of this Article, I refer to “restorative justice” as the general framework under which specific practices and processes (i.e., circles, mediations, conferences, reparative sentencing boards, etc.) are used to achieve restorative justice goals. These practices or processes can occur as a single action or a series of actions within a restorative justice framework.

<sup>3</sup> See, e.g., VAN NESS & STRONG, *supra* note 1, at 28; MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE 113 (2010) [hereinafter UMBREIT & ARMOUR, AN ESSENTIAL GUIDE]; Howard J. Vogel, *The Restorative Justice Wager: The Promise and Hope of a Value-Based, Dialogue-Drive Approach to Conflict Resolution for Social Healing*, 8 CARDOZO J. CONFLICT RESOL. 565, 568 (2007).

<sup>4</sup> See, e.g., Kay Pranis, *Conferencing and the Community*, in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 40–48 (Gale Burford & Joe Hudson eds., 2000); UMBREIT & ARMOUR, AN ESSENTIAL GUIDE, *supra* note 3, at 143–73 (presenting a detailed overview of family group conferencing theories, principles, practices and models in multiple contexts); VAN NESS & STRONG, *supra* note 1, at 28, 30–33.

<sup>5</sup> See generally HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE (3d ed. 2005) (arguing restorative justice offers an alternative paradigm to understand law); see also Mark S. Umbreit, *Avoiding the Marginalization and “McDonaldization” of Victim-Offender Mediation: A Case Study in Moving Toward the*

positioned a legal view of restorative justice: a new lens by which legal systems could define and respond to crime, punishment, and harm.<sup>6</sup> He argued that retributive justice recognizes crime as “a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.”<sup>7</sup> By contrast, restorative justice views crime as a conflict not between the individual and the state, but fundamentally between individuals.<sup>8</sup> His work oriented the legitimacy of restorative justice in relation to law and, in particular, to criminal justice processes.<sup>9</sup> While discourse internal to the movement supported the idea of restorative justice becoming a new legal norm, there is no strong evidence to suggest that this actually occurred during this period. From 1990 to 2000, for example, only fourteen state laws codified the term “restorative justice.”<sup>10</sup>

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*Mainstream*, in *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* 213, 214 (Gordon Bazemore & Lode Walgrave eds., 1999).

<sup>6</sup> See generally ZEHR, *supra* note 5. Zehr is widely recognized for his work in the restorative justice field. While not defined in these terms in the literature, I contend in other work that Zehr—often cited, as the “grandfather of restorative justice” in the United States—is a norm entrepreneur. Thalia González & Annalise Buth, *Restorative Justice at the Crossroads: Politics, Power, and Language*, 7 (forthcoming 2019) (on file with author). As a norm entrepreneur, Zehr has been positioned simultaneously as a translator of theoretical discourse, policy, and practice. *Id.* at 8. He also has used social and political capital to move the ideas of restorative justice both vertically and horizontally in diverse settings to express restorative justice as a normative and aspirational goal. *Id.* Further, Zehr’s prominence in the field serves as a mechanism for other restorative justice norm entrepreneurs to package, repack, and present his ideas to motivate micro- and macro-level changes. *Id.* However, Zehr’s influence is not limited to making restorative justice legally cognizable. One is hard pressed to find a literature review or other recitation of the history of the restorative justice in the United States without multiple references to Zehr. *Id.* In fact, if a scholar were to exclude citation to Zehr’s work that would reflect negatively on one’s perceived expertise in the field. *Id.* As a result, Zehr’s legal frame of restorative justice has become a common cognitive orientation and shared assumption. *Id.*

<sup>7</sup> ZEHR, *supra* note 5, at 181.

<sup>8</sup> *Id.*

<sup>9</sup> It should be noted there is a significant tension in the current restorative justice movement as to how, and whether, restorative justice should continue to be positioned within and/or adjacent to formal legal systems. See, e.g., Annalise Buth & Lynn Cohn, *Looking at Restorative Justice Through A Lens of Healing and Reconnection*, 13 NW. J.L. & SOC. POL’Y 1, 2 (2017); Theo Gavrielides, *Bringing Race Relations Into the Restorative Justice Debate: An Alternative and Personalized Vision of “the Other,”* 45 J. BLACK STUDIES 216, 224–26 (2014); George Pavlich, *Critical Policy Analysis, Power and Restorative Justice*, 75 CRIM. J. MATTERS 24, 24–25 (2009); Mara Schiff, *Institutionalizing Restorative Justice: Paradoxes of Power, Restoration, and Rights*, in *RECONSTRUCTING THE RESTORATIVE JUSTICE PHILOSOPHY* 164 (Theo Gavrielides & Vasso Artinopoulou eds., 2013).

<sup>10</sup> See *infra* Figure 4.

While once primarily conceived as a social service<sup>11</sup> associated with the criminal and juvenile justice systems, restorative justice has now migrated across multiple public systems.<sup>12</sup> These include a wide range of practices in formal and informal settings, including community-based circles, conferences and dialogues, reparative sentencing and probation structures, victim-offender mediation, prison-based processes, as well as city- and state-level truth and reconciliation commissions.<sup>13</sup> Presently, some form of restorative justice is being implemented in

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<sup>11</sup> SONYA SHAH ET AL., RESTORATIVE JUSTICE LISTENING PROJECT 9 (2017), <http://zehrinstitute.org/images/Restorative-Justice-Listening-Project-Final-Report.pdf> [<https://perma.cc/XNN8-ABRX>]. Some argue the first restorative justice process occurred in Kitchener, Ohio in 1974 when a probation officer suggested in a pre-sentencing report to the court that an encounter with the victims might have “therapeutic value” for two young men who had pleaded guilty to vandalism. Dean E. Peachey, *The Kitchener Experiment*, in A RESTORATIVE JUSTICE READER 75 (Gerry Johnstone ed., 2013).

<sup>12</sup> See *infra* Figures 5 and 6; see also Thalia González, *Restorative Justice from the Margins to the Center: The Emergence of a New Norm in School Discipline*, 60 HOW. L.J. 267, 274 (2016); TREVOR FRONIUS ET AL., RESTORATIVE JUSTICE IN U.S. SCHOOLS: AN UPDATED RESEARCH REVIEW 5–7 (2019), <https://www.wested.org/wp-content/uploads/2019/04/resource-restorative-justice-in-u-s-schools-an-updated-research-review.pdf> [<https://perma.cc/94T8-DWGY>] [hereinafter González, *Restorative Justice from the Margins to the Center*]; WILLIE MCCARNEY, A RESTORATIVE JUSTICE APPROACH TO WORKING WITH CHILDREN IN RESIDENTIAL CARE 1 (2009), <https://www.unicef.org/tdad/4williemccarney.pdf> [<https://perma.cc/VYD2-3D46>]; Joan Pennell, *Family Group Conferencing in Child Welfare: Responsive and Regulatory Interfaces*, 31 J. SOC. & SOC. WELFARE 117, 118–24 (2004).

<sup>13</sup> Telephone Interview with Lauren Abramson, Former Dir., Restorative Response Balt., in L.A., Cal. (May 29, 2018) (on file with author); Telephone Interview with Derek Miodownik, Restorative and Cmty. Justice Exec., Vt. Dep’t Corrections (Apr. 19, 2018); see also SUJATHA BALIGA ET AL., RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST’S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY 1 (2017), [https://impactjustice.org/wp-content/uploads/CWW\\_RJreport.pdf](https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf) [<https://perma.cc/Y4LS-23A7>]; Carol Izumi, *The Use of ADR in Criminal and Juvenile Delinquency Cases*, in ADR HANDBOOK FOR JUDGES 196 (Donna Steinstra & Susan M. Yates eds., 2004); Barry Stuart, *Circle Sentencing: Turning Swords into Ploughshares*, in RESTORATIVE JUSTICE: INT’L PERSPECTIVES 193–206 (Burt Galway & Joe Hudson eds., 1996); SUSAN L. MILLER, AFTER THE CRIME: THE POWER OF RESTORATIVE JUSTICE DIALOGUES BETWEEN VICTIMS AND VIOLENT OFFENDERS 20 (2011); Kathleen Daly, *What Is Restorative Justice? Fresh Answers to a Vexed Question*, 11 VICTIMS & OFFENDERS 9, 14 (2016); Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms*, 34 VT. L. REV. 563, 566 (2010); UMBREIT & ARMOUR, AN ESSENTIAL GUIDE, *supra* note 3, at 179–208. While viewed as arising from a distinctly different origin, indigenous communities and tribal courts have long been pioneers in the use of restorative and peacemaking processes to address conflict and harm. See, e.g., SHAH, *supra* note 11, at 15–21 (presenting narrative accounts from tribal members and communities about distinctions between Western and indigenous peacemaking processes); see also Howard L. Brown, *The Navajo Nation’s Peacemaker Division: An*

nearly every state, at state, regional and local levels.<sup>14</sup> As the data in this study indicate, forty-five states<sup>15</sup> have codified restorative justice into statutory or regulatory law.<sup>16</sup> This represents a significant increase from prior accounts of formal state support for restorative justice, which ranged from twenty states<sup>17</sup> to thirty-two states.<sup>18</sup> This “legalization” of restorative justice is not limited to enacted laws. Previously compiled data (2017) indicated that eighty-five state and federal legislatures were at some stage in considering proposed restorative justice legislation.<sup>19</sup> Between January and May 2019, eighteen restorative justice bills were proposed in eleven states.<sup>20</sup> This includes proposed legislation in South Carolina and Arizona, two of the five states currently without any restorative justice laws.<sup>21</sup> While there continues to be a greater representation of restorative justice in state law adjunct to the criminal and juvenile justice systems, a strong trend also has emerged in schools (Pre-K to 12).<sup>22</sup> This pattern is not surprising given the trajectory and growth of restorative justice as a response to ever-increasing attention on the collateral consequences of zero-tolerance policies, exclusionary discipline practices,

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*Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297, 301 (2000) (discussing the Navajo Nation Peacemaker Courts established in 1982).

<sup>14</sup> Given that restorative justice includes a diverse range of practices and processes which are highly individualized to each context, there is significant variance in what is defined within the broad scope of “restorative justice.” While outside the theoretical constructs and empirical analysis of study, this raises key questions regarding fidelity of practice not only for researchers seeking to measure outcomes of restorative processes, such as recidivism or satisfaction of participants, but the impact (positive or negative) that restorative justice processes may have on individuals.

<sup>15</sup> See *infra* Figure 1. The dataset date range is closed after May 31, 2019.

<sup>16</sup> The only states that have not codified “restorative justice” into the text of state statute, court rules, and administrative code are: Arizona, North Carolina, North Dakota, Ohio and Oklahoma. See Appendix I (on file with author).

<sup>17</sup> Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 JUST. POL’Y J. 1, 5–9 (2016) (finding twenty states included balanced or restorative justice in statute or code).

<sup>18</sup> Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL’Y PRACTICE 77, 85 (2015) (showing thirty-two states provided support for the use of restorative justice in criminal justice settings between 1998 and 2014).

<sup>19</sup> GEORGIA STATE UNIVERSITY COLLEGE OF LAW, CONSORTIUM OF NEGOTIATION AND CONFLICT RESOLUTION, PROPOSED RESTORATIVE JUSTICE LEGISLATION DATABASE (2017), <https://law.gsu.edu/centers/consortium-on-negotiation-and-conflict-resolution/programs-and-research/> [<https://perma.cc/SF4B-J9C5>].

<sup>20</sup> The states are Arizona, California, Colorado, Hawaii, Illinois, Nebraska, New Mexico, South Carolina, Tennessee, Texas, and Vermont. See Appendix III (on file with author).

<sup>21</sup> If both of these bills pass, the total number of states with restorative justice codified formally into law will rise from 45 to 47 or 94 % saturation.

<sup>22</sup> See *infra* Part I.

racial and gender disproportionality, and widespread demands for positive school climate and school safety.<sup>23</sup>

The vertical and horizontal transmission and translation of restorative justice in legislation, across public systems, and within social movements, support the normative change hypothesis of this Article.<sup>24</sup> As new norms emerge, no longer are they disseminated solely by “norm entrepreneurs” but instead are carried forward by a range of individuals, networks, organizations, and stakeholders within and across institutions. Given the “expressive power” of law,<sup>25</sup> the legalization of restorative justice and its expanded use in public systems is one likely explanation for the increased attention to the possibility of restorative remedies to address issues

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<sup>23</sup> See generally Marilyn Armour, *Restorative Practices: Righting the Wrongs of Exclusionary School Discipline*, 50 U. RICH. L. REV. 999, 1019–23 (2016) (describing empirical outcomes of restorative justice and state legislation to codify restorative justice in education codes to address zero tolerance); González, *Restorative Justice from the Margins to the Center*, *supra* note 12 (presenting detailed case studies of restorative justice practices and processes from five and descriptive analysis of trends and emerging practices across the country).

<sup>24</sup> As sociolegal scholar Janice Nadler contends, “Legislation reveals attitudes approving or disapproving of a given behavior, which causes people to update their beliefs about what others think, which in turn might lead to behavior change in order to avoid the disapproval of others.” Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 L. & SOC. INQUIRY 60, 64 (2017); see also *Establishment of a National Center on Restorative Justice*, DEP’T OF JUST., <https://nij.gov/funding/Documents/solicitations/NIJ-2019-16510.pdf> [<https://perma.cc/BH5H-MKMX>] (last visited Jul. 29, 2019) (requesting applications for funding the establishment of the National Center on Restorative Justice); *OJJDP and Children’s Bureau Blog and Video Highlight Federal and Local Partnerships to End Child Abuse*, OJJDP, [https://www.ojjdp.gov/newsletter/252760/on\\_1.html](https://www.ojjdp.gov/newsletter/252760/on_1.html) [<https://perma.cc/U25C-UN93>] (last visited Jul. 27, 2019).

<sup>25</sup> The claim that law influences attitudes and behavior by what it expresses. See RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 5–9, 101–04 (2015).

ranging from racial harm<sup>26</sup> to sexual violence,<sup>27</sup> discrimination and bias,<sup>28</sup> community violence,<sup>29</sup> environmental injustice,<sup>30</sup> and the school-to-prison pipeline.<sup>31</sup>

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<sup>26</sup> See, e.g., Fania E. Davis et al., *Restoring Racial Justice*, in EMERGING TRENDS IN THE SOCIAL AND BEHAV. SCI. 1, 5–8 (Robert Scott & Stephen Kosslyn eds., 2015); Gavrielides, *supra* note 9, at 224–26; David R. Karp & Olivia Frank, *Anxiously Awaiting the Future of Restorative Justice in the United States*, 11 VICTIM & OFFENDERS 1, 15–16 (2015); Mikhail Lyubansky & Dominic Barter, *A Restorative Approach to Interpersonal Racial Conflict*, 23 PEACE REV. 37, 38–44 (2011); David B. Rabbani, Note, *Enhancing the Community Relations Service Arsenal: A Restorative Justice Solution for Community Conflicts with Local Law Enforcement that Have a Race-Relations Basis*, 17 CARDOZO J. CONFLICT RESOL. 567, 585–87 (2016); *The Civil Rights and Restorative Justice Project*, NE. UNIV. SCH. OF LAW (2019), <https://crrj.northeastern.edu> [<https://perma.cc/RP4A-XLRD>] (last visited June 8, 2019).

<sup>27</sup> See, e.g., Donna Coker & Ahjané D. Macquoid, *Alternative U.S. Responses to Intimate Partner Violence*, in COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE: LESSONS FROM EFFORTS WORLDWIDE 169 (Rashmi Goel & Leigh Goodmark eds., 2015); Clare McGlynn et al., *'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice*, 39 J.L. & SOC'Y 213, 216 (2012); DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2–5 (2016), [http://www.skidmore.edu/campusrj/documents/Campus\\_PRISM\\_Report\\_2016.pdf](http://www.skidmore.edu/campusrj/documents/Campus_PRISM_Report_2016.pdf) [<https://perma.cc/4CJE-S4XY>]; Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA VIOLENCE & ABUSE 242, 242 (2014); Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1623 (2014); Katherine Mangan, *Why More Colleges Are Trying Restorative Justice in Sex-Assault Cases*, CHRON. HIGHER EDUC. (Sept. 17, 2018), <https://www.chronicle.com/article/Why-More-Colleges-Are-Trying/244542> [<https://perma.cc/6ASH-HFK6>]; Deborah M. Weissman, *The Personal Is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 443–44 (2007).

<sup>28</sup> See, e.g., Desiree Anderson, *The Use of Campus Based Restorative Justice Practices to Address Incidents of Bias: Facilitators' Experiences*, U. NEW ORLEANS THESES & DISSERTATIONS 2442 (2018), <https://scholarworks.uno.edu/cgi/viewcontent.cgi?article=3638&context=td> [<https://perma.cc/67NB-NPN8>].

<sup>29</sup> See, e.g., Daly, *supra* note 13, at 6–7; Lynn Freehill-Maye, *Restorative Justice Helps Rehabilitate Tough Chicago Neighborhoods*, KROC INST. FOR INT'L PEACE STUDIES (Jan. 24, 2018), <https://kroc.nd.edu/news-events/news/restorative-justice-helps-rehabilitate-tough-chicago-neighborhoods> [<https://perma.cc/U7U4-LW3K>]; Tess Williams, *Empathy, justice: Restorative Justice initiatives prove successful at crime prevention, promoting community understanding*, GRAND FORKS HERALD (Sept. 17, 2018, 8:00 AM), <https://grandforksherald.com/news/crime-and-courts/4499410-empathy-justice-restorative-justice-initiatives-prove-successful-crime> [<https://perma.cc/TT5T-67YP>].

<sup>30</sup> Chaitanya Motupalli, *Intergenerational Justice, Environmental Law, and Restorative Justice*, 8 WASH. J. ENVTL. L. & POL'Y 333, 340–48 (2018); Michael L. Rustad et al., *Restorative Justice to Supplement Deterrence-Based Punishment: An Empirical Study and Theoretical Reconceptualization of the EPA's Power Plant Enforcement Initiative, 2000–2001*, 65 OKLA. L. REV. 427, 467–79 (2013); D. Kapua'ala Sproat, *An Indigenous People's*



This Article has two objectives. First, it tracks the increasingly legal nature of restorative justice. To do this, it empirically analyzes an original 50-state dataset of restorative justice laws and I argue that restorative justice has emerged as a new legal norm. However, the applicability of this study's findings is not limited to research agendas. This growing statutory framework, coupled with broader social and political acceptance, may serve as an important signal to impacted communities, activists, educators, and others that restorative justice may function as a remedy across a broad range of justice issues. The internalization and diffusion of restorative justice in state law also creates unprecedented conditions by which attorneys, judges, and policymakers are currently, or will be, positioned to regularly make decisions regarding the use of restorative justice processes in a variety of legal settings. The legal academy simply cannot overlook the significant implications of near-universal codification by states of restorative justice into state law.

Second, this Article advances a new understanding of how to assess normative change. Specifically, I contend that the dominant constructivist theories<sup>32</sup> of norm change present a binary account of legal internalization and, as such, I propose a more nuanced approach consisting of three distinct indicators. These typologies are not meant to be mutually exclusive, nor are they exhaustive. Rather, I view them as an essential first intervention in the literature to better account for the variations in how legal internalization of a new norm manifests in law. In this study, I use these typologies to describe the rise of restorative justice in the domain of legal regulation by states, but they are not limited to this context. Understanding the development of norms vis-à-vis law (in multiple fora) is valuable to a broad audience, from legal scholars to practicing attorneys to grassroots activists and social movements.

Recognizing that there is no precise formula to account for all the complexities of norm emergence across the norm life cycle, I situate my finding—the emergence of restorative justice as a new legal norm—within what is commonly defined as the second (cascade) and third (internalization) stages of the norm life cycle. The liminal position of restorative justice as a new norm does not detract from the significance of this study's findings. In fact, it is consistent with prior examinations of normative change. Norms move in multiple ways as they gain traction across a range of stakeholders and institutions. In some instances, they translate into social or political norms, and in other instances, into legal norms. In either case, the growth of intensity of the norm in a specific area (whether legal, political, social or an admixture of all three) is indicative of change. Further, understanding the emergence of restorative justice as a norm along an internalization continuum more accurately accounts for current levels of saturation and diffusion of restorative justice in statutory and regulatory law between different states as well as within individual states. It may

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*Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Devastation*, 35 STAN. ENVTL. L.J. 157, 181–2, 201–12 (2016); Aiden Stark, *Environmental Restorative Justice*, 16 PEPP. DISP. RESOL. L.J. 435, 442–58 (2016).

<sup>31</sup> See, e.g., Armour, *supra* note 23, at 1019; González, *Restorative Justice from the Margins to the Center*, *supra* note 12, at 274.

<sup>32</sup> See *infra* Part II.

also help explain the prevailing legislative preference for restorative justice over victim-offender mediation, which has characterized the period since 2008. As study data illustrates, restorative justice legislation has outpaced victim-offender mediation since 2008 and has more than twice the representation in state laws as victim-offender mediation and dialogue.<sup>33</sup>

### I. A BRIEF ACCOUNTING OF RESTORATIVE JUSTICE THEORY

Restorative justice is not a list of specific programs or a clear blueprint for systemic change.<sup>34</sup> As Umbreit, Vos, Coates, and Lightfoot note, it “requires a radically different way of viewing, understanding, and responding to the presence of crime within our communities.”<sup>35</sup> Restorative justice aims to reestablish the balance between primary stakeholders (i.e., victims, offenders, and affected communities) following harm or crime by engaging in a collective decision-making process.<sup>36</sup> Thus, the focus is on healing, rather than punitive responses. In the criminal and juvenile justice systems, restorative justice encourages “constructive responses to wrongdoing by bringing those who have harmed, their victims, and affected communities into processes that repair the harm and rebuild relationships.”<sup>37</sup> In the education system, restorative justice requires “a philosophical and practical shift away from punitive and retributive control mechanisms . . . to prioritize individual and community growth to support safe and healthy school culture.”<sup>38</sup>

With its complex, multidimensional nature, it comes as no surprise that restorative justice can be examined through a diverse set of scholarly inquiries. Given the specific focus of this Article—to empirically analyze restorative justice in state law—it does not aim to review the entire body of literature since the emergence of restorative practices in the United States, or since its even earlier emergence in other areas of the world.<sup>39</sup> Instead, this Article seeks to complement the current

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<sup>33</sup> See *infra* Section IV.3. While outside the scope of this Article, the social and political conditions that led to the dramatic spike in legislative attention and, as importantly, acceptance of restorative justice as an alternative to victim-offender mediation existing structures and systems warrants further consideration.

<sup>34</sup> Telephone Interview with Lauren Abramson, *supra* note 13; Telephone Interview with Derek Miodownik, *supra* note 13.

<sup>35</sup> Umbreit et al., *Restorative Justice: An Empirically Grounded Movement*, *supra* note 1, at 518.

<sup>36</sup> See generally ZEHR, *supra* note 5.

<sup>37</sup> BALIGA ET AL., *supra* note 13, at 2; see also *Guide for Implementing the Balanced and Restorative Justice Model*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUST., <https://www.ojjdp.gov/pubs/implementing/balanced.html> [<https://perma.cc/SKX9-RSHW>] (last visited June 8, 2019).

<sup>38</sup> González, *Restorative Justice from the Margins to the Center*, *supra* note 12, at 270–71.

<sup>39</sup> See *supra* note 1 and accompanying text.

emphasis in the literature on the theoretical, social, political, and practical aspects of restorative justice<sup>40</sup> by addressing a prominent gap: a lack of attention to its increasing legal character in the United States. However, a brief accounting of the dominant strands of restorative justice literature is useful to clarify the field and further ground this Article. Additionally, as a diverse theoretical and empirical body of work has developed over time, it has, in turn, supported processes of legal internalization. Specifically, as policymakers and legislators have turned their attention to restorative justice values, principles and practices, they have looked to empirical examinations of existing programs and case studies highlighting promising practices.<sup>41</sup>

A first set of questions relates to the theoretical and philosophical contours of restorative justice.<sup>42</sup> Such work is often marked by inquiries into the relational taxonomies of restorative justice and positioned in both global<sup>43</sup> and local contexts.<sup>44</sup>

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<sup>40</sup> See *infra* Part I.

<sup>41</sup> Telephone Interview with Annalise Buth, M.R. Bauer Foundation Fellow, Dispute Resol., Ctr. Negot. Mediation Northwestern Pritzker School of Law (May 15, 2018); Thalia González, Presentation at the National Conference of State Legislatures in Denver, Colorado, Social Emotional Learning and Trauma-Informed Practice: Defining Terms and Exploring Implications (Apr. 13, 2018); Thalia González et al., Presentation at the National Conference of State Legislatures in L.A., Cal., State Policy and Research for Early Education (SPREE) Working Group (Jul. 29, 2018); Telephone Interview with Derek Miodownik, *supra* note 13; Shannon Sliva, *A Tale of Two States: How U.S. State Legislatures Consider Restorative Justice Policies*, 20 CONTEMP. J. REV. 255, 259–61 (2017).

<sup>42</sup> See generally JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 10–12 (2002) (arguing that restorative justice should focus not on restoring a previous condition but instead moving forward to a better condition, and should focus not on individuals, but on structural solutions to offending and victimizing).

<sup>43</sup> See generally NAJLA ELMANGOUSH, CUSTOMARY PRACTICE AND RESTORATIVE JUSTICE IN LIBYA: A HYBRID APPROACH, SPECIAL REPORT, U.S. INST. PEACE (2015), <https://www.usip.org/sites/default/files/SR374-Customary-Practice-and-Restorative-Justice-in-Libya-A-Hybrid-Approach.pdf> [<https://perma.cc/TV98-34T8>] (reporting on the use of integration of restorative justice and restorative principles in Libya); Liam Leonard & Paula Kenny, *The Restorative Justice Movement in Ireland: Building Bridges to Social Justice Through Civil Society*, 18 IRISH J. SOC. 38, 41–42 (2010); Jennifer J. Llewellyn & Daniel Philpott, *Restorative Justice and Reconciliation: Twin Frameworks for Peacebuilding*, in RESTORATIVE JUSTICE, RECONCILIATION, AND PEACEBUILDING 14–37 (Jennifer J. Llewellyn & Daniel Philpott eds., 2014); Shannon A. Moore & Richard C. Mitchell, *Rights Based Restorative Justice: Towards Critical Praxis with Young People in Conflict with the Law*, in THE UN CHILDREN’S RIGHTS CONVENTION: THEORY MEETS PRACTICE 549–64 (A. Alen et al. eds., 2006); Bruce Archibald & Jennifer Llewellyn, *The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia*, 29 DALHOUSIE L.J. 297 (2006) (examining Nova Scotia’s Restorative Justice Program).

<sup>44</sup> See generally BEYOND THE MANDATE, CONTINUING THE CONVERSATION: REPORT OF THE MAINE WABINAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMMISSION (2015), [http://www.mainewabanakitrc.org/wp-content/uploads/2015/07/TRC-Report-Expanded\\_July2015.pdf](http://www.mainewabanakitrc.org/wp-content/uploads/2015/07/TRC-Report-Expanded_July2015.pdf) [<https://perma.cc/W7H2-HNBJ>] (final report of the Maine-

Sharpe, for instance, argues that the passage of the 2012 EU Directive requires a recalibration of victimhood in the context of criminal justice policy.<sup>45</sup> Specifically, she contends that to realize the potential of restorative justice in justice systems one must engage in an examination of the broad relational effects of criminal harm and criminal justice.<sup>46</sup> Similarly, Llewellyn asserts that restorative justice should be conceived as a comprehensive relational theory of justice that is concerned with “the harm and effects of wrongs on relationships at all levels: individual, group, community, national, and international.”<sup>47</sup> In accepting a relational understanding of restorative justice, she reasons that it broadens the concern of justice beyond simply advocating different processes or institutional alternatives to fulfill the task of ensuring individual accountability in post-conflict contexts.<sup>48</sup> Not surprisingly, whether internationally or domestically, the literature most often views restorative justice relative to punitive and retributive systems.<sup>49</sup> As a result, there is a common characterization of restorative justice as “the other” or “alternative” model or system.<sup>50</sup> In fact, Umbreit traces the term “retributive justice” as emerging in the early years of the restorative justice movement “to describe the conventional

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Wabinaki State Child Welfare Truth and Reconciliation Commission); KAY PRANIS ET AL., *PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY* (2003); Buth & Cohn, *supra* note 9; Thalia González, *Reorienting Restorative Justice: Initiating a New Dialogue of Rights Consciousness, Community Empowerment and Politicization*, 16 CARDOZO J. CONFLICT RESOL. 457 (2015) [hereinafter González, *Reorienting Restorative Justice*] (offering, among other things, a historical take on restorative justice); Joshua Inwood, *The Politics of Being Sorry: The Greensboro Truth Process and Efforts at Restorative Justice*, 13 SOC. & CULTURAL GEOGRAPHY 607 (2012) (looking at restorative justice through the Greensboro Truth and Reconciliation Commission); Howard J. Vogel, *Healing the Trauma of America's Past: Restorative Justice, Honest Patriotism, and the Legacy of Ethnic Cleanings*, 55 BUFF. L. REV. 981 (2007) (discussing stories and storytelling in the context of restorative justice and historical ethnic cleansing in the United States); Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J. OF SOC. PHIL. 377, 388–89 (2006).

<sup>45</sup> Susan Sharpe, *Reshaping Relations to Fit Justice Aims*, 5 RESTORATIVE JUST.: AN INT'L J. 441, 441–54 (2017).

<sup>46</sup> *Id.*

<sup>47</sup> Llewellyn & Philpott, *supra* note 43, at 16; *see also* Jennifer J. Llewellyn, *Integrating Peace, Justice and Development in a Relational Approach to Peacebuilding*, 6 ETHICS & SOC. WELFARE 290, 293 (2012) [hereinafter Llewellyn, *Integrating Peace*].

<sup>48</sup> *See* Llewellyn, *Integrating Peace*, *supra* note 47, at 293.

<sup>49</sup> *See supra* notes 1–6 and accompanying text; *see also* Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. REV. 323, 335–46 (2017); Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic Look at Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 671–80 (2005).

<sup>50</sup> Like many reform movements, the restorative justice movement focused on contrasting its values and principles with those of the status quo. *See, e.g.,* Umbreit et al., *Restorative Justice: An Empirically Grounded Movement*, *supra* note 1, at 516–23; Vogel, *supra* note 3, at 568–70.

criminal justice system approach, particularly regarding its emphasis on offenders getting what they deserved.”<sup>51</sup>

Some scholars have sought to expand the domain of restorative justice beyond justice settings with attention to the political nature of restorative justice. For example, in a previous article, I argue that restorative justice should be understood through an emancipatory lens, not simply as a proposition of accountability, repairing harm or values aiming to transform systems.<sup>52</sup> I assert that restorative justice should be “re-theorized as a way to confront the injustice that becomes a political demand, specifically one for emancipation, for an end to domination and oppression, and the right to have a meaningful, rather than tokenized, voice.”<sup>53</sup> Likewise, Vogel contends that restorative justice should embrace social justice principles and the transformative possibilities of social healing.<sup>54</sup> Stauffer and Shah define a new identity for restorative justice as a “social justice movement—a transformative force that addresses healing and accountability at personal and structural levels of society . . . .”<sup>55</sup> Taking a more activist approach, Davis and Scharrar examine nascent truth and reconciliation practices in the United States and explore future uses of restorative justice to remedy racial harm.<sup>56</sup> Similarly, Hooker argues that restorative justice has applicability not only in the present reality of injustices but also in dealing with the legacy and aftermath associated with historical harms.<sup>57</sup>

For Leonard and Kenney, restorative justice represents a social contract, which seeks to recognize a broader notion of participatory and deliberative processes,<sup>58</sup> while Braithwaite and Pettit position restorative justice as a necessary political

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<sup>51</sup> Mark S. Umbreit et al., *Restorative Justice in the Twenty-first Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251 (2005).

<sup>52</sup> See generally González, *Reorienting Restorative Justice*, *supra* note 44.

<sup>53</sup> *Id.* at 460.

<sup>54</sup> Vogel, *supra* note 3, at 566–67.

<sup>55</sup> Carl Stauffer & Sonya Shah, *Restorative Justice: Taking the Pulse of a Movement* (2018) (unpublished manuscript) (on file with Zehr Institute for Restorative Justice), <http://zehr-institute.org/publications/docs/introduction.pdf> [<https://perma.cc/T42Z-XL6Q>].

<sup>56</sup> Fania Davis & Jonathan Scharrar, *Reimagining and Restoring Justice: Toward a Truth and Reconciliation Process to Transform Violence Against African-Americans in the United States*, in *TRANSFORMING JUSTICE, LAWYERS, AND THE PRACTICE OF LAW* 103–08, 117–22 (Marjorie A. Silver ed., 2017).

<sup>57</sup> See generally DAVID ANDERSON HOOKER, *THE LITTLE BOOK OF TRANSFORMATIVE COMMUNITY CONFERENCING: A HOPEFUL, PRACTICAL APPROACH TO DIALOGUE* (2016) (describing the process of transformative community conferencing and its applicability to historic harm); Interview by Carl Stauffer with David Anderson Hooker, Author, Webinar for the Zehr Institute of Restorative Justice at Eastern Mennonite University: Transformative Community Conferencing (Sept. 20, 2017), <http://zehr-institute.org/webinars/transformative-community-conferencing/> [<https://perma.cc/6Y7D-PXB3>]; see also Joshua Inwood et al., *Addressing Structural Violence Through US Reconciliation Commissions: The Case Study of Greensboro, NC and Detroit, MI*, 52 POL. GEOGRAPHY 57, 60 (2016).

<sup>58</sup> Leonard & Kenney, *supra* note 43, at 46–53.

response to the arbitrary exercise of state power.<sup>59</sup> Within this strand of the literature, there is also growing attentiveness to a critical analysis of restorative justice in relation to multiple social constructs and identities, including race<sup>60</sup> and gender,<sup>61</sup> within criminal and juvenile justice settings.<sup>62</sup>

A second set of questions in the literature is aimed at understanding the practice of restorative justice across a range of settings. This research encompasses a broad array of theoretical perspectives and methodological approaches with the principal objective of capturing outcomes of restorative practices. The first set of empirical studies occurred in the criminal and juvenile justice systems,<sup>63</sup> followed by more recent analysis in education. Researchers have employed a diverse set of analyses using mixed methodologies to test victim satisfaction, accountability, and recidivism.<sup>64</sup> For example, Strang et al.'s systematic review of programs in the

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<sup>59</sup> John Braithwaite & Philip Pettit, *Republicanism and Restorative Justice: An Explanatory and Normative Connection*, in *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 145, 156–59 (Heather Strang & John Braithwaite eds., 2000).

<sup>60</sup> See, e.g., Gavrielides *supra* note 9, at 218–19, 221–24; Karp & Frank, *supra* note 26, at 156–66; Lyubansky & Barter, *supra* note 26, at 38–44; Davis et al., *supra* note 26; see also Mark S. Umbreit & Robert B. Coates, *Multicultural Implications of Restorative Juvenile Justice*, 63 *FED. PROBATION* 44, 44–48 (1999).

<sup>61</sup> See, e.g., Gavrielides *supra* note 9, at 226 (discussing Charkoudian and Wayne study of gender matching in restorative processes and outcomes); Linnea Österman & Usla Masson, *Restorative Justice with Female Offenders: The Neglected Role of Gender in Restorative Conferencing*, 13 *FEMINIST CRIM.* 3 (2017) (discussing the examination of gender-specific characteristics and needs for restorative practices); Ann Schumacher, *Talking Circles for Adolescent Girls in an Urban High School: A Restorative Practices Program for Building Friendships and Developing Emotional Literacy Skills*, 1 *SAGE OPEN* 1 (2014) (ethnographic study of gender-specific restorative justice).

<sup>62</sup> Though outside the scope of this Article, it is important to note that in the context of school-based restorative justice there is robust examination of race. This has occurred given that school-based restorative justice was initially (and in many cases continues to be) conceptualized and implemented as a response to school discipline, zero tolerance, and racial disproportionality. See generally Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline Through Restorative Justice*, in *CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION* 152 (Daniel J. Losen ed., 2015); Allison Ann Payne & Kelly Welch, *Restorative Justice in Schools: The Influence of Race on Restorative Discipline*, 47 *YOUTH & SOC'Y* 539, 539 (2013).

<sup>63</sup> Umbreit et al., *Restorative Justice: An Empirically Grounded Movement*, *supra* note 1, at 519–20.

<sup>64</sup> See, e.g., James Bonta et al., *Restorative Justice and Recidivism: Promises Made, Promises Kept?*, in *HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE* 108, 114–15 (Dennis Sullivan & Larry Tifft eds., 2006); James Bonta et al., *An Outcome Evaluation of a Restorative Justice Alternative to Incarceration*, 5 *CONTEMP. JUST. REV.* 319 (2002); Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 *PRISON J.* 127 (2005); Gwen Robinson & Joanna Shapland, *Reducing Recidivism: A Task for Restorative Justice?*, 48 *BRIT. J. CRIMINOLOGY* 337, 340 (2008); Nancy Rodriguez, *Restorative Justice at Work: Examining the Impact of Restorative Justice*

United States, Australia, and the United Kingdom finds that restorative models decrease the risk of reoffending, especially for violent crimes.<sup>65</sup> Similarly, Bradshaw and Roseborough's study of 11,950 juveniles from twenty-five different service sites reveals that restorative justice interventions represented an intervention effect that is double that of the traditional justice programs.<sup>66</sup> In a meta-analysis for the Department of Justice, Wilson, Olaghere and Kimbrell indicate that overall restorative justice programs and practices show a reduction in future delinquent behavior in comparison to traditional juvenile court processing.<sup>67</sup>

In the education system, a parallel empirical body of work of school-based restorative practices has developed. Schumacher's two-year ethnographic study in public urban high schools reveals insights specific to restorative justice, school safety, and emotional literacy.<sup>68</sup> Knight and Wadhwa's examination of the use of restorative circles in response to fights, misbehaviors, and gang violence indicates that, in addition to addressing school safety, restorative justice serves an important school-level resilience-building strategy for both educators and students.<sup>69</sup> Parallel to a body of academic empirical research on restorative justice in criminal justice and school processes, there is a robust advocacy movement, led by the ACLU, the Advancement Project, the NAACP and other civil rights organizations to transition from traditional retributive practices and punitive systems to restorative ones.<sup>70</sup>

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*Resolutions on Juvenile Recidivism*, 53 CRIME & DELINQUENCY 355, 363 (2007); see also MARK S. UMBREIT ET AL., THE IMPACT OF RESTORATIVE JUSTICE CONFERENCING: A REVIEW OF 63 EMPIRICAL STUDIES IN 5 COUNTRIES (2002) (reviewing 63 different studies on the effect of restorative justice techniques).

<sup>65</sup> Heather Strang et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. QUANTITATIVE CRIMINOLOGY 1 (2015); see also LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 8 (2007), [http://www.iirp.edu/pdf/RJ\\_full\\_report.pdf](http://www.iirp.edu/pdf/RJ_full_report.pdf) [<https://perma.cc/Z22J-CZCD>].

<sup>66</sup> William Bradshaw & David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, 69 FED. PROBATION 15, 19 (2005).

<sup>67</sup> DAVID B. WILSON ET AL., EFFECTIVENESS OF RESTORATIVE JUSTICE PRINCIPLES IN JUVENILE JUSTICE: A META-ANALYSIS, U.S. DEP'T OF JUST. 2 (2017), <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/250872.pdf> [<https://perma.cc/EGR5-N2PT>].

<sup>68</sup> Schumacher, *supra* note 61, at 3–4.

<sup>69</sup> David Knight & Anita Wadhwa, *Expanding Opportunity Through Critical Restorative Justice*, 11 SCH.: STUD. IN EDUC. 11, 14–16 (2014).

<sup>70</sup> See, e.g., Vanessa Hernandez, *Restorative Justice Offers a Powerful Alternative to Prisons and Jails*, ACLU WASH. (Oct. 24, 2016), <https://www.aclu-wa.org/story/restorative-justice-offers-powerful-alternative-prisons-and-jails> [<https://perma.cc/SD9U-6BK7>]; Mark Fancher & Jeffery Edison, *Using Restorative Justice to Combat Mass Incarceration*, ACLU MICH., <http://www.aclumich.org/article/using-restorative-justice-combat-mass-incarceration> [<https://perma.cc/AEK6-QJQQ>] (last visited June 8, 2019) (discussing the organization's 2014-2015 legal docket and program to establish a restorative justice program in Michigan); *ACLU Launches Prosecutor Accountability Initiative*, ACLU (June 5, 2018), <https://www.aclu.org/news/aclu-launches-prosecutor-accountability-initiative> [<https://perm>

These advocacy organizations have added valuable policy research across multiple justice movements and the larger reform discourse

## II. NORM GENERATION: NORM LIFE CYCLE THEORY

As the data in this Article's study illustrates, the United States is currently undergoing a normative shift with respect to restorative justice.<sup>71</sup> In prior work, I argue that restorative justice has emerged as a new norm for school discipline.<sup>72</sup> In this Article, I contend that this phenomenon is more widespread. No longer located only at the margins, restorative justice as a legal norm—as well as potentially a social and political one—is increasingly embedded in state law and subsequently transmitted into a multitude of public systems.<sup>73</sup> There is a robust interdisciplinary

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a.cc/M5QS-HJ34]; MELISSA GOEMANN, NAT'L JUVENILE JUSTICE NETWORK, NEW ZEALAND'S YOUTH JUSTICE TRANSFORMATION: LESSONS FOR THE UNITED STATES 2 (2018); see also Rebecca Beitsch, *States Consider Restorative Justice as Alternative to Mass Incarceration*, PBS NEWS HOUR (Jul. 20, 2016, 11:51 PM), <https://www.pbs.org/newshour/nation/states-consider-restorative-justice-alternative-mass-incarceration> [<https://perma.cc/EH3C-LY83>].

<sup>71</sup> See *infra* Part IV.

<sup>72</sup> González, *Restorative Justice from the Margins to the Center*, *supra* note 12, at 270.

<sup>73</sup> In legal, socio-legal, and political science fields, there is an important body of work calling attention to the ways that system frameworks, especially ones fixed in legal constructs, create and maintain inequality, based on characteristics such as race, ethnicity, gender, sexual orientation, poverty, disabilities, and their intersections. Further, a systems orientation affirms ontological claims about the constitution of the social world and “presuppose[] both the existence of and the legitimacy of existing hierarchical institutions.” See Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. SOC. CHANGE, 369, 373 (1982). For example, Iris Marion Young argues that “[j]ustice should refer not only to distribution, but also to the institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation.” IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 39 (1990). This diverse literature presents an essential future lens by which to evaluate and critique the increasing legalization of restorative justice. As restorative justice has embedded itself in law and legal systems, a hybrid of restorative and retributive approaches have emerged. From a phenomenological standpoint, this raises tensions between restorative and retributive theories of justice as well as the lived experiences of those who are system-involved. While positioned outside the scope of this study, I argue in other work that restorative justice's centrality in law may limit its potential to transform these systems, produce socially just results, or at the very least be compromised and co-opted. This raises critical questions, such as whether the codification of restorative justice into statutory law challenges political, social, and economic power or is instead a victory of ideas over interests where elite actors repackage values and principles into more generic models that satisfy multiple constituencies? Or whether the current hybridity, a mixture of restorative and retributive values and processes, is irreconcilable with the aim of using restorative justice to address various forms of social injustice? See González & Buth, *supra* note 6, at 9–10.



literature examining how, why, and when norms influence formal institutions. Broadly speaking, the scholarship in this field is divided into two areas of study—(1) research illuminating distinct dimensions of the “norm life cycle” (emergence, acceptance or cascade, and internalization)<sup>74</sup> and (2) studies that aim to understand the mechanisms that influence normative change.<sup>75</sup> This Article is positioned within the first strand of this literature.

Plainly understood, norms are social regularities that impose informal and formal standards and constraints on human behavior in deference to the preferences of others.<sup>76</sup> They “come in varying strengths” with individual norms<sup>77</sup> “commanding different levels of agreement.”<sup>78</sup> For purposes of this Article, the term “legal norm”

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<sup>74</sup> Legal scholars, political scientists, sociologists, and anthropologists have attempted to understand how legal norms have emerged and map the stages of normative change in legal systems. *See, e.g.,* Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 26–36 (2000); Hannah Entwisle, *Tracing Cascades: The Normative Development of the U.N. Guiding Principles on Internal Displacement*, 19 GEO. IMMIGR. L.J. 369, 375–76 (2005); Harold Hongju Koh, *1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 642–51 (1998) [hereinafter Koh, *1998 Frankel Lecture*]; Sally Engle Merry et al., *Law from Below: Women's Human Rights and Social Movements in New York City*, 44 LAW & SOC'Y REV. 101, 102–04 (2010); Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591, 650–51 (2000).

<sup>75</sup> There is often overlap in the scholarship addressing the norm life cycle theoretically and the testing specific mechanisms of normative and ideational change. *See generally* RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013) [hereinafter GOODMAN & JINKS, *SOCIALIZING STATES*] (exploring macro-level phenomena, including law and legal institutions as a mechanism of acculturation processes); Sheri Berman, *Ideas, Norms, and Culture in Political Analysis*, 33 COMP. POL. 231 (2001) (examining ideational variables and internalization in political outcomes and behaviors); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) [hereinafter Goodman & Jinks, *How to Influence States*] (arguing for a new framework to understand how states and state actors behave and under what conditions their behavior changes); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (discussing normative change and legal institutions); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008) (examining growth and significance of translocal organizations of government actors and their role in the importation and exportation of law across national boundaries).

<sup>76</sup> William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545, 546 (1994); *see also* Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1097 (1986).

<sup>77</sup> There is general agreement within the literature that norm development requires a degree of social “connectedness.” Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2150 (1996).

<sup>78</sup> Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political*

represents an authoritative legal text, namely state law (statutory and regulatory), which may include rules and principles. Thus, restorative justice as a multi-dimensional theory should be understood not as the norm itself, but rather that the codification of term “restorative justice” in state law represents a normative alternative to retributive and punitive forms of justice that have formed the status quo in the United States.<sup>79</sup>

Although there is no precise or standardized way to predict the specific content of norms, constructivist theories drawn from the field of political science are useful for explaining the different dynamics of norm change. These theories primarily describe human rights, international law, normative change, and norm compliance in international contexts (subnational and national levels), though there is a small body of work applying them to domestic (United States) settings.<sup>80</sup> According to these theories, the norm life cycle is marked by three stages. In the first stage (*emergence*) norm entrepreneurs introduce, create, and interpret a new norm through processes of framing, articulating, and spreading ideas.<sup>81</sup> Norm entrepreneurs highlight the norm through association with pressing social, political and legal issues or create new issues entirely.<sup>82</sup> The aim of norm entrepreneurs is to secure support from powerful state actors who will ultimately endorse the norms and make them part of their agenda.<sup>83</sup> During this dialogic process “[n]orms do not appear out of thin air,”<sup>84</sup> but are instead actively built by individual and group actors. As the norm becomes more resonate, actors outside of the initial cohort of norm entrepreneurs begin to carry the norm forward into different social, political, and legal environments.<sup>85</sup>

Stage two (*cascade*) is marked by shifts toward new norms through norm-affirming events.<sup>86</sup> These are often verbal or written statements, such as laws and

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*Change*, 52 INT’L ORG. 887, 892 (1998).

<sup>79</sup> The methods used for data analysis reflects this distinction and, as such, all statutes, court rules, and regulations with the term “restorative justice” were included rather than only specific forms of restorative justice. However, such analysis was conducted when measuring system diffusion. See *infra* Figure 5 and accompanying discussion.

<sup>80</sup> For application in an international context, see, e.g., Goodman & Jinks, *How to Influence States*, *supra* note 75 (arguing for a new framework to understand how states and state actors behave and under what conditions their behavior changes); Finnemore & Sikkink, *supra* note 78; Brunnée & Toope, *supra* note 74; Hannah Entwisle, *supra* note 74. For application to domestic setting, see, e.g., Judith Resnik et al., *supra* note 75; Davis, *infra* note 91; Babcock, *infra* note 94.

<sup>81</sup> Finnemore & Sikkink, *supra* note 78, at 902. The success of norm entrepreneurs has been characterized in multiple ways, for example, shifting rules that govern social institutions, transforming social meanings and mechanisms, and internalizing such normative changes into the doctrinal structure of law and legal analysis.

<sup>82</sup> *Id.* at 909.

<sup>83</sup> *Id.* at 900.

<sup>84</sup> *Id.* at 896–97.

<sup>85</sup> *Id.*

<sup>86</sup> Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in*

formal policies, asserting the norm.<sup>87</sup> Lutz and Sikkink contend that the legalization of norms interacts with political processes in mutually strengthening ways to solidify consensus.<sup>88</sup> Sunstein observes that the *cascade* stage represents the process through which individuals and other actors demand that the government convert abstract principles into concrete law.<sup>89</sup> For Sunstein, legal norm internalization is a key starting point for subsequent political and social internalization.<sup>90</sup> Since, as Davis observes, “lawmakers and legal decision makers have always cast a wide net when searching for new policy ideas and approaches, or evaluating jurisprudential directions,”<sup>91</sup> it is not surprising to see the passage of laws during both norm cascade and norm internalization. During the norm life cycle, the law serves an expressive function whereby statutory and common laws act to create social meanings (i.e., norms) that can redefine behaviors, symbolic activities, policies, practices, and language.<sup>92</sup> These processes are not static; rather, they are constantly defined and redefined through the dynamic interplay of institutions, individuals, and the broader society.<sup>93</sup> During the second or third stages (or more likely both), the legalization of norms sends the public a message that can “have an impact on perceptions about the sources of a problem and on the social norms that develop in response to those perceptions.”<sup>94</sup>

In the third stage (*internalization*), “norms shift into wide acceptance [so] that they are internalized by actors that makes conformance with the norm almost automatic.”<sup>95</sup> What constitutes a transition from cascade to internalization has been hypothesized as a sufficient number of individuals or groups who agree with the new norm to establish broad-based adoption and consensus.<sup>96</sup> The internalization of a new norm depends upon the type of norm involved and the ‘prominence’ of the norm leaders.<sup>97</sup> Though scholars present slightly different approaches to conceptualizing norm diffusion at each stage, changes in legal systems and formal law signals are commonly accepted as an alteration in normative status.

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*Latin America*, 54 INT’L ORG. 633, 655 (2000).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 658.

<sup>89</sup> See CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 38 (1999).

<sup>90</sup> Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

<sup>91</sup> Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 420 (2008).

<sup>92</sup> *Id.*

<sup>93</sup> Finnemore & Sikkink, *supra* note 78, at 888.

<sup>94</sup> Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENV’T L. REV. 117, 143–44 (2009).

<sup>95</sup> Finnemore & Sikkink, *supra* note 78, at 904.

<sup>96</sup> SUNSTEIN, *supra* note 89, at 259–60; see also Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2185 (1996).

<sup>97</sup> Babcock, *supra* note 94, at 143–44.

## III. METHODS

This study employs textual content analysis.<sup>98</sup> I primarily used the Westlaw database to compile an original 50-state dataset across the following categories: enacted statutes, court rules, regulations, and proposed legislation.<sup>99</sup> The primary search term used was “restorative justice.”<sup>100</sup> To test the third measure of internalization, three terms were codes: “restorative justice,” “victim offender,” and “victim-offender mediation.” The terms “victim offender” and “victim-offender mediation” were selected given their association with the early restorative justice movement and presence in state law prior to restorative justice.<sup>101</sup> Data were disaggregated by year to determine if there were any observable differences between the three terms. An initial data sample was reviewed to determine if other search terms were appropriate to screen for each measure.<sup>102</sup> Content analysis was conducted for individual data categories and coded by such indicators as system,

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<sup>98</sup> Content analysis is an accepted empirical methodology across multiple fields including law, political science, sociology, and anthropology. *See generally* Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC’Y REV. 11 (2005) (discussing how social context and social institutions affect workers’ preferences and choices about mobilizing their rights by interviews with workers who negotiated leaves in the workplace); Lynette J. Chua, *Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore*, 46 LAW & SOC’Y REV. 713 (2012) (conducting content analyses of Singapore organizations’ documents, media reports, government statements, Parliamentary records, and legislation, regulations and cases from the early 1990s to 2010); Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 65 (2008) (analyzing the history and benefits of content analysis, and arguing that content analysis could form the basis for a uniquely legal empirical); Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2012) (conducting content analysis of the nearly 1400 law review articles and arguing that the most salient critiques of regulation express anxiety about the coercive nature of administrative government).

<sup>99</sup> The dataset for this study only includes statutory and regulatory law. While the Westlaw 50-state searches also included additional data (e.g., administrative decisions and guidance, and judicial decisions) these data categories were excluded given the small sample size. In addition to Westlaw, I used LexisNexis, FindLaw, and individual state legislature to cross reference the dataset. Following the Westlaw grouping, data reported in this Article are grouped by state “statutes and court rules” and state “regulations.”

<sup>100</sup> Even though restorative justice was the term to be tested, initial results were cross-referenced against restorative justice adjacent terms such as “balanced justice,” “family conference,” and “victim impact.”

<sup>101</sup> *See* Figure 7.

<sup>102</sup> For example, statutes that did not use the term “restorative justice” in the text of state statute, court rule or regulation were excluded. Thus, a primary search in Westlaw of “restorative justice” in the state of Virginia yielded 21 results. However, when reviewed and coded, it was identified that the term (restorative justice) was only used in the commentary.

usage, and form. The final results for each search term were analyzed against each other. Westlaw data was also cross-referenced against any known databases and studies of restorative justice legislation.<sup>103</sup>

#### IV. DISCUSSION

The movement of a new norm into state law is useful for assessing and characterizing normative change in four ways. First, laws can serve as indicators of normative change.<sup>104</sup> Second, they can be examined as mechanisms of normative change, i.e., by spreading new norms.<sup>105</sup> Third, the presence of a new norm in law affirms the status of norm-generating institutions, thereby enhancing the legitimacy of the norm itself.<sup>106</sup> Fourth, the codification of norms into law often leads to internalization of the norm into formal legal processes, increasing the likelihood of overall adherence to the norm.<sup>107</sup> Increased legal adherence to the norm can also result in expanding social or political acceptance of the norm. In the context of norm theory, transmitting the legal norm (vertically and horizontally) into new settings shows variation in the norm's influence. Put another way, as the norm moves from legal to political or social sites, it increases the possibility of full internalization in a diverse range of structural domains. Thus, while the interpretive value of data from this study is limited to analyzing the specific norm of restorative justice in state law, it provides a mechanism to examine, at both the macro- and micro-phenomenological levels, the movement of norms into law more generally.

Most often, the study of legal internalization is positioned within studies of transnational legal processes where public and private actors interact to interpret, enforce, and ultimately internalize rules of international law or inquiries into the potential differences in compliance between legal and non-legal norms.<sup>108</sup> As legal scholars have adopted and adapted theories from international relations and political science to test the norm life cycle, variant yet complementary theoretical

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<sup>103</sup> PROGRAMS AND RESEARCH, GA. STATE UNIV. COLLEGE OF LAW, <https://law.gsu.edu/centers/consortium-on-negotiation-and-conflict-resolution/programs-and-research/> [<https://perma.cc/9Y5L-39TP>] (last visited June 9, 2019); Karp & Frank, *supra* note 26, at 12; Pavelka, *supra* note 17, at 1–23; Sliva & Lambert, *supra* note 18, at 85–87; Shannon M. Sliva, *Finally “Changing Lenses”? State-Level Determinants of Restorative Justice Laws*, 98 THE PRISON J. 519, 527–32 (2018) [hereinafter Sliva, *Finally “Changing Lenses”?*].

<sup>104</sup> Koh, *1998 Frankel Lecture*, *supra* note 74, at 643.

<sup>105</sup> GOODMAN & JINKS, *SOCIALIZING STATES*, *supra* note 75, at 24–26.

<sup>106</sup> Koh, *1998 Frankel Lecture*, *supra* note 74, at 643.

<sup>107</sup> Thalia González, *From Global to Local: Domestic Human Rights in Theory and Practice*, 59 HOW. L.J. 373, 383–87 (2016).

<sup>108</sup> See, e.g., Koh, *1998 Frankel Lecture*, *supra* note 74, at 642; Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 473 (2008).

understandings and practical applications have emerged.<sup>109</sup> Most of these studies exist against a backdrop of global-local politics where scholars grapple with how international human rights become internalized in domestic law.<sup>110</sup>

Domestic legal scholars often cite the work of American law professor Harold Hongju Koh for his identification of key “markers” of norm internalization. In the mid-1990s, Koh set forth three forms of norm internalization—social, political, and legal<sup>111</sup>—as increased attention turned to processes of international human rights norm creation and compliance. He argued that legal internalization occurs when norms are incorporated into “legal systems through executive action, legislative action, judicial interpretation or a combination of all three.”<sup>112</sup> In the United States, his work has catalyzed a range of studies on different fora for internalization ranging from the judiciary<sup>113</sup> to social movements<sup>114</sup> to domestic regulatory policymaking.<sup>115</sup> However, Koh and others have not actively sought to clarify and differentiate internalization in state law. This has created a void in the literature. Instead of developing a more nuanced approach to measuring legal internalization, the current “measure” presents a binary: a presence of the norm in law means there is legal internalization while an absence of the norm in law indicates that internalization has not yet occurred.

This is an incomplete framework for understanding norm change as manifested through legal internalization. Adherence to this paradigm, for instance, would mean that the presence of restorative justice in two statutes in 1990, for instance, would indicate legal internalization (at least in those jurisdictions) and thus suggest a normative change. While two statutes could arguably reflect the advocacy of early restorative justice norm entrepreneurs, it would be a stretch to conclude that substantive legal normative change had occurred. Consider a more contemporary and specific example using data from this study. It seems quite clear that an assessment of legal internalization should differentiate between Wyoming, a state

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<sup>109</sup> See, e.g., Sandeep Gopalan, *Changing Social Norms and CEO Pay: The Role of Norm Entrepreneurs*, 39 RUTGERS L.J. 1, 30–56 (2007) (arguing for a recognition of the power of social norms and a protection of the minority opinion); Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1110–21 (2002) (demonstrating that the United States has strayed from global norms in maintaining the death penalty and detailing the long history of nations borrowing each other’s legal systems); see generally Resnik et al., *supra* note 75 (using example of climate of the general phenomenon of subnational and majoritarian-based importation and domestication of international law).

<sup>110</sup> See generally Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755 (2013) (analyzing the movement of human rights norms in the common law).

<sup>111</sup> Koh, *1998 Frankel Lecture*, *supra* note 74, at 642.

<sup>112</sup> *Id.*

<sup>113</sup> McGuinness, *supra* note 110.

<sup>114</sup> Soohoo & Stoltz, *supra* note 108.

<sup>115</sup> See generally Rebecca M. Bratspies, *Human Rights and Environmental Regulation*, 19 N.Y.U. ENVTL. L.J. 225 (2012).

with two laws containing the term restorative justice, and California, a state with twenty-one.<sup>116</sup> Thus, the current paradigm is not only under theorized but fails to account for the heterogeneity of legal internalization and the associated processes of normative change at the micro- and macro-levels.

To address this, I propose a new approach to measuring legal internalization that may clarify the emergence of new norms in law. As a methodology, this proposal presents three dimensions organized around an empirical analysis to examine the content of various laws. First, legal internalization can be analyzed based on the degree of saturation. The logic of this proposed measure is straightforward: the greater the frequency with which a new or alternate norm appears in the law, the greater the likelihood that partial or complete internalization has occurred. Saturation can be analyzed in three ways—(1) aggregated presence of the norm across multiple sites, (2) intensity (i.e., degree or extent of presence of the norm) within a single site or (3) change over time from lower to higher levels of norm presence either at the aggregate or individual level.<sup>117</sup>

Second, legal internalization can be measured by testing for the diffusion of the new norm into laws governing different public systems. Prior studies have shown that as norms gain acceptance, they diffuse or move across individuals, networks, organizations, stakeholders, and systems.<sup>118</sup> Thus, an examination of the diffusion of the norm in law across distinct systems may more accurately capture different stages of the norm life cycle. Additionally, diffusion may highlight subtle trends in normative change that might not otherwise be exposed under the current theoretical approach.

Third, legal internalization can be examined comparatively through an evaluation of changes in preferences from a similar norm to a new norm. In this case, the new norm replaces or surpasses prior, yet similar, legal norms in content, degree, or another characteristic. To assess this metric, one could track a norm from the first time it is codified in state law to the time when it is present in half, or all jurisdictions, or one could track the changes observed over another discrete temporal window. In either case, changes in the norm's saturation from lesser to greater (or vice versa) would help to identify changes in processes of normative change.

While additional indicators of legal internalization certainly may exist, these three key empirical measures provide an important and as-yet unexplored framework for the study of normative change. Taken as a whole, they represent a new typology for testing legal internalization but are not intended to offer a comprehensive or exclusive theory for assessing norm emergence. Nor should it be

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<sup>116</sup> See Appendix I (on file with author).

<sup>117</sup> As a measure, saturation is deployable beyond a state-level or domestic (United States) context. For example, saturation could be measured in the aggregate (macro-level) within federal law or intensity within discrete areas (micro-level) of federal law. Similarly, in international contexts saturation could be examined in international law or at the local, regional, national, and supranational levels.

<sup>118</sup> See generally Vogel, *supra* note 3; Stauffer & Shah, *supra* note 55; Leonard & Kenny, *supra* note 43; Umbreit et al., *Restorative Justice: An Empirically Grounded Movement*, *supra* note 1; Schumacher, *supra* note 61; Jones, *supra* note 76.

understood that all three are required to indicate legal internalization. Rather, they reflect an intervention in the scholarly discourse aimed at clarifying claims about legal internalization as part of the norm life cycle. Lastly, these measures do not seek to test the exclusivity of restorative justice as a norm in state law, i.e., restorative justice's replacement of other norms such as punitive or retributive systems or processes, but instead the emergence and increasing presence of restorative justice within state law as representative of normative change.

#### *A. Type I: Saturation of a New Legal Norm*

##### *1. Restorative Justice Across Multiple States*

One way to test for legal internalization is to examine the macro-level acceptance of the norm. Evaluation of macro-level acceptance could occur in multiple forms depending on the type of legal internalization one seeks to evaluate (i.e., statutory law, common law, judicial actors, etc.). Irrespective of the specific forum of legal internalization, this measure presents utility for identifying normative change associated with the different stages of the norm life cycle. For example, observations regarding macro-level acceptance may more accurately diagnose when a tipping point has occurred than the current binary framework in the literature.

To examine macro-level (i.e., across multiple jurisdictions) saturation of restorative justice in statutory and regulatory law, data were collected and coded for all fifty states. As Figures 1–3 illustrate, presently forty-five states have codified the term “restorative justice” into state law.<sup>119</sup> Collectively, “restorative justice” appears in a total of 229 statutes, court rules, and regulations.<sup>120</sup> Specifically, Figure 1 shows the combined totals distributed by state. The color gradient over the states ranges from no presence in state law (white) to more than fifty discrete statutory provisions, court rules and regulations (black).<sup>121</sup> Across the states, the form and use of

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<sup>119</sup> See Appendix I (on file with author). The only states that have not codified “restorative justice” into the text of state statute, court rules, and administrative code are: Arizona, North Carolina, North Dakota, Ohio and Oklahoma. *Id.*

<sup>120</sup> See Appendix I (on file with author). Given the nature of empirical research and that state law data is not static, it should be noted that Appendix I reflects dataset closure date of May 31, 2019. Since May 31, 2019 new statutes, regulations and court rules have become effective, but have been excluded.

<sup>121</sup> In Colorado, restorative justice is present in fifty-one state laws. See Appendix I (on file with author).



restorative justice vary from juvenile diversion<sup>122</sup> to adult post-sentencing and reentry<sup>123</sup> to school discipline.<sup>124</sup>

Aggregate data analysis of association or placement within a specific legal system (discussed further below) reveals a dominant trend for use in criminal and juvenile justice processes.<sup>125</sup> For example, thirty-five states have codified the use of restorative justice in juvenile justice and criminal justice processes.<sup>126</sup> Taken as a whole, the variations in the usage and form (i.e., diversion, sentencing, post-sentencing or in schools) and level of support<sup>127</sup> (i.e., ideological versus structural) of restorative justice reflect anticipated variations based on state-level social and political dynamics. Across the aggregate data, there were no discernable trends in patterns of diffusion regionally or politically.<sup>128</sup>

In applying the proposed measure (saturation) of legal internalization to the data, at the macro-level, the legal norm of restorative justice has reached, and likely surpassed, the tipping point between cascade and internalization. The presence of restorative justice in state law in ninety percent of the states reflects not only its increasing legitimacy as a new norm but also its acceptance within formal legal institutions. While macro-level data cannot fully explain social internalization, they present a more complete understanding of current sub-national legal and political climates. This is useful for future inquiries across a range of topics, including the role that state governments may play in influencing national-level legal internalization and policy change. Such clarity is not possible under the current construct of legal internalization.

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<sup>122</sup> See, e.g., COLO. REV. STAT. § 18-1.3-101 (2019); MINN. STAT. § 388.24 (2018); W. VA. CODE ANN. § 49-4-725 (West 2019).

<sup>123</sup> See, e.g., CAL. PENAL CODE, § 3450 (West 2019); HAW. REV. STAT. § 353H-31 (2018).

<sup>124</sup> See, e.g., ARK. CODE ANN. § 6-18-516 (2019); CAL. EDUC. CODE § 48900.5 (West 2019); FLA. STAT. § 1006.13 (2018); IND. CODE ANN. § 20-28-3-3.5 (West 2019).

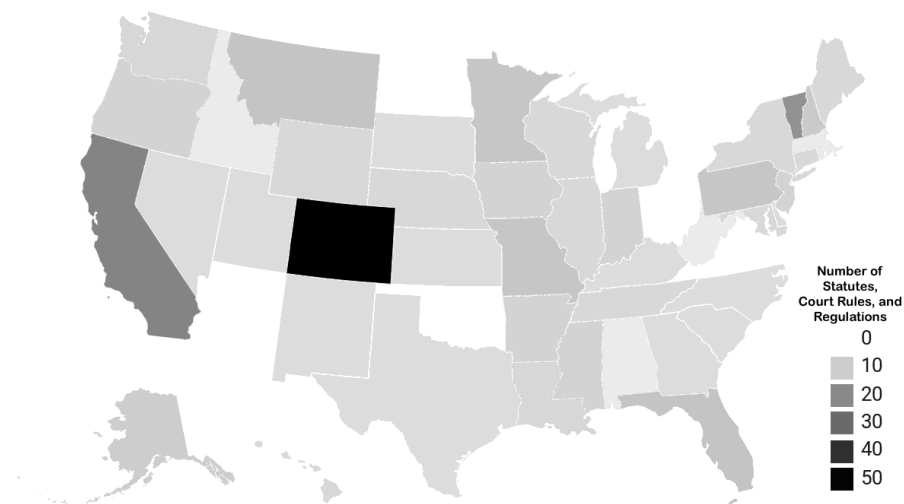
<sup>125</sup> See *infra* Figure 6.

<sup>126</sup> System association is not limited to criminal and juvenile justice processes. Sixteen states restorative justice is present in education and in four states in child welfare. See Figures 5 and 6.

<sup>127</sup> Sliva & Lambert, *supra* note 18, at 85–89.

<sup>128</sup> To analyze for trends in political association, state-level data saturation was compared to the partisan composition of each state. See *State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 1, 2019), <http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/LBM6-CV5D>].

Figure 1. Restorative Justice Statutes, Court Rules, and Regulations (Aggregated)  
 The color gradient over the states ranges from no presence in state law (white) to more than fifty discrete statutory provisions, court rules and regulations (black)



Even though restorative justice has been institutionalized most frequently within or adjacent to formal legal processes in the criminal and juvenile justice systems, there is a noticeable absence of court rules, administrative guidelines, or legislative provisions specifically addressing confidentiality or admissibility of statements made before (intake) or during restorative justice practices.<sup>129</sup> This poses a risk that evidence derived from restorative justice processes may or may not be privileged, leaving participants and practitioners in a liminal space of legal

<sup>129</sup> While the practice is not widespread, some states have adopted laws addressing confidentiality in restorative justice. *See* MASS. GEN. LAWS ch. 276A, § 5 (2018) (mandating that statements made by defendants during assessment for pretrial diversion cannot be disclosed to prosecutors or during criminal court proceedings); W. VA. CODE ANN. § 49-4-725(d) (West 2019) (“No information obtained as the result of a restorative justice program is admissible in a subsequent proceeding under this article.”) Other states, such as Illinois, have proposed confidentiality rules, but at present time they have not passed. *See* ILL. SUP. CT. R. ON CONFIDENTIALITY (proposed July 2017), <http://njdc.info/wp-content/uploads/2017/10/Illinois-Proposed-Supreme-Court-Rule-on-Confidentiality-July-2017.pdf> [<https://perma.cc/8KMX-Z9VZ>]; S.B. 678, 2019 Leg., Reg. Sess. (Cal. 2019), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB678](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB678) [<https://perma.cc/8RAP-AH75>] (This legislation for a Restorative Justice Pilot Program states: “This bill would make specified statements, and information derived from those statements, made as a part of the program *inadmissible* in any action or proceeding.”) (emphasis added).

protections. In Alabama, for example, not only is there no confidentiality protection for participation in pre-trial restorative justice programs, but state legislation requires a written statement from the offender in which they accept “responsibility for, the offense” and the statement “shall be admissible in any criminal trial.”<sup>130</sup>

In the absence of statutory protections codified at the state level, practitioners in multiple jurisdictions have sought a remedial measure—reliance on the use of Memorandum of Understandings (MOUs) with local prosecuting authorities.<sup>131</sup> Specifically, restorative justice programs enter into agreements with prosecutors, in which the prosecutor agrees not to use any statements made in preparation for or during a restorative justice process in a pending or subsequent criminal case.<sup>132</sup> This ad hoc approach to confidentiality raises important ethical and constitutional concerns.<sup>133</sup>

In the absence of explicit statutory protections, MOU agreements, or the importation of privilege from other alternative dispute resolution processes,<sup>134</sup> restorative justice processes carry the risk of feeding back into formal punitive processes or trigger new criminal or civil processes if the restorative process is determined to be inadequate, incomplete or fail. Therefore, notwithstanding the fundamentally different values and aims of restorative and retributive justice, including a rejection of a crime logic belief,<sup>135</sup> the current patchwork of formal legal

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<sup>130</sup> See AL ST § 45-28-82.25 (emphasis added) (“Provide a statement, written by the offender, admitting his or her participation in, and responsibility for, the offense which is the subject of the application for entry into the pretrial diversion program, which statement shall be admissible in any criminal trial.”).

<sup>131</sup> E-mail from Sujatha Baliga, Director and Just Beginnings Collaborative Fellow, Restorative Justice Project, to campus-rj@googlegroups.com (Apr. 12, 2019) (on file with author); Telephone Interview with Derek Miodownik, *supra* note 13; Interview with Jonathan Scharrer, Clinical Assistant Professor, and Dir., Restorative Justice Project, University of Wisconsin Law School, in L.A., Cal. (Nov. 7, 2018); E-mail from Jonathan Scharrer, Clinical Assistant Professor and Dir. Restorative Justice Project, University of Wisconsin Law School to Thalia González (Dec. 10, 2018) (on file with author).

<sup>132</sup> *Id.*; see also S.B. 678, 2019 Leg., Reg. Sess. (Cal. 2019).

<sup>133</sup> See Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 876 (2013) (“Indeed, without binding assurances that those communications are confidential and could not be used in any fashion, either directly or derivatively, to gather evidence and launch criminal charges, a defendant would be foolhardy to participate or would be chilled from participating in a meaningful and open way.”).

<sup>134</sup> Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 202–03 (2016) (arguing that in some jurisdictions confidentiality protections from other forms of alternative dispute resolution may be extended to the use of restorative justice processes in sexual assault cases).

<sup>135</sup> *Id.* at 156 (2016) (defining and describing crime logic belief).

protections for restorative processes indicate that restorative justice is not hermetically sealed from punitive approaches. This represents an underdeveloped, yet critical, set of legal issues demanding attention from scholars and advocates alike.

## 2. *Restorative Justice in Individual States*

A second potential measure of legal internalization is saturation at the micro-level. The complementary use of macro- and micro-level measures to understand legal internalization aims to provide greater depth and insight into the diverse processes of normative change at different levels.<sup>136</sup> For example, a mixed methodological approach that combines micro-level content analysis of statutory and/or regulatory law with a qualitative assessment of social or political conditions could help identify the existence of legal or structural isomorphism occurring between actors, laws, or policies. As sociological scholarship on the phenomenon of isomorphism explains, one mechanism leading to state change is mimicry by norm-generating institutions, such as state legislatures, to purposefully model themselves on other similar institutions.<sup>137</sup> Investigation of isomorphism represents a ripe area for future theoretical or empirical inquiry given the data presented in this study.<sup>138</sup> Such an inquiry could consider not only whether specific patterns exist between states to indicate isomorphism, but also if these patterns are a result of internal or external pressures in the form of persuasion, acculturation or material inducement. This would move the literature forward from normative to empirical claims and likely identify qualitative and quantitative indicators of diffusion of a particular legal norm.

A more nuanced picture of restorative justice as a legal norm emerges when a micro-level approach is applied to the dataset. Figure 2 represents the state-level distribution of statutes and court rules, and Figure 3 represents the state-level

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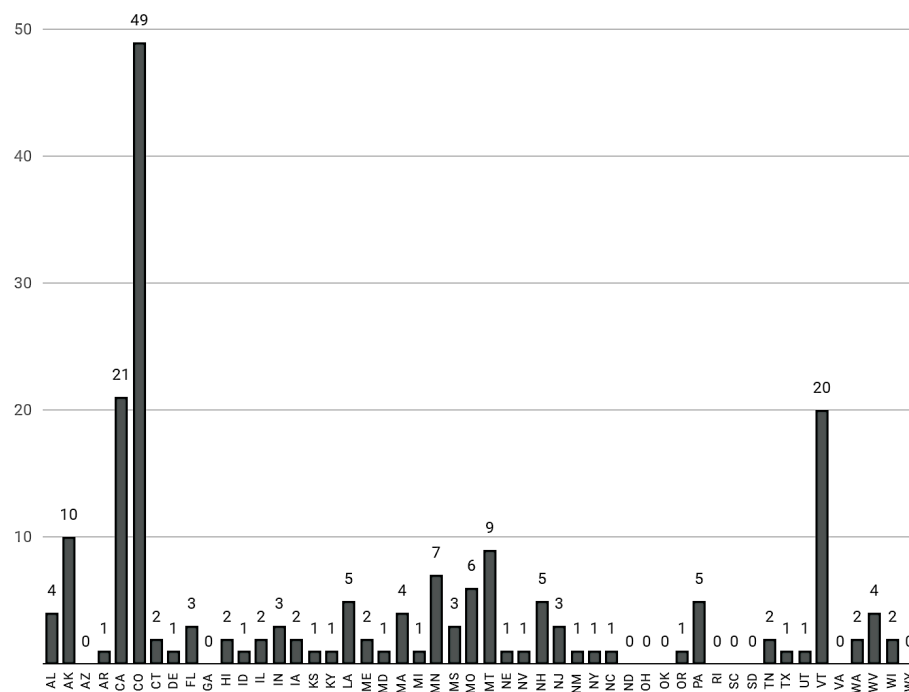
<sup>136</sup> A micro-level analysis could also answer outstanding questions regarding textual legislation changes that removed the term restorative justice, i.e. repeal or amendment. For example, was a code repealed or amended to remove the term restorative justice (thus signaling change in norm acceptance of restorative justice) or was it repealed or amended to address other sections of the code that were no longer acceptable to voters and/or the state legislature distinct from restorative justice?

<sup>137</sup> Francisco J. Granados, *Intertwined Cultural and Relational Environments of Organizations*, 83 SOC. FORCES 883, 885 (2005).

<sup>138</sup> Analysis of isomorphism could, for example, build on data and findings of this study to observe any patterns in restorative justice legislation between different states. Institutional isomorphism is a sociological theory, which contends that environmental forces and norms cause the institutions to evolve, eventually becoming more similar to others in their field. See, e.g., Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 148–49 (1983); PAUL J. DiMAGGIO & WALTER W. POWELL, *Introduction*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 9 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

distribution of regulations.<sup>139</sup> Not surprisingly, varying levels of internalization and norm saturation of restorative justice exist among the states. For instance, in some states, there is greater representation of restorative justice in statutes and court rules than in regulations: California is one such example.<sup>140</sup> In other states (e.g., Florida), it is the reverse.<sup>141</sup> Due to the broad array of variables associated with the distinct legislative process in each state, it is difficult to determine from the data whether codification in statute, court rule, or regulation represents any significant factors specific to restorative justice's movement into law, or if it simply indicates discrete, and unrelated, preferences and priorities. This area merits future study, especially for those interested in public and regulatory law.

Figure 2. Restorative Justice Statutes and Court Rules (State-Level Distribution)

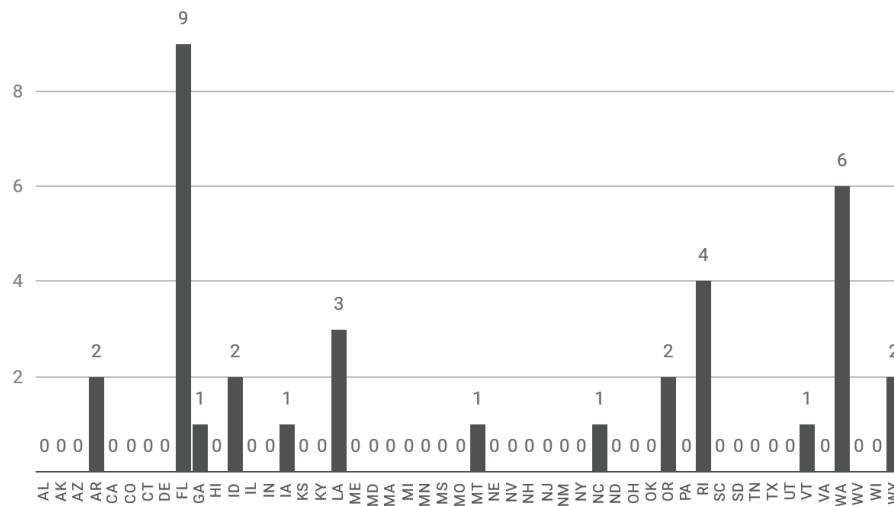


<sup>139</sup> Grouped (statutes and court rules) and single (regulations) categories were selected to match Westlaw database reporting.

<sup>140</sup> See *infra* Figures 2 and 3.

<sup>141</sup> See *infra* Figures 2 and 3.

Figure 3. Restorative Justice Regulations (State-Level Distribution)



Setting aside differences in siting, combining all three categories (statutes, court rules, and regulations) at the individual state-level provides a more detailed picture of restorative justice internalization than aggregated macro-level analysis. Colorado exhibits the highest degree of combined state-level saturation (forty-nine statutes, rules, and regulations).<sup>142</sup> Vermont follows at twenty-two<sup>143</sup> and California with twenty-one statutes, rules, and regulations.<sup>144</sup>

Similar to the macro-level measure, preliminary I conducted content analysis within individual states for patterns, such as implementation framework, siting and usage, and structural mechanism (e.g., funding or composition of hearing boards).<sup>145</sup> Differences between states are likely attributable to a diverse set of factors, such as the presence of norm entrepreneurs within state legislatures, civil society actors and advocacy, litigation, size of state, population demographics or policy preferences that align with restorative justice values, principles and/or practices.<sup>146</sup> These and other factors warrant further exploration to clarify the conditions under which

<sup>142</sup> See Appendix I (on file with author).

<sup>143</sup> See Appendix I (on file with author).

<sup>144</sup> See Appendix I (on file with author).

<sup>145</sup> See *infra* Figures 5 and 6 and discussion accompanying for results.

<sup>146</sup> See Telephone Interview with Derek Miodownik, *supra* note 13 (contending that state size and a shared and commonly accepted social and cultural identity among Vermont citizens has positively influenced restorative justice growth); see also Sliva, *supra* note 41, at 260–61 (describing the role of Representative Pete Lee in advancing restorative justice legislation in Colorado).

restorative justice has emerged as a new legal norm, i.e., law in action.<sup>147</sup> While the methodological approach of this study, and resulting data, cannot account for the localized normative socialization occurring in each state, it can, however, expose for civil society actors, attorneys, and policymakers potential sites of future legislative attention.

When examined for association with criminal and juvenile justice processes (in form and content), trends present in the macro-level analysis held constant. Two points should be highlighted regarding this finding. First, the total number of states for which analysis of this nature could be completed is smaller than the total number of states that have internalized restorative justice. Since some states express a lesser degree of internalization than others, it is not possible to make claims regarding system association or transmission. Thus, a trend in greater association with criminal and juvenile processes at the micro-level is perhaps more limited in its efficacy than at the macro-level. Second, as Figure 6 indicates, an increasing number of states have codified restorative justice within the education system. This legislative trend will likely increase as local school-based restorative justice policies and practices continue to gain momentum.<sup>148</sup> According to the Consortium on Negotiation and Conflict Resolution, in 2017, twenty-two bills were introduced specifically addressing school-based restorative justice.<sup>149</sup> Thus, we may observe a shift away from the current trend, at macro- or micro-levels, of higher association with criminal and juvenile justice processes in the near future. Such a phenomenon would conform to expected variation during the norm development processes.

### 3. *Change in Saturation over Time*

In addition to macro-level analysis of specific sites of legal internalization or norm expression, another potential measure is change over time. This temporal analysis offers a distinct view of legal internalization that may allow for studies to predict unique patterns of norm diffusion, highlight key moments of normative change, or clarify other ways in which law and legal institutions have responded to discrete social and cultural phenomena. Each of these areas raises a variety of normative questions including the mode, direction, strength, and sustainability of norm-promoting institutions. Research informed by this approach will facilitate the construction and refinement of a more integrated model of legal internalization.

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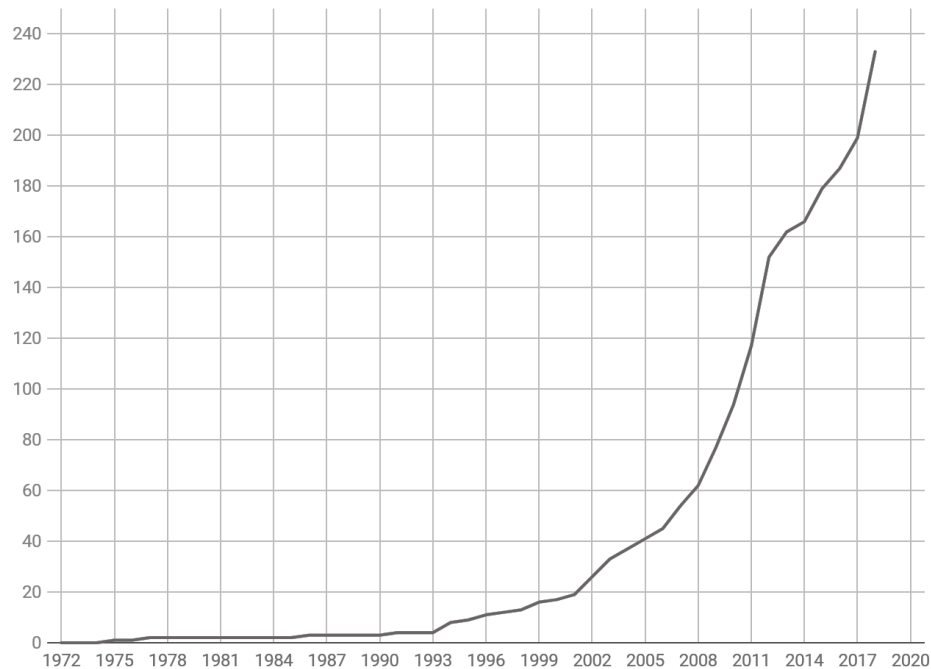
<sup>147</sup> For example, independent variables such as racial demographics (state population), gender representation (among legislators), state revenue, incarceration rates, victim's rights policy preference, crime rates, and partisan policy preferences have been identified as possible predictors of statutory support for restorative justice. *See generally* Sliva, *Finally "Changing Lenses"?*, *supra* note 103, at 532–36.

<sup>148</sup> González, *Restorative Justice from the Margins to the Center* *supra* note 12, at 298–308.

<sup>149</sup> PROGRAMS AND RESEARCH, GA. STATE UNIV. COLLEGE OF LAW, <https://law.gsu.edu/centers/consortium-on-negotiation-and-conflict-resolution/programs-and-research/> [<https://perma.cc/UEE7-AFVK>] (last visited June 9, 2019).

Applying this approach to the legal internalization of restorative justice in the United States, analysis of combined state-level data indicates a positive normative trend. The earliest identified use of restorative justice in statutory law occurred in 1975,<sup>150</sup> and since then, its use in state law has steadily increased. For example, in 2001 there were 21 state laws that formalized restorative justice; in 2009, there were 79; in 2015, there were 178; and presently (2019), there are 229. Figure 4 illustrates this change over time.<sup>151</sup>

Figure 4. Restorative Justice in State Law (1975 to 2019)



Rather than view the diffusion of restorative justice in state law through a singular linear trajectory, data displayed in Figure 4 can be delineated into three specific periods of normative change or shifts. Period 1 occurred from 1975 to 2001. During this time, the internalization of restorative justice is best described as slow, with the norm moving from one to twenty-one state provisions, ultimately in twelve different states.<sup>152</sup> Period 2 occurred from 2002 to 2008 when responsiveness to the new legal norm gained traction, as evidenced by statutory inclusion increasing to

<sup>150</sup> See ALA. CODE § 45-39-82.05(c) (1975).

<sup>151</sup> See Figure 4 presents data in four-year intervals. Individual state-level data for Figure 4 is available in Appendix I.

<sup>152</sup> See Appendix I (on file with author).



sixty-two times in nineteen different states.<sup>153</sup> Period 3 (2008 to 2019) is marked by a dramatic shift in normative change. Since 2008, the saturation of restorative justice in state law has increased rapidly, resulting in the current landscape—229 laws distributed across forty-five states.<sup>154</sup>

Analysis of the cascade of restorative justice during Period 3 does not adhere to a specific formula, but rather reflects a proliferation of the norm across multiple states and different systems. When looking for more subtle distinctions in Period 3, the most significant development, measured empirically, in legal acceptance of restorative justice occurred from 2013 and 2019. During this five-year period, the number of restorative justice statutes, court rules, and regulations increased from 159 (2013), to 229 in 2019.<sup>155</sup> The states contributing to this rise in restorative justice laws included New Mexico, New York, Iowa, New Hampshire, Pennsylvania, Rhode Island, Hawaii, Idaho, Kansas, Washington, Wisconsin, Kentucky, Maryland, Texas, West Virginia, Massachusetts, Connecticut, Michigan, and Tennessee.<sup>156</sup>

The change in the legalization of restorative justice since the 2000s, particularly since 2008, is extraordinarily important not only to theoretical models of norm change, but also to legal practice, advocacy movements, and localized practices, processes, and values. It leads to obvious research questions regarding specific and general conditions that fueled this significant growth in the legalization of restorative justice both in state law and, by extension, in public systems. It also challenges scholars to examine the specific social and political context of 2008 that may have catalyzed greater normative acceptance of restorative justice. I hypothesize one account for the increase in restorative justice in 2008 is heightened economic crisis and recession. During this time, state legislators and policymakers may have become increasingly attentive to strategies and interventions aimed at curbing significant economic costs associated with the criminal justice system.<sup>157</sup> A second hypothesis is the strong interest of civil society actors and policymakers

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<sup>153</sup> See Appendix I (on file with author).

<sup>154</sup> See Appendix I (on file with author).

<sup>155</sup> See Appendix I (on file with author). Dataset closed as of May 31, 2019. See *supra* note 121.

<sup>156</sup> See Appendix I (on file with author).

<sup>157</sup> See generally Elizabeth K. Brown, *Foreclosing on Incarceration? State Correctional Policy Enactments and the Great Recession*, 24 CRIM. JUST. POL'Y REV. 317 (2012) (applying data from National Conference of State Legislatures, the article reviews types of correctional policies enacted by states); PETER K. ENNS & DELPHIA SHANKS-BOOTH, RUSSELL SAGE FOUND., THE GREAT RECESSION AND STATE CRIMINAL JUSTICE POLICY: DO ECONOMIC HARD TIMES MATTER? (Dec. 2015) (analyzing criminal justice reforms and the Great Recession), <https://inequality.stanford.edu/sites/default/files/great%20recession%20criminal%20justice.pdf> [<https://perma.cc/62PU-N9GB>]; Donovan A. McFarlane, *The Impact of the Global Economic Recession on the American Criminal Justice System*, 7 INT'L. J. CRIM. JUST. SCI. 539 (2012) (discussing the impact of Great Recession on state-level policy and criminal justice reforms).

(state and federal) in school-based restorative justice practices as remedial response to disproportionality and restricted educational access and reduced attainment across such identity indicators for race, gender, sexual orientation, socioeconomic status, and disability.<sup>158</sup> Since the early 2000s, school reformists and civil rights advocates have sought to challenge the social, political, and legal consequences of the school discipline policies grounded in punitive and exclusionary responses to student behavior.<sup>159</sup> Their work clarified, socialized, and institutionalized restorative justice in local, state, and national policies and laws.<sup>160</sup> These are just two among many possible explanations for social, cultural, political, and legal contexts that facilitated the rapid growth and increased legitimacy of restorative justice in state law.

*B. Type II: Diffusion of a Legal Norm Between Systems*

The prior section outlined and examined different approaches of measuring saturation to parse out variances and trends in legal internalization. Another method that may provide a greater understanding of legal internalization is the diffusion of a new norm between different systems. More specifically, it is useful to examine whether a norm moves (or diffuses) in law between different systems and whether that movement sheds new light on the expression of the new norm.

To apply this diffusion measurement approach to restorative justice, this study analyzed its presence in statutory or regulatory laws specific to different public systems. This Article coded the data represented in Figures 5 and 6 for substantive use and grouped them into four categories (“Juvenile Justice,” “Criminal Justice,” “Education,” and “Child Welfare”). Data not attributable to one of the four systems were coded as “Other” and excluded from Figures 5 and 6. The “Other” included provisions coded as not associated with restorative justice practices and/or processes or specific formal usage within or adjacent to the four systems. The common examples of laws in the “Other” category included statutes that established a revenue stream or funding model for a program or defined the mechanism for populating a board for a specific restorative justice program.

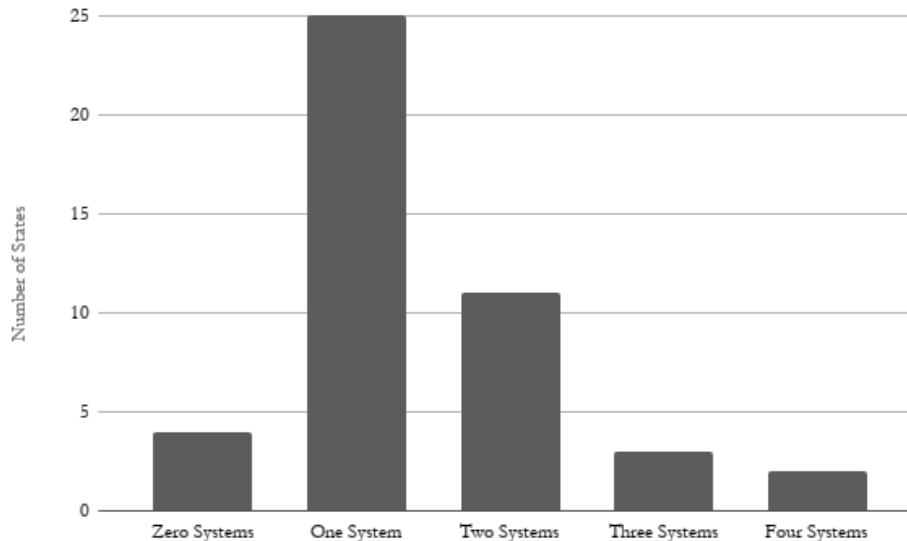
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<sup>158</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (2018) (presenting disaggregated data analysis of use of exclusionary school discipline); Walter S. Gilliam, *Early Childhood Expulsions and Suspensions Undermine Our Nation’s Most Promising Agent of Opportunity and Social Justice*, ROBERT WOOD JOHNSON FOUND. (Sept. 2016), [https://media.wix.com/ugd/fb2077\\_477fd22230a048aa90bed576fa051501.pdf](https://media.wix.com/ugd/fb2077_477fd22230a048aa90bed576fa051501.pdf) [<https://perma.cc/8USM-M293>] (documenting the use of exclusionary school discipline in preschool and racial disproportionality); Evie Blad, *When School Doesn’t Seem Fair, Students May Suffer Lasting Effects*, EDUC. WK. (Feb. 14, 2017), <https://www.edweek.org/ew/articles/2017/02/15/when-school-doesnt-seem-fair-students-may.html> [<https://perma.cc/47U2-SDN2>] (discussing how punitive policies can increase feelings of fear and isolation, compound stress, and foster mistrust decreasing educational success).

<sup>159</sup> González, *Restorative Justice from the Margins to the Center*, *supra* note 12, at 285–96.

<sup>160</sup> *Id.*

Figure 5. Restorative Justice in Public Systems (Aggregated)



There are several conclusions to be drawn by using this approach. First, a general inference can be made about an increase in the legitimacy of restorative justice. Presence in laws across multiple systems suggests its increased overall acceptance as a new legal norm. Second, the current dataset is more limited in its ability to help identify specific patterns of norm diffusion. For example, analysis of temporal change attempted to discern the movement of the norm from one system to another over time, but in some instances, restorative justice was introduced into multiple systems at the same time.<sup>161</sup> This highlights a key issue in theoretical models of normative change, namely that norm progression is likely polymorphic and represented both linearly or non-linearly. Third, the overall universe of states with restorative justice present in multiple systems is quite small (three states with restorative justice in three systems<sup>162</sup> and two states with restorative justice present in four systems),<sup>163</sup> which limits more specific conclusions from being drawn from this data.

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<sup>161</sup> For example, in 2011, the Colorado state legislature passed statutes codifying the use of restorative justice in schools, *see* COLO. REV. STAT. ANN. § 22-30.5-522 (West 2019), and in pre-sentence investigation. *See* COLO. REV. STAT. ANN. § 19-2-905(4) (West 2019).

<sup>162</sup> California, Louisiana, Florida, and Oregon. *See* Figure 6.

<sup>163</sup> Colorado and Florida. *See* Figure 6.

Figure 6. Restorative Justice in Public Systems (State-Level)

The color gradient in Figure 6 represents system association ranging from dark gray (four systems) to white (no systems).

State	Juvenile Justice	Criminal Justice	Education	Child Welfare
AL	X			
AK	X	X		
AZ				
AR		X	X	
CA	X	X	X	
CO	X	X	X	X
CT	X			
DE			X	
FL	X	X	X	X
GA	X			
HI		X		X
ID	X			
IL	X	X		
IN			X	X
IA		X		
KS	X			
KY	X			
LA	X	X	X	
ME	X			
MD				
MA		X	X	
MI			X	
MN	X	X		
MS		X		
MO		X		
MT		X	X	
NE	X			
NV		X		
NH	X	X		
NJ	X		X	
NM		X		
NY	X			
OR	X	X	X	
PA	X		X	
RI				
TN	X		X	
TX			X	
UT	X			
VT	X			
WA			X	
WV	X			
WI	X			
WY				

*C. Type III: Change in Norm Preference*

A third potential mechanism for addressing legal internalization and norm diffusion is comparative—examining the new norm in relation to similar pre-existing or simultaneously emerging norms. Given that institutionalization, as a stage within the norm life cycle, occurs when new norms take on a certain level of acceptance and adherence, it is logical to assume that there may be changes in adherence or resonance between similar norms over time. This approach provides an important complement to the previously discussed micro- and macro-models of saturation or diffusion between systems, by accounting for other activities that occur during the operation of legal internalization. It also aligns with research on how different mechanisms of social influence might “crowd out” each other under certain conditions.<sup>164</sup> There are multiple methodological approaches to test this measure. One could look for differences between similar norms as they co-exist. For example, one could observe a trend in which the new norm moves into a position of greater dominance over an earlier norm. Alternatively, an examination could focus on whether the new norm assumes the characteristics of the previous norm. These examples represent only two in a range of possibilities. Irrespective of the specific instrument or measure, focusing on legal internalization in this manner offers greater insight into the overall processes associated with norm internalization.

This Article applies this norm comparison approach to the case of restorative justice, by examining over time the relative position of dominance or presence of restorative justice to victim-offender mediation or other closely aligned forms of victim-offender processes (i.e., victim-offender dialogue) in state statutory and/or regulatory law. Figure 7 presents the results of this analysis. As of the mid-1980s, the codification of restorative justice and victim offender or victim-offender mediation occurred in similar numbers. For example, from 1981 to 1985, both victim offender or victim-offender mediation and restorative justice were codified just two to three times total.<sup>165</sup> From 1993 to 2002, victim offender or victim-offender mediation was present in greater numbers than restorative justice. In 2000, for instance, restorative justice was codified only seventeen times, whereas victim offender or victim-offender mediation was codified thirty-four times.<sup>166</sup> However, in 2004, a discernable shift occurred between the two domains. The inclusion of restorative justice in state law began to increase, but victim offender or victim-offender mediation either remained constant or did not change in a meaningful manner. Consider that, from 2002 to 2008, victim offender or victim-offender mediation was codified into state law sixteen times (changing from forty to fifty-

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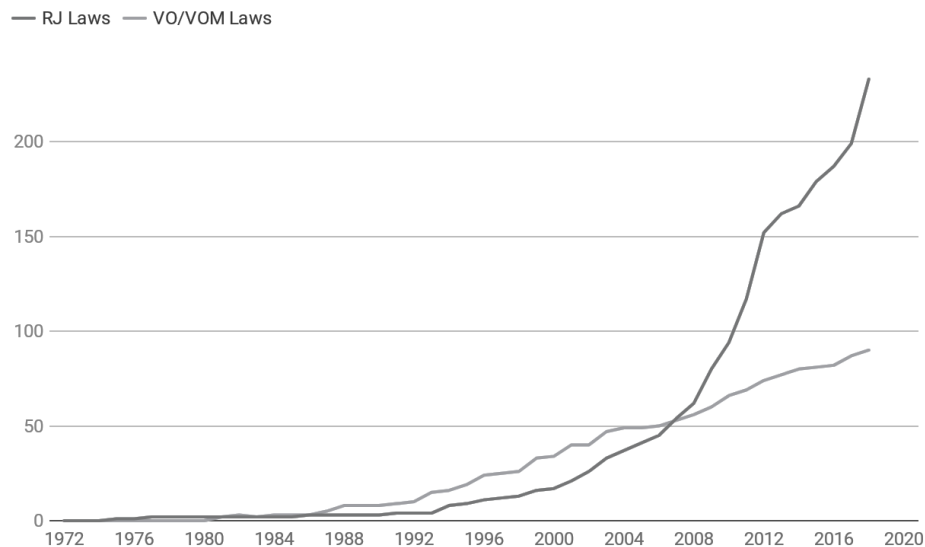
<sup>164</sup> See GOODMAN & JINKS, *SOCIALIZING STATES*, *supra* note 75, at 172–93 (discussing socialization mechanisms that promote human rights through international law).

<sup>165</sup> See Appendices I and II (on file with author).

<sup>166</sup> *Id.*

five).<sup>167</sup> By comparison, the inclusion of restorative justice in state law nearly tripled—increasing from twenty-six in 2002 to sixty-one in 2008.<sup>168</sup> Since 2009, the gap has widened even more dramatically, resulting in a current differential of more than 2.5:1 between restorative justice laws and victim-offender mediation laws.<sup>169</sup> This finding improves our understanding of the unique legal internalization process of restorative justice. It is not simply the case that restorative justice has grown in state law; it has also moved into a dominant position compared to earlier forms of restorative processes.

Figure 7. Restorative Justice and Victim Offender / Victim-Offender Mediation<sup>170</sup>



Given the specificity of this data, there are clearly open questions similar to those discussed earlier. For instance, what are the specific features of restorative justice that have influenced individuals and institutions to adopt it with greater frequency than victim-offender mediation or processes described as “victim offender”? Are there distinctive properties of restorative justice that give it greater adherence as a norm over other similar norms? Or are there political opportunity structures that favor restorative justice?

I hypothesize one possible explanation is grounded in the specific linguistic construction of restorative justice. Restorative justice is understood as the universal

<sup>167</sup> See Appendix II (on file with author). During this same time period, a statute with prior inclusion was amended to remove the term “victim offender”. See IND. CODE § 11-12-1-2.5 (2018).

<sup>168</sup> See Appendix I (on file with author).

<sup>169</sup> See Appendices I and II (on file with author).

<sup>170</sup> *Id.*

theory or larger conversational domain under which a diverse set of practices can be placed, including victim-offender mediation. As restorative justice has gained broader social acceptance—i.e., moved into the mainstream discourse—victim-offender mediation may now be understood as one archetype of restorative justice, but not representative of the entire universe of restorative justice. A second, and related, hypothesis is the adoption of school-based practices and processes in the mid-2000s. In educational settings, victim-offender mediation (or victim-offender dialogue) models are not commonly implemented, if used at all. Therefore, as new systems have operationalized non-punitive responses and practices the need has emerged to utilize variant forms of practice under the broader theory and term of restorative justice. These explanations also offer a potential answer to the non-linear movement or diffusion of restorative justice between different public systems. As a legal norm, restorative justice appears to carry with it a theoretical and practical identity that is translatable into diverse settings distinct from the criminal and juvenile justice systems that require new practices responsive to individualized sites. Thus, even though the finding of this measure is discrete and cannot explain all of the possible micro-processes, without it, such questions might not ever be considered.

#### V. INTERNALIZATION OF RESTORATIVE JUSTICE OUTSIDE OF FORMAL LAW

Though this Article focuses theoretically on legal internalization and empirically on the increasing legal nature of restorative justice in state law, it does not aim to advance a normative argument that restorative justice must or should be codified in state law to operate.<sup>171</sup> In fact, there are a significant number of examples both domestically and internationally of restorative values and ideas, remedies, and practices present in formal and informal settings without codification or operationalization into law.<sup>172</sup>

Consider the state of Oregon. Presently, there is no state law providing for, or even ideologically encouraging, school-based restorative justice practices. Nevertheless, since 2008, districts across the state have implemented restorative justice as part of their discipline policies and practices, and multi-tiered systems of

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<sup>171</sup> In other work, I argue that “system mechanisms may be converting restorative justice into rebranded and redesigned form of oppression.” See González & Buth, *supra* note 6, at 14.

<sup>172</sup> From a social movement perspective, restorative justice offers a variety of discursive, political, and strategic benefits to reformists, civil society actors and policymakers even though they do not mobilize it as law. In Chicago, for example, restorative justice values, concepts, and practices have been introduced and incorporated by individuals, community-based groups, and non-profit organizations in the absence of specific state laws or mandates. This has been represented in a spectrum of activities ranging from the use of community building circles in after school programs to the creation of neighborhood restorative justice hubs. E-mail from Annalise Buth, M.R. Bauer, Foundation Fellow in Dispute Resolution, Ctr. to Thalia González (Oct. 27, 2019, 12:27 PM) (on file with author).

support.<sup>173</sup> In Oregon's Parkrose School District, for example, the implementation of restorative practices occurred against the backdrop of a partnership between the Department of Community Justice in the City of Portland and the District, with the goal of mitigating the movement of students into the school-to-prison pipeline.<sup>174</sup> The early forms of restorative justice practices used in Parkrose School District and other Portland-area schools were modeled on diversion processes used by the Juvenile Services Division of Multnomah County.<sup>175</sup>

However, the education and criminal justice systems are not the only sites of restorative justice initiatives developed in the absence of formal law.<sup>176</sup> Across the globe, policymakers, advocates, and communities have sought to integrate restorative justice into all levels of government and civil society.<sup>177</sup> One model is commonly referred to as "restorative cities." Restorative cities represent integrated models that are localized and cross-sectoral with strategic actions to create healthier and equitable communities by incorporating restorative justice values and practices.<sup>178</sup> While formal legal internalization of restorative justice into law and policy in restorative justice cities may occur, it is not prescriptive.<sup>179</sup> Instead, in each of these cities, a diverse body of stakeholders aims to integrate restorative justice

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<sup>173</sup> Interview with Maria Scanelli, Co-Dir., Resolutions Northwest, in Portland, Or. (Dec. 6, 2011.)

<sup>174</sup> See Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 293, 301 (2012).

<sup>175</sup> Interview with Bob Tallman, Sch. Res. Officer, Parkrose Sch. Dist., in Portland, Or. (May 10, 2010).

<sup>176</sup> However, as school-based restorative justice has grown, states have increasingly adopted laws that have formalized its use and federal law and policy have internalized restorative justice as an intervention to discipline and mitigating set of practices to address zero tolerance and disproportionality. See González, *Restorative Justice from the Margins to the Center*, *supra* note 12, at 269. The earliest forms of restorative justice have been used informally with harm associated with the criminal justice system. See *supra*, note 11.

<sup>177</sup> See, e.g., John Anderson & Nicola Ross, A Restorative City for New South Wales — Could Newcastle Be a Model, Presentation to the Second International Conference on Non Adversarial Justice, Australasian Institute of Judicial Administration, Sydney Australia (Apr. 6, 2017) (on file with author); IIRP Graduate School, *Restorative Practices in Hull: The First Restorative City*, YOUTUBE (Sept. 25, 2012), <https://youtu.be/s4tpmantqeI>.

<sup>178</sup> See generally Anderson & Ross, *supra* note 177; see also *Restorative Cities with Teiahsha Bankhead, Pd. D & Tyreece Sherrills*, RESTORATIVE JUST. ON THE RISE (Nov. 28 2018) (downloaded on using Apple Podcast).

<sup>179</sup> See generally *Restorative Cities with Teiahsha Bankhead*, *supra* note 178.



frameworks into the social, political, and structural fabric.<sup>180</sup> While many open questions exist regarding the future of restorative justice in the United States, its increasing codification provokes a reevaluation of current perceptions with heightened attention on its operationalization within as well as outside the law and formal legal systems.

### CONCLUSION

This Article extends my prior work examining the emergence of restorative justice as a new norm in education and school discipline. As the data of this study indicates, there is an expanding formal legal character of restorative justice within the United States. Thus, normative internalization of restorative justice should not be understood as isolated to one system, but instead developing across a range of systems and indicators.

Studies of this nature are noticeably absent from the literature yet essential, given restorative justice's increasing presence in state law, as well as operationalization within multiple public systems. To address both a theoretical and empirical gap in the literature, this Article intervenes in two important ways. First, it proposes a new theoretical framework for measuring the internalization of norms in law. The typologies presented in this Article, while tested against a specific dataset, apply across legal landscapes in both American and international law. They are not meant to be mutually exclusive, nor are they exhaustive. Instead, their purpose is to better account for how new norms manifest in law. Second, this Article empirically examines the present codification of restorative justice in state law. Drawing on data from an original 50-state survey, it argues that restorative justice has emerged as a new legal norm. Whether viewed at the macro- or micro-levels, there is a clear positive trajectory of the legitimacy of restorative justice within law. While differences certainly exist between states, they represent a productive avenue for future research and do not detract from the overall findings of this project.

The conclusion that restorative justice has emerged as a legal norm has significant implications across multiple academic fields and, as importantly, for the daily practice of law. Empirically recognizing restorative justice as a legal norm pushes scholars to consider fresh areas of research, such as studies that test mechanisms of social influence in the process of legal internalization. Such examinations could provide valuable lessons for lawyers, advocates, and communities seeking to advance similar laws within their jurisdictions. They also might explain variations in state law across jurisdictions, including system

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<sup>180</sup> This represents a range of areas such as, urban planning and design, delivery of social services, schools, justice systems, and community capacity building. Thus, restorative justice functions simultaneously a system, a set of values, and a vision of good governance. Presently, Hull and Leeds (United Kingdom), Whanganui (New Zealand), and Oakland, California and Chicago, Illinois have all been identified as restorative cities. See Anderson & Ross, *supra* note 177; Interview with Annalise Buth, M.R. Bauer Foundation Fellow in Dispute Resolution, Ctr. on Negotiation & Mediation, Northwestern Pritzker Sch. of Law, by telephone in L.A., Cal. (May 15, 2018) (on file with author).

preferences. Accepting restorative justice as a legal norm, and in particular, understanding the saturation of restorative justice across the country at a more nuanced level, scholars now may seek to prioritize theoretical or empirical studies interrogating relevant questions of legal ethics or constitutional protections in restorative justice processes and practices. Alternatively, they may consider new areas for restorative justice remedies outside the current systems.

However, the applicability of this study's findings is not limited to research agendas. This growing statutory framework of restorative justice, coupled with its broader social and political acceptance, may serve as an important signal to impacted communities, activists, educators, and others for whom restorative justice can function as a remedy across a broad range of justice issues, including racial harm, environmental injustice, and education inequities. The internalization and diffusion of restorative justice in state law has also created new conditions by which attorneys, judges, and policymakers may increasingly make decisions regarding the use of restorative justice at different stages of legal processes. The legal academy should take note that nearly all the states have codified restorative justice in some form. This underscores the pressing need for increased curricular attention in law schools on restorative justice. With only a handful of law schools currently offering restorative justice courses,<sup>181</sup> law students may ultimately be inadequately prepared to represent the needs of their clients and effectively work in systems that increasingly utilize restorative justice practices, processes, and remedies.<sup>182</sup> Further, for those students interested in developing alternatives to pressing contemporary justice issues, such as mass incarceration, they must not only know how the existing criminal justice system works but also understand what alternative structures might look like.

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<sup>181</sup> Karp & Frank, *supra* note 26, at 7. Karp and Frank's sample of schools may not necessarily be complete, as it is difficult to identify variability in courses offered in law schools, especially when taught by contingent faculty. I, for example, have taught restorative justice courses in the 2019 winter terms at Georgetown University Law Center and Southwestern Law School in 2019.

<sup>182</sup> Furthermore, legislators, agency officials, and judges may not practice law full-time but are essential participants in defining and shaping systems in which restorative justice is present.