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Plowing in Hope: A Three-Part Framework for Incorporating Restorative Justice into Sentencing and Correctional Systems

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**PLOWING IN HOPE:^{*} A THREE-PART FRAMEWORK FOR
INCORPORATING RESTORATIVE JUSTICE INTO
SENTENCING AND CORRECTIONAL SYSTEMS**

Lynn S. Branham[†]

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^{*} See 1 *Corinthians* 9:10 (“[T]he plowman ought to plow in hope . . .”).

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Who among you has not been the victim of a crime? Did anyone ever steal from you? Burglarize your home? Intentionally push you? How did you feel?

I could tell you how I felt when I was victimized by a crime—when, for example, a burglar stole my jewelry box containing treasured and irreplaceable family heirlooms. But you already know how I felt. You know the feeling of loss. You know the feeling of having been invaded. You know the feeling of being vulnerable and the attendant angst and fear for yourself and loved ones. And you know the feeling of anger—the incense that arises as the repeat dialer in your brain keeps asking: “How could someone do this? How could someone be like this?”

Now let me ask you another question: Who among you has not been the perpetrator of a crime? Before you hasten to say “not me,” think hard. Did you ever intentionally take and keep something that was not yours? Did you ever push someone because you were mad at him or her? Did you ever drive after having, as they say, “one too many?” Did you ever smoke marijuana or, as people sometimes describe it in an effort to give their actions an unblemished, scientific bent, “experiment” with other drugs? Did you ever procure marijuana or some other illegal drug to give or sell to a friend? Did you ever commit *any* other malefaction officially denominated a crime?

These latter questions—about our own misdeeds—are the ones that can cause us to squirm. While we are quick to point out, remember, and be irate about the transgressions of others, we want to, and tend to, overlook, forget, rationalize, or minimize the significance of our own criminal or, even when not criminal, immoral conduct. How very unfortunate, though very human, that is.

So what does this colloquy have to do, if anything, with the subject of prisons? First, it reminds us of the psychic carnage, as well as more tangible injuries, that crimes can leave in their wake. Second, it can then prompt an examination of whether current sentencing structures, which so often culminate in a sentence to jail or prison, are responsive to, and lead to the redressing of, the actual harm, including psychic harm, crimes inflict on individuals and the community as a whole. Third, assuming that the readers answering the questions about their own delicately named “missteps” in life are neither saints nor self-deceptive in their responses, the queries and the admissions of wrongdoing they

engender add a dose of humility, that rarest of commodities, when considering the proposal in this essay for certain fundamental changes in conventional sentencing and correctional constructs.

This essay outlines a three-part framework for actuating this proposal. After a brief overview in Part I of some of the elemental features of restorative justice, the criminal-justice theory on which this framework is founded, Part II calls for modifications in current sentencing and correctional systems to enable judges to impose a new kind of sentence called a “restorative sentence.” The restorative sentences explicated in Part II would be served within the community. Part II explains how restorative sentences could integrate restorative justice into criminal-justice systems in a way that some existing mechanisms for implementing restorative justice, such as victim-offender mediation programs, have not and cannot. After providing several examples of what could become prevalent restorative sentences, this section of the essay delineates some particularly key steps that would need to be taken if the goals and objectives of restorative sentences are to be realized.

Part III of the essay focuses on a different locus where a sentence is being served—a jail or prison. This section of the essay calls for the emplacement of “restorative-justice programming” in these places of confinement, not at the periphery of institutional programming, but at its heart. Part III describes several prototypical examples of the kinds of restorative-justice work programs that could become central components of restorative-justice programming in prisons and jails nationwide and explains how these programs could be linked to the structures established within communities for the restorative sentencing profiled in Part II. Part III concludes with a list of several recommended steps that, if taken, would help restorative-justice programming in prisons and jails fulfill its purposes and reach its potential as an integral part of a holistic, rather than compartmentalized, system of correctional programming.

Part IV of the essay turns to the final component of the proposed three-part framework for sentences and integrated correctional programming with a restorative-justice focus. This portion of the essay calls for the establishment of specialized reentry-employment programs to secure jobs for those released inmates who have successfully completed their service in one of the restorative-justice work programs described in Part III. The essay details the linkages that would need to be developed, as part of this

reentry effort, between institutional restorative-justice programs and prospective employers seeking employees with the skills and knowledge gained through completion of a particular program.

Recognizing that there exists a formidable, though not insurmountable, obstacle to the success of these reentry-employment programs, namely employers' reticence to hire ex-prisoners even when they are equipped to perform the jobs for which they are applying,¹ Part IV of the essay then proffers a recommendation to help remedy this problem, one that will likely engender controversy. Adoption of this recommendation would require policymakers to be open-minded and not summarily reject the perhaps unwelcome proposition on which the recommendation is founded. This proposition is that there is an interface between the daunting challenges individuals face securing employment after their release from prison and another endemic societal problem—the consumption of jobs by individuals who are illegally in the country or, even when authorized residents, are working in contravention of legal bans or restrictions on their employment.

I. RESTORATIVE JUSTICE: THE THEORETICAL UNDERPINNING FOR REFORM

In law school and college criminal-justice classes, students typically learn about what are considered the conventional theories of criminal justice—retribution, deterrence, incapacitation, and rehabilitation. Restorative justice is usually cast on the sidelines.² This curricular vacuum is due, in part, to the reality that many of those who teach about the criminal law and its purposes have not been trained about restorative justice and its basic tenets. To be

1. See HARRY J. HOLZER ET AL., EMPLOYMENT BARRIERS FACING EX-OFFENDERS 11 (2003), available at <http://www.sscnet.ucla.edu/issr/csup/pubs/papers/pdf/csup6.pdf> (reporting that employers are more reluctant to hire former prisoners than any other marginalized group, including those on welfare).

2. The addition of a discussion of restorative justice in the most recent edition of a leading criminal-law hornbook may be a portent of similar content refinements in other resources utilized to teach students about criminal law and criminal justice. See WAYNE R. LAFAVE, CRIMINAL LAW 32–33 (5th ed. 2010). My casebooks on sentencing and correctional law and policy have also profiled restorative justice since 2002. See, e.g., LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 18–22 (6th ed. 2002); LYNN S. BRANHAM & MICHAEL S. HAMDEN, THE LAW AND POLICY OF SENTENCING AND CORRECTIONS 21–26 (8th ed. 2009).

blunt, our ignorance perpetuates ignorance.

Perhaps the easiest way to grasp what restorative justice means is to contrast it with the sentencing theory that currently permeates sentencing systems in this country—the theory of retribution. Retribution, in its essence, is about “getting back” at those convicted of crimes.³ A criminal sanction is imposed on an individual because, quite simply, that individual, having violated societal mores enshrined in a criminal law, deserves it.⁴

Restorative justice has a very different focus. Restorative justice, at its core, is not about society getting back at criminal offenders, but about offenders “giving back” to others. At the heart of restorative justice are three premises. The first is that a crime violates people and the relationships between them. The second is that this violation spawns obligations. The third premise is that the primary obligation created by a crime is to “right the wrong” stemming from the violation.⁵ Restorative justice, when implemented, enables those who commit crimes to make amends, in a concrete and reparative way, for the harm their crimes have caused individuals and the community as a whole. Instead of concentrating on the exaction of revenge, restorative justice strives for other ends: accountability, healing, peace, and wholeness.⁶

There are a number of different modalities for the delivery of restorative justice. Victim-offender mediation programs, which afford a victim of a crime the opportunity to meet with the perpetrator of the crime in the presence of a trained mediator, are one example.⁷ Through these mediation sessions offenders can gain an understanding of the harm their crimes have caused, and they can enter into an agreement with the victim that is designed to remedy that harm.⁸ Other variants of these mediation programs

3. See LAFAYE, *supra* note 2, at 30 (referring to retribution as “revenge”).

4. *Id.* at 31.

5. MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE 39 (2011) [hereinafter RESTORATIVE JUSTICE DIALOGUE].

6. *Id.* at 6–9. For a more detailed exposition of the distinctions between retributive and restorative justice, see Howard Zehr, *Retributive Justice, Restorative Justice*, NEW PERSP. ON CRIME & JUST., Sept. 1985, at app.

7. For an in-depth discussion of victim-offender mediation, see RESTORATIVE JUSTICE DIALOGUE, *supra* note 5, at 111–41; MARK UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION (2001).

8. For recommendations regarding how to prepare victims and offenders for mediation sessions, conduct those sessions, and follow up on those sessions, see MARK S. UMBREIT & JEAN GREENWOOD, U.S. DEP’T OF JUSTICE, GUIDELINES FOR

pull additional people, such as family members, into the restorative dialogues.⁹

These mechanisms for implementing restorative justice all have value.¹⁰ They can help, for example, to meet the unrequited needs of victims struggling with the after-effects of crimes committed against them. Victims can experience a degree of catharsis as they explain to the person who victimized them the injurious effects of their crimes. Additionally, victims can seek and secure answers to questions that may have been troubling them, such as what propelled the offender to commit the crime in the first place.

These implements of restorative justice are also a means of combating the tendency of offenders to rationalize their wrongdoing, a proclivity all humans share. After meeting a victim face to face and hearing the victim recount how the crime has hurt the victim, it is more difficult for the offender to ignore or discount the real-life impact of his or her crime. In sum, restorative-justice programs that have a mediation or dialogue component can humanize the criminal-justice system and the perceptions of those most directly affected by crimes—those who are victimized by such crimes and those who perpetrate them.

VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE 7–16 (2000) [hereinafter MEDIATION GUIDELINES], *available at* https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/ncj176346.pdf.

9. Family group conferencing is an example of one of these variants. This mediation modality also includes the victim's and the offender's family members and friends. For more information about family group conferencing, see RESTORATIVE JUSTICE DIALOGUE, *supra* note 5, at 143–78; MARK S. UMBREIT, U.S. DEP'T OF JUSTICE, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS (2000), *available at* https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176347.pdf. What are usually called either “peacemaking circles” or “sentencing circles” are restorative-justice mechanisms that are even more inclusive, with criminal-justice officials and sometimes members of the community participating in these sessions. KAY PRANIS ET AL., PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY (2003). For a detailed discussion of peacemaking circles, see *id.*

10. The satisfaction reported by most victims and offenders with the restorative-justice processes in which they have participated is one tangible example of this value. See 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, 79–80 (2011). To delve further into the benefits of restorative justice, its tenets, and some of the ways in which it can be implemented, see, for example, RESTORATIVE JUSTICE DIALOGUE, *supra* note 5; DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE (4th ed. 2010). See also the myriad books and articles on restorative justice listed in the latter book's bibliography. VAN NESS & HEETDERKS STRONG, *supra*, at 209–34.

These restorative-justice mechanisms, if properly constructed, can also provide a pathway for individuals who have committed crimes to put their wrongdoing behind them. As offenders meet their responsibility to rectify “their wrong,” they affirm not only their own dignity and humanity, but, importantly, the dignity and humanity of their victims. Thus, through the accountability imported into a criminal-justice system into which restorative justice has been integrated—an accountability that currently is not the norm—those who are guilty of criminal wrongdoing can become instruments of healing rather than harm.

II. RESTORATIVE SENTENCES

Recommendation #1: Federal, state, and local governments should take the steps needed to integrate “restorative sentences” into their sentencing systems.

A. *The Authorization and Imposition of Restorative Sentences*

Despite their benefits, restorative-justice programs in the United States, though growing in number,¹¹ still tend to be on the outskirts of most criminal-justice systems. If a jurisdiction utilizes the programs at all, they often are reserved for minor offenses, employed for crimes, like theft, in which there was a discrete victim, and, in particularly timorous jurisdictions, confined to juvenile offenders.¹² Rejecting this miserly approach to restorative justice, the threshold recommendation set forth in this essay calls on jurisdictions to specifically authorize, and then facilitate the imposition of, what would be called “restorative sentences.” This essay envisions that through these restorative sentences, restorative justice can begin to be moved from the sidelines and become a

11. While only a smattering of victim-offender mediation programs were in place in the United States in the 1970s, there were over 300 in the nation twenty years later. See MARK S. UMBREIT ET AL., U.S. DEP’T OF JUSTICE, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES 3, 5 (2000), available at https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176350.pdf; see also RESTORATIVE JUSTICE DIALOGUE, *supra* note 5, at 10–13 (summarizing the evolution and growth of the “restorative justice movement” since the 1970s).

12. See the descriptions of the restorative justice programs set forth in ALT. DISPUTE RESOLUTION AND RESTORATIVE JUSTICE COMM., AM. BAR ASS’N, MEDIATION IN CRIMINAL MATTERS: SURVEY OF ADR AND RESTORATIVE JUSTICE PROGRAMS, available at <http://www.americanbar.org/content/dam/aba/publications/criminaljustice/mediationsurvey.authcheckdam.pdf> (last visited Apr. 1, 2012).

centerpiece of sentencing systems.

It is true that there are already, though not in name, restorative sentences imposed in pockets of this country. This typically occurs when a judge imposes a sentence that incorporates and reflects the reparative agreement reached during victim-offender mediation, family-group conferencing, or some other restorative-justice program.¹³ This agreement might, for example, require the offender to pay restitution to the victim or enroll in a treatment program to address a substance-abuse problem that contributed to the offender's ill-advised choice to commit the crime.

The premises of this essay are that we have grown past or, at least, need to grow past, this point of tepidity, and that jurisdictions need to fully embrace restorative justice and its animating principles. These principles include: (1) the need to import healing—the healing of victims, offenders, and the community—into the criminal-justice system; (2) the need to provide opportunities for victims and offenders to become actively engaged in this healing process; and (3) the need to enable the community to play its role in fostering peace within individuals and the community as a whole in the aftermath of the discord that a crime causes.¹⁴ Under this envisioned criminal-justice construct, restorative justice would no longer be on the margins of a criminal-justice system, generally only making an overt and official appearance in a court when a judge occasionally places his or her imprimatur on a reparative agreement fleshed out by the victim, the offender, and perhaps others. Instead, sentences and the structures through which they are tailored and implemented would be specifically designed to promote, on a systemic basis, the aims of restorative justice.

A primary step in integrating restorative justice into sentencing would be to authorize judges to impose what would be, in name, purpose, and content, “restorative sentences.”¹⁵ As discussed later

13. See, e.g., VA. CODE ANN. § 19.2-11.4(A) (2011) (authorizing the consideration at sentencing of restitution agreements developed through victim-offender reconciliation programs).

14. See VAN NESS & HEETDERKS STRONG, *supra* note 10, at 43–47 (elaborating further on these principles).

15. I could even be so bold as to suggest that jurisdictions should adopt a presumption, though a rebuttable one, that a “restorative sentence” is the most appropriate one. But this recommendation would entail complexities that go far beyond the scope of this essay—issues that will need to be addressed in depth in a

in this essay,¹⁶ planning, training, and other steps would have to be undertaken in a jurisdiction to ensure that these sentences are, in truth, restorative sentences, and not simply a summary edict by a judge that a defendant perform some type of community service as a part, or all of, the criminal sentence. Without taking these steps, defendants might perform work benefiting the community, such as picking up trash along a highway, without having any comprehension of the real and full harm their crimes have caused, without any personal embracing of their responsibility to remediate that harm, and without any signifier from the community, after the completion of that community service, that they have repaid their debt to the community arising from their criminal conduct and are now being welcomed back fully as members of it. Providing for the imposition of what would be specifically denominated a “restorative sentence” would be a starting point for this overall endeavor to transplant restorative justice into a jurisdiction’s sentencing system.

But why should it matter what a sentence is called? Because words matter. The way we characterize someone or something matters. If you doubt that truth, then by all means introduce a friend as “my dearest friend” to some people and as “an acquaintance” to others. Notice the varying impact, both on your friend and on others, of the different terminology employed.¹⁷

Thus, under the proposal espoused in this essay, judges would announce from the bench when they have decided to impose a restorative sentence on a defendant. They would refer to the sentence by name:

future writing.

16. See *infra* Part II.C.

17. Psychologists have confirmed what some might consider an intuitive truth—that the words we use make a difference. For example, studies have revealed that when presented with what is really the same choice, though couched in different language, people tend to select the option described in terms that appear to maximize gains and minimize losses. See, e.g., Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981). This phenomenon, known as decision “framing,” was evidenced in one illustrative study in which individuals were presented with the following two options to combat a disease that would kill 600 people if no preventive measures were undertaken:

If Program A is adopted, 200 people will be saved.

If Program B is adopted, there is 1/3 probability that 600 people will be saved, and 2/3 probability that no people will be saved.

Although the two specified outcomes were, in fact, identical, 72% of the respondents favored the first option, the one that provided an explicit assurance that the lives of 200 people would be saved. *Id.* at 453.

Mr. James, after a great deal of thought, I have decided to impose a “restorative sentence” in this case.

The judge would then elaborate on the harm the defendant’s crime has caused:

The burglary you committed, Mr. James, hurt a lot of people. Ms. Wilson not only lost—forever—the jewelry you stole, but she lives in constant fear that her home will be broken into again. But Mr. James, you did not just hurt Ms. Wilson when you decided to commit the burglary. You hurt everybody in this community. When people go to bed in their homes at night or leave their homes during the day, they should feel secure—confident that they, their loved ones, and their property will be safe. You have taken that sense of security and safety away from each of us, security and safety that you, no doubt, want for yourself.

Next the judge would explain to the defendant the significance and meaning of a restorative sentence:

Through the commission of this crime, you have created a debt, Mr. James, not only to Ms. Wilson, but also to the whole community. You have an obligation to repay that debt. If you do so, you will be able to put this crime behind you and move forward with your life. By taking responsibility for the harm you have caused, you will bring back some peace to your community. You will bring healing. And, if you have the right attitude when serving your sentence—if you really want to “make it right,” you and your family, I hope, will be able to experience healing and peace as well.

At this point, the judge would announce the terms of the defendant’s sentence. To better understand what those terms might be, descriptions of two kinds of restorative sentences follow.

B. Examples of Restorative Sentences

Both examples of restorative sentences posited here recognize the reality that people living in poor neighborhoods disproportionately suffer the adverse effects of crime.¹⁸ The execution of these two kinds of sentences could occur, over time, in many parts of a community. But their dominant focus, at their incipiency, would be on remediation and reconciliation occurring through restorative sentences served in those impoverished areas

18. See Adam Benforado, *The Geography of Criminal Law*, 31 CARDOZO L. REV. 823, 847–48, 854 (2010) (explaining that impoverished neighborhoods often are afflicted by conditions that are conducive to higher rates of crime).

particularly plagued by the ill effects of crime.

1. Restorative Sentences, Locally Grown Food, and the Beautification of Low-Income Neighborhoods

We are hearing a lot these days about the need to eat healthy foods, including fresh fruits and vegetables. What has been termed the “obesity epidemic” in the United States has been linked to unhealthy diets, including the consumption of too few fruits and vegetables.¹⁹ And many serious health problems that plague people in our country, such as diabetes, high blood pressure, heart disease, and cancer are attributable, in part, to poor nutrition.²⁰

Procuring truly fresh fruits and vegetables—not the hard, round, reddish or orangish objects that are transported from sometimes a thousand miles away and masquerade as tomatoes—can be challenging for most of us. But for some people living in certain poor neighborhoods, particularly in large cities, gaining access to fresh fruits and vegetables—even rubbery tomatoes—can be particularly difficult and sometimes, as a practical matter, nearly impossible. Many of these areas have become what are known as “food deserts”—places where access to food that is both affordable and nutritious is limited.²¹

My husband is a professor and horticulturist who has worked to integrate locally grown foods into food systems. When working

19. JEFFREY LEVI ET AL., TRUST FOR AMERICA’S HEALTH, F AS IN FAT: HOW OBESITY THREATENS AMERICA’S FUTURE 3, 27–28 (2011), *available at* <http://healthyamericans.org/reports/obesity2011/Obesity2011Report.pdf>. The percentage of American adults who are obese rose from 15% in 1980 to 34% in 2008. *Id.* at 11. And if being overweight is included in the calculus, the majority of adults in this country—68%—are either overweight or obese. *Id.* Childhood obesity is also now endemic, with almost 17% of children between two and nineteen years old categorized as obese. *Id.* Almost a third of the children within this age range are obese or overweight. *Id.*

20. *Id.* at 8, 26–27. For additional information regarding the significant health risks, including an augmented risk of death, stemming from being obese or overweight, see NAT’L HEART, LUNG, & BLOOD INST., NAT’L INST. OF HEALTH, CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS: THE EVIDENCE REPORT 12–25 (1998), *available at* http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf.

21. *See, e.g.*, Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–246, § 7527(a), 122 Stat. 2039 (2008) (defining a “food desert” as “an area in the United States with limited access to affordable and nutritious food, particularly such an area composed of predominantly lower-income neighborhoods and communities”).

with a ministry in Chicago that wanted to grow vegetables to be distributed to the poor, he learned that the biggest impediment to the realization of the organization's goal was not the lack of land, but the lack of workers to do the day-in, day-out work of tilling the soil, planting, weeding, watering, harvesting, and distributing these fresh foods.

When my husband shared this discovery with me, we recognized how our very different disciplines could and should intersect—for the good of all. In brief, certain individuals who have been convicted of certain crimes could serve a restorative sentence in which they make amends to the community for the injurious effects of their crimes by helping to fill the healthy-food void amongst the poor. More specifically, they could perform, as their payback to society for their crimes, food-production work like that described above.

But the service performed in expiation of crimes would not necessarily need to be confined to the local growing of food to benefit the needy. Communities could also extend restorative sentencing to encompass the processing and preservation of such locally grown foods. If, for example, a system were in place to enable the convicted individuals to can or otherwise preserve some of the fresh fruits and vegetables grown locally, these foods could then be distributed to the disadvantaged even after the growing season for a particular food crop has ended.

Those serving a restorative sentence might, in addition or alternatively, be involved in the actual distribution of the food to designated recipients. But whether growing, preserving, or distributing the food for the poor, the subjects of these sentences would be providing recompense to their communities for their crimes in quite tangible and productive ways. And, importantly, both those serving the sentences and the community would witness the indemnifying effects of their labors.

Another potential expansion of, or alternative to, the restorative-sentence program aimed at making healthy, locally grown foods readily available in certain disadvantaged sectors of the community would involve the beautification, through "greening," of poor neighborhoods. Restorative sentences focused on this step in the revitalization of these neighborhoods might entail, for example, the growing and planting of trees, bushes, and flowers and other landscaping work in bleak, barren, or concrete-ridden places in these neighborhoods.

2. *Restorative Sentences and the Repair, Renovation, and Construction of Homes in Low-Income Neighborhoods*

The repair and renovation of dilapidated homes in low-income neighborhoods and, in some instances, the construction of new homes in those areas, could also be a focal point of restorative sentences. This home-repair and construction work, like the planting and upkeep of large and small food gardens, flower beds, and other greenery in urban areas populated by the poor, would be another means of helping to eradicate, through the service of restorative sentences, urban blight in crime-ridden areas.

Before implementing this category of restorative sentences or, indeed, any type of restorative sentence, a community would have to address and resolve a host of questions. To give but one example of such a question, the restorative-sentence planners would need to consider how to structure the restorative sentences so as not to displace current workers. This they could do. The restorative sentences being proposed would involve work that is generally not being done, except on occasion by a few nonprofit organizations,²² and that likely will not otherwise be done. So if someone were to invoke the specter of construction companies laying off employees or going out of business in the future because they cannot compete with the “free labor” of those serving their restorative sentences, this hand-wringing would not, in all probability, be factually founded.

In fact, with some creative brainstorming and innovative public-private partnerships, these restorative sentences might be structured in ways that could spur the local economy and, perhaps in the long term, be job-creating. For example, some individuals serving restorative sentences might, after receiving proper training, be assigned the responsibility of helping to tear down abandoned buildings that are an eyesore in a run-down area of the community.²³ With these lots now vacant, developers might then

22. Habitat for Humanity is perhaps the most well known of these organizations. See *Habitat for Humanity fact sheet (frequently asked questions)*, HABITAT FOR HUMANITY, <http://www.habitat.org/how/factsheet.aspx> (last visited Mar. 22, 2012).

23. Urban planners and local policy makers already recognize how the dismantling of these deteriorating buildings can be an important step in the upgrading of poor neighborhoods and in combating the crime that festers in areas marked by urban blight. The Wayne County/Detroit Demolition Initiative, for example, was created in 2010 to help develop a strategic plan for the demolition of thousands of vacant buildings within the city of Detroit. *2010 Wayne*

be more likely to employ private contractors to erect new buildings on those sites, particularly if the prospective development is a part of a comprehensive neighborhood-revitalization or community-development plan.

C. Key Steps in the Integration of Restorative Sentences into Criminal-Justice Systems

In order for restorative sentencing to suffuse criminal-justice systems and for communities to fully realize its benefits, jurisdictions would need to undertake a number of steps, as is always true when long-entrenched norms are being changed. Some particularly pivotal steps are briefly outlined below.

1. Formation of Restorative Sentencing Planning Committee

One of the threshold steps to be undertaken would be the formation of a broad-based committee to develop a plan for the integration of restorative sentences into the criminal-justice system and the community. Research and experience have confirmed what many might intuit: major changes in a criminal-justice system are more likely to garner the support of key constituencies within that system if they are spearheaded and contoured by a diverse coalition of individuals drawn from these constituencies.²⁴ In addition, the varying perspectives of these individuals, who have seen the operations of the criminal-justice system from many different angles, will augment the quality of the plan to implement restorative-sentencing changes.²⁵

What might be known as the Restorative Sentencing Planning Committee should therefore include, among others, one or more local judges with jurisdiction over criminal cases, a prosecutor, a defense attorney, an administrator of the local jail, a probation official, a local city official or administrator, and one or two members of the public who have been informed about, and are committed to, the principles of restorative justice. Who the other

County/Detroit Urban Demolition Initiative, WAYNE COUNTY EDGE, <http://www.co.wayne.mi.us/3599.htm> (last visited Mar. 22, 2012).

24. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, CRITICAL ELEMENTS IN THE PLANNING, DEVELOPMENT, AND IMPLEMENTATION OF SUCCESSFUL CORRECTIONAL OPTIONS 5–6 (1998), available at <https://www.ncjrs.gov/pdffiles/168966.pdf>; Joan Petersilia, *Conditions That Permit Intensive Supervision Programs to Survive*, 36 CRIME & DELINQ. 126, 138–41 (1990).

25. BUREAU OF JUSTICE ASSISTANCE, *supra* note 24, at 6.

members of the planning team are would depend on other variables, such as, perhaps, the kinds of restorative sentences that would probably become the most commonplace in that particular community. For example, if it were anticipated that the local production and distribution of fresh foods to the poor were to become a core part of the community's restorative-sentencing program, a horticulturist with expertise in locally grown foods or a city official or other individual involved in local sustainability efforts would bring valuable insights to the planning committee's deliberations and decisions.

2. Identification of Restorative-Sentencing Program's Goals and Objectives

One of the Restorative Sentencing Planning Committee's first tasks would be to identify the goals and objectives of the restorative-sentencing program. A recommended paramount goal would be the full incorporation of restorative justice into the culture, expectations, and norms of the community's criminal-justice system. But the planning committee could, and likely would, identify and embrace other goals for the restorative-sentencing initiative. The reduction of criminal-justice-related costs, particularly the costs of incarceration in the local jail and prisons in the state, might very well be one such goal. Another example of a potential goal would be the beautification of low-income neighborhoods.

Whatever the goals and objectives, they would need to be defined. Obviously, an assessment of whether, and the extent to which, the restorative-sentencing program is meeting its goals and objectives could not be completed if those goals and objectives had not even been determined. And the refinements needed to enable the program to better meet those goals and objectives could not be identified and made if the goals and objectives were unclear.

In addition, and importantly, how restorative sentences are crafted and upon whom they are imposed would depend, in part, on their goals and objectives. If, for example, an end goal of the restorative-sentencing plan was to close a unit at the jail or diminish crowding at the jail by a specified percentage, the restorative-sentencing program, at least when it is first established, would target defendants who would otherwise receive jail sentences for their crimes. In other words, the object of the restorative sentences would be jail diversion rather than, for example, "probation

enhancement”—the augmenting of the conditions imposed on defendants who, even in the absence of the restorative-sentencing option, would have received a non-incarcerative sanction.

3. Training of Judges, Criminal-Justice Practitioners, Defendants, and Others About Restorative Justice and Restorative Sentences

In order for a restorative-sentencing program to be effectual and endure, those who are at the frontlines in its implementation need to understand the purposes and benefits of restorative justice. Without a deep grasp of, for example, the accountability, reparations, and healing that are restorative justice’s intended by-products, these individuals not only will fail to be facilitators of restorative justice, but may be obstacles to its effectuation. Thus, judges handling criminal cases in the community need to be trained about restorative justice, as do prosecutors, defense attorneys, probation officials, and other individuals who work within the criminal-justice system and will play an integral role in the infusion of restorative justice into that system.²⁶

In addition, judges and other criminal-justice practitioners need to become informed about the particular restorative sentences that can and will be served within that community. Gaining an understanding of the day-to-day work that the restorative sentences will entail, and of their ensuing benefits, will dispel misimpressions about restorative sentences and the accountability they demand. Details about restorative-sentencing

26. This recommendation springs, in part, from my own personal experience as the chair of an American Bar Association subcommittee that drafted a policy resolution calling on federal, state, territorial, and local governments to incorporate victim-offender mediation programs into their criminal-justice systems. This policy resolution was initially opposed by diverse constituencies within the ABA’s Criminal Justice Section—judges, prosecutors, defense attorneys, and victims’ rights advocates—all of whom felt threatened by the change in the status quo that victim-offender mediation would present. Dr. Mark Umbreit, one of the nation’s foremost experts on victim-offender mediation and restorative justice, then met with key leaders in the Section to share insights he had gained during his many years of researching these kinds of mediation programs and serving as a mediator himself. In addition, the Section’s leaders heard the moving testament of a man, whose daughter had been raped and murdered, about the personal benefits of participating in mediation sessions with his daughter’s killer. Having gained a clearer understanding of the purposes, need for, and practical benefits of victim-offender mediation, the ABA then approved the policy resolution endorsing victim-offender mediation programs. See CRIMINAL JUSTICE SECTION, AM. BAR ASS’N, RESOLUTION 101B REPORT TO THE HOUSE OF DELEGATES (1994).

options within the community will also guide those, such as judges and probation officials, in making recommendations and decisions about the nature and amount of a particular restorative sentence to be served by a defendant.

Defendants eligible to receive a restorative sentence must also be conversant with what that sentence would mean. The knowledge imparted before imposition of a restorative sentence should include an overview of the aims of restorative justice, other components of the restorative-justice process of which the defendants would become a part if the judge were to impose a restorative sentence,²⁷ and the integral role they would play in that process. Those defendants who then receive a restorative sentence should later receive training about the particular type of restorative sentence they will serve and how their particular labors will benefit individuals and the community—how they will, in a way, be indemnifying the community for the ways in which their crime has injured it. Without such training, defendants may still, through service of their sentences, provide tangible benefits to their communities, as is true when convicted offenders perform community service outside the context of a program imbued with the precepts of restorative justice. But it is unlikely that they will bring the healing and peace to the community—or to themselves—for which restorative justice strives.

If other public or private entities or individuals are enlisted in the effort to integrate restorative sentences into a particular jurisdiction's criminal-justice system, these partners in the restorative-justice endeavor also need to comprehend the aims of restorative justice and, more specifically, of the restorative sentences in whose success they will be playing a role. The city ministry mentioned earlier that had contacted my husband for assistance in growing fresh vegetables for distribution to the homeless provides an example of when it would be prudent to target individuals from outside the criminal-justice system for such training.²⁸ This charitable organization, you will recall, was having trouble finding the laborers needed to plant, tend to, and harvest

27. Participation in "peacemaking circles" might, for example, be a standard accompaniment to restorative sentences or certain restorative sentences in that jurisdiction. See PRANIS ET AL., *supra* note 9 and accompanying text; see also *infra* text accompanying note 37 (discussing the planning that would preface the institution of these other ingredients of restorative justice in a jurisdiction).

28. See discussion *supra* Part II.B.1.

the food crops. If a Restorative Sentencing Planning Committee were to determine that it would be cost-effective and advisable to have some offenders serve their restorative sentences at a site owned or overseen by such a charitable organization, key individuals within the organization, such as those supervising the offenders' horticultural labors, should receive the restorative-justice-oriented training described above. This training would help to ensure that the requisite steps are taken, including at the work site each day, to maximize the realization of the restorative purposes of those sentences.

4. *Screening of Defendants for Eligibility for a Restorative Sentence*

Imposition of a restorative sentence would clearly not be appropriate in some instances. Jurisdictions therefore need to ensure that screening mechanisms are in place to identify suitable candidates for a restorative sentence.²⁹ Examples of criteria that would lead to a defendant's exclusion from a restorative-sentencing program include the following: first, it would have to be determined if the defendant is receptive to the goals of restorative justice and is willing to meet the terms of a restorative sentence. If a defendant refuses to acknowledge the harm his or her criminal conduct has caused or is reticent to remedy that harm, imposition of a restorative sentence would be futile, erode the commitment of other convicted offenders trying to remedy their past misconduct, and could, in a sense, revictimize the community. If there is any doubt about this potential for revictimization, try to remember a time when you were the victim of a wrong and the wrongdoer was palpably unrepentant.

Second, a defendant should not receive a restorative sentence when such a sentence would pose a significant threat to public safety. A gang leader involved in a drive-by shooting, for example, would be ineligible for a restorative sentence. Risk-assessment tools whose accuracy has been confirmed through testing should be

29. Screening mechanisms are also utilized to determine defendants' suitability to participate in other kinds of restorative-justice programs, such as victim-offender mediation. See, e.g., MEDIATION GUIDELINES, *supra* note 8, at 8–9. Screening for eligibility for a restorative sentence would often, although not always, yield the same result as the screening for participation in restorative mediation or dialogue. However, there likely would be some defendants who, though ready and willing to participate productively in, say, victim-offender mediation, are reticent to do the work entailed in a restorative sentence.

employed when making this risk assessment. Risk-assessment instruments can help correctional officials determine the degree of risk posed by a particular offender and what level of supervision he or she needs while serving a sentence.³⁰ The use of such instruments to calibrate supervision levels not only promotes the public safety, but also avoids the unnecessary incursion of costs for an unneeded amount of supervision.³¹

Third, if the restorative-sentencing program is used for prison-diversion or jail-diversion purposes, rather than as an adjunct to some other sentence, such as probation,³² screening or other mechanisms should be in place to ensure that, absent the restorative sentence, a defendant would otherwise have been jail- or prison-bound.³³ Without such screening, some restorative sentences would end up being imposed on individuals who would have received a community-based sanction in any event. The jurisdiction's objective to utilize restorative sentences to diminish its reliance on incarceration as a sentence would then not be fully realized.

5. *Establishment of the Restorative-Sentencing Program Structure*

Before the imposition of restorative sentences could become a convention within a community, the restorative-sentencing program structure would need to be in place. The Restorative Sentencing Planning Committee would resolve many of the central questions about this structure. The resolution of other structural details would be remitted to spin-off subcommittees and to the personnel who would be involved in the daily work of overseeing

30. See JAMES AUSTIN & TONY FABELO, THE JFA INST., THE DIMINISHING RETURNS OF INCREASED INCARCERATION: A BLUEPRINT TO IMPROVE PUBLIC SAFETY AND REDUCE COSTS 15 (2004), available at <http://www.jfa-associates.com/BlueprintFinal.pdf>. For a set of recommendations designed to safeguard the reliability and validity of correctional risk assessments, see James Austin, *How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections*, FED. PROBATION, Sept. 2006, at 58, 59–60.

31. AUSTIN & FABELO, *supra* note 30, at 15.

32. Restorative sentences might also be stand-alone sentences unaccompanied by such requirements as probationary supervision or attendance at a day reporting center.

33. Such screening instruments and other measures have already been utilized successfully for diversion purposes in other jurisdictions, often to alleviate prison or jail crowding. See *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 WL 2430820, at *95–96 (E.D. Cal. Aug. 4, 2009) (citing examples of jurisdictions that have diverted offenders from prison and jail without compromising the public's safety).

the execution of restorative sentences leveled on certain defendants. A few illustrations of just some of the structural questions to be addressed include:

- (1) How should the length of a restorative sentence be calibrated?
- (2) If one goal of restorative sentencing in the community is diminution in the use of incarceration, what is the planned diversionary impact? In other words, approximately how many defendants would be serving, at any one time, a restorative sentence in lieu of incarceration in jail or prison?
- (3) What will be the supervision structure and the level of supervision for defendants serving the restorative sentences? Will the nature or amount of supervision vary depending on the classification level of defendants working on a particular work crew, the nature of the service work they are performing, or other factors?
- (4) How many work sites will there be, what will be their focus, and where will they be located?
- (5) In addition to the training mentioned earlier that defendants would receive about the purposes of restorative justice, their own restorative sentences, the community needs that they will be meeting through service of those sentences, and any other restorative processes in which they will be participating, what additional training should defendants undergo as a precursor to the execution of those sentences? More specifically, what training is needed about program expectations and requirements, and who should conduct that training? And what training is needed to equip the defendants to perform the tasks they are assigned well and to understand and appreciate their significance?³⁴
- (6) What additional partners, both public and private, should be enlisted to maximize the program's efficacy and success? If, for example, the restorative-sentencing program encompasses the construction or renovation of homes for the impecunious, should the program planners ally with a nonprofit, such as Habitat for Humanity, to advance their shared goals? Should,

34. If defendants' restorative sentences, for example, were to entail making locally grown foods accessible to those who are indigent, potential additional components of their training might include, among others: nutrition, an overview of sustainable food systems, demonstrations of certain tasks to be performed, and other foundational information needed to prepare the defendants for their food-growing, food-preservation, or food-distribution labors.

alternatively or in addition, the program establish some partnerships with local contractors? If so, what would be the nature of those partnerships?

- (7) Should any linkages established with public or private entities be designed, in part, to help unemployed offenders serving restorative sentences gain employment, whether during or after the service of their sentences?³⁵
- (8) What personnel are needed to implement restorative sentencing, and how will personnel requirements be met?
- (9) What other resources are needed to implement the restorative-sentence program, and how will those resource requirements be met?³⁶
- (10) When will a restorative sentence be combined with another community sanction, such as electronic monitoring or electronically monitored home confinement at prescribed times of the day or night?

6. *Inclusion of Other Restorative-Justice Components*

When planning the system for the imposition and execution of restorative sentences, the Restorative Sentencing Planning Committee should also consider other ways the sentences could be and should be contoured, and what other steps should be taken, to integrate the aims of restorative justice into the restorative-sentencing program. An example of one possible step would be the holding of a completion ceremony at the conclusion of a defendant's service of a restorative sentence. The defendant and representatives of the community would participate in the ceremony, and other individuals whose presence would help

35. Studies have confirmed that unemployment is a risk factor for recidivism. See Christy A. Visher et al., *Workforce Development Program: A Pilot Study of its Impact in the U.S. Probation Office, District of Delaware*, FED. PROBATION, Dec. 2010, at 16, 16, 21 (reporting a diminution in recidivism for probationers participating in an employment-services program).

36. This latter question, like others to be addressed by the Restorative Sentencing Planning Committee, is interrelated with other issues to be resolved by the planning committee. For example, as mentioned earlier, the planning committee might determine that one goal of the restorative-sentencing program is to divert low-risk offenders from confinement in state prisons. Such diversion would yield cost savings to the state, the funding source for the prisons. Consequently, a state-local partnership could be established to effectuate the goal of utilizing restorative sentences to reduce incarceration in state prisons. One component of that partnership could be state funding of a defined amount of the cost of restorative sentences imposed in lieu of prison sentences.

achieve restorative goals, such as any discrete individual victim of the defendant's crime, family members of the victim, and members of the defendant's family, could potentially participate in the ceremony as well. One purpose of this ceremony would be to help bring some final closure to those affected by the defendant's crime, including the defendant, offering a new beginning in the defendant's relationship with the community.³⁷

7. *Program Evaluation*

The Restorative Sentencing Planning Committee should also initiate the steps needed for the restorative-sentencing program to include an evaluation component. The outcome measures that would enable the committee to ascertain, from evaluations conducted at regular intervals, the extent to which the program is realizing its goals and objectives would need to be identified. In addition, the structure for both collecting and then reporting relevant program-related data would need to be set up following the careful planning of that structure. These programmatic evaluations would not simply serve as a quality-assurance mechanism. If the results of the evaluations were, as they should be, disseminated publicly, then the evaluations would also import accountability to the public into the structure and mores of the restorative-sentencing program.

8. *Adoption of a Process for Ongoing Program Refinements*

As is true with any overall sentencing system, any particular kind of sentence or correctional program, or, for that matter, any other product of a human endeavor, there will always be room for improvement—ways in which, in this case, the restorative-sentencing system and the types of restorative sentences imposed under it can be further refined. The Restorative Sentencing

37. These kinds of completion ceremonies are not without precedent. Drug courts, for example, typically hold a graduation ceremony for individuals who have successfully completed the drug-court program. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 17 (2009), available at <http://www1.spa.american.edu/justice/documents/2710.pdf>. In jurisdictions that have established what are known as "reentry courts," released prisoners who have met the terms of a reentry plan, whose implementation was overseen by the court, participate in similar graduation ceremonies. See, e.g., Melissa Aubin, *The District of Oregon Reentry Court: An Evidence-Based Model*, 22 FED. SENT'G REP. 39, 40 (2009).

Planning Committee should therefore establish a process that ensures that the import of the data whose collection was just discussed is assessed, programmatic deficiencies are identified and rectified, and action plans are developed to enable the program to meet its full potential. These action plans might address such matters as when and how to extend the restorative-sentencing program's scope, whether through the addition of other kinds of restorative sentences or the extension of restorative sentencing to a greater number of defendants or additional categories of defendants.

9. *Public Education*

Outreach to, and the education of, the public about the restorative-sentencing program should also be among the Restorative Sentencing Planning Committee's chief priorities. This ongoing educational effort should be designed to inform the public about restorative justice, its key tenets, and its purposes. The public should be apprised of the principal benefits of restorative justice and of the restorative sentences that will be imposed within that particular community. Comparative information about the costs and risks of restorative sentences vis-à-vis other criminal sanctions, such as incarceration, should also be disclosed.³⁸ One object of this educational endeavor would be to help inculcate, over time, a commitment throughout the community to restorative justice and to fulfillment of the community's role in its effectuation.

It would also be prudent for the planning committee to highlight the care with which the restorative-sentencing program has been structured and individual restorative sentences tailored to minimize risks to the public safety. But it would be foolhardy, as well as unseemly and deceptive, for the planning committee to

38. Studies have shown that the public's support for different kinds of sentences varies greatly depending on the extent to which the public is informed about the comparative costs and benefits of various sentencing options. For example, when researchers conducting one study asked over 400 individuals to choose between probation and prison as the sentence for twenty-three hypothetical offenders, the respondents opted for incarceration in the vast majority of the cases—eighteen of the twenty-three. See JOHN DOBLE & JOSH KLEIN, PUNISHING CRIMINALS: THE PUBLIC'S VIEW—AN ALABAMA SURVEY 26–31 (1989). But when the respondents were given five additional sentencing options from which to choose and told of their relative costs, the respondents favored a prison sentence in only four of the cases. *Id.* at 32–40.

state or intimate that restorative sentences hold no risk. They, of course, do entail risk, as do all sentences. Prison sentences, for example, carry the risk, substantiated by researchers, of endangering the public's safety as a result of the criminogenic effects of incarceration.³⁹

If the restorative-sentencing planners were to profess or suggest that the restorative-sentencing program is risk-free, then when someone serving a restorative sentence later commits a serious crime, as will inevitably happen at some point, public support for the program may quickly erode. Instead, members of the public should be regularly reminded of two realities that they would realize, upon reflection, they already accept: life is risky, and they readily take risks every day. Whenever they drive a car, for example, or are a passenger in a car, they risk being injured and perhaps killed. Yet they travel in cars. In short, the comparative benefits of, and risks associated with, restorative sentences should be explained in a candid and truthful way that forestalls irrational fears about them and garners the community's long-term support for them.

III. RESTORATIVE-JUSTICE PROGRAMMING IN PRISONS AND JAILS

Recommendation #2: Federal, state, and local governments should take the steps needed to integrate restorative-justice programming, including restorative-justice work programs, into prisons and jails.

The next recommendation, one that provides the underpinning for the second part of the three-part framework espoused in this essay, is to infuse restorative-justice programming, including restorative-justice work programs, into prisons and jails nationwide. There are pockets of this country where at least one restorative-justice program, usually mediation, has already been

39. For a list of the array of reasons why incarceration can be criminogenic, helping to spawn rather than curb future crimes, see Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1054–60 (2008). One of the many cited reasons is that prisons are, in effect, “schools” for crime, with the recidivism risk for low-risk offenders elevating once they are incarcerated with high-risk offenders. *Id.* at 1054–55. Also, due to the violence and threat of violence that attend incarceration, prisoners often become hardened while they are imprisoned, making them more inclined to commit violent acts themselves. *Id.* at 1057.

implanted in a correctional institution.⁴⁰ Under the recommendation tendered here, restorative-justice programs would not just be added to the menu of programs—educational, treatment, recreational, and the like—within a correctional facility. Instead, restorative justice itself would become part of the ethos within the prison or jail community.

Admittedly, integrating restorative-justice precepts into non-incarcerative sentences served within a community may be easier than inculcating those precepts into incarcerative settings. When convicted offenders are serving restorative sentences within the community, the public is more likely to see firsthand how they are making amends to the community for the harm their crimes have caused. In witnessing the tangible benefits the community is reaping from the offenders' reparative endeavors, both the community and the offenders are more likely to experience the catharsis that can ensue when a person atones, through ameliorative acts, for his or her misdeeds.

There are, however, some convicted persons who, for public-safety or other compelling reasons, need to serve a period of confinement as a part or all of their sentences. Most of these confined individuals will ultimately be released back into their communities.⁴¹ But whether these individuals die behind prison walls or fall within the vast majority of inmates who return to their communities, the ends of restorative justice mentioned earlier—meeting the needs for accountability, healing, peace, and wholeness—apply equally to them and the public they have harmed.

It might be difficult for those familiar with the norms and conditions that prevail in prisons and jails today to even envision how restorative justice could become part of the ethos in places where people are sometimes kept, quite literally, in cages. I will not

40. See Martha Henderson Hurley, *Restorative Practices in Institutional Settings and at Release: Victim Wrap Around Programs*, FED. PROBATION, June 2009, at 16, 19. Minnesota, notably, has pioneered a statewide initiative to import a breadth of restorative-justice programs into its prisons. See Jessica A. Focht-Perlberg, Note, *Two Sides of One Coin—Repairing the Harm and Reducing Recidivism: A Case for Restorative Justice in Reentry in Minnesota and Beyond*, 31 HAMLINE J. PUB. L. & POL'Y 219, 259–60 (2009).

41. See SEAN P. ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 2, 7 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf> (reporting that fewer than one percent of all persons sentenced by state courts in 2006 for a felony received a life sentence).

pretend that this would be an easy task. Fundamental change never is. But history is replete with examples of attitudinal changes that are similarly seismic. Views about a “woman’s role” in the workplace is but one of many examples of such changes.

The purpose of this essay is not to identify the myriad steps—some big, some small—that, if taken, could collectively alter the climate of confinement facilities by embedding within them a commitment to restorative justice.⁴² But to gain a fuller understanding of the import of the recommendation to institute or modify programs in prisons and jails to effectuate restorative-justice goals, it would be helpful, I believe, to describe several specific examples of restorative-justice work programs that could be established within correctional institutions.

A. Examples of Restorative-Justice Programming in Prisons and Jails

There are, as mentioned earlier, countless ways in which restorative justice could, over time, come to permeate prison and jail cultures.⁴³ The examples of restorative-justice work programs posited below illustrate not only how such programs could advance the goals of restorative justice, but also how they could do so in a particularly effective manner through linkages and partnerships with restorative-justice programs at the community level, like those proposed in Part II of this essay.

42. I have proposed earlier the taking of some steps, in addition to infusing prisons with a restorative-justice ethos, which would be integral to the transformation of prison cultures. See Lynn S. Branham, “*The Mess We’re In: Five Steps Towards the Transformation of Prison Cultures*,” 44 IND. L. REV. 703 (2011). These other steps include: (1) adoption by the states and federal government of a statutory cap on the per-capita imprisonment rate in their jurisdictions that is at a level at least fifty percent lower than the current national rate; (2) instituting in each jurisdiction a comprehensive plan to bring transparency and accountability into prison operations—a plan that includes the monitoring of prison conditions, and public reporting about them, by an independent public entity; (3) assigning a trained and dedicated mentor to each prisoner at the beginning of his or her term of imprisonment; and (4) according prisoners a key role in the development of an individualized reentry plan whose implementation would commence at the outset of incarceration. *Id.* at 706–18, 724–31.

43. For other examples (besides the restorative-justice work programs elaborated on in this essay) of ways to instill restorative justice in prison environments, see Branham, *supra* note 42, at 720–24 (explaining how victim-offender mediation, victim-impact panels, faith-based prison units, and other restorative-justice modalities can be integrated into prison operations).

1. Horticultural Programs to Benefit Low-Income Neighborhoods and the Disadvantaged

Just as restorative sentences served within the community can entail work that benefits, in particular, neighborhoods that suffer disproportionately from the ill effects of crime, so can restorative-justice programs based in prisons and jails target those neighborhoods as beneficiaries of inmates' restorative-intended labors. And just as restorative sentences can culminate in the provision of healthy, fresh foods to be consumed by the impecunious with little access to, or insufficient means to buy, such foods, so can restorative-justice programs in prisons and jails involve the production of healthy fresh foods for the disadvantaged. The Missouri Department of Corrections has in fact instituted such a food-production program, with over fifty tons of fruits and vegetables harvested in 2011 for distribution to local food pantries.⁴⁴

When planning such a food-production program, correctional officials would need to take care not to supplant, or undermine the efficacy of, restorative-sentencing structures that have parallel aims. For example, if individuals serving restorative sentences in a city are growing and harvesting three kinds of fresh vegetables—tomatoes, green beans, and spinach—and then distributing them to food pantries and homeless shelters in two impoverished areas of a city, the restorative-justice program in a nearby prison should not duplicate that service by distributing the same vegetables to the same recipients. Instead, the food produced through the prison-based program could be distributed to other designated indigent recipients in those same neighborhoods, in other low-income areas of the city, or in other communities where the restorative sentences do not involve the growing of these kinds of fresh foods. Alternatively or in addition, the restorative-justice program at the prison could focus on food crops that are more difficult to grow in an urban setting. Crops that require more land to produce a high yield, such as sweet corn and raspberries, are examples of such crops.

There are innumerable other ways in which a restorative-

44. See Press Release, Missouri Dep't of Corrs., Missouri Department of Corrections Institutions Donate More Than 50 Tons of Produce to Local Food Pantries as Part of Restorative Justice Garden Program (Oct. 11, 2011), available at <http://doc.mo.gov/pressreleases/2011/20111011.pdf>.

justice program with a horticultural focus in a prison or jail could complement a restorative-sentencing structure within a community. For example, as discussed earlier, restorative sentences could center on revitalizing—through the planting of trees, bushes, and flowers—places that are visual eyesores in poor neighborhoods. Then prisoners enrolled in a restorative-justice program at a prison in the state could grow some or many of the trees, shrubs, and other plants that would be used in a collaborative effort to renew these crime-stricken areas that are often bereft of greenery.

2. *Carpentry, Construction, and Related Programs to Benefit Low-Income Neighborhoods and the Disadvantaged*

Other examples abound of how restorative-justice programs in prisons and jails might be tailored to synergize well with restorative sentences. As alluded to earlier, when serving what could become a classic restorative sentence, convicted individuals could repair, renovate, or build homes to combat the palpable deterioration of buildings that often plagues crime-infested neighborhoods. Prisons could pair with communities to facilitate this restorative work. Prisoners serving in a restorative-justice carpentry program, for example, might produce the woodwork or cabinets to be installed in homes being renovated for people in these neighborhoods who are destitute. And inmates might even be used to build modular homes or parts of homes that could then be erected in certain crime-ridden neighborhoods by individuals serving restorative sentences.

It bears emphasizing that whatever the specific nature of the restorative work undertaken, the restorative-justice work programs would be distinct from traditional prison work programs. These traditional programs can have many goals: the allaying of the inmate idleness that can make prisoners more unruly and difficult to manage, the inculcation of work skills that will facilitate inmates' attempts to secure employment upon their release from prison, and the reduction in recidivism that occurs when released prisoners are successful in obtaining steady employment.⁴⁵ But while restorative-justice work programs may share these goals, their

45. Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison 'Real Work' Programs Work?*, NIJ J., June 2007 at 32, 33, available at <https://www.ncjrs.gov/pdffiles1/nij/jr000257h.pdf>; see also *infra* notes 60–64 and accompanying text for a discussion of the link between post-release unemployment and recidivism.

overarching purpose (and the way in which they would be contoured) would be to effectuate the goals of restorative justice, including offenders' recognition, acknowledgement, and assumption of their responsibility to make positive contributions to a community that serve as tangible recompense for the harm their crimes have caused.

B. Key Steps in the Integration of Restorative-Justice Programming into Prisons and Jails

Incorporating restorative justice into prisons and jails and, more specifically, restorative-justice programs like those described above, would require, above all, open-mindedness, a willingness to depart from the status quo, and the discarding of conventional attitudes about inmates and the purposes of incarcerative sentences. In addition, correctional officials and others committed to imbuing correctional settings with a restorative-justice ethos would need to take an array of steps to implant this new paradigm in prisons and jails. Several particularly key steps are outlined below, many of which mirror the prescribed steps to be taken when establishing restorative-sentencing structures within communities.

1. Formation of Restorative Justice Planning Committee

What could be denominated the Restorative Justice Planning Committee should be charged with the responsibility of developing the infrastructure for the infusion of restorative justice into the prison or jail. Certainly a key focus of the planning committee would be the restorative-justice work programs, like those profiled in this essay, through which inmates provide direct and tangible benefits to communities as recompense for their crimes. But the planning committee's charge would extend beyond these work programs. The planning committee might, for example, consider how to import victim-offender mediation programs into the facility or how the correctional facility's disciplinary process could be altered to reflect restorative-justice principles. These alterations would be geared, in part, towards promoting the recognition that an inmate who commits a disciplinary infraction injures the "community," comprised of both staff and inmates, within that facility and has a responsibility to repair, to the extent possible, that harm.

As is true for a committee planning the restorative-sentencing

structure in a community context, it would be imperative that the Restorative Justice Planning Committee in a prison or jail be diverse, including individuals with differing perspectives and expertise. This diversity would enhance the quality of the plans developed by the planning committee, bringing creativity and proactive problem solving to that planning process. And with different key constituencies represented on the planning committee, it is more likely that the plans would secure the wide support needed for them to be actually implemented and most effectual. For example, one or more correctional officers should serve on the committee, in part to help defuse any reflexive opposition from line staff to the planning committee's innovative plans.

The planning committee should also include at least one inmate, and perhaps more.⁴⁶ Some individuals will probably object to this latter recommendation, remonstrating that it would somehow inappropriately empower inmates. But inmates would bring an illuminating and unique perspective to the work of the planning committee. Because they would know what it is like to be confined at that particular facility and because they would likely have come from the kind of milieu towards which the prisoners' restorative labors would be directed, they would have insights about how to optimize the benefits—to communities, the correctional facility, and those who live and work within the facility—of the restorative work in which the inmates will be engaged. An inmate representative or representatives on the planning committee could also counsel the committee on how to assist inmates in understanding restorative justice and the aims of the restorative-justice work programs, enhancing the prospects that inmates will support those programs and strive to effectuate their aims.

Perhaps more fundamentally, excluding inmates from the Restorative Justice Planning Committee would not be consonant

46. The number of inmate representatives on the planning committee might depend, in part, on the size of the correctional facility's inmate population. To bring to the planning committee the requisite broad range of ideas about how to incorporate restorative justice into the facility's programs and operations, more than one inmate representative might be needed in a facility holding thousands, as opposed to hundreds, of inmates. Including more than one inmate on the planning committee might also be prudent in order to maintain continuity in the committee's planning endeavors. Otherwise, the planning committee's work might be disrupted and impeded whenever an inmate representative is transferred to a different correctional facility or released from confinement.

with the underlying tenets of restorative justice. One of the core credos of restorative justice, for example, is that convicted offenders should be welcome at the frontlines when sifting out how their criminal conduct has harmed others, including society, and then in repairing that harm.⁴⁷ In other words, restorative justice, if executed correctly, is participatory and problem solving in nature,⁴⁸ not subjugating.

2. Identification of Restorative-Justice Program's Goals and Objectives

Another very basic step in the planning process would be to identify the restorative-justice programs' goals and objectives. An obvious overarching goal would be to make restorative justice a mainstay within the correctional facility—at the core, not the outskirts, of day-to-day life within the facility. But the planning committee should determine the other aims of the restorative-justice structure emplaced within the prison or jail. For example, the planning committee might decide, and appropriately so, that the development or augmentation of prisoners' vocational skills should be an end goal of at least some of the restorative-justice work programs. This decision would, in turn, affect other decisions, such as those about the kinds of restorative-justice work programs established within the correctional facility, how they are structured,⁴⁹ and who else, such as a vocational-training expert, will serve on the planning committee.

3. Training of Correctional Administrators, Staff, and Inmates About Restorative Justice and the Correctional Facility's Restorative-Justice Programs

The success of restorative-justice work programs in prisons and jails and the more encompassing restorative-justice structures of which they are a part would hinge, in part, on the training provided to correctional staff, inmates, and others about both

47. See Zehr, *supra* note 6.

48. *Id.*

49. Some work programs, for example, might be designed to include a formal educational component. Thus, inmates working in a restorative-justice work program that has a horticultural focus might learn in a classroom setting certain basics about soil science, such as what to do with soil to make plants flourish, and certain basics about how to protect food crops or other plants from insects, diseases, and weeds.

restorative justice and the ways in which it is being implemented throughout the prison or jail. The need for and benefits of such training parallel those summarized earlier that accrue when training is provided to certain categories of individuals—such as judges—about restorative justice and the specific types of restorative sentences being served within the community.⁵⁰ Without similar training about restorative justice and restorative-justice-related initiatives within a correctional institution, the purposes of restorative justice will be misunderstood and its benefits unrealized. Instead, restorative justice will likely be misperceived as a “touchy-feely” notion that has no place in the harsh environs of a prison or jail.

4. Screening of Inmates for Eligibility to Participate in a Restorative-Justice Work Program

Just as some criminal defendants are ill suited for a restorative sentence, so will some prisoners not be at a point where their participation in a restorative-justice work program would be productive or advisable. For example, if a prisoner spurned the goals and objectives of restorative justice or those of the specific restorative-justice work program for which the prisoner is being screened, the prisoner’s enrollment in the program would likely undermine the realization of those goals and objectives and might corrode the *esprit de corps* that should fuel the program. Still other inmates might be barred, for safety or security reasons, from participating in a restorative-justice work program.

The planning committee should therefore ensure that appropriate screening mechanisms are in place to identify inmates eligible to participate in a restorative-justice work program. At the same time, the committee should creatively brainstorm the steps that could be taken to maximize inmate participation in the work programs. It should consider, for example, how restorative-justice work programs could be adapted to include inmates confined, for their own safety, in a protective-custody unit. The planning committee should also identify ways to help inmates currently ineligible to participate in a restorative-justice work program to transition to the point of eligibility.

50. See discussion *supra* Part II.C.3.

5. *Establishment of the Restorative-Justice Work Programs*

When establishing restorative-justice work programs within a correctional facility, the planning committee would need to resolve a number of questions. Examples of a few particularly pertinent questions include:

- (1) What linkages should be established between restorative-justice programs within the correctional facility and communities, including restorative-sentencing structures within those communities?⁵¹
- (2) What steps should be taken to ensure that restorative-justice work programs do not displace workers in the private sector?
- (3) Can the restorative-justice work programs be crafted in a way that not only avoids unfair competition with private employers but also helps spur economic development and the creation of jobs for others?
- (4) What would be the costs of planning and implementing a particular restorative-justice work program? How could those costs be defrayed? And could any residual costs be covered through a shifting of resources within the correctional facility or the correctional system of which it is a part?

6. *Inclusion of Other Restorative-Justice Components*

It bears reiterating that the main thrust of the work programs envisioned in this essay is restorative. A restorative-justice program is not to be confused with one whose focus is strictly rehabilitative. In a solely rehabilitative program, a prisoner may acquire the education, develop skills, or receive treatment that leads the prisoner to desist from committing future crimes. That is a laudable feat. Yet, the prisoner may have done absolutely nothing, nor been afforded the opportunity to do anything, to help heal what are often the invisible wounds of a crime, including its adverse effects on a community.

The planning committee should therefore examine, on an ongoing basis, how to accentuate and continue to further a work

51. In order for many of these restorative-justice initiatives to yield maximum benefits—to the communities from which inmates have come and to which many of them will return, to the prison or jail “community,” to crime victims, to the inmates themselves, and to others—correctional officials should coordinate with restorative-justice planners in selected local communities as they plan and implement their own restorative-justice programs within the institution.

program's restorative-justice goals. The planning committee might consider, for example, ways to inform prisoners, in a personalized way, how their efforts are helping communities and individuals outside the prison. A video or slide presentation showing before and after pictures of buildings repaired or refurbished with materials constructed by the inmates is but one of many examples of ways to impress upon the prisoners, as well as others, the significance of the prisoners' reparative efforts.⁵² Completion ceremonies for inmates who have fulfilled their service in a restorative-justice work program—the institutional counterpart to the completion ceremonies for persons serving restorative sentences in a community—would be another way of recognizing the tangible steps taken by the inmates to bring remediation and closure to those who have suffered from their crimes, including the inmates themselves.

7. *Program Evaluation*

As mentioned earlier, the periodic evaluation of a restorative-sentencing structure and the making of refinements to that structure in light of the findings of that evaluation are critical to the long-term viability of restorative sentences and the realization of their potential.⁵³ For similar reasons, restorative-justice work programs within correctional institutions need to be regularly evaluated. That assessment process should encompass both the extent to which the goals and objectives of the work programs are being met, and existing impediments to their achievement.

8. *Adoption of a Process for Ongoing Program Refinements*

Conducting an evaluation that is, at most, read but not acted upon is an exercise in futility. The Restorative Justice Planning Committee should therefore ensure that a process is in place to follow up on the results of evaluations of restorative-justice work programs at the correctional facility. That follow-up should include the planning and taking of measures to correct program deficiencies and more fully realize the restorative aims of the work programs.

52. The restorative impact of the video or slide presentation could be augmented further if narrated, at least in part, by a resident of the neighborhood or community to which the inmates have lent assistance.

53. See discussion *supra* Part II.C.7.

9. *Public Education*

I have been, and still am, an advocate for bringing transparency and accountability into the operations of prisons, jails, and other correctional and detention facilities.⁵⁴ Educating the public about restorative-justice programs that are operating within the confines of a correctional facility would be part of this broader movement towards greater transparency and public accountability.

However, there is another, quite fundamental reason why this outreach to the public about the restorative-justice programs would be important; the work programs' reconciliatory and restorative aims would encompass, and need to encompass, communities as well as inmates. Communities play a key role in the effectuation of restorative justice.⁵⁵ In order for restorative justice to fulfill its healing, peacemaking, and reintegrative functions, communities must be directly involved in, and facilitators of, the restorative process.⁵⁶ However, the communities obviously cannot meet these restorative-justice obligations unless, as a first step, they are made

54. In the past few years, I have had the privilege to chair two American Bar Association projects that were directed towards these goals and culminated in policy resolutions approved by the ABA's House of Delegates. The first resolution calls on federal, state, local, and territorial governments to develop comprehensive plans to bring transparency and accountability to the public into the operations of correctional and detention facilities. See CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, RESOLUTION 104B REPORT TO THE HOUSE OF DELEGATES (2008), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.pdf. This resolution also urges these jurisdictions to require the monitoring of these facilities by an independent public entity that would then issue public reports on conditions within them. *Id.* The second resolution, which was adopted by the ABA in 2011, recommends that correctional and detention facilities be accredited by a federally certified accrediting entity. See CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, RESOLUTION 105B REPORT TO THE HOUSE OF DELEGATES, (2011) available at http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105b.athcheckdam.pdf. In order to receive this certification, the accrediting entity would have to comply with the "Key Requirements for the Certification of Correctional Accrediting Entities" endorsed by the resolution. *Id.* Several of these requirements are geared to ensure that the public is privy to what occurs in what are, right now, quite secretive accreditation processes. See David M. Bogard, *Effective Corrections Oversight: What Can We Learn from ACA Standards and Accreditation?*, 30 PACE L. REV. 1646, 1653 (2010) (attesting to the lack of transparency and public accountability in the American Correctional Association's (ACA) accreditation process).

55. See Paul McCold, *Restorative Justice and the Role of Community*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 85, 90-91, 93-96 (Burt Galaway & Joe Hudson eds., 1996).

56. See Zehr, *supra* note 6, at app.

aware of how certain prisoners have striven to make amends to the community. Thus, in order for restorative-work programs to be effective implements of restorative justice, the Restorative Justice Planning Committee would need to explore the steps that could be taken to help make the public both conversant with, and then vessels of,⁵⁷ restorative justice.

Inviting members of the media to observe and report on restorative-justice work programs at the prison and the tangible benefits of the prisoners' labors to a neighborhood or community would be one way to educate the public, not only about the programs, but also their restorative purpose. The videos and slide presentations mentioned earlier are other examples of steps that could be taken to instill in the public a commitment to restorative justice as it learns about the work programs through which it is being implemented.⁵⁸ These videos or slide presentations could be shown to community leaders and policy makers, posted on websites, presented at neighborhood or community gatherings or meetings, or disseminated in other ways.

If the planning committee were to opt to use these latter outreach approaches, it might consider including a prisoner as one of the narrators discussing the work done by those participating in the work programs. This prisoner-narrator could explain how the prisoners are striving through this work to make amends for their crimes in a meaningful way, and repair their relationship with communities injured by their crimes. Having this explanation come from a prisoner would help, in a way that comports with restorative justice, to humanize prisoners in the eyes of others and dispel erroneous assumptions about those who are incarcerated.

57. Identifying ways in which to integrate communities into the restorative-justice programs at a correctional facility would be part of the committee's planning, alluded to earlier, of "other restorative-justice components." *See supra* Part III.B.6. To give but one example of the many ways in which this integration could occur, certain individuals who are regarded as and denominated "representatives of the community" could be invited to attend and participate in the completion ceremonies for inmates who have fulfilled their service commitments in a restorative-justice work program.

58. *See supra* note 52 and accompanying text.

IV. REENTRY EMPLOYMENT FOR INMATES COMPLETING
RESTORATIVE-JUSTICE PROGRAM REQUIREMENTS

Recommendation #3: Federal, state, and local governments should develop specialized reentry programs to secure jobs for released prisoners who successfully complete the requirements of restorative-justice work programs in which they are enrolled.

The third recommendation tendered in this essay calls for jurisdictions to establish a structure for securing employment for prisoners who complete their service in a restorative-justice work program—jobs that capitalize on the knowledge and skills that the prisoners gained through their participation in the program.⁵⁹ This recommendation would complete a carefully calibrated continuum—one that begins with restorative sentences, encompasses restorative-justice work programs in prisons and jails, and closes with reentry programs specially targeted towards prisoners who have successfully completed their service in those programs.

A part of this recommendation is, admittedly, not novel at all. It is now well recognized that prisoners who are unemployed after they leave prison, as most of them are,⁶⁰ are at high risk of recidivating.⁶¹ To help curb what might be termed “the revolving-door syndrome”—the recurring phenomenon of prisoners being

59. This recommendation would not, of course, foreclose a prisoner who graduates from a restorative-justice work program from securing a different kind of job within the community, such as a job with a former employer. But the structure would still be in place to funnel all of the graduates into jobs that capitalize on their work experience in the restorative-justice program.

60. See, e.g., CHRISTY VISHER ET AL., URBAN INST., EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATES 6 (2008), available at http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf (reporting that 55% of released prisoners studied in three states—Illinois, Ohio, and Texas—were unemployed eight months after release); see also Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, FED. PROBATION, June 2001, at 3, 5 (reporting that one year after their release from prison, 60% of ex-prisoners have no job in the regular labor market).

61. See VISHER ET AL., *supra* note 60, at 1, 8 (reporting that 22% of released prisoners who were unemployed two months after their release from prison were reincarcerated within one year of their release); see also COMM’N ON EFFECTIVE CRIMINAL SANCTIONS, AM. BAR ASS’N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 27 (2007), available at [http://www.pardonlaw.com/materials/rev_2ndchance\(3\).pdf](http://www.pardonlaw.com/materials/rev_2ndchance(3).pdf) (confirming that unemployment is a “reliable predictor” of recidivism).

released from, and then returned to, confinement,⁶² jurisdictions have begun to establish reentry programs to facilitate inmates' transition back into their communities.⁶³ One dimension of these programs has been to counsel returning prisoners, or otherwise assist them, as they try to surmount what are often daunting obstacles to their employment.⁶⁴

What singles out this recommendation, in part, from already existing reentry initiatives, is that the envisioned linkages to employers would be the final step in the creation of an exemplar of the integrated criminal-justice programming for which there is an evident and unmet need—programming that cross-sects the community (through front-end sentences), jails and prisons (through restorative-justice work programs within those facilities), and then the community once again (at the point of reentry). The recommendation is also distinctive because it could be implemented in a way specifically designed to continue to foster the aims of restorative justice. For example, the reentry plan for an individual who successfully completed his or her service in a prison-based restorative-justice program with a carpentry or construction focus might include employment with a private contractor involved in the community-development efforts in which the restorative sentences mentioned earlier are playing an important role. This employment could then be integrated with a condition of the ex-prisoner's supervised release or parole under which the ex-prisoner would provide training at periodic intervals to convicted offenders whose restorative sentences involve, or will involve, the repair, renovation, or construction of homes in neighborhoods marked by crime and urban blight. Through the provision of this training, the

62. A major study on the recidivism of prisoners released in 1994 revealed that almost 52% were returned to prison within three years after their release. See PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 1994* 1, 7 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>. One-fourth of the released prisoners received a new prison sentence within this three-year time period, while roughly another quarter of them were returned to prison for violating conditions of their earlier release. *Id.* at 3, 7.

63. For lists and descriptions of such reentry programs, see *Reentry Program Database*, REENTRY POLICY COUNCIL, <http://reentrypolicy.org/reentry-program-examples/reentry-programs-start> (last visited Mar. 22, 2012).

64. For examples of reentry programs that offer assistance to prisoners or ex-prisoners in garnering post-release jobs, see *Reentry Program Examples*, REENTRY POLICY COUNCIL, <http://reentrypolicy.org/reentry-program-examples?issue=Employment> (last visited Mar. 22, 2012).

ex-prisoner would now be at the frontlines of restorative justice—within the community itself.

Set forth below are some further details about the structuring of this specialized reentry initiative and its interface with the other implements of restorative justice discussed earlier in this essay—restorative sentences and restorative-justice work programs in prisons and jails. The essay then proposes the taking of a significant and likely controversial step to resolve a problem that has confounded policy makers and reentry specialists—how to open up jobs for released prisoners.⁶⁵

A. Specialized Reentry Employment Initiative

There are three key features about the reentry employment initiative for which this essay advocates that particularly warrant highlighting. First, the program would not be one that simply helps inmates burnish their resumes, assists them in polishing their cover letters to be sent to prospective employers, and provides inmates with lists of potential employers to contact (and, most likely, never hear from). Instead, the program would develop linkages to, and ongoing partnerships with, these potential employers.

Second, these corrections-employer partnerships would entail the placement of inmates who have graduated from a correctional facility's restorative-justice work program into jobs that are related to, or are a logical outgrowth of, that program. For example, if a prisoner had worked in a restorative-justice program with a horticultural or food-processing focus, the prisoner might be paired with an employer whose work involves landscaping, the tending of gardens, the growing of food, or the preservation and processing of fresh foods.

Third, correctional officials would work in concert, both with prisoners and employers, to ease prisoners' transitions into the work force. The correctional officials would, for example, develop strategies to ensure that prisoners understand and are equipped to meet certain of the elemental job requirements to which most, though not all, people are so inured that they adhere to them with

65. For an in-depth discussion of the employment barriers facing released prisoners and steps that can be taken to diminish those barriers, see AMY L. SOLOMON ET AL., URBAN INST., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY (2004), available at http://www.urban.org/uploadedpdf/411097_From_Prison_to_work.pdf.

little or no thought. One example of such a requirement is to show up for work on time. Another is to treat coworkers and bosses, no matter how trying they may be, with respect.

Much of this foundational work could be undertaken while the prisoners are participating in the restorative-justice work program within the correctional institution. But the focus of the preparatory efforts to smooth the transition into the work force of prisoners who successfully complete the work program would not be confined to prisoners. Correctional officials should also consider what actions they should take vis-à-vis others to make it more likely that those employment relationships will endure and hopefully flourish. For example, in laying the groundwork for prisoners not only to secure a job but keep it, correctional officials would likely collaborate with employers with whom prisoners are matched. The correctional officials would also coordinate with community-based reentry specialists who work with individuals, after and perhaps before their release, to help them adjust successfully to life outside a correctional institution.

A facility-level planning committee for the specialized reentry employment initiatives could, if constituted and functioning properly, guide these job-placement and employment-retention endeavors effectively.⁶⁶ Optimally, a planning committee would include the following people among its members: one or more individuals involved in implementing restorative-justice work programs at the correctional facility, a staff member involved in the job-placement initiative for program graduates, a prisoner currently enrolled in a restorative-justice work program at the facility, an ex-prisoner who has secured program-related employment post-release, one or more reentry specialists who provide guidance and assistance to individuals released from prison, and several employers experienced in working with released prisoners. This planning committee could help identify steps that

66. The planning work described in Part II (planning of restorative sentences), Part III (planning of restorative-justice programming in prisons and jails), and Part IV (planning of the specialized reentry initiative for graduates of institutional, restorative-justice work programs) of this essay entails planning undertaken within communities and correctional facilities. This planning could be facilitated by planning at the state and federal levels, such as planning by a state's department of corrections. However, the ways in which local, state, and federal planning efforts, on the one hand, and facility-level and central-office planning efforts, on the other, could and should interface to promote efficiencies and to augment, rather than detract from, the goals of restorative justice entails many complexities—matters that will need to be dissected in a future writing.

can be taken by staff overseeing restorative-justice work programs, by staff involved in the reentry-employment undertaking, by prisoners participating in and graduating from the work programs, by employers, and by others to thwart and limit problems that might impede the success of this new employment paradigm for released prisoners.

*B. The Interconnection Between the Specialized Reentry Employment Initiative and the Illegal Employment of Immigrants*⁶⁷

The visceral response, I believe, to the proposal for undertaking the reentry employment initiative for prisoners who have successfully met their reparative obligations in a restorative-justice program will be that it will not work, largely because there are no jobs in which to place these released prisoners. I disagree. Emphatically.

There are jobs, and more importantly, jobs in fields in which restorative-justice work programs would likely focus, such as, as explicated in this essay, horticulture, carpentry, and construction. The catch is that persons working in contravention of the law are, at present, performing many of these jobs. Of the over 8 million immigrants illegally in the country in 2008, for example, the vast majority—94%—were employed.⁶⁸ And they typically were employed in low-skilled jobs⁶⁹—the types of jobs that prisoners graduating from a restorative-justice work program would often be best equipped to perform. In fact, 25% of all farm workers in 2008 were unauthorized residents (persons with no legal right to be in the United States), as were 17% of all construction workers, and 19% of all workers falling within the vocational category denominated “building, groundskeeping and maintenance.”⁷⁰

These statistics, it bears noting, do not fully capture the potential job market for the select group of released prisoners mentioned here (and perhaps other prisoners as well). Even more

67. References to the illegal employment of “immigrants” in this essay encompass both the employment of unauthorized residents, who are individuals illegally in the country, and the employment of nonimmigrant aliens, who are individuals legally in the country but working in violation of legal restrictions. See *infra* notes 68–71 and accompanying text.

68. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 12 (2009), available at <http://pewhispanic.org/files/reports/107.pdf>.

69. *Id.* at 14.

70. *Id.* at 15.

jobs would open up, including jobs considered “low skill,” if jobs currently given to nonimmigrant aliens⁷¹ working in contravention of restrictions on when, how much, and even whether they can be employed were instead allotted to individuals who have met both the terms of their confinement sentence and the obligations assumed in a restorative-justice work program.

1. Responses to Some Anticipated Objections to the Employment of Graduates of Restorative-Justice Work Programs in Lieu of Illegally Employed Immigrants

Naysayers will likely protest that it is unrealistic to believe that released prisoners can perform these jobs. These critics will contend that it is preferable to adhere to the status quo, in effect reserving large swaths of jobs for the immigrant population. But let’s parse through that argument. At its core, opponents of the specialized reentry initiative will be arguing—or need to argue if their position is to be given any credence—that society will benefit more by not “upsetting the apple cart”—by continuing to condone, explicitly or implicitly, illegality. In short, the argument goes, we should not displace workers presently employed unlawfully by people who, after all, once broke the law. There is a dissonance to that argument that is, at least I find, unsettling.

Two assumptions, though perhaps unspoken, lie behind the anticipated reflexive opposition to assigning, through corrections-employer linkages and partnerships, some of the jobs currently filled illegally by immigrants to released prisoners who have completed their service in related restorative-justice work programs: one, immigrants are hard workers; two, released prisoners are not. It is this second assumption that warrants examining and responding to here.

The first flaw in the assumption that all formerly incarcerated individuals lack a work ethic is that it is founded on a group stereotype.⁷² And stereotypes like, say, the view that men are not compassionate enough to be nurses or women are not tough

71. A nonimmigrant alien is a person who legally enters the country for a specific reason, such as to attend school, and does not intend to remain permanently in the United States. *LeClerc v. Webb*, 419 F.3d 405, 410 n.2 (5th Cir. 2005). Nonimmigrant aliens are subject to substantial restrictions on their ability to work while in the country. *Id.* at 419.

72. It bears noting that the assumption that immigrants are hard workers also reflects stereotypical thinking, though the persons being stereotyped are cast in an ostensibly positive light.

enough to be leaders in government or business, are not only typically wrong but also, when applied to bar basic opportunities to others, wrong-headed. As one person once aptly observed, “Stereotypes are devices for saving a biased person the trouble of learning.”⁷³

Stereotypes are also corrosive. Automatically assuming that a particular individual will be shiftless because he or she did something wrong in the past consigns that individual, in perpetuity, to an inferior status. Harboring such a reflexively judgmental attitude is also degrading to those who embrace stereotypes, whether or not they recognize their own degradation.

Allowing stereotypes to drive decisions can, furthermore, be injurious to communities and the public. Misguided policies, programs, procedures, and decisions are the inevitable by-products of subscribing to stereotypes.⁷⁴ And stereotypes foster unwariness and lack of trust between people as the dynamic unfolds where a person’s character is prejudged by others and a door closed and locked before the individual on the other side has even knocked on it.

As we delve more deeply into the merits of the supposition that persons who have been incarcerated—*all* of them—are simply too lazy to be engaged in productive work after they have been released, we must also be mindful of the temptation and perversity of hypocrisy. Were I a cartoonist, I could sketch a cartoon

73. *Stereotype Quotes*, THINKEXIST.COM, <http://thinkexist.com/quotes/with/keyword/stereotype> (last visited Mar. 22, 2012).

74. If anyone should doubt the verity of this assertion, I recommend that they consider the description in the famous (or, more accurately, infamous) *Dred Scott* decision of how African Americans were viewed at the time of the adoption of the Declaration of Independence and the U.S. Constitution:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).

capturing this hypocrisy: Five individuals are seated at their desks in a small office. One is monitoring the stock market on her work computer and then moving funds in response to fluctuations in the market. The second is texting a friend. The third is checking his Facebook page. The fourth is watching a basketball game. (It is, after all, “March Madness!”) And the fifth is reading an article on Google news about the enormous difficulties individuals have securing jobs after being released from prison. The caption above this fifth worker reads: “Hey, do you guys think our company should hire released prisoners?” The four others respond in unison: “Nah! They’re too lazy!”

There is no need in this essay to provide specifics refuting the validity of the broad-brush proposition that all released prisoners are such miscreants that they cannot do the work being performed illegally by certain immigrants. The need for such refutation is obviated by a second palpable flaw in the “ex-prisoners are too lazy” argument that I anticipate would be made by those trying to thwart the part of the reentry initiative under which released prisoners would be placed in jobs held now by unauthorized residents or nonimmigrant aliens employed illegally. In asserting that this part of the initiative is unrealistic because once-incarcerated individuals are indolent, and intractably so, detractors would be overlooking that the reentry employment initiative would not be directed towards all released prisoners. Instead, it would focus on a select group of individuals—on people who have successfully completed a restorative-justice work program. This program, if designed correctly, would already have weeded out individuals who perform their work responsibilities haphazardly. So the presupposition regarding ex-prisoners who have completed a restorative-justice work program should be the converse of that touted by those resisting what they might be tempted to portray, though oxymoronically, as an “encroachment” on illegally held jobs. The presupposition should be that an individual who falls within this special cadre of prisoners is equipped, in terms of having a work ethic, to meet the requirements of the job with which he or she is being matched.

There will, no doubt, be other objections voiced to the employment of graduates of correctional restorative-justice work programs to fill jobs now commonly held illegally by immigrants. Concerns will be raised, for example, about the impact that the specialized reentry initiative will have on the welfare of those

working illegally in this country and their families. These concerns emanate from the larger question—one that goes beyond the scope of this essay—of how the United States can wean itself, in a humane way, from its dependency on such illegal labor.

Another expected argument is that the envisioned employment framework is unworkable because prisoners, upon their release, usually will return to the poor neighborhoods in urban areas from which many, though clearly not all, of them came—neighborhoods where unemployment is endemic. It is true that poor neighborhoods are, at least now, marked by low employment and a relative dearth of jobs within those neighborhoods.⁷⁵ But many of those neighborhoods (in which, it bears noting, many unauthorized residents also live)⁷⁶ adjoin areas where there are such jobs, or there is public transportation or other means of getting to the locations where jobs are more prevalent. In addition, and quite importantly, the corrections-employer linkages established through the specialized reentry initiative could be structured in a way that slots prisoners in jobs that, upon their release, they can physically get to.

It is also true, indeed obvious, that most of the agricultural jobs taken, at present, illegally by immigrants—remember, 25% of agricultural jobs fall within that category⁷⁷—are located in rural areas, not in cities. But to contend that those who completed a horticultural, restorative-work program while incarcerated are therefore, as a practical matter, foreclosed from being hired for those agricultural jobs overlooks at least three realities.

First, one premise of this essay is that this country needs to move, and will be moving, to a point where “urban agriculture” is an expected norm.⁷⁸ In other words, the horticultural jobs that graduates of certain restorative-justice work programs will be particularly qualified to perform will become increasingly available in the future in urban areas.

75. SOLOMON ET AL., *supra* note 65, at 1, 13.

76. See Paul A. Jargowsky, *Immigrants and Neighborhoods of Concentrated Poverty: Assimilation or Stagnation?* 9–10 (Nat'l Poverty Ctr., Working Paper No. 06-44, 2006), available at http://www.npc.umich.edu/publications/u/working_paper06-44.pdf.

77. See *supra* note 70 and accompanying text.

78. See generally KATHERINE H. BROWN & ANNE CARTER, CMTY. FOOD SEC. COAL., N. AM. URBAN AGRIC. COMM., URBAN AGRICULTURE AND COMMUNITY FOOD SECURITY IN THE UNITED STATES: FARMING FROM THE CITY CENTER TO THE URBAN FRINGE (2003), available at <http://www.foodsecurity.org/PrimerCFSCUAC.pdf>.

Second, even if urban agriculture were not, as I predict, to become prevalent throughout the country, large-scale agricultural employers and others could devise methods to transport at least some program graduates, particularly those living in certain mid-size and small cities, to their work sites in rural areas. While cynics will be quick to argue that this suggestion is an unworkable conjuration, it stems, at least in part, from personal experience. I remember, only too well, clambering at dawn onto a bus filled with teenagers to be transported to fields twenty miles away. There we would detassel corn until reboarding the employer-owned bus for transportation back to the original pick-up point. Today, some employers continue to pay for shuttles to transport their employees to and from work.⁷⁹

Third, underlying the argument that it is infeasible to reserve for individuals who once lived in cities some of the agricultural jobs filled illegally by immigrants is an assumption that released prisoners will not relocate in order to secure a job. That assumption, of course, ignores the reality that individuals leaving a place of confinement are, by definition, relocating. But the preemptive effort to prevent specialized reentry initiatives from unsettling the norm to which agricultural employers and those whom they employ illegally have become long accustomed ignores an even larger truth: we are, and always have been, a transient society in which large numbers of people of all income levels, ethnic and racial backgrounds, and places of residence—city, suburb, small town, or country—move for job-related reasons.⁸⁰ Individuals with high incomes often move to garner a new job, individuals of lesser means frequently uproot themselves and their families in order to obtain work, and people even leave their home countries, moving hundreds or thousands of miles away, in order to gain economic security. To acknowledge these facts while insisting that released prisoners cannot and would not be propelled to live

79. See *Smarter Transportation Case Study #14: Employer Commuter Benefits Program in Santa Clara, Calif.*, TRANSP. FOR AM. (Oct. 26, 2010), <http://t4america.org/blog/2010/10/26/smarter-transportation-case-study-14-employer-commuter-benefits-program-in-santa-clara-calif/> (reporting that over 8,000 employees of one company rode on employer-operated shuttles in 2005).

80. See D'VERA COHN & RICH MORIN, PEW RESEARCH CTR., AMERICAN MOBILITY: WHO MOVES? WHO STAYS PUT? WHERE'S HOME? 3, 7, 14–16 (2008), available at <http://pewsocialtrends.org/files/2010/10/Movers-and-Stayers.pdf>. The majority of American adults have moved to a new community at least once in their lives, often for employment-related reasons. *Id.* at 3, 14–16.

any place other than their home community reveals, once again, stereotypical thinking about once-incarcerated individuals—viz., they lack the gumption to start their lives anew by living elsewhere.

That is not to suggest that prisoners would face no difficulties transitioning from prison to a place they have never lived, particularly in finding an affordable place to live. But these challenges simply underscore that reentry planning for released prisoners, to be successful, must cover a host of matters, in addition to employment. Beyond employment and housing, the planning would, for example, address such questions as how to maintain continuity in the released individual's substance-abuse treatment, how to meet other mental-health, medical, or therapeutic needs, and how the prisoner will, upon release, meet family-related needs and obligations.⁸¹

A fallback argument will be invoked at some point by those trying to obstruct the building of a consensus to focus job-placement efforts for prisoners completing restorative-justice work programs on the stronghold of jobs currently held illegally by some, and I emphasize some, of the noncitizens within the United States. This argument will fall along these lines: Why should the beneficiaries of these job-targeting measures be released prisoners—people who have committed crimes? A lot of law-abiding people need jobs. If we are, in a sense, going to “take back” jobs held by unauthorized residents or by nonimmigrant aliens employed in violation of the law, then those jobs should be reserved for “good people,” not “bad people.”

An entire article could be dedicated to responding to this argument, one that raises questions about the individual and societal interests implicated by the employment of persons with criminal convictions, in particular persons incarcerated for those crimes. But suffice it to say for now that, once dissected, this argument reveals a mindset that the “law-abiding” (whatever that means) should always be given precedence when vying for a job also being sought by a person who was incarcerated for a crime. And what that, in turn, means is that those espousing this view

81. To gain a more in-depth understanding of the broad range of steps that need to be taken, both systemically and when working with prisoners and ex-prisoners on an individual level, to promote their successful transition out of prison, see RE-ENTRY POLICY COUNCIL, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY (2005), available at <http://www.reentrypolicy.org/publications/1694;file> (presenting thirty-five recommendations for implementing reentry processes).

believe that, in actuality, people convicted of, and incarcerated for, crimes should never be able to put their pasts behind them and will always, in truth, be “bad people.” These beliefs, at their roots, are the antithesis of restorative justice. And this way of thinking reflects, sadly, in my opinion, an intransigent unwillingness to extend the forgiveness to others that we so often welcome when extended to us.

Having said that, it does behoove us to remember that specialized reentry initiatives would not foreclose the employers with whom correctional officials are coordinating from also employing people who were not formerly incarcerated to work side by side with the graduates of restorative-justice work programs. In fact, the daily interactions ex-prisoners would have with others within such a mixed work force could potentially promote the reintegration of the released prisoners into “everyday life” as they work with, and are accepted as equals by, individuals without a background of confinement. This reintegration would be consonant with the goals of restorative justice, both as community members witness, through personal interactions, the humanness of ex-prisoners, and as ex-prisoners being treated as fellow cohorts are, in effect, welcomed back into the community.

2. Developing and Implementing Plans to Employ Graduates of Restorative-Justice Programs in Lieu of Illegally Employed Immigrants

Saying that a jurisdiction should institute a specialized reentry initiative to place graduates of restorative-justice work programs in jobs held illegally by unauthorized residents or nonimmigrant aliens is one thing. Doing it is another.

Myriad details would need to be fleshed out before a concerted effort is undertaken to wean certain employers from their reliance on illegal laborers and to spur the employers to instead hire graduates of restorative-justice work programs. The differing ways in which questions about these details could be resolved and how they should be resolved will likely spawn much debate in the future. To guide that debate, I proffer the following observations.

First, every jurisdiction—local, state, and federal—is adversely affected when inmates fail to reintegrate successfully into society upon their release. Consequently, each jurisdiction—local, state, and federal—should identify what it can do, both alone and in conjunction with other jurisdictions, to make available to program

graduates jobs that are currently held illegally by unauthorized residents and nonimmigrant aliens.

Second, the federal government should play a leadership role in this endeavor—the “immigration component” of the specialized reentry initiatives. The federal government should assume this leadership role partly because it has the primary responsibility to protect the country from illegal immigration.⁸² Vesting the federal government with this leadership role would also be cost-effective, since some of the employers on whom the job-placement efforts would be focused, such as large-scale agricultural employers, have work sites across the country.

Third, as jurisdictions consider ways to implement the specialized reentry initiatives for graduates of restorative-justice work programs, the jurisdictions should determine whether it would be advisable to pilot any of the specific plans for steering jobs away from those employed illegally towards program graduates. Pilot projects would be a way of allaying concerns about the consequences of—it seems odd to say—helping former prisoners gain lawful employment by ending the unlawful employment of others.

V. CONCLUSION

Author Wayne Dyer once said, “If you change the way you look at things, the things you look at change.”⁸³ This essay calls for us to change the way we look at the criminal-justice system. Rather than viewing that system as a mechanism for inflicting pain and tribulation on convicted offenders because of the pain and tribulation they have caused others, we can choose to view the criminal-justice system as a mechanism through which at least many convicted offenders alleviate, through compensatory deeds, the harm their misdeeds have caused others, including the community as a whole. The two views obviously reflect very differing perspectives on what constitutes the “justice” that the criminal-justice system is supposed to effectuate.

But this essay is not a theoretical exercise. Instead, it has a

82. See *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1974 (2011) (reiterating that the federal government has the authority to regulate immigration while noting that a state retains the authority to regulate employer-employee relationships to protect laborers in the state).

83. *Wayne Dyer Quotes*, BRAINYQUOTE, http://www.brainyquote.com/quotes/authors/w/wayne_dyer.html (last visited Mar. 22, 2012).

practical bent, setting forth a three-part framework to be implemented by policy makers and criminal-justice practitioners, one that reflects this changed view of the criminal-justice system. The components of this framework are designed, individually and collectively, to import into the core of a jurisdiction's criminal-justice system the accountability, healing, wholeness, and forgiveness that are so sorely lacking in criminal-justice systems today.

Each part of this framework—restorative sentences served within the community, restorative-justice work programs in prisons and jails, and the specialized reentry initiatives that are adjuncts to these work programs—has inherent value as an implement of restorative justice. The framework also offers the pragmatic benefits of a continuum of programming and much-needed interconnections between varied parts of the criminal-justice system. The envisioned framework consequently can serve as a template for other coordinated programming and planning between officials working in community corrections, jails, prisons, and other segments of the criminal-justice system.

The public will reap many other benefits from the adoption of the three-part framework proposed in this essay. What those benefits are will depend on a number of variables. These variables include, among others: the goals and objectives adopted by the committees planning particular restorative-sentencing structures and restorative-justice work programs; the specific kinds of restorative sentences imposed in jurisdictions and work programs put in place in prisons and jails; how various implementation details for the restorative-sentencing structures, work programs, and specialized reentry initiatives are resolved; and the extent to which governmental officials are willing to recognize and address the nexus between the illegal employment of immigrants and the lack of employment opportunities for some released prisoners. For example, if a Restorative Sentencing Planning Committee were to identify the diversion of individuals from prison or jail as a goal of restorative sentences in that community, the public would be the beneficiaries of any cost savings stemming from the reduction in the size of jail or prison populations due to the imposition of restorative sentences. And if the restorative sentences in a community involved the growing of fruits and vegetables for distribution to the poor, a number of other benefits would follow. Depending on how these sentences were structured, these benefits

might include, among others, health improvements, neighborhood beautification, and the development of work skills in offenders serving the restorative sentences.

This essay is, indeed, grounded on the conviction that if we change the way we look at the criminal-justice system, that system will change fundamentally. And if, as individuals work to pay back society for the harm their crimes have caused, we become less inclined to dismiss them as “criminals” and more willing to acknowledge that they are “people,” we too will change. For the better.