

ELDER *RESTORATIVE* JUSTICE

Mary Helen McNeal* and Maria Brown**

I. INTRODUCTION

As populations age throughout the world and older people face the challenges of declining health and independence, opportunists frequently exploit seniors' vulnerabilities. This exploitation may take the form of financial, emotional, physical, and sexual abuse, and even neglect,¹ and it occurs with alarming frequency.² It happens in a climate where older people endeavor to maintain their independence, and advocates and service providers face the challenge of helping seniors to remain autonomous while simultaneously preventing and addressing harm when it occurs.

Most elder abuse and exploitation occurs at the hands of family members and caregivers³—usually the same people seniors rely on for assistance to live independently. Too often, options to address harms caused by elder abuse and exploitation are limited. Although seniors may be encouraged to report abuse to law enforcement and other service providers, civil and criminal remedies are often ineffective.⁴

This dynamic confluence of factors further complicates a serious problem that currently lacks effective solutions and begs for alternative options. “Elder *restorative* justice” presents such alternatives. The process promotes repair and reconciliation of the underlying relationships.⁵ In a restorative process, the person harmed has the opportunity to obtain reparation and closure, while the person committing the harm has the opportunity to understand the effects of his behavior and take responsibility, and the community

* Professor and Director, Elder and Health Law Clinic, Syracuse University College of Law. I am appreciative of the Borchard Foundation on Law and Aging who supported the research for this project, and Syracuse University College of Law for a summer research grant. Additional thanks go to research assistants Christopher Billups, Kaitlin Jacob, and Caroline Bertholf without whose assistance this article would never have come to fruition.

** Assistant Research Professor, Syracuse University School of Social Work, and Faculty Affiliate of the Syracuse University Aging Studies Institute.

¹ See *infra* Part II.

² See *infra* Part II.

³ See *infra* Part II.

⁴ See *infra* Part III.

⁵ Elizabeth Beck et al., *Restorative Justice with Older Adults: Mediating Trauma and Conflict Later in Life*, 21 *TRAUMATOLOGY* 219, 220 (2015).

can promote well-being and prevent future crime.⁶ Restorative principles currently are utilized in a variety of conflict resolution contexts, such as addressing behavioral issues and disputes between students in schools,⁷ addressing juvenile offenses,⁸ resolving custody issues,⁹ and most recently, in situations of domestic violence.¹⁰ Some proponents of restorative principles also are exploring their application in addressing problems in workplaces, community groups, apartment complexes, agencies, and in other community-based contexts.¹¹ However, restorative principles have rarely been adapted to address elder abuse.¹²

This article explores the viability of utilizing restorative principles to address elder abuse and recommends the continuing implementation of an “elder *restorative justice*” paradigm. Part I describes the widespread problem of elder exploitation and possible reasons for it, and Part II outlines current strategies to address it. Part III offers an overview of restorative principles, with a description of selected models. In Part IV, this paper reviews restorative approaches currently addressing elder abuse, and their benefits and challenges. Part V analyzes the applicability of the restorative models outlined above to the elder abuse context, assessing the most effective options for addressing this rapidly ex-

⁶ *Id.* at 219.

⁷ See, e.g., Jill Davidson, *Restorative Justice: Putting the Responsibility on the Shoulders of Students to Correct Mistakes When They Happen*, 80 EDUC. DIG. 19, 19 (Nov. 2014).

⁸ See, e.g., William Bradshaw & Mark S. Umbreit, *Crime Victims Meet Juvenile Offenders: Contributing Factors to Victim Satisfaction with Mediated Dialogue*, 49 JUV. & FAM. CT. J. 17, 18 (1998).

⁹ See, e.g., Robert Koehler, *Get a Rock and Talk*, HUFFINGTON POST (Sept. 13, 2012, 11:27 AM), http://www.huffingtonpost.com/robert-koehler/get-a-rock-and-talk_b_1880900.html; see also Susan Daicoff, *Families in Circle Process: Restorative Justice in Family Law*, 53 FAM. CT. REV. 427, 433 (2015).

¹⁰ See, e.g., Laurie S. Kohn, *What’s So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 573 (2010) (citing Amanda Dissel, *Restoring Harmony: A Report on a Victim Offender Conferencing Pilot Project*, CTR. FOR THE STUDY OF VIOLENCE & RECONCILIATION (Oct. 2000), <http://www.csvr.org.za/docs/crime/restoringtheharmony.pdf>).

¹¹ *Restorative Justice and Practice: Emergence of a Social Movement*, VICTORIA U. OF WELLINGTON, N.Z., <https://www.edx.org/course/restorative-justice-and-practice-emergence-of-a-social-movement> (last visited Jan. 31, 2019). Some institutions seek to be “restorative organizations.” *Restorative Justice and Practice: Emergence of a Social Movement*, VICTORIA U. OF WELLINGTON, N.Z., <https://courses.edx.org/courses/course-v1:VictoriaX+RJ101x+2T2018/courseware/94c38b8d2f22486c95b6e71db105496a/34b3ed091e43429b9eed5b18de2631fa/?child=first> (last visited August 13, 2018) [hereinafter EdX, Online Course] (A restorative community is “one that is intentionally conditioned by the principles, values, practices and priorities of a restorative justice framework.”).

¹² *But see infra* Part III.

panding societal problem. Finally, the article concludes with recommendations for specific pilot projects. Although restorative processes are not a panacea, they do provide viable alternatives in certain elder abuse contexts. The goal of this article is to examine past and present projects using restorative justice principles to assess the potential for broader adoption of these models. This analysis is a step towards identifying alternative remedies to assist older people confronted with elder abuse, enabling them to repair the underlying relationships, and enhancing their ability to continue their aging processes in safer and genuinely supportive environments.¹³

II. THE BASICS OF ELDER ABUSE

The World Health Organization (“WHO”) defines elder abuse as “a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person,”¹⁴ although terminology and definitions vary.¹⁵ The harm may be financial, physi-

¹³ Because of the negative connotations and stigma associated with the words “victim,” “offender,” and “perpetrator,” this article will refrain from using those terms, and instead refer to “the person harmed” and “the person committing the harm.” See Alan Clarke et al., *Access to Justice for Victims/Survivors of Elder Abuse: A Qualitative Study*, 15 SOC. POL’Y & SOC’Y 207, 208 (2016) (noting that “it has also been suggested that older adults are less likely to engage with interventions if they have to identify themselves as being ‘abused’ rather than [sic] ‘mistreated’” (citing Gemma Smyth, *Mediation in Cases of Elder Abuse and Mistreatment: The Case of University of Windsor Mediation Services*, 30 WINDSOR REV. OF LEGAL & SOCIAL ISSUES 121, 125 (2011)). For clarity, feminine pronouns are used throughout when referring to the older person and male pronouns when referring to the person who committed the harm. While not intended to be rigid stereotypes, this is consistent with research findings. See Shelly L. Jackson, *All Elder Abuse Perpetrators Are Not Alike: The Heterogeneity of Elder Abuse Perpetrators and Implications for Intervention*, 60 INT’L J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 265, 272 (2016)).

¹⁴ *Ageing and Life-Course: Elder Abuse*, WORLD HEALTH ORG., https://www.who.int/ageing/projects/elder_abuse/en/ (last visited Mar. 24, 2019). This article addresses only abuse caused by people known to the senior. Although financial exploitation perpetrated on seniors generally in the form of scams, fraud, and identity theft, is rampant, these issues are beyond the scope of this article. See, e.g., *Money Smart for Older Adults Resource Guide*, CONSUMER PROTECTION FINANCE BUREAU (Sept. 2018), https://files.consumerfinance.gov/f/documents/201703_cfpb_money-smart-for-older-adults-resource-guide.pdf.

¹⁵ See Clarke et al., *supra* note 13 (“A broader view, within the policy context of the protection of vulnerable adults, describes abuse as ‘a violation of an individual’s civil or human rights by any other person or persons.’ However, the definition of elder abuse remains problematic. The very term is seen as failing to reflect the diversity of the phenomenon and the ‘mistreatment of older adults’ is preferred. It has also been suggested that older adults are less likely to engage with interventions if they have to identify themselves as being ‘abused’ rather [than] ‘mis-

cal, psychological, and sexual, or some combination of these types, and it may be the result of intentional or unintentional neglect.¹⁶

The prevalence of elder abuse is well-documented. The WHO estimates that 17% of all people aged 60 and older have been subjected to some form of abuse¹⁷—roughly 141 million people.¹⁸ Due to the difficulty of collecting accurate data and the reluctance of many who have been harmed to report the abuse, most experts believe the figure to be much higher.¹⁹ In the United States, it is estimated that 10% of those over age 65 have been subject to physical, sexual, psychological, verbal, or financial abuse, or to neglect.²⁰ It is estimated that only 1 in 24 cases of elder abuse comes to the attention of authorities, while only 1 in 44 cases of *financial* abuse is actually reported to authorities.²¹

Despite growing awareness and attention to prevention and effective responses, elder abuse is expected to affect an increasingly large number of people. A comprehensive systematic study of international elder abuse reports found that the global prevalence rate of elder abuse was 15.7%, or about one in six older adults.²² Worldwide populations continue to age, with a projected worldwide population of 2 billion people over age 60 by 2050.²³ Assuming the prevalence rate remains constant, there will be an

treated”); see also SHELLY L. JACKSON, UNDERSTANDING ELDER ABUSE: A CLINICIAN’S GUIDE 11 (2018) (noting that comparing international studies is difficult due to differences in definitions, methodologies, and instruments).

¹⁶ *Ageing and Life-Course: Elder Abuse*, WORLD HEALTH ORG., https://www.who.int/ageing/projects/elder_abuse/en/ (last visited Mar. 24, 2019).

¹⁷ *Abuse of Older People, on the Rise—1 in 6 Affected*, WORLD HEALTH ORG. (June 14, 2017), <http://www.who.int/news-room/detail/14-06-2017-abuse-of-older-people-on-the-rise-1-in-6-affected>. [hereinafter *Abuse Of Older People on the Rise*, WHO].

¹⁸ Yongjie Yon et al., *Elder Abuse Prevalence in Community Settings: A Systematic Review and Meta-analysis*, 5 THE LANCET GLOBAL HEALTH 147, 147 (2017).

¹⁹ *Abuse Of Older People on the Rise*, *supra* note 17.

²⁰ *Statistics/Data*, NAT’L CTR. ON ELDER ABUSE, <https://ncea.acl.gov/whatwedo/research/statistics.html#prevalenceprevalence> (last visited Feb. 2, 2019).

²¹ LIFESPAN OF GREATER ROCHESTER, INC., WEILL CORNELL MEDICAL CENTER OF CORNELL UNIVERSITY & NEW YORK CITY DEP’T FOR AGING, UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY (May 2011), <https://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf>; see also *Abuse Of Older People on the Rise*, WHO, *supra* note 17; Arlene Groh & Rick Linden, *Addressing Elder Abuse: The Waterloo Restorative Justice Approach to Elder Abuse*, 23 J. OF ELDER ABUSE & NEGLECT 127, 128 (2011) (Possible reasons for failure to report abuse include dependence on the one committing the harm, shame, fear of suffering additional harm or being confined to a facility, and fear of losing the familial relationship.).

²² Yon et al., *supra* note 18, at 152.

²³ *Abuse Of Older People on the Rise*, *supra* note 17.

estimated 330 million victims of elder abuse worldwide by 2050.²⁴ Only as the aging population has grown to such extreme levels have policy makers, researchers, and other professionals actually begun to grasp the magnitude of the problem, and to consider more effective ways to address and prevent it. In the last ten years, new efforts have been initiated to better understand this phenomenon. Surveys of the problem continue to proliferate, and large datasets are now available to analyze prevention and intervention strategies,²⁵ the fiscal impact,²⁶ and the public health consequences of elder abuse.²⁷

Elder abuse significantly impacts those involved and the surrounding communities. For example, psychological abuse, the type of abuse most frequently reported, harms a person's well-being and self-worth.²⁸ Financial abuse may leave the senior without food, shelter, medication, and other basic necessities.²⁹ Neglect, by defi-

²⁴ Yon et al., *supra* note 18, at 155.

²⁵ See, e.g., Zach Gassoumis, *Elder Mistreatment Data From Survey to Surveillance*, JUDITH D. TAMKIN SYMPOSIUM ON ELDER ABUSE (Mar. 2, 2018), http://eldermistreatment.usc.edu/wp-content/uploads/2018/03/Elder-Mistreatment-Data.-From-Science-to-Surveillance_Zach-Gassoumis.pdf.

²⁶ See, e.g., THE METLIFE MATURE MKT. INST. ET AL., *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders* 6 (June 2011), https://vtechworks.lib.vt.edu/bitstream/handle/10919/24184/mmi_elder_financial_abuse_2011.pdf?sequence=1&isAllowed=y.

²⁷ See, e.g., *id.* Simultaneously, new entities are devoted to the study of this phenomenon, including the University of Southern California's Center on Elder Mistreatment and the National Center on Elder Abuse, funded by the federal Administration on Aging. See U. of S. Cal., *National Center On Elder Abuse*, U.S.C. CTR. ON ELDER MISTREATMENT, <https://eldermistreatment.usc.edu/national-center-on-elder-abuse-ncea-usc/> (last visited Jan 31, 2019); see also *Prevention of Elder Abuse, Neglect & Exploitation*, ADMIN. FOR CMTY. LIVING, <https://www.acl.gov/programs/elder-justice/prevention-elder-abuse-neglect-and-exploitation> (last visited Feb. 1, 2019). The Administration on Community Living funds the National Indigenous Elder Justice Initiative, dedicated to addressing "the lack of culturally appropriate information and community education materials on elder abuse, neglect, and exploitation in Indian Country." *National Indigenous Elder Justice Initiative*, NAT'L INDIGENOUS ELDER JUSTICE INITIATIVE, <https://www.nieji.org/> (last visited Feb. 1, 2019). The U.S. Department of Justice has established an Elder Justice Initiative (EJI) with the goal of supporting the Department's enforcement and programmatic efforts. *Elder Justice Initiative (EJI)*, U.S. Dep't of Just., <https://www.justice.gov/elderjustice> (last visited Feb. 1, 2019); *Elder Abuse Resource Roadmap—Financial*, THE U.S. DEP'T OF JUST., <https://www.justice.gov/elderjustice/roadmap> (last visited Feb. 1, 2019). Similar entities are proliferating at the state and local levels. See, e.g., *A Statewide Elder Abuse Prevention Effort*, N.Y. ST. COALITION ON ELDER ABUSE, <https://www.nyselderabuse.org/> (last visited August 31, 2018); see also *Elder Justice Coalition*, VERA HOUSE, INC., <https://www.verahouse.org/elder-justice-coalition> (last visited Feb. 1, 2019).

²⁸ *Abuse Of Older People on the Rise*, *supra* note 17.

²⁹ *Ageing and Life-Course: Elder Abuse*, *supra* note 16, https://www.who.int/ageing/projects/elder_abuse/en/ (last visited Mar. 24, 2019) ("Elder abuse has serious consequences for individuals and society including . . . hospitalization and death.")

dition, is the failure to meet the seniors' needs, and therefore has similar consequences.³⁰ Physical abuse can cause serious injuries, which can result in expanded use of emergency services, increased hospitalizations, and potentially death.³¹ All types of abuse can result in depression, stress, and anxiety, and increased risk of placement in long term care,³² an issue of grave concern to many seniors. These health consequences require expenditure of scarce resources on treatment and care, resulting in high societal costs.

Characteristics of those being harmed and of those committing harm are relevant when considering effective solutions to elder abuse. Research indicates which populations of older adults are most at risk of elder abuse, with risk being described generally as "vulnerability plus exposure."³³ Older adults with poor physical health and other risks of impairment are at greater risk of abuse,³⁴ as are those who have poor social support systems.³⁵ It is estimated that approximately 50% of elders who have dementia have experienced abuse.³⁶ Other factors increasing the likelihood of abuse include living with a large number of family members³⁷ and lower income or poverty.³⁸ Factors increasing the likelihood of financial abuse specifically include non-use of social services, needing assistance with activities of daily living, not having a spouse or partner, being female,³⁹ and being African-American.⁴⁰ One study

³⁰ XinQi Dong & Melissa A. Simon, *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, 173 JAMA INTERNAL MED. 911, 911 (2013) ("Elders who have experienced abuse are three times more likely to require hospitalization").

³¹ NAT'L CTR. ON ELDER ABUSE, *supra* note 27 (citing Dong & Simon, *supra* note 30 ("Elders who have experienced abuse are three times more likely to require hospitalization")).

³² *Abuse Of Older People on the Rise*, *supra* note 17.

³³ True Link Financial, *The True Link Report on Elder Financial Abuse 2015* at, 1 (Jan. 2015), <https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>

³⁴ *Statistics/Data*, NATIONAL CENTER ON ELDER ABUSE, *supra* note 27; NAT'L CTR. ON ELDER ABUSE, *supra* note 22 (citing Claudia Cooper & Gill Livingston, *Intervening to Reduce Elder Abuse: Challenges for Research*, 45 AGE AND AGEING 184, 184-85 (2016)).

³⁵ NAT'L CTR. ON ELDER ABUSE, *supra* note 27 (citing Bruce Friedman, et al., *Longitudinal Prevalence and Correlates of Elder Mistreatment Among Older Adults Receiving Home Visiting Nursing*, 27 J. OF ELDER ABUSE AND NEGLECT 34 (2015)).

³⁶ NAT'L CTR. ON ELDER ABUSE, *supra* note 27 (citing Kathleen Quinn & William Benson, *The States' Elder Abuse Victim Services: A System in Search of Support*, 36 GENERATIONS 66, 66 (2012)).

³⁷ NAT'L CTR. ON ELDER ABUSE, *supra* note 27 (citing Bruce Friedman, et al., *Longitudinal Prevalence and Correlates of Elder Mistreatment Among Older Adults Receiving Home Visiting Nursing*, 27 J. OF ELDER ABUSE AND NEGLECT 34 (2015)).

³⁸ NAT'L CTR. ON ELDER ABUSE, *supra* note 27.

³⁹ Charles P. Sabatino, *Legal Basics: Elder Financial Exploitation*, NAT. CTR. ON L. & ELDER RIGHTS 3 (2018), https://ncler.acl.gov/pdf/Legal%20Basics-Elder_Financial_Exploita

found that those who are “extremely friendly” experience financial losses at a rate four times greater than those with a more average degree of friendliness.⁴¹

Burgeoning research also offers insight into those who commit the harm, most of whom are adult children or spouses.⁴² They are more likely to have a criminal history, to have a former or current substance abuse problem, to have health problems of their own, to be socially isolated, and to be unemployed or facing financial challenges.⁴³ Other than family members, those most likely to financially exploit seniors are friends, neighbors, and home health aides.⁴⁴ Research is limited regarding the demographics and situations of those committing specific kinds of harm, but there is increasing awareness that they are a heterogeneous group with notable patterns, associating characteristics of the person committing the harm with the specific type of abuse.⁴⁵

Research efforts are currently underway to further develop theories explaining the causes of elder abuse. Current theoretical explanations include: 1) caregiver stress; 2) ecological theory;⁴⁶ 3)

tion_Chapter_Summary.pdf (citing RUIJIA CHEN & XINQI DONG, *ELDER ABUSE: RESEARCH, PRAC. AND POL’Y* 93 (2017)); *but see*, True Link Financial, *supra* note 33, at 21 (stating that it “found no correlation between gender and exploitation”).

⁴⁰ NAT’L CTR. ON ELDER ABUSE, *supra* note 20; NAT’L CTR. ON ELDER ABUSE, *supra* note 27 (citing Janey C. Peterson, et al., *Financial Exploitation of Older Adults: A Population-based Prevalence Study*, 29 J. OF GEN. INTERNAL MED.1615 (2014)).

⁴¹ True Link Financial, *supra* note 33 (“A possible explanation is that seniors facing cognitive changes do not experience lack of trustworthiness the same way as others”).

⁴² NAT’L CTR. ON ELDER ABUSE, *supra* note 20 (citing Karl A. Pillemer & Mark S. Lachs, *Elder Abuse*, 373 NEW ENG. J. OF MED. 1947 (2015)); *see also* Clarke et al., *supra* note 13 (finding that most perpetrators are adult children).

⁴³ NAT’L CTR. ON ELDER ABUSE, *supra* note 20 (citing Karl A. Pillemer & Mark S. Lachs, *Elder Abuse*, 373 NEW ENG. J. OF MED. 1947 (2015)); *see also* Clarke et al., *supra* note 13 (finding that most perpetrators are adult children).

⁴⁴ *Id.* (citing Janey C. Peterson, et. al., *Financial Exploitation of Older Adults: A Population-based Prevalence Study*, 29 J. OF GEN. INTERNAL MED.1615 (2014)). One study found that 44% of those committing harm against older people either witnessed or experienced childhood family violence and between 20–50% of those committing harm had substance abuse problems. *See* Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 272–73.

⁴⁵ *See, e.g.*, Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 266 (concluding that, for example, neglect is most frequently committed by adult children while physical and psychological abuse are most frequently at the hands of a partner or spouse).

⁴⁶ Ecological theory adopts the view that individuals are “embedded in a series of environmental systems that interact with one another and with the individual to influence personal development and life experiences;” Karen A. Roberto & Pamela B. Teaster, *Theorizing Elder Abuse*, *ELDER ABUSE: RESEARCH, PRACTICE AND POLICY* 21, 25 (XinQi Dong ed., 2017). *See also* Nancy Darling, *Ecological Systems Theory: The Person in the Center of the Circles*, 4 RESEARCH IN HUM. DEV. 203, 204 (2007).

the life course perspective;⁴⁷ 4) feminist perspectives; 5) the National Academies of Science (“NAS”) “Elder Mistreatment Framework;”⁴⁸ and 6) a human rights perspective.⁴⁹ Given the heterogeneity of those committing the abuse, some argue that the theory, and intervention, should target the motivation of the abuser and the context.⁵⁰

III. CURRENT STRATEGIES TO ADDRESS ELDER ABUSE

The complexities of elder abuse and exploitation present challenges for identifying successful potential interventions. Traditional legal remedies are law enforcement, prosecution, and civil action. However, many seniors do not want to pursue these options. This is understandable when considering that a large percentage of perpetrators are family members. For example, a grandmother, may not want to feel responsible for her grandson going to prison.⁵¹ Additionally, she may be reluctant to participate due to the trauma *she* may experience through the prosecution process. Some older people may experience guilt about their need to depend on others for their care and daily needs, or feel shame that one of their own adult children or a family member would treat them with such disrespect. As mentioned above, many older people are dependent on the very people who are committing the

⁴⁷ The life course perspective focuses on periods of stability and transition and the many factors that affect them. See DARLING *supra* note 46 at 26.

⁴⁸ This theory focuses on elders in relationship to others, acknowledging that the elder and the person committing the harm are embedded in a social context. See DARLING, *supra* note 46 at 27–28.

⁴⁹ These rights include “dignity, respect for persons, and equality of social status.” DARLING *supra* note 47 at 28; see also Sidney M. Stahl, *A General Field Theory of Elder Abuse: It’s Not Rocket Science, It’s Harder*, JUDITH D. TAMKIN SYMPOSIUM ON ELDER ABUSE (March 1, 2018), http://eldermistreatment.usc.edu/wp-content/uploads/2018/03/A-General-Field-Theory-of-Elder-Abuse.-Its-not-Rocket-Science-Its-Harder_Sid-Stahl.pdf.

⁵⁰ See Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 276.

⁵¹ See Cythnia Moore & Colette Browne, *Emerging Innovations, Best Practices, and Evidence-Based Practices in Elder Abuse and Neglect: A Review of Recent Developments in the Field*, 32 J. FAMILY VIOLENCE 383, 389 (2017) (citing Mara Schecter & Donna Dougherty, *Combating Elder Abuse Through a Lawyer/Social Worker Collaborative Team Approach: JASA Legal/Social Work Elder Abuse Prevention Program (LEAP)*, 10 CARE MGMT. J. 71, 71 (2009) (noting that many vulnerable elders feel shame and do not want to pursue action against family members who are committing harm)); see also Lori A. Stiegel, *Elder Abuse Victims’ Access to Justice: Roles of the Civil, Criminal and Judicial Systems in Preventing, Detecting, and Remediating Elder Abuse*, in ELDER ABUSE: RESEARCH, PRACTICE & POLICY 343, 344 (XinQi Dong ed., 2017) (listing an array of factors for why elders do not report abuse).

harm.⁵² The older person may be grateful for the assistance these family members provide because it enables her to live independently and she may not want to risk damaging that relationship. This abuse may be seen as a relatively small price to pay for the ability to live independently, and although fully aware of the exploitation and other abuse occurring, she may reasonably choose to ignore it. These are just some of the considerations for an older person when deciding whether to utilize a traditional remedy for the abuse.

A. *Law Enforcement and Prosecution*

Historically, perpetrators of elder abuse were characterized as overwhelmed caregivers needing support.⁵³ As a result, protective services programs became the leading interveners.⁵⁴ Research in the 1980s and 1990s concluded that while abuse *may* be the result of caregiver stress, often it is due to “abuser psychopathology.”⁵⁵ Consequently, interventions transitioned from a child protective model to one based upon domestic violence, resulting in more frequent criminal justice responses.⁵⁶

In the past, prosecution was limited. Few cases were referred for prosecution, and even fewer were prosecuted.⁵⁷ The cases were difficult,⁵⁸ and included criminal offenses or legal issues which prosecutors and law enforcement were not trained to address, required expert testimony, and demanded analysis of extensive financial records.⁵⁹ Additionally, the nature of the offense often allowed the abuse to go undetected for a significant amount of

⁵² See Stiegel, *supra* note 51. But see Clarke et al., *supra* note 13, at 214 (describing the relationship between senior and perpetrator as interdependent).

⁵³ See Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 267.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.* (noting that historically, elder abuse has not been considered criminal)

⁵⁸ See *id.* at 276.

⁵⁹ See Page Ulrey, *Confusion on the Front Lines: The Response of Law Enforcement and Prosecutors to Cases of Elder Abuse* (2016), https://www.acl.gov/sites/default/files/programs/2016-09/Ulrey_White_Paper.pdf (last viewed Mar. 27, 2019); see also Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 268 (finding that certain categories of cases, including physical abuse cases and cases involving physical abuse and financial exploitation, are more likely to be prosecuted).

time, and securing reliable testimony became more difficult when the older person exhibited diminishing capacity.⁶⁰

In recent years, efforts have been made to address these prosecutorial limitations. The Elder Abuse Prevention and Prosecution Act of 2017 requires that training be provided at the federal level to assist in the investigation and prosecution of elder abuse cases.⁶¹ Among other things, it requires enhanced support for prosecutors handling these cases, data collection, and a multi-pronged approach to prevention, protection of seniors, and prosecution of those doing the harm.⁶² Additionally, training materials for prosecutors have proliferated,⁶³ particularly as federal grant monies have become available for this purpose. As one scholar comments, “the historical denial of elder abuse as a crime has fueled the current enthusiasm for prosecution [and] [c]alls for increasing rates of prosecution abound.”⁶⁴ These training and advocacy efforts are augmented by successes in several high-profile cases.⁶⁵ Today, district attorneys’ offices are more willing to pursue cases of elder exploitation and abuse,⁶⁶ and some advocates argue for yet more aggressive prosecution.⁶⁷

⁶⁰ See, e.g., MARY JOY QUINN & SUSAN K. TOMITA, ELDER ABUSE & NEGLECT: CAUSES, DIAGNOSIS, AND INTERVENTIONAL STRATEGIES 286 (2d ed. 1997); *The Elderly and Civil Procedure: Service and Default, Capacity Issues, Preserving and Giving Testimony, and Compulsory Physical or Mental Examinations*, 30 STETSON L. REV. 1273, 1273 (2001).

⁶¹ See 34 U.S.C. § 21711(a)(1) (2018) (for a full summary of the legislation, see <https://www.congress.gov/bill/115th-congress/senate-bill/178> (last visited Feb. 4, 2019)).

⁶² See 34 U.S.C. § 21711(a)(2) (2018). It charges the United States Department of Justice (“DOJ”) with providing information, training and technical assistance to state and local law enforcement agencies, and periodic reporting of efforts to address the problem. See 34 U.S.C. § 21711(b) (2018).

⁶³ See, e.g., NATIONAL CENTER FOR STATE COURTS, PROSECUTING ELDER ABUSE CASES: BASIC TOOLS AND STRATEGIES, <https://www.bja.gov/Publications/NCSC-Prosecuting-Elder-Abuse-Cases-Basic-Tools-and-Strategies.pdf> (last visited Feb. 4, 2019); *Prosecutors*, U.S. DEP’T OF JUST., ELDER JUSTICE INITIATIVE, <https://www.justice.gov/elderjustice/prosecutors> (last visited Feb. 4, 2019) (includes training videos, sample pleadings and other documents, research, and selected statutes); AEQUITAS, THE PROSECUTORS’ RESOURCE: ELDER ABUSE (2017), <https://aequitasresource.org/wp-content/uploads/2018/09/Prosecutors-Resource-on-Elder-Abuse.pdf>; *How to Overcome Barriers to Successful Investigation and Prosecution of Elder Abuse Cases: Webinar Notes*, JUSTICE CLEARINGHOUSE (June 22, 2017), <https://justiceclearinghouse.com/resource/overcome-barriers-successful-investigation-prosecution-elder-abuse-cases-webinar-notes/> (last visited Feb. 4, 2019).

⁶⁴ Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 276.

⁶⁵ See e.g., *People v. Marshall*, 961 N.Y.S.2d 447 (App. Div. 2013); see also *Pub. Adm’r v. Beth Israel Med. Ctr. (In re Clark)*, 2017 N.Y. LEXIS 1305, at *1 (N.Y. May 9, 2017).

⁶⁶ See Arlene D. Luu & Bryan A. Liang, *Clinical Case Management: A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse*, 15 CORNELL J. L. & PUB. POL’Y 165, 180–81 (2005) (illustrating California’s increased willingness to pursue elder abuse prosecution).

⁶⁷ See Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 276.

However, prosecution is of limited usefulness. First, a large percentage of elder abuse cases are unreported.⁶⁸ Additionally, not all elder abuse cases rise to the level of a criminal offense.⁶⁹ Also, because the perpetrator is often a family member or caregiver, some seniors do not want to see those same people face the threat of incarceration,⁷⁰ and a successful prosecution usually requires participation of the person harmed.⁷¹ Some seniors, because of denial, disbelief, fear, or lack of understanding that the abuse is occurring, may not want to address the problem at all. Finally, some of those who have been harmed by elder abuse have diminishing capacity, rendering prosecution more challenging.⁷²

The threat of prosecution has minimal impact as a deterrent because even convicted abusers often return to the person they harmed.⁷³ Scholars argue that criminal justice interventions have not been effective in reducing recidivism in the intimate partner violence context and therefore are unlikely to be effective in addressing elder abuse.⁷⁴ Another concern is the revictimization of persons harmed, and the disempowering impact of prosecution.⁷⁵

⁶⁸ See *supra* note 21; see also *Abuse Of Older People on the Rise*, WHO, *supra* note 17.

⁶⁹ See Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 276.

⁷⁰ Shelly L. Jackson & Carrie F. Mulford, *The Complexity of Responding to Elder Abuse Demands the Use of Multidisciplinary Teams*, NCCD BLOG (Oct. 30, 2013), <https://www.nccdglobal.org/newsroom/nccd-blog/complexity-responding-elder-abuse-demands-use-multidisciplinary-teams> (Noting the complexity of the relationship between the person committing the harm and the person harmed, researchers have acknowledged that often the cases “typically involve long-standing, co-dependent relationships in which the dyad has no desire to be separated”).

⁷¹ See Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 RUTGERS L. J. 305, 322 (2003); see also Douglas E. Beloff & Joel Shapiro, *Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims’ Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 32 (2002).

⁷² Barry Kozak, *The Forgotten Rule of Professional Conduct—Representing a Client with Diminished Capacity*, 49 CREIGHTON L. REV. 827, 857 (2016); see also AM. BAR ASS’N COMM’N ON L. & AGING & AM. PSYCH. ASS’N, *ASSESSMENT OF OLDER ADULTS WITH DIMINISHING CAPACITY: A HANDBOOK FOR LAWYERS* (2005) <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf> (last visited Feb. 4, 2019).

⁷³ See Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 276.

⁷⁴ See *id.*

⁷⁵ See *id.*

B. *Civil Remedies*

Theoretically, traditional civil remedies are also available to those who have been harmed. These remedies include pursuing litigation against the perpetrator by alleging undue influence, unjust enrichment, breach of contract, breach of fiduciary duty, rescission, or fraud, and by pursuing actions seeking orders of protection, restitution, injunctive relief, damages, or declaratory relief.⁷⁶ In recent years, resources for advocates, such as training and resource materials, have proliferated, and include those offered by the National Center on Elder Abuse⁷⁷ and the National Clearinghouse on Abuse in Later Life.⁷⁸

Civil suits against those abusing and exploiting seniors carry some of the same challenges as criminal prosecutions. First, it may take many months, even years, to identify that the abuse is happening or has occurred, resulting in diminished memories and insufficient documentation. The senior may be reluctant to pursue litigation, despite acknowledging that it does not involve jail time. Gathering evidence remains difficult, particularly in matters of financial exploitation that may involve securing and examining large volumes of documents.⁷⁹ Often the stolen money is spent or the property is sold long before the litigation begins,⁸⁰ limiting the amount of compensation a senior may recover if her claim is successful. Finally, litigation is a famously slow process, a problem further aggravated by the inevitable aging of the person harmed.

⁷⁶ See Sabatino, *supra* note 39, at 6–7; see also Lori A. Stiegel, *Legal Basics: Elder Abuse*, NAT'L CTR. ON L. & ELDER RTS. 4 (2017), <https://ncler.acl.gov/pdf/Legal-Basics-Elder-Abuse.pdf>.

⁷⁷ *Legal Training*, NAT'L CTR. ON L. & ELDER RTS., <https://ncler.acl.gov/Legal-Training.aspx> (last visited Feb. 4, 2019).

⁷⁸ *For Trainers*, THE NAT'L CLEARINGHOUSE ON ABUSE IN LATER LIFE, <https://www.ncall.us/for-trainers/> (last visited on Jul. 31, 2019).

⁷⁹ See Sabatino, *supra* note 39, at 6–7. This problem is aggravated by the lack of subpoena power until after the lawsuit is filed.

⁸⁰ The challenge of obtaining any lost resources is even more difficult when the person who committed the harm has a substance abuse and/or mental health problem. The National Elder Mistreatment Study concluded that 21–51% of known perpetrators had a drug or alcohol problem and 19–28% had a history of receiving mental health treatment. See Travis Labrum & Phyllis L. Solomon, *Elder Mistreatment Perpetrators with Substance Abuse and/or Mental Health Conditions: Results from the National Elder Mistreatment Study*, 89 PSYCHIATRIC Q. 117, 121–22 (2018); Jackson, *All Elder Abuse Perpetrators Are Not Alike*, *supra* note 13, at 272–73; see also *supra* note 20.

C. *Multi-Disciplinary Teams*

Given the need for “collaboration, cooperation, and communication” among the professionals involved in elder abuse cases,⁸¹ one modern approach is the use of Multidisciplinary Teams (“MDTs”). MDTs are groups of professionals who collaborate to review incidents of elder abuse and pool their collective resources to develop a plan of action.⁸² They provide consultations to service providers, identify service gaps, advocate for change, offer trainings, and facilitate coordinated investigations.⁸³ Team members typically include aging services personnel, adult protective services representatives, civil attorneys, criminal justice participants, health care representatives, and victim advocates.⁸⁴

The DOJ’s Multidisciplinary Team Technical Assistance Center provides consultation and training on the establishment of MDTs, and produces materials.⁸⁵ It describes the predominant characteristics of MDTs as: 1) shared decision-making; 2) partnership; 3) interdependency; 4) balanced power; and 5) process.⁸⁶ Advantages of MDTs include enhanced evidence gathering, support for the person who has been harmed, and collaboration to encourage that person’s participation in the investigation and potential prosecution.⁸⁷ Although MDTs report successful interdisciplinary collaborations, more evaluation is needed to assess their effectiveness and develop a consensus of appropriate goals and outcomes for this approach.⁸⁸ Despite these limited improvements, traditional criminal and civil remedies remain largely inadequate to address the complex nature of elder abuse.⁸⁹

⁸¹ See *How to Overcome Barriers to Successful Investigation and Prosecution of Elder Abuse Cases: Webinar Notes*, JUSTICE CLEARINGHOUSE (June 22, 2017), <https://justiceclearinghouse.com/resource/overcome-barriers-successful-investigation-prosecution-elder-abuse-cases-webinar-notes/> (last visited Feb. 4, 2019).

⁸² See *About the MDT TAC*, U.S. DEP’T OF JUST., ELDER JUSTICE INITIATIVE, <https://www.justice.gov/elderjustice/mdt-tac>. (last visited Feb. 4, 2019).

⁸³ See Georgia J. Anetzberger, *Elder Abuse Multidisciplinary Teams*, in *ELDER ABUSE: RESEARCH, PRACTICE AND POLICY* 417, 423–24 (XinQi Dong ed., 2017).

⁸⁴ See *id.*

⁸⁵ *About the MDT TAC*, *supra* note 82.

⁸⁶ *Introduction to Multidisciplinary Teams*, U.S. DEP’T OF JUST., ELDER JUST. INITIATIVE, <https://www.justice.gov/elderjustice/1-introduction-multidisciplinary-teams> (last visited Feb. 4, 2019) (For descriptions of other MDT models, see Moore & Browne, *supra* note 51, at 391–93).

⁸⁷ Jackson & Mulford, *supra* note 70. One study found a relationship between multi-disciplinary services and a reduction in mistreatment risk. Moore & Browne, *supra* note 51.

⁸⁸ See Anetzberger, *supra* note 83, at 427; see also Moore & Browne, *supra* note 51, at 392.

⁸⁹ Finally, there is some evidence that “traditional” legal options are not even explored with some seniors who have been harmed. See generally Clarke et al., *supra* note 13 (finding that

IV. OVERVIEW OF RESTORATIVE PRINCIPLES AND SELECTED MODELS

This Part offers a foundational discussion of basic restorative principles before considering their application to elder abuse. The literature in this field has expanded exponentially in recent years, particularly as policymakers consider alternatives to the current criminal justice system and the large number of incarcerated offenders in the United States.⁹⁰ However, the application of restorative principles expands far beyond the criminal justice system, as scholars and practitioners consider their application in diverse contexts that include even the development of restorative institutions and communities.⁹¹ Advocates, policy-makers, and funders should initiate and implement projects applying restorative principles to elder abuse.

A. Restorative Justice Generally

Definitions of restorative justice abound. Howard Zehr, referred to as “the grandfather of restorative justice”⁹² and author of *The Little Book of Restorative Justice*, one of the early texts in the field, defines it as “an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible.”⁹³ Re-

decisions regarding how to address elder abuse were made *for* seniors, not *by* seniors, and that the harmed seniors frequently were not informed about the process, likelihood of success, and consequences). In Part V, this article will outline alternative remedies, acknowledging that the theoretical framework will inform approaches and criteria for identifying which remedies may be useful in which situations.

⁹⁰ See generally Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012) (examining the proliferation of specialized criminal courts and their effect on increasing rates of incarceration); see also Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016*, U.S. DEP’T OF JUST. 1, <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

⁹¹ See, e.g., Center for Justice Reform Conferences, *International Restorative Justice Conference: Global Unity and Healing, Building Communities with a Restorative Approach*, VT. L. SCH. (June 28–30, 2018), <https://www.vermontlaw.edu/academics/centers-and-programs/center-for-justice-reform/conference/international-restorative-justice-conference> (focusing on three themes—environmental justice; building safe, healthy and inclusive communities; and addressing harm and conflict).

⁹² HOWARD ZEHR ET AL., *The Little Book of Restorative Justice: Revised and Updated* 108, 108 (Good Books, 2nd ed. 2015).

⁹³ *Id.* at 50.

storative justice is based upon three principles: 1) “Wrongdoing is a violation of people and of interpersonal relationships;” 2) “Violations create obligations;” and 3) “The central obligation is to put right the wrongs, i.e. to repairs the harms caused by wrongdoing.”⁹⁴ Acknowledging that restorative justice practices have proliferated, he writes that “[r]estorative justice is not a map . . . but can be seen as a compass offering direction. At a minimum, it is an invitation for dialogue and exploration.”⁹⁵ It expands stakeholders to include the community, which is inevitably harmed as well, and focuses on the needs of the person harmed, the person who committed the harm, and the community.⁹⁶

More specifically, restorative justice includes a dialogue that focuses on facts and emotions, and addresses what happened in the past, what things are like now as a result of that experience, and what participants want for the future.⁹⁷ Essential components of the process include voluntariness, respect, honest communication, a desire to repair harms, and accountability for the harms.⁹⁸ It is “a process that has empathy at its heart,”⁹⁹ with a primary goal being to “reduce the social distance or ‘gap’ that results from crime.”¹⁰⁰

⁹⁴ *Id.* at 30–31.

⁹⁵ *Id.* at 19.

⁹⁶ *Id.* at 23. Zehr suggests that the following six questions must be asked when a wrong occurs, and thus they form the essence of restorative justice: 1) Who has been harmed? 2) What are their needs? 3) Whose obligations are these? 4) Who has a stake in this situation? 5) What are the causes? and 6) What is the appropriate process to involve stakeholders in an effort to put things right and address underlying causes? *Id.* at 51.

⁹⁷ See Andrea Păroșanu, *Elder Harm and Restorative Practices: A Literature Review*, 6 OCCASIONAL PAPERS IN RESTORATIVE JUST. PRAC. 1, 13 (2017), https://www.wgtn.ac.nz/__data/assets/pdf_file/0003/1311870/Occasional-papers-restorative-justice-elder-harm.pdf.

⁹⁸ See *id.* at 19–20.

⁹⁹ PETE WALLIS, UNDERSTANDING RESTORATIVE JUSTICE: HOW EMPATHY CAN CLOSE THE GAP CREATED BY CRIME 6 (Policy Press 2014).

¹⁰⁰ *Id.* at 2. Wallis also identifies different forms of the restorative processes in the criminal context, including “pure restorative justice,” where the parties organically resolve the issues independently; “street restorative justice interventions,” where the police utilize restorative processes in the immediate aftermath of a crime; and pre-court restorative justice, offered as an alternative to the criminal justice system. *Id.* at 42–44. As the application of restorative justice has expanded, so has the language used to describe the activities and models. Today, the term “restorative practice” is used to describe “a process that be used anywhere to prevent conflict, build relationships and repair harm by enabling people to communicate effectively and positively.” *What is restorative justice?*, RESTORATIVE JUSTICE COUNCIL, <https://restorativejustice.org.uk/what-restorative-justice> (last visited Feb. 14, 2019).

It can “involve both a proactive approach to preventing harm and conflict and activities that repair harm where conflicts have already arisen.” *Id.*

Consistent among all definitions and descriptions of a restorative approach is its emphasis on relationships.¹⁰¹ The goal is to foster relationships based upon respect, concern, and dignity, and to facilitate those relationships to function in a positive way.¹⁰² However, practitioners and scholars alike express frustration with the focus on descriptive definitions.¹⁰³ Scholar Jennifer Llewellyn focuses instead on restorative justice's underlying "relational theory of justice" and emphasizes that restorative justice's strength "lies with its relational approach and the understandings it offers about needs and capacities of human beings, the institutions, systems, practices, processes and policies in and through which we can flourish."¹⁰⁴

While a complete history of the evolution and development of restorative justice principles is beyond the scope of this discussion, it is important to acknowledge their roots in indigenous communities,¹⁰⁵ most notably among the Navajo and Maori.¹⁰⁶ Although the Navajo people were not the only Native American tribe to utilize restorative processes,¹⁰⁷ their peacemaking process has been

¹⁰¹ See Jennifer J. Llewellyn et al., *Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation*, 36 DALHOUSIE L. J. 281, 296–97 (2013).

¹⁰² See Jennifer J. Llewellyn, *Restorative Justice: Thinking Relationally About Justice*, BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW AND POLICY 89 (Jocelyn Downie & Jennifer J. Llewellyn eds., 2011).

¹⁰³ Zehr, *supra* note 92, at 49; see also Llewellyn et al., *supra* note 101 (suggesting that most discussions of restorative justice focus on descriptions of the processes, and not on the underlying theory and articulating a "relationship theory of justice").

¹⁰⁴ Llewellyn, *supra* note 102. With this as a backdrop, she describes the essential principles of restorative approaches as relationship focused, participatory, inclusive, comprehensive and holistic, and forward looking. See Llewellyn et al., *supra* note 101, at 282 (Other descriptive terms include "community-based, informal, dialogical . . . and egalitarian." *Id.* at 283). See also Restorative Justice Council, *Principles of Restorative Practice*, <https://restorativejustice.org.uk/sites/default/files/resources/files/Principles%20of%20restorative%20practice%20-%20FINAL%2012.11.15.pdf> (last visited Oct. 11, 2019) (describing the principles of restorative practice—restoration, voluntarism, neutrality, safety, accessibility, and respect). But also Zehr, *supra* note 92, at 14–15 (writing that although he acknowledges the term "justice" can be limiting, he chooses to use it so as not to "lose awareness of the justice dimension").

¹⁰⁵ Jon'a F. Meyer, *History Repeats Itself: Restorative Justice in Native American Communities*, 14 J. OF CONTEMPORARY CRIM. JUST. 42, 43 (1998).

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* at 44–45 (noting the practices of the Iroquois, Karok, and Ojibway tribes among others); see also, Robert V. Wolf, *Widening the Circle: Can Peacemaking Work Outside of Tribal Communities?*, CTR. FOR CT. INNOVATION 3 (2012), https://www.courtinnovation.org/sites/default/files/documents/PeacemakingPlanning_2012.pdf (citing Robert B. Porter, *Strengthening Tribal Sovereignty through Peacemaking: How the Anglo American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUMAN RIGHTS L. REV. 235 (1997) (noting the use of peacemaking among tribes in the U.S. Southwest, but also in the Pacific Northwest, the Plains, the Southeast, Alaska, and Hawaii)).

broadly adapted.¹⁰⁸ Instead of judging the participants, the process addresses the “consequences of such actions and substitutes healing in place of coercion.”¹⁰⁹ In 1992, the Navajo formally established the Peacemaker Court which incorporates traditional Navajo law into its tribal court system.¹¹⁰ Other tribes similarly have begun reconstructing their traditional justice systems, all with problem-solving as a core component with a focus on future, not past, events.¹¹¹ Beginning in the 1990s, prominent judges and scholars began suggesting the adaptation of native justice models to the U.S. justice system.¹¹² At most, these peacekeeping models used in state court and other dispute resolution contexts are described as “inspired” by Navajo traditions, but not “considered replications of Native peacemaking.”¹¹³

Somewhat akin to the Navajo, the Maori people’s legal system is based on relationships and “on mutual expectations and collective responsibility with the goal of avoiding dispute.”¹¹⁴ This unwritten “customary law” derives its essence from spiritual, economic, political, and social principles which enables it to be flexibly applied to a variety of disputes.¹¹⁵ Although all Maori communities utilize restorative principles to resolve disputes, specific practices may vary from community to community.

Today, New Zealand law incorporates restorative practices and some of the values fundamental to indigenous communities.¹¹⁶ This process began after a study of New Zealand’s child protection system concluded that current governmental practices had elimi-

¹⁰⁸ Meyer, *supra* note 105, at 44–45 (noting the practices of the Iroquois, Karok, and Ojibway tribes).

¹⁰⁹ Jud. Branch of the Navajo Nation, *Peacemaking: A Guide to the Peacemaking Program of the Navajo Nation*, 1 (Sept. 2004), <http://www.navajocourts.org/Peacemaking/peaceguide.pdf> (explaining that by solving their own problems in peacemaking, people replace coercive decisions such as punishment to correct behavior).

¹¹⁰ Wolf, *supra* note 107, at 1.

¹¹¹ *Id.* at 1–3.

¹¹² *Id.* at 1–2 (noting support from then-Attorney General Janet Reno, then-U.S. Supreme Court Justice Sandra Day O’Connor, and leaders at the U.S. Justice Department).

¹¹³ Erika Sasson & Nora Sydow, *Inspired by Peacemaking: Creating Community-Based Restorative Programs in State Courts*, CTR. FOR CT. INNOVATION vi (2017), https://www.courtinnovation.org/sites/default/files/documents/Inspired_by_Peacemaking.pdf.

¹¹⁴ Stephanie Vieille, *Maori Customary Law: A Relational Approach to Justice*, 3 THE INT’L INDIGENOUS POL’Y J. 1, 2 (2012).

¹¹⁵ *Id.* at 3–4. *Tikanga Maori*, “the Maori way of doing things,” is about relationships and kinship, central to the culture, which results in seeing crime as a breakdown in relationships, for which there is a collective responsibility. *Id.* at 6.

¹¹⁶ *See id.* at 2.

nated Maori self-determination.¹¹⁷ In response to this finding, New Zealand created a new child protection system. It adopted a Family Group Conferencing Model adapted from Maori tradition that provided for native communities to have a voice in this process; however, the process was not *developed* by the Maori people.¹¹⁸ As the New Zealand government adapted these native practices, it exerted control over how and when they were used, resulting in criticisms that it had reduced the Maori's complex, customary law to codes and fixed practices.¹¹⁹

Following the incorporation of family group conferencing into New Zealand's youth justice system, New Zealand later adapted the model to address school disciplinary issues and adult offenders.¹²⁰ Since then, the use of restorative principles has continued and expanded throughout the world. For example, peacemaking circles are used in the United States, most notably in local courts to address juvenile offender issues, as a diversion program to prevent youth offenders from entering the criminal justice system, and to address parenting issues.¹²¹ Restorative principles are now applied to disputes in residential settings and in nursing facilities; in campus abuse situations; among sports teams; regarding corporate reg-

¹¹⁷ EdX, Online Course, *supra* note 11; Allan Cooke, State Responsibility for Children in Care 204–205 (Dec. 17, 2013) (unpublished Ph. D. thesis, University of Otago) (on file at <https://ourarchive.otago.ac.nz/bitstream/handle/10523/4796/CookeAllanJ2014PhD.pdf?sequence=1&isAllowed=y>). This transformation occurred following a 1986 examination of social issues impacting Maori children and the government's removal of children from their families and homes, and placing them in foster care and institutions. In response to this study, which included a listening component with members of Maori communities, the New Zealand government acknowledged the lack of Maori self-determination.

¹¹⁸ EdX, Online Course, *supra* note 11; *see also* Vieille, *supra* note 114.

¹¹⁹ Joseph Robinson & Jennifer Hudson, *Restorative Justice: A Typology and Critical Appraisal*, 23 WILLAMETTE J. INT'L L. & DISP. RESOL. 335, 347 (2016) (citing Matt Hakiha, What is the State's Role in Indigenous Justice Process?, *Critical Issues in Restorative Justice* 355 (Howard Zehr & Barb Toews eds., 2004)). *See also* Donna Coker, *Restorative Justice: Navajo Peacemaking and Domestic Violence*, 10 THEORETICAL CRIMINOLOGY 67, 71–72 (2006) (quoting Robert Yazzie, *Navajo Peacemaking and Intercultural Dispute Resolution*, INTERCULTURAL DISP. RESOL. IN ABORIGINAL CONTEXTS 104–15 (Catherine Bell & David Kahane eds., 2004)). Some criticize the efforts to tie New Zealand's use of restorative principles to Maori customary law, noting that current restorative practices “reveal[] a lack of understanding of the cultural, social, and spiritual principles that underpin Maori society and its approach to justice.” Vieille, *supra* note 114, at 11 (citing Matt Hakiha, What is the State's Role in Indigenous Justice Process?, *Critical Issues in Restorative Justice* 358 (Howard Zehr & Barb Toews eds., 2004)).

¹²⁰ EdX, Online Course, *supra* note 11; *see also* Vieille, *supra* note 114.

¹²¹ *See* Sasson & Sydow, *supra* note 113, at 19.

ulatory compliance, staffing conflicts and employment grievances; and among communities and neighborhoods.¹²²

B. *Descriptions of Selected Restorative Practice Models*

Numerous conflict resolution models incorporate restorative principles, all based on the fundamental importance of dialogue.¹²³ There are three main dialogue-based models: 1) Circle processes; 2) Family Group Conferences; and 3) Victim-Offender Mediation.¹²⁴ All models include preparation of the parties, attention to interconnecting relationships, third party participation, facilitator guidance, an emphasis on story-telling, listening and being heard, and practical agreements.¹²⁵ Because Victim-Offender Mediation focuses on those already convicted,¹²⁶ it is less likely to be a viable remedy for elder abuse.¹²⁷

Beyond having these basic characteristics, restorative practice models are difficult to categorize; programs have unique features appropriate to particular situations and communities, “making clear distinctions between them difficult.”¹²⁸ As Zehr writes, the “restorative justice field is becoming too diverse to capture it in any simple classification,” an issue further compounded by blended models.¹²⁹ The outline below describes selected restorative models and then considers their use in the elder abuse context, where they

¹²² The principles are also utilized to resolve environmental problems and social issues. See e.g., International Restorative Justice Conference, *supra* note 91. A well-known example of a restorative process in the political realm is in the South African Truth and Reconciliation Commission. *Id.*

¹²³ Mark S. Umbreit & Ted Lewis, *Victim Offender Mediation Training Manual: A Composite Collection of Training Resource Materials*, CTR. FOR RESTORATIVE JUST. & PEACEMAKING 19 (2015), <http://rjp.umn.edu/sites/g/files/pua5026/f/media/victim-offender-mediation-manual.pdf>.

¹²⁴ Zehr, *supra* note 92, at 58. See also Umbreit & Lewis, *supra* note 123.

¹²⁵ Umbreit & Lewis, *supra* note 123, at 20. Other components include voluntariness, safety, acceptance of all, and respect. *Id.* at 19.

¹²⁶ See generally, Lorraine Stutzman Amstutz, *The Little Book of Victim Offender Conferencing: Bringing Victims and Offenders Together in Dialogue*, THE BIG BOOK OF RESTORATIVE JUSTICE 117 (2015).

¹²⁷ Therefore, it will not be addressed further in this article. For more information on Victim Offender Mediation, see Bradshaw & Umbreit, *supra* note 8 at 17; Umbreit & Lewis, *supra* note 123, at 40. See Amanda Dissel & Kindiza Ngubeni, *Giving Women Their Voice: Domestic Violence and Restorative Justice in South Africa*, CTR. FOR THE STUD. OF VIOLENCE & RECONCILIATION 1 (2003), <http://www.csvr.org.za/docs/crime/givingwomenvoice.pdf>. (discussing specific projects); see also Bradshaw & Umbreit, *supra* note 8, at 19.

¹²⁸ Zehr, *supra* note 92, at 57.

¹²⁹ *Id.*

may be particularly useful for repairing relationships, with the assistance of relevant support persons and community interventions.¹³⁰

1. Peacemaking

The restorative practice holding the most promise for addressing elder abuse is peacemaking. Peacemaking involves not only the person harmed and the person who committed the harm, but also potentially includes family, friends and the larger community, signifying that disputes between two people negatively impact the entire community.¹³¹ Typically, the peacemaking process offers all participants opportunities to speak, often with a “talking piece” or similar instrument designating the person authorized to speak at a given time.¹³² Peacemaking circles typically involve four stages: 1) screening for appropriateness; 2) meetings with the involved parties and others to prepare for the session; 3) the circle process itself, hopefully leading to a resolution; and 4) implementation of the resolution plan.¹³³ There is no search for truth.¹³⁴ Instead, the goal is “a consensus decision that focuses on healing and restitution, not punishment.”¹³⁵

As is true with other restorative models, peacemaking circles are being implemented in a variety of non-Native settings, addressing, for example, adult and juvenile criminal matters, school disciplinary matters and related disputes, family law issues,¹³⁶ child protective cases, and guardianships.¹³⁷ In recent years, the New York State Center for Court Innovation has championed peacemaking as an alternative to the adversarial justice system, and sup-

¹³⁰ Because of the considerable debate regarding characterizing mediation as a restorative practice, it will be addressed separately.

¹³¹ *Peacemaking Program: Plan of Operations* 1,11 (2013), <http://www.navajocourts.org/Peacemaking/Plan/PPPO2013-2-25.pdf>.

¹³² Beck et al., *supra* note 5, at 224.

¹³³ For more details on the peacemaking process, see Yvon Dandurand & Curt T. Griffiths, *Handbook on Restorative Justice Programmes*, U.N. Off. on Drugs & Crimes 1, 23 (2006), <https://rm.coe.int/16806f4722>.

¹³⁴ Beck et al., *supra* note 5, at 224.

¹³⁵ Wolf, *supra* note 107, at 7. In the Native tradition, the peacemaker is a community elder, respected and knowledgeable, whose “leadership depends on respect and persuasion.” *Id.* at 3. The native peacemaker has also been described as a combination of “leader, teacher, and healer.” Judicial Branch of the Navajo Nation, *Peacemaking Program: Plan of Operations* 1, 9 (2013), <http://www.navajocourts.org/Peacemaking/Plan/PPPO2013-2-25.pdf>.

¹³⁶ See Daicoff, *supra* note 9, at 429.

¹³⁷ See Deborah Thompson Eisenberg, *White Paper: What We Know and Need to Know About Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245, 254–55 (2016).

ported the development of programs through funding and technical expertise.¹³⁸

One example of the peacemaking process was developed in the Cook County, Illinois family court, which used it to address parenting issues, and found it particularly useful for resolving issues between unmarried parents.¹³⁹ Among the positive attributes of the process were its ability to incorporate the voices of supportive extended family members, its ability to foster positive communication between the parties following the resolution of the immediate issue, and the emphasis on self-enforced accountability.¹⁴⁰ In describing its use in family law, Susan Daicoff writes that the “Circle process can reduce anxiety, slow down the participants’ interactions, reduce hostility, create a community within the participants, communicate mutual respect for all present, and unify them in common values and goals.”¹⁴¹

2. Family Group Conferencing

Another restorative model used in a variety of contexts is family group conferencing, which also involves the individuals as well support people, extended family, and community members.¹⁴² Often used in the child welfare context, it has been described as a “decision-making model that focuses on the family and its social network, and which aims to gather all parties with an interest in the wellbeing of a child and his or her family to make a family group

¹³⁸ See Sasson & Sydow, *supra* note 113, at 1. A specific example of the circle process is sentencing circles, which bring together both parties, participants from the criminal justice system, and members of the community. See Dandurand & Griffiths, *supra* note 133, at 22–23 (noting that processes will vary in different locales, and that this model continues to operate within the context of the criminal justice system); see also Heino Lilles, *Circle Sentencing: Part of the Restorative Justice Continuum*, INT’L INST. FOR RESTORATIVE PRACTICES (Aug. 9, 2002), <https://www.iirp.edu/eforum-archive/circle-sentencing-part-of-the-restorative-justice-continuum>. The goal is to gain consensus on a sentencing plan, while balancing the needs of the victim and offender. Umbreit & Lewis, *supra* note 123, at 16.

¹³⁹ Sasson & Sydow, *supra* note 113, at 15; see Daicoff, *supra* note 9, at 434.

¹⁴⁰ See Daicoff, *supra* note 9, at 430.

¹⁴¹ *Id.* at 435. This pilot program ended when the participating judge retired. Email from Heather Dorsey, Program Manager- Courts, Children and Family Unit, Administrative Office of Illinois Court, August 8, 2019 (on file with author).

¹⁴² See Mark Umbreit et al., *Restorative Justice Dialogue: Evidence-Based Practice*, CTR. FOR RESTORATIVE JUST. & PEACEMAKING 1 (2006), http://rjp.umn.edu/sites/g/files/pua5026/f/media/rj_dialogue_evidence-based_practice_1-06.pdf. The terms Family Group Conferencing, community group conferencing, and restorative group conferencing are synonymous. Family Group Conferencing is used in a myriad of contexts, including to develop support plans for those needing services. See also Rosalie Metzger et al., *Family Group Conferencing: A Theoretical Underpinning*, 23 HEALTH CARE ANALYSIS 165, 166–67 (2015).

plan that teaches and supports active responsibility.”¹⁴³ The process is based on the assumption that “the family knows best what they need and are indeed experts,”¹⁴⁴ and parents are more likely to be invested in, and successful with, a plan the family devises.¹⁴⁵

Similar to other restorative models, a trained professional facilitates the conference process.¹⁴⁶ The model includes three parts: 1) A preparatory meeting with family members to identify participants’ concerns and resource needs and prepare family members for the conference; 2) the conference process itself, which may have its own stages—an initial meeting involving the referring social worker and the restorative coordinator, private family time, and then a review of the family’s plan with the social worker and practitioner; and 3) an implementation stage, during which the professionals assist the family in following the plan.¹⁴⁷ A specific feature of family group conferencing, and one that distinguishes this model from the peacemaking model, is that the family meets alone to devise its plan.¹⁴⁸ Once the plan has been determined, other participants rejoin the family, may offer input, and describe how they can assist in its implementation.¹⁴⁹

After being adopted in New Zealand to address the burgeoning youth crime problem,¹⁵⁰ this statutorily enacted model was subsequently applied to adult crimes¹⁵¹ and is now utilized in the

¹⁴³ Sharon Dijkstra et al., *The Effectiveness of Family Group Conferencing in Youth Care: A Meta-Analysis*, 62 CHILD ABUSE & NEGLECT 100, 101 (2016).

¹⁴⁴ Beck et al., *supra* note 5, at 223.

¹⁴⁵ See Dijkstra et al., *supra* note 143.

¹⁴⁶ See Dandurand & Griffiths, *supra* note 134, at 20.

¹⁴⁷ See Dijkstra et al., *supra* note 143. See also Interview with Richard Chalmers, CEO, Daybreak Family Group Conferences, London, U.K. (July 3, 2019).

¹⁴⁸ See Dandurand & Griffiths, *supra* note 134, at 20–21; see also *What is a family group conference? (Also known as a family group meeting)*, FAM. RTS. GROUP 3, https://www.frg.org.uk/images/Advice_Sheets/3-what-is-a-family-group-conference.pdf (last visited Feb. 18, 2019); see also Beck et al., *supra* note 5, at 223; Interview with Richard Chalmers, CEO, Daybreak Family Group Conferences, London, U.K. (July 3, 2019). In some models, the family meeting may not be private. See Dijkstra et al., *supra* note 143.

¹⁴⁹ Family group conferencing can be particularly effective at monitoring compliance with the participants’ agreed-upon resolution. See Dandurand & Griffiths, *supra* note 134, at 21.

¹⁵⁰ See Dijkstra et al., *supra* note 144. See also Children, Young Persons, and their Families Act 1989 (N.Z.).

¹⁵¹ For a contemporary analysis of the implementation of this statute, see generally Judge Andrew Becroft, *Family Group Conferences: Still New Zealand’s Gift to the World?*, <https://www.occ.org.nz/assets/Uploads/OCC-SOC-Dec-2017-Companion-Piece.pdf> (last visited August 8, 2019) (arguing that the legislative vision did not become the reality due to insufficient resources and the failure to prioritize meaningful Maori involvement). See also Murray Levine, *The Family Group Conference in the New Zealand Children, Young Persons, and Their Families Act of 1989 (CYP&F): Review and Evaluation*, 18 BEHAV. SCI. & THE L. 517, 517–56 (2000).

school system.¹⁵² Following family group conferencing's implementation in New Zealand, by 2016 it had spread throughout the world and was present in more than twenty countries.¹⁵³

Strengths of the family group conferencing model include providing families a voice in addressing their problems,¹⁵⁴ to share their problems with others, to accept help, and to be respected by others.¹⁵⁵ Conferences purportedly can be designed in a culturally appropriate manner,¹⁵⁶ although some scholars dispute this claim.¹⁵⁷ While some conferences have been found to yield positive results,¹⁵⁸ a meta-analysis of existing studies of family group conferencing in child welfare cases suggests little evidence of improved outcomes for the involved children.¹⁵⁹

3. Mediation: A Restorative Model?

There is considerable debate about whether or not mediation (distinguished from Victim-Offender Mediation) is a restorative model. Some scholars argue that distinctions between the two are beginning to blur,¹⁶⁰ while others go to considerable lengths to distinguish mediation from restorative processes.¹⁶¹ This section will provide an overview of how mediation has been used in working with the elderly, and then briefly summarize the debate regarding the relationship between mediation and restorative practices.

Mediation is defined as “a process by which an impartial third party meets with the parties to a dispute in order to help them settle their differences.”¹⁶² Although types of mediation vary, the goal is “to assist people to reach a voluntary resolution of a dis-

¹⁵² Vieille, *supra* note 115.

¹⁵³ Dijkstra et al., *supra* note 142.

¹⁵⁴ *Id.*

¹⁵⁵ Metze et al., *supra* note 143, at 177.

¹⁵⁶ See Beck et al., *supra* note 5, at 224.

¹⁵⁷ See Paora Moyle & Juan Marcellus Tauri, *Māori, Family Group Conferencing and the Mystifications of Restorative Justice*, 11 VICTIMS & OFFENDERS 87, 97 (2016) (arguing that New Zealand's family group conferencing model fails to be culturally responsive, practitioners are insufficiently knowledgeable about Maori cultural perspectives, and that restorative justice generally is mischaracterized as based on indigenous principles).

¹⁵⁸ See Beck et al., *supra* note 5, at 224.

¹⁵⁹ See Dijkstra et al., *supra* note 143, at 108.

¹⁶⁰ Mark Umbreit et al., *supra* note 142.

¹⁶¹ See, e.g., Mark Umbreit et al., *supra* note 142. Bradshaw & Umbreit, *supra* note 8; see Sasson & Sydow, *supra* note 113, at 1; see also Zehr, *supra* note 92, at 17–18.

¹⁶² Canadian Ctr. for Elder Law, *Elder and Guardianship Mediation* 11 (2012), http://www.bcli.org/sites/default/files/EGM_Report_Jan_30_2012.pdf.

pute.”¹⁶³ Elder mediation, pioneered in Canada,¹⁶⁴ is a growing field that uses “a person-centred [sic] approach” that “aims to enhance the wellbeing . . . of the elderly and promote communication between everyone involved.”¹⁶⁵ Practitioners are expected to be knowledgeable about age-related issues, the aging process, and capacity assessment,¹⁶⁶ and to adapt the model to the specific needs of seniors.¹⁶⁷ Issues addressed include disputes over caregiving responsibilities, financial issues, housing concerns, inheritances issues, alternative living arrangements, safety issues, and health and medical care issues as well as elder abuse.¹⁶⁸

Among the recommended practices in elder mediation are pre-mediation interviews with the parties; co-mediators when multiple family members are involved; and mediators with specialized training, who are neutral but not passive, and who are capable of assessing the parties’ capacity to participate.¹⁶⁹ Other suggestions include using an evaluative model¹⁷⁰ and having the referring social

¹⁶³ *Id.* at 12. For a brief explanation of the mediation process, see Alexandra Crampton, *Elder Mediation in Theory and Practice: Study Results From a National Caregiver Mediation Demonstration Project*, 56 J. OF GERONTOLOGICAL SOC. WORK 423, 424 (2013).

¹⁶⁴ See Păroșanu, *supra* note 97, at 15.

¹⁶⁵ *Id.* (citing Judy McCann-Beranger, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse: Final Report*, DEP’T OF JUST., CAN. 1, 1 (2010)); see also Dale Bagshaw et al., *Elder Mediation and the Financial Abuse of Older People by a Family Member*, 32 CONFLICT RESOL. Q. 443, 448 (2015) (“Older-person-centered family mediation is a voluntary, collaborative, confidential, informal process in which members of a family come together, face-to-face or separately (e.g. by telephone or with the mediator going between), with the assistance of an impartial mediator who helps them to communicate respectfully, listen to others, share concerns, clarify issues, create options, consider consequences and plan for the future”).

¹⁶⁶ See *id.* at 15–16 (citing Judy McCann-Beranger, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse: Final Report*, DEP’T OF JUST., CAN. 1, 1 (2010)).

¹⁶⁷ See *id.* at 16–17 (citing Lise Barry, *Elder Mediation*, 24 AUSTRAL. DISP. RESOL. J. 251, 251–58 (2013)).

¹⁶⁸ See *id.* at 15 (citing Judy McCann-Beranger, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse: Final Report*, DEP’T OF JUST., CAN. 1, 2–3 (2010)); see also Canadian Ctr. for Elder Law, *supra* note 162; see also Crampton, *supra* note 163, at 426; Bagshaw et al., *supra* note 165, at 446–47.

¹⁶⁹ See Canadian Ctr. for Elder Law, *supra* note 162 (describing the success of a program using senior volunteers as mediators, following a basic mediation training).

¹⁷⁰ There are three general styles of mediation: 1) facilitative; 2) transformative; and 3) evaluative. A facilitative style involves a mediator assisting parties in reconciling a conflict, encouraging them to reach a voluntary solution, with the mediator being “in charge of the process, while the parties are in charge of the outcome.” In evaluative mediation, the mediator may make recommendations and suggestions, focusing on a fair result and the legal merits of the situation. In this context, the mediator is responsible for the process but also influences the outcome. Finally, in transformative mediation, the goal is to empower “disputants to resolve their own conflict . . . and to recognize each other’s needs and interests.” The mediator follows the parties’ lead; the parties structure both the process and the result. See Katie Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict*, HARV. L. SCH.: PROGRAM ON NEGOTI-

worker participate as the older person's advocate.¹⁷¹ Although research addresses several critiques,¹⁷² one study concluded that with a specially trained mediator, the process could enhance the rights and wishes of older people, increase communication in the family, enhance accountability, and reduce family conflict overall.¹⁷³

Elder mediation is commonly used in the guardianship context,¹⁷⁴ with older people who have limitations and may be frail, dependent, and vulnerable.¹⁷⁵ In some courts, mediation is required before guardianship proceedings,¹⁷⁶ reportedly with mixed results.¹⁷⁷

While there are similarities between mediation and restorative practices, both being based on dialogue and the parties deciding the outcome,¹⁷⁸ there are also significant differences. In the restorative model, the peacemaker assumes a proactive role, and supports people and community members actively participating.

ATION DAILY BLOG (Dec. 3, 2018), <https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/>; see also Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE, <https://www.mediate.com/articles/zumeta.cfm> (last visited Feb. 20, 2019).

¹⁷¹ Crampton, *supra* note 163, at 426. For a slightly modified approach, see, e.g., Jack C. Wall & Marcia K. Spira, *A Conceptual Framework for Differential Use of Mediation and Family Therapy Interventions With Older Adults and Their Families*, 55 J. OF GERONTOLOGICAL SOC. WORK 282, 287 (2012) (advocating the combined use of a family therapy perspective, to resolve emotional and communication issues, and mediation to develop a care plan).

¹⁷² Critiques include that the process cannot protect against power imbalances and conflict occurring after the mediation and ageist assumptions, resulting in older people being subjected to techniques that feel "intrusive and coercive," Crampton, *supra* note 163, at 430–32; and concerns about securing the families' participation and their willingness to discuss financial matters. Bagshaw et al., *supra* note 165, at 466–67.

¹⁷³ See Bagshaw et al., *supra* note 165, at 465–66.

¹⁷⁴ See Canadian Ctr. for Elder Law, *supra* note 162; see also Mary Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611, 617 (2002), <https://www.stetson.edu/law/lawreview/media/is-the-use-of-mediation-appropriate-in-adult-guardianship-cases.pdf>.

¹⁷⁵ Crampton, *supra* note 163, at 426.

¹⁷⁶ See *id.* at 424.

¹⁷⁷ In one study, mediators thought the court-imposed requirement helped to empower the person who was the subject of the guardianship if special procedures were implemented to assess capacity. See Crampton, *supra* note 163, at 431. Those procedures included mediator training on aging issues, a capacity assessment of the older person, and including an elder advocate in the process to assure the elder's needs are protected. *Id.* A different study found that mediation often proceeded despite the older adult being unable to participate meaningfully due to diminished capacity. *Id.* at 431–32. To address these shortcomings, programs should increase the involvement of geriatric social workers, require more thorough mediator and party preparation, including attention to family dynamics, and provide more mediator training on aging, family dynamics, caregiving, and guardianship decision-making. *Id.*

¹⁷⁸ Sasson & Sydow, *supra* note 113, at 3.

Additionally, restorative processes include community members, while mediation rarely includes accompanying support people in the decision-making process.¹⁷⁹ A final distinguishing feature of restorative processes is the goal sought to be accomplished, which is “healing relationships and restoring the participant’s place in the community.”¹⁸⁰ Mediation, on the other hand, seeks to resolve a dispute. Studies of restorative practices and mediation demonstrate that there are no pure models, but instead “degrees of restorativeness,” with the benefit of all models being their flexibility.

C. *Past and Existing Applications of Restorative Principles to Elder Abuse*

Despite the growing popularity of restorative principles, they have been applied to address elder abuse infrequently. Worldwide, a small number of international projects explicitly do incorporate restorative principles in addressing elder abuse.

One early model, the Waterloo Restorative Justice Approach to Elder Abuse, was developed in Ontario in 2000.¹⁸¹ The project’s goals were to increase the reporting of elder abuse, “to develop and to implement a restorative approach to elder abuse that encourages personal responsibility, permits healing, and promotes healthier relationships,” and to assist individuals experiencing abuse.¹⁸² The Waterloo project included a community education component and implemented the use of circles, guided by the principles of “safety, confidentiality, dignity and respect, autonomy, access to information, and the least restrictive interventions.”¹⁸³ It excluded cases where the senior was at risk of imminent harm, and determined that the most appropriate cases were those in their earliest stages.¹⁸⁴

The program successfully changed attitudes about elder abuse, strengthened partnerships among the participants, and was useful for those who completed the circles.¹⁸⁵ However, it did not attract

¹⁷⁹ *Id.* at 5.

¹⁸⁰ *Id.* at 3.

¹⁸¹ See Groh & Linden, *supra* note 21.

¹⁸² *Id.* at 129.

¹⁸³ *Id.* at 130.

¹⁸⁴ *Id.* at 130–31.

¹⁸⁵ *Id.* at 139. Assessments concluded that the process gave voice to the seniors participating, those seniors who participated were satisfied with the results, and the circles addressed the needs of the persons who committed the harms. *Id.* at 137–38.

a large number of referrals, despite a reinvigorated effort mid-stream, because the issue “was just too sensitive and too private for people to come forward.”¹⁸⁶ Other challenges included heavy reliance on volunteers, the resource-intensive preparation for the circles, explaining the process to family members, securing family participation, and the declining cognitive abilities of some participants.¹⁸⁷

Ultimately, the program was modified to create a comprehensive model integrating the health care and criminal justice systems.¹⁸⁸ Today’s Elder Abuse Response Team (“EART”) is integrated into the police department’s Domestic Violence Investigations Unit, with a mandate to provide community education and training as well as direct interventions, including investigations, referrals to resources, and case management.¹⁸⁹ Still guided by restorative principles, the EART offers broader, more holistic supports to those in abusive situations.¹⁹⁰

The Caring for Native American Elders project, a community-based participatory research project in one northwestern Native American community, implemented a family conferencing model in the 2000s.¹⁹¹ It was developed following concerns that demonstration projects designed to address elder abuse did not reflect tribal traditions and values.¹⁹² In response, the tribe created an “elder-focused, family-centered, community-based intervention for the prevention and mitigation of elder abuse.”¹⁹³ Family members, a spiritual leader, and service providers came together to address concerns about the elder, with trained and respected professionals facilitating the meetings.¹⁹⁴ Following an initial discussion, family members had the option of meeting alone to develop a plan, and then inviting service providers to participate in its implementation.¹⁹⁵

¹⁸⁶ *Id.* at 138.

¹⁸⁷ *Id.* at 138–39.

¹⁸⁸ *Id.* at 140.

¹⁸⁹ *Id.* at 141.

¹⁹⁰ *Id.*

¹⁹¹ See Patricia A. Holkup et al., *Drawing on the Wisdom from the Past: An Elder Abuse Intervention With Tribal Communities*, 47 *THE GERONTOLOGIST* 248, 254 (2007).

¹⁹² See *id.* at 249.

¹⁹³ *Id.*

¹⁹⁴ See *id.* at 251.

¹⁹⁵ See *id.* at 254. As with other restorative practices, this model consisted of various stages, including referral, screening, engaging the family, logistical preparation, the family meeting and follow-up. *Id.*

Early assessment of this family group conferencing model demonstrated that families accepted the model and intervention.¹⁹⁶ It provided a forum to be heard and understood, drew upon “the values of interdependence and reciprocity among Native American kin,” and provided “a culturally anchored and individualized way to identify a frail elder’s care needs and to find solutions”¹⁹⁷ Other strengths included empowering seniors to share their life stories and to be valued as members of society, promoting their autonomy and independence, illuminating the challenges of caregiving and fostering the involvement of additional family members, and building social supports.¹⁹⁸

The Jamestown S’Klallam Family Group Conferencing Project, sponsored by the United States Administration on Aging,¹⁹⁹ used family group conferences to address family conflict related to issues such as end of life planning, sibling rivalry, caregiver burnout, and confronting anger and guilt.²⁰⁰ Advantages identified with this model were that the family determined the solution independently, the service was “culturally anchored,” and it relied on community and family resources.²⁰¹

The Choice Project, established at the University of Aberystwyth, Wales, was originally founded on restorative principles, with the goals of raising public awareness about the problem of elder abuse and effective responses, and designing new approaches to justice based upon restorative principles. It includes the creation of a “Well Being” service as an alternative to civil and criminal remedies. Focused on those determined to be low risk, the staff include a “Choice Support Worker,” who identifies options with the senior, and a “Choice Practitioner,” who provides support for up to 18 months. Different entities provide necessary support services.²⁰²

The Nova Scotia “Restorative Approach with Seniors Network,” a collaboration that includes representatives of the departments of Justice and Aging, legal counsel, government and

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Beck et al., *supra* note 5, at 224. Research revealed no further information about this project; it appears to no longer exist.

¹⁹⁹ LISA NERENBERG, *ELDER ABUSE PREVENTION: EMERGING TRENDS AND PROMISING STRATEGIES* 136 (2008).

²⁰⁰ See Păroșanu, *supra* note 97, at 16.

²⁰¹ *Id.* at 15.

²⁰² See *The Dewis Choice Service*, DEWIS CHOICE, <https://choice.aber.ac.uk/choice-initiative/> (last visited Feb. 28, 2019).

community stakeholders, the police, and safety officers,²⁰³ is designed to address seniors' needs to be heard, have their questions answered, feel safe, provide input throughout the process, and experience meaningful accountability.²⁰⁴ Each restorative process involves preparation, voluntary participation of the victim and person committing the harm, a safe environment, a facilitator, community members and other support people, and a talking instrument.²⁰⁵ The project is designed for both simple and complex cases, and is also being used to prevent problems before situations escalate.²⁰⁶

In 2017, a new project, *Kôrero Tahī: Using Restorative Circles for Addressing Harms Experienced by Older Persons*, began in Wellington, New Zealand.²⁰⁷ The goals of this pilot project are to develop a model that is “victim sensitive, empowers older people to have a voice, strengthens positive family relationships and promotes justice and accountability.”²⁰⁸ An objective is to create “a safe space for repairing the harm and to develop a community of care around older people.”²⁰⁹ The ensuing research will study the success of the circles, and in particular, their impact on “the older person’s sense of wellbeing, safety and connectedness to others.”²¹⁰

Several elder abuse programs utilize family group conferencing. Project Daybreak Bluebird, in southern England, provides family group conferences to “extended families where decisions have to be made with and for an adult member of the family”²¹¹ Issues may include “domestic violence; physical, emotional or financial abuse; or where a vulnerable adult wants to live.”²¹² Following the initial coordination and support of a restor-

²⁰³ See Jocelyn Yerxa et al., *Restorative Approaches to Senior Safety: The Nova Scotia Experience*, CAN. NETWORK FOR THE PREVENTION OF ELDER ABUSE 1, 20 (2015), https://cnpea.ca/images/webinar_restorativeapproaches_may2015.pdf.

²⁰⁴ See *id.* at 43.

²⁰⁵ See *id.* at 45.

²⁰⁶ See *id.* at 47.

²⁰⁷ See *Kôrero Tahī: Using Restorative Circles for Addressing Harms Experienced by Older Persons*, VICTORIA U. OF WELLINGTON, <https://www.victoria.ac.nz/sog/researchcentres/chair-in-restorative-justice/research/elder-harm> (last visited Feb. 28, 2019).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *FGCs for Vulnerable Adults*, DAYBREAK FAM. GRP. CONF., <http://www.daybreakfgc.org.uk/adult-safeguarding> (last visited Feb. 26, 2019).

²¹² *Id.*

ative practitioner, the family develops a resolution and plan independently.²¹³ One scholar notes that

families will discuss problems more openly when there are no “outsiders” present, and will be able to find solutions that take into account their own culture(s) It also has the effect of empowering the family as a unit, to think about problems and develop their own solutions²¹⁴

Depending on the nature of the abuse, safety risks, and desires of the senior, the person committing the harm may or may not participate.²¹⁵ Project leaders report that the model works well for those seniors able to make their own decisions, and they have found family group conferences effective in addressing elder abuse.²¹⁶

Finally, a small number of projects have adapted mediation to address elder abuse issues.²¹⁷ A community-based model in Israel incorporates family mediation with counseling and group work.²¹⁸ Other interventions include public awareness workshops and training for the public and professionals. Among the identified successes of this project are the development of coping strategies and empowerment of those who have been harmed, an improved awareness of possible responses, and better identification of elder abuse cases.²¹⁹

²¹³ See *id.*; see also Moore & Browne, *supra* note 51, at 392.

²¹⁴ Linda Tapper, *Using Family Group Conferencing in Safeguarding Adults*, 12 J. OF ADULT PROTECTION, 27, 30 (2010).

²¹⁵ See *id.*

²¹⁶ See *id.*; see also Daybreak, *Family Group Conferences for Adults, Pilot Project for Elder Abuse, Evaluation Report 2007–2010* 1, 15 (2010), <http://www.daybreakfgc.org.uk/wp-content/uploads/2012/02/Adult-Safeguarding-Evaluation-report-2007.pdf> (acknowledging that measurements of success vary depending on the viewpoint from which success is evaluated). The use of family group conferencing in the elder abuse context, particularly if it includes the family meeting alone, runs the risk of replicating existing power imbalances within the family. For a critique of restorative justice as mirroring power imbalances in the broader community, see MIKHAIL LYUBANSKY & ELAINE SHPUNGIN, *THE PSYCHOLOGY OF RESTORATIVE JUSTICE* 183 (Theo Gavrielides ed., 2015). In response to this concern, Daybreak CEO Chalmers stated his belief that this potential problem can be counterbalanced by trained and highly skilled restorative coordinators who address these issues at the outset. Interview with Richard Chalmers, CEO, Daybreak Family Group Conferences, London, U.K. (July 3, 2019).

²¹⁷ The Canadian Department of Justice reported that a Google web search returned 8,800 results for “elder mediation” and 1,860 results for “elder mediation + elder abuse,” noting the growing interest in the use of mediation to address elder abuse. See Government of Canada, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse*, DEP’T. OF JUST., <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mp-pm/p1.html> (last visited Feb. 26, 2019).

²¹⁸ See Sarah Alon & Ayelet Berg-Warman, *Treatment & Prevention of Elder Abuse & Neglect: Where Knowledge & Practice Meet—A Model for Intervention to Prevent & Treat Elder Abuse in Israel*, 26 J. OF ELDER ABUSE & NEGLECT 150, 155 (2014).

²¹⁹ See *id.* at 161, 163–64.

“Relationships Australia” offers therapeutic family counseling and mediation services designed to prevent and resolve family conflict and to prepare for future medical, financial, health, or living arrangements.²²⁰ The goal is to assist the family in improving relationships and protecting “the interests, rights, and safety of all family members.”²²¹

With the exception of the Waterloo project, which was heavily evaluated,²²² and the Jamestown S’Klallam Family Group Conferencing Project, which no longer exists, most of these programs are too new to have been studied comprehensively. However, they do exhibit commonalities that may be essential for successful interventions. One is interdisciplinary collaborations, as exhibited in the Waterloo project as redesigned,²²³ the Nova Scotia program, and the Choice Project. Recommended members of an interdisciplinary team include health care providers, law enforcement, social service providers, conflict resolution entities, mediators, and those with expertise in restorative approaches. Today, restorative-based models are being *developed* collaboratively, potentially resulting in more effective teams.²²⁴

Many existing programs offer comprehensive approaches with an array of options, often including educational programs and training initiatives. Following an evaluation, the Waterloo project implemented a more holistic approach, evolving into a “comprehensive conflict management programme [sic] guided by restorative principles.”²²⁵ Researchers in New Zealand recommend offering diverse interventions that are tailored to the individual who has been harmed.²²⁶ The developing project in Maine intends to modify existing models as needed to best address seniors’ individualized needs.²²⁷

²²⁰ See *Elder Relationship Services*, RELATIONSHIPS AUSTRALIA, <https://www.relationships.org.au/what-we-do/services/elder-relationship-services> (last visited Feb. 26, 2019).

²²¹ *Id.*

²²² See generally Groh & Linden, *supra* note 21, at 127.

²²³ The redesigned Waterloo project created the “Inter-Agency Elder Abuse Working Group” involving case managers and law enforcement, specifically developed to facilitate an interdisciplinary response. See Groh & Linden, *supra* note 21, at 140. As a result, the project *did* reach more seniors. *Id.* at 140–41.

²²⁴ See, e.g., the CAPSTONE (Community and Adult Protective Services Trial of Novel Enhanced Services), a collaboration between the Elder Abuse Institute of Maine and Adult Protection Services. (Project Description on file with authors).

²²⁵ See Groh & Linden, *supra* note 21, at 143.

²²⁶ Păroșanu, *supra* note 97, at 29.

²²⁷ Interview with Patty Kimball, Executive Director, Elder Abuse Institute of Maine, January 11, 2019.

Another essential component of a successful restorative project is specialized training for the restorative practitioners. In addition to providing training in the restorative models themselves, the training should incorporate issues specific to elder abuse, including training on the aging process; indicators of, and risk factors for, abuse; family dynamics and family systems; principles of senior autonomy and empowerment; information on community resources; and an overview of relevant legal issues. Perhaps most importantly, restorative facilitators must be trained in utilizing trauma-informed techniques.²²⁸ Successful models also further educate service providers and community members about both elder abuse and restorative models and options. These have been found effective in enhancing communities' capacities to address the problem.²²⁹

V. LESSONS FROM EXISTING PROJECTS AND RESEARCH

Both traditional and innovative elder abuse intervention models reveal key lessons relevant when assessing the viability of restorative practice models. Existing literature summarizes the critical components of a successful intervention system. There is a growing consensus that “[a]ddressing elder abuse requires multiple and co-ordinated [sic] approaches, which involve increasing public awareness, addressing cultural norms and effective multi-disciplinary collaboration in areas such as health, policing, law and social care.”²³⁰ Multi-disciplinary teams have proven successful, and can assist with articulating strategic responses, case planning, and decision-making.²³¹

Increasingly, researchers are identifying the importance of involving both the person harmed and the person who committed the harm in successful resolutions. Scholar Shelly Jackson offers four principles critical to effective elder abuse interventions: (1) treatment must be focused on both parties; (2) no unitary solution will be effective in all situations; (3) variations in culpability among those committing the harm must be acknowledged; and (4) cases

²²⁸ Beck et al., *supra* note 5, at 221. See also Păroșanu, *supra* note 97, at 29–30.

²²⁹ See Groh & Linden, *supra* note 21, at 142; See Păroșanu, *supra* note 97, at 13–17.

²³⁰ Deirdre O'Donnell et al., *Interventions and Services with Address Elder Abuse: An Integrated Review*, NAT'L CTR. FOR THE PROT. OF OLDER PEOPLE (NCPOP), U. COLL. DUBLIN 1, 52 (2015), http://www.ncpop.ie/userfiles/file/ncpop%20reports/Interventions_Services_WEB.pdf (last visited Mar. 28, 2019).

²³¹ See Păroșanu, *supra* note 97, at 23; see also O'Donnell et al., *supra* note 230 at 18.

exist on a continuum of complexity.²³² Without addressing these factors, “intervention and prevention efforts will be futile if not harmful.”²³³

The literature describes varying characteristics of the person committing the harm based on type of abuse²³⁴ and based on varying degrees of culpability.²³⁵ Jackson describes five different levels of culpability: (1) bad-actors whose abuse is knowing and deliberate; (2) those who readily exploit opportunities; (3) those who reluctantly exploit opportunities (i.e. due to caregiver stress); (4) those who act according to the seniors’ wishes, although inappropriately; and (5) those who lack understanding that their actions constitute abuse or neglect.²³⁶ Cases are increasingly complex when they involve familial relationships and co-occurring forms of elder abuse.²³⁷ Restorative models are ideally suited for addressing some types of elder abuse. They give a voice to seniors, and may empower them to develop personalized, creative, and feasible solutions that can be implemented with adequate support.²³⁸ The flexibility of restorative practices also enables the processes to be adapted to culturally appropriate interventions.²³⁹ This is critical because not only do cultures define elder abuse differently, but their willingness to discuss elder abuse and identify appropriate interventions varies as well.²⁴⁰ For these reasons, if implemented properly, restorative processes show tremendous potential.

Despite these benefits, restorative practices also present challenges when used to address elder abuse. One challenge is determining for which types of abuse these models are most

²³² See Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, *supra* note 13, at 277–78.

²³³ *Id.* at 279.

²³⁴ See *id.* at 270–71 (Even within a particular type of abuse, such as financial exploitation, perpetrator characteristics vary depending on the nature of the financial abuse. . . .).

²³⁵ See *id.* at 271–75.

²³⁶ See *id.* at 275.

²³⁷ See *id.*

²³⁸ See e.g., O’Donnell et al., *supra* note 230 at 20 (noting the effectiveness of using an empowerment model to address psychological abuse). Another advantage of such models is that they may “equip older people to develop coping strategies and resilience to abusive behaviors.” O’Donnell et al., *supra* note 230 at 54.

²³⁹ See *infra*.

²⁴⁰ See Laura Mosqueda et al., *The Abuse Intervention Model: A Pragmatic Approach for Intervention for Elder Mistreatment*, 64 J. AM. GERIATRICS SOC’Y 1879, 1883 (2016) (noting that different cultures have different norms as to what constitutes elder abuse); See also MARSHALL B. KAPP, *Future Directions in Public Policy Relating to Elder Abuse*, in ELDER ABUSE: RESEARCH, PRACTICE AND POLICY 693, 704 (XinQi Dong ed., 2017) (citing INTERNATIONAL PERSPECTIVES ON ELDER ABUSE (Amanda Phelan ed., 2013)).

appropriate. Other difficulties include defining the category of persons committing the harm for which these models would be most successfully implemented; identifying strategies to encourage participation by the person committing the harm; the possible diminished capacity of the older person; and finally, defining the meaning of a successful intervention.

A. *Using Restorative Processes for Different Types of Harm*

A major challenge is to determine which types of elder abuse are most effectively addressed through the use of the restorative processes. This challenge is intensified by the prevalence of complex family relationships and co-occurring types of abuse.²⁴¹ Cases need to be examined individually, taking the type of abuse and other factors into account. Although the analysis below relies on generalizations, it categorizes abuse generally to assess where restorative principles may be most appropriately implemented.

1. Financial Abuse

Financial abuse may be the type of abuse best-suited for a restorative intervention. While proof may be complicated and cases often require extensive investigation, the abuse is verifiable and the monetary losses are tangible.²⁴² Restorative processes may be particularly useful when the person committing the harm either inadvertently or negligently mismanaged a senior's money or reluctantly took advantage of an unexpected opportunity.²⁴³ A restorative model would permit the financially irresponsible person to explain his situation and perspective to the elder, and to take responsibility for his conduct. Also, the process may empower the participants to resolve the situation without the threat of criminal or civil punishments by developing a plan to reimburse the senior or provide an alternative remedy, and by identifying and implementing creative alternatives, such as selecting a different person to assist with the senior's financial management.

²⁴¹ See Action on Elder Abuse, *Elder Abuse Advocacy Toolkit* 1, 1010, <https://lx.iriss.org.uk/sites/default/files/resources/Elder%20abuse.pdf>, (last visited on Mar. 30, 2019).

²⁴² See *id.* (Although physical and sexual abuse may result in physical conditions that are either visible or able to be proven clinically, those harmed may go to considerable trouble to camouflage their injuries).

²⁴³ See Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, at 275.

2. Neglect

Neglect, whether intentional or unintentional, is another category of elder abuse that can be resolved using a restorative process. Unintentional neglect can be addressed through education and traditional interventions. A restorative process offers the additional benefit of enabling support people and members of the community to identify and provide suitable alternative caregivers or resources needed by the person committing the harm.

Intentional neglect could similarly be addressed using a restorative process, enabling the involved parties to each share their perspectives. With the active participation of family members and other support people, the individual committing the neglect may fully realize the consequences of his conduct. All parties can use restorative dialogues to agree on ways to repair the effects of prior conduct and to prevent future abuse.

3. Psychological and Emotional Abuse

Elder abuse is a multi-dimensional phenomenon, with older adults often experiencing psychological or emotional abuse in conjunction with other types of abuse.²⁴⁴ Older adults with dementia are particularly at risk, and as many as 88.5% of older adults with dementia experience some type of psychological abuse.²⁴⁵ Too often, this type of abuse may not be reported. Victims may not consider emotional or psychological abuse severe enough to merit seeking help, and although psychological and emotional abuse can often be a marker for other types of abuse,²⁴⁶ providers may prioritize physical or sexual abuse over emotional abuse. The ability of a restorative process to address psychological and emotional abuse may depend more on the characteristics of the person committing the harm than of the person being harmed. If the person committing psychological or emotional harm is genuinely unaware of the effect of his behavior and is willing to accept assistance to reform his behavior, a restorative process may be appropriate. Restorative justice provides the opportunity for the person causing the harm, upon hearing the older person's perspective, to change his behavior and take steps to repair his relationship with the older person.

²⁴⁴ See Ana Joao Santos et al., *Elder Abuse Victimization Patterns: Latent Class Analysis Using Perpetrators and Abusive Behaviors*, BMC GERIATRICS, April 23, 2019, at 1, 11.

²⁴⁵ *Statistics/Data*, NATIONAL CENTER ON ELDER ABUSE, *supra* note 20.

²⁴⁶ Mark S. Lachs & Karl A. Pillemer, *Elder Abuse*, 373 NEW ENG. J. MED. 1947, 1956 (2015).

4. Physical and sexual abuse

To evaluate whether restorative principles may be applicable to physical and sexual abuse, the debate about using restorative principles in intimate partner violence cases provides some insight. Historically, alternative dispute resolution techniques, such as mediation, were deemed inappropriate for addressing complex domestic violence situations.²⁴⁷ Critics argued that the severity of battering was reduced to a mere “dispute,” “victimizing events [were] deemphasized” with the process favoring the batterer,²⁴⁸ reconciliation often became the goal rather than repairing the harm, and the victim’s voice was silenced in the language of disagreement and misunderstanding.²⁴⁹ Many critics viewed mediation techniques as inappropriate when the abuse stemmed from underlying issues of power and control.²⁵⁰

However, as interest in restorative justice increases, advocates are reexamining its usefulness in the context of intimate partner violence. This focus is, at least in part, due to frustration with traditional criminal justice models. Restorative practices offer survivors an opportunity to participate by telling their story, to have their experiences and perspectives validated by the community and the batterer, and to hear their batterer take responsibility for his conduct.²⁵¹ They also allow for flexible resolutions and may have the effect of repairing the damaged relationship.²⁵² In the context of intimate partner violence, the harmed party seeks individualized justice, which includes survivor autonomy, self-determination, voice, validation, and vindication.²⁵³ Restorative processes seek to achieve these same objectives.²⁵⁴

However, critics are concerned that the power dynamics present in the intimate partner violence context may continue within the restorative process itself. Specifically, concerns exist regarding the safety of the survivor; offenders manipulating the process

²⁴⁷ See Lois Presser & Emily Gaarder, *Can Restorative Justice Reduce Battering? Some Preliminary Considerations*, 27 SOC. JUST. 175, 175 (2000).

²⁴⁸ *Id.* at 180.

²⁴⁹ *Id.* at 179–80; see also Leigh Goodmark, *Law and Justice Are Not Always the Same: Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 718 (2015) (“when prosecutors have their own goals, victims’ voices can be silenced”).

²⁵⁰ See Presser & Gaarder, *supra* note 246 at 181.

²⁵¹ See Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 9, 18 (2006).

²⁵² See *id.*

²⁵³ See Goodmark, *supra* note 248, at 726–31. See also Coker, *supra* note 119, at 67–68.

²⁵⁴ See Goodmark, *supra* note 248, at 731.

through insincere acknowledgments of responsibility or half-hearted attempts to repair the relationship; ineffective participation from the survivor due to the power dynamics; an absence of supportive family and community members; the minimal impact on offenders; the conveyance of the message that the abuse is not serious or criminal in nature; and the presence of community norms that reinforce the abusive relationship.²⁵⁵ Feminist critiques argue that practitioners fail to appreciate the challenges and dangers of intimate partner violence, that offenders may not be held accountable, and that the criminal nature of the conduct is diminished.²⁵⁶

Proponents of applying restorative principles to intimate partner violence cases argue that community participation in restorative justice models provides vindication to the abused.²⁵⁷ Restorative processes facilitate implementing innovative and creative remedies to solve problems, and ongoing accountability that is more likely to result in reformed behavior than is likely in the criminal justice context.²⁵⁸ Other advantages of restorative models include moral and community support for confrontation of the batterer, alternatives to the binary “staying or leaving” options available to the person harmed, and discussion of oppression in the batterer’s life.²⁵⁹ Advocates of using restorative processes in the intimate partner violence context recommend their use if processes: (1) prioritize victim safety; (2) offer material and social supports; (3) are incorporated into a coordinated community response; (4) resist gendered domination; and (5) do not require the goal of forgiveness.²⁶⁰

In elder abuse cases, restorative approaches may be ineffective in repairing relationships since the power dynamics often mirror those present in intimate violence cases. For example, the “Duluth

²⁵⁵ See Daly & Stubbs, *supra* note 250, at 17–18.

²⁵⁶ See Goodmark, *supra* note 248, at 723.

²⁵⁷ Leigh Goodmark, *Responsive Alternatives to the Criminal Legal System in Cases of Intimate Partner Violence*, in *RESTORATIVE AND RESPONSIVE HUM. SERVS.* 165, 169 (Gale Burford et al. eds., 2019).

²⁵⁸ *Id.*

²⁵⁹ See Coker, *supra* note 119, at 68.

²⁶⁰ See *id.*; Erika Sasson, *Can Restorative Practices Address Intimate Partner Violence?*, *INNOVATIONS* (2016), https://www.courtinnovation.org/sites/default/files/documents/Monograph_December2016_BriefingPaperByErika.pdf. See, e.g., Kohn, *supra* note 10, at 522 (for further support of using restorative justice to address domestic violence); but cf. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 *UCLA L. REV.* 1 (1999) (emphasizing that Navajo peacemaking as implemented at the time fell short of adequately addressing battering).

Power and Control Wheel,”²⁶¹ a popular conceptual model used to analyze domestic violence, has been adapted for the elder abuse context.²⁶² The dynamics of power and control, physical and sexual violence, and emotional and psychological abuse exist in both contexts.²⁶³ The principle distinction is how the abuse is manifested.

Although using restorative models to address physical and sexual abuse among seniors would offer some of the advantages noted above, particularly when the person committing the harm is a family member, the risks outweigh the potential advantages. Both intimate partner violence and elder abuse involve complex interpersonal dynamics. However, those dynamics are often more complex in the elder abuse context because the people committing the harm are often adult children and the abuse may be motivated by life-long conflict, abuse within the family, rivalries between siblings, and perceptions of parental favoritism. These family dynamics and communication patterns have often become entrenched over time. Persons committing the harm may involve other family members in support of their conduct, and other family members may rally in support of the older person, creating additional tensions and intrafamily conflict, weakening the senior’s support system. This dynamic further exacerbates the isolation many seniors already experience.²⁶⁴

Although survivors of partner violence also are often dependent on their abusers, they typically have the physical ability to access help. Many seniors do not. Many older people are dependent on those committing the harm for their most basic needs—the

²⁶¹ See *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, 18, (2019); see also Chris Griffith, *The Power and Control Wheel: Everything You Need to Know*, <https://www.ardfky.org/sites/ardfky.org/files/Chris%20Griffith%20-%20PPT%20%28Everything%20you%20need%20to%20know%20wheel%202017%29.pdf> (last visited Mar. 18, 2019) (provides further explanation of the Duluth Power and Control Wheel). <https://www.theduluthmodel.org/wheels/understanding-power-control-wheel/> (last visited Mar. 18, 2019).

²⁶² See National Clearinghouse on Abuse in Later Life, *Abuse in Later Life Wheel*, NAT’L. CTR. ON DOMESTIC & SEXUAL VIOLENCE (2006), http://www.ncdsv.org/images/NCALL_abuse%20later%20in%20life%20power%20and%20control%20wheel%20final_2006.pdf (last visited Mar. 18, 2019).

²⁶³ See Griffith, *supra* note 261.

²⁶⁴ See *Statistics & Data*, *supra* note 245. Additional factors contributing to isolation include friends aging and moving or passing away. Seniors often move to a smaller, more accessible home, or to a structured living situation. Some seniors relocate to be closer to adult children. While helpful on a practical level, these changes distance elders from their customary social contacts. Physical limitations may constrain a seniors’ ability to socialize and interact. Hearing or visual impairments that often accompany aging further limit social interactions, as does lack of transportation.

ability to get out of bed, eat, bathe, secure medical care, interact, and communicate. These issues of family dynamics, social isolation, and greater dependence on the person harming them can place elders at greater risks for additional harm when using restorative processes to address physical and sexual abuse.²⁶⁵

B. *Using Restorative Processes for Different Types of People Committing the Harm*

Recent research has begun to closely examine who commits elder abuse and their relevant characteristics.²⁶⁶ It correlates particular characteristics of people and particular types of harm committed, and suggests that interventions should vary with these characteristics in mind.²⁶⁷ Returning to Jackson's degrees of culpability, a restorative process would be most effective with those "least culpable."²⁶⁸ This includes those who act out of ignorance, unaware that their behavior constitutes abuse or even neglect, and those whose behavior is inappropriate and contrary to the senior's desires.²⁶⁹ In these instances, those committing the harm may have the older person's best interests at heart, but that person's vision of the older person's best interests may differ from the older person's own desires. Those committing the harm are likely to have empathy, "the driver for the restorative process."²⁷⁰ Equipped with this mindset, they may be receptive to the "restorative inquiry" and willing to explore their own needs and potential paths forward.

Similarly, a person who commits harm by "reluctantly exploiting opportunities" may be a good candidate for participating in a restorative process.²⁷¹ Restorative processes could be particularly valuable for a person in this category because their reluctance to exploit the senior suggests that their own unmet needs may be con-

²⁶⁵ To date, there is no meaningful research evaluating the success of restorative processes in addressing intimate partner violence. See Daye Gang et al., *A Call for Evaluation of Restorative Justice Programs*, TRAUMA, VIOLENCE, & ABUSE, 2019, at 1, 2 (noting the dearth of empirical research and recommending study as a matter of urgency). Future studies in this area could be mined for insights regarding its usefulness in addressing elder abuse and exploitation.

²⁶⁶ See Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, at 266.

²⁶⁷ See *id.* at 277–78.

²⁶⁸ See *id.* at 277.

²⁶⁹ See *id.* at 277–78.

²⁷⁰ Wallis, *supra* note 99, at 6–7 (defining empathy as having three components: (1) identifying with another person's feelings; (2) assessing the reasons for that person's feelings; and (3) responding with action).

²⁷¹ See Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, at 275.

tributing to their behavior. The restorative process could successfully identify and address those needs as well as the emotional fallout of the abuse.

Restorative processes are not recommended for harms committed by those with the greatest degrees of culpability—those consciously exploiting opportunities and those acting in a deliberate, knowledgeable and premeditated way.²⁷² However, a detailed assessment could identify select cases that might be appropriate depending on the person's level of empathy, his ability and willingness to participate in a restorative process, and ultimately his motivation to change his behavior.²⁷³ Most importantly, it would determine whether initiating a restorative process could cause any future harm between the parties, particularly if their relationship is restored.

Another category of those committing harm is those with a substance abuse problem.²⁷⁴ Because restorative processes require honest communication and a sincere desire to repair the relationship, they are not appropriate for individuals currently suffering from addiction. In contrast, a person receiving treatment and progressing toward a stable lifestyle may be a suitable candidate. A critical factor will be the degree of personal and professional support available to assist both parties. Similarly, severely mentally ill individuals who commit harms against seniors may not be able to meaningfully participate in a restorative process unless they also participate in treatment and receive support. A detailed assessment can determine whether restorative processes are viable options in both of these scenarios.

C. *Capacity Issues: Ability of the Older Person to Participate in Restorative Processes*

Addressing the problems of elder abuse and exploitation is further complicated when the older person is experiencing diminishing capacity. The initial assumption should be one of capacity and respect for self-determination.²⁷⁵ However, as the prevalence

²⁷² See *id.*

²⁷³ See Wallis, *supra* note 99, at 76.

²⁷⁴ See Jackson, All Elder Abuse Perpetrators Are Not Alike, *supra* note 13, at 273. Rates of substance abuse among those committing elder abuse are estimated to be between 20–50%.

²⁷⁵ A HANDBOOK FOR LAWYERS, *supra* note 72, at 5. . See also SUSAN D. HARTMAN, CTR. FOR SOC. GERONTOLOGY, ADULT GUARDIANSHIP MEDIATION MANUAL 83 (2003).

of Alzheimer's, other forms of dementia, and other medical conditions that cause cognitive challenges²⁷⁶ are increasingly diagnosed, all participants in a restorative process must be aware of this dynamic. In a restorative setting, critical questions must be addressed. Who is best situated to evaluate an older person's capacity when necessary? What should the standard be for determining adequate capacity to participate? And what supportive mechanisms can be adopted to enhance an older person's ability to participate?

Legal and medical assessments of capacity differ, and a clinical assessment tool may be of limited usefulness in this context. Such evaluations often assess the older person at a *particular* moment in time. However, the question is whether the senior has the capacity to make necessary decisions *throughout* the duration of the restorative process. Given that capacity may vary depending on location of the meeting, time of day, stress levels, and various other factors,²⁷⁷ using an instrument that is fixed in time is not optimal.²⁷⁸ Second, a clinical assessment is expensive. The older person may not have the ability to pay for it, especially if the harm is financial exploitation. Finally, clinical assessments typically do not allow for the accommodations and supported decision making that can maximize the older person's ability to participate.²⁷⁹

A legal assessment of capacity is contextual, and asks whether the senior has the capacity to engage in the particular task,²⁸⁰ with the required degree of capacity depending "largely on the type of transaction or decision under consideration."²⁸¹ Given that the restorative process is an alternative to a legal resolution, the legal assessment approach, although not necessarily conducted by a law-

²⁷⁶ A HANDBOOK FOR LAWYERS, *supra* note 72. For example, conditions such as dehydration, vitamin deficiencies, persistent pain, and even grief may result in symptoms of cognitive decline. See, e.g., *id.* at 16–17. See also Am. Bar Ass'n, *Practical Tool for Lawyers: Steps in Supported Decision-Making* 11–12 (2016), https://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALGuide.pdf.

²⁷⁷ A HANDBOOK FOR LAWYERS, *supra* note 72, at 16–18.

²⁷⁸ See *id.* at 22 (noting that "cognitive screening alone has been found lacking sensitivity or specificity to many decisional tasks, such as medical decision making").

²⁷⁹ See *id.* at 9–12; See also Jonathan G. Martinis & Jason P. Harris, NAT'L RESOURCE CTR. FOR SUPPORTED DECISION-MAKING, *ABLE Accounts and Supported Decision-Making: Building a Pathway to Independence, Inclusion, and a "Decent Quality of Life"* 10 (2019), <http://www.supporteddecisionmaking.org/sites/default/files/martinis-harris-2019-able-accounts-sdm-pathways-independence.pdf>.

²⁸⁰ A HANDBOOK FOR LAWYERS, *supra* note 72.

²⁸¹ *Id.* at 5. See also, Candice A. Garcia-Rodrigo, *Tips for Representing a Client With Diminished Capacity*, ABA (Jan. 29, 2016), <https://www.americanbar.org/groups/litigation/committees/solo-small-firm/practice/2016/tips-representing-client-diminished-capacity/>.

yer, is most appropriate in this context. The legal assessment approach would evaluate whether the older person has an understanding of the restorative process and an appreciation for the consequences of her decisions.²⁸² If there is a central screening and referring entity, ideally that service provider would perform an informal capacity assessment before exploring options with the older person.²⁸³ That provider would make the assessment, with the legal standard in mind, of whether the older person understands each option, its consequences, and its potential results.²⁸⁴ The assessment would be conducted on an ongoing basis throughout the referral, screening, preparation, and restorative process itself.²⁸⁵

Most importantly, the question is whether the older person has the ability to participate *with support*.²⁸⁶ That support could include necessary accommodations to address physical limitations, which may include “changing the place or time of the session . . . keeping the sessions short, or using techniques and strategies helpful for communication with persons with memory loss or confu-

²⁸² A HANDBOOK FOR LAWYERS, *supra* note 72, at 3. Lawyers are guided by the relevant ethical standards for representing clients with diminished capacity. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt (Am. Bar Ass'n 2016) (1983). Model Rule 1.14, a version of which exists in almost every state, guides the lawyer to maintain a normal attorney-client relationship to the extent possible, and to seek guidance only when the client is at risk of “substantial physical, financial, or other harm unless action is taken and [the client] cannot adequately act in the client’s own best interest.” MODEL RULES OF PROF'L CONDUCT r. 1.14 & cmt. (Am. Bar Ass'n 2016). See also Erica Wood, *Addressing Capacity: What Is the Role of the Mediator?*, MEDI-ATE.COM, (July 2003), <https://www.mediate.com/articles/woodE1.cfm>.

²⁸³ See Wood, *supra* note 282. Those options could include criminal prosecution, civil litigation, mediation, or restorative practices.

²⁸⁴ *Id.* These are not, in fact, binary options. One could opt for using restorative principles, and if that is not successful in accomplishing the client’s goals, shift to a more confrontational approach. One would need to be mindful, however, of any relevant statutes of limitation that could require these legal claims to be brought within a fixed period of time or be lost forever. See, e.g., HARTMAN, *supra* note 275, at 81–84.

²⁸⁵ HARTMAN, *supra* note 275, at 83, ((g)uidelines established in the mediation context are instructive here, where appropriate considerations include an understanding of who the parties are, the issues at hand, the role of the mediator, and the various options being explored, as well as the ability to understand and make an agreement.) See also The Kukin Program for Conflict Resol. at Benjamin N. Cardozo Sch. of L. & The Cardozo J. of Conflict Resol., *ADA Mediation Guidelines*, 1, 6 (2003), <https://cardozoocr.com/ADA%20Mediation%20Guide.pdf>. The assessment should not rely exclusively on a medical diagnosis, and even a participant adjudicated legally incapacitated is not necessarily lacking capacity to mediate. *Id.*

²⁸⁶ HARTMAN, *supra* note 275 at 83. See also Am. Bar Ass'n Comm'n, A HANDBOOK FOR LAWYERS, *supra* note 72 at 1–3; Susan H. Crawford et al., *From Determining Capacity to Facilitating Competencies: A New Mediation Framework*, 20 CONFLICT RESOL. Q. 385, 393 (2003) (although skeptical of mediators assessing capacity, describes the process as “facilitating competencies”).

sion.”²⁸⁷ Equally important is providing personal support by utilizing “supported decision making,” which “generally occurs when people use one or more trusted friends, family members, professionals, or advocates to help them understand the situations and choices they face so they may make their own informed decisions.”²⁸⁸ In a supported decision making model, the older person may rely on a support person to help her understand the options, answer questions, and communicate her choices to others.²⁸⁹ Such a process could be useful in assisting an older person to evaluate possible elder abuse interventions, including restorative processes. However, caution must be exercised when identifying the support person because the older person’s family, “friends,” or support people may be the very ones perpetuating the abuse.

The greatest challenge arises when an individual’s capacity declines during the process of selecting the most appropriate remedy and addressing the abuse problem. This situation presents several options. One could conclude that the view the senior expressed previously remains her choice, absent information to the contrary. Another option is to involve a surrogate decision maker, as recommended in the supported decision-making models.²⁹⁰ That person would honor the wishes of the senior based upon the wishes and values she expressed in the past.²⁹¹ While involving another person is cumbersome, this process will enable the senior’s preferences to be honored. Although this requires a highly trained practitioner

²⁸⁷ Wood, *supra* note 282.

²⁸⁸ Peter Blanck & Jonathan M. Martinis, “*The Right to Make Choices*”: *The National Resource Center for Supported Decision-Making*, 3 INCLUSION 24 (2015). http://supporteddecisionmaking.org/sites/default/files/inclusion_blanck_maritinis_2015.pdf. http://supporteddecisionmaking.org/sites/default/files/inclusion_blanck_maritinis_2015.pdf. This concept, recognized in the United Nations Convention on the Rights of Persons with Disabilities, acknowledges that each person has the right to self-determination, and appropriate supports should be provided to maximize her ability to make her own decisions. United Nations Convention on the Rights of Persons with Disabilities & Optional Protocol, U.N. Doc. A/RES/61/106, at 10–11 (2006), <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

²⁸⁹ Morgan K. Whitlatch, *Supported Decision-Making: Practical Tips for Implementation*, NAT’L RESOURCE CTR. FOR SUPPORTED DECISION-MAKING (2017) http://www.supporteddecisionmaking.org/sites/default/files/event_files/NRC-SDM%20NGA%20Presentation.pdf.

²⁹⁰ See e.g., Morgan K. Whitlatch & David Godfrey, NAT’L RESOURCE CTR. FOR SUPPORTED DECISION-MAKING, *Supported Decision-Making Basics* 13 (2017), http://www.supporteddecisionmaking.org/sites/default/files/event_files/ABA%202017%20SDM%20Basics%20Presentation%20%282017.10.25%29.pdf; see also Lisa Nerenberg, *Elder Abuse: Policy and Procedures*, in 1 WILEY ENCYCLOPEDIA OF FORENSIC SCIENCE (Allan Jamieson & Andre Moenssens eds., SCI. 2013) (recommending reliance on surrogate decision makers).

²⁹¹ See e.g., Whitlatch, *supra* note 289, at 25. See e.g., WHITLATCH & GODFREY, *supra* note 289, at 25.

aware of potentially ongoing capacity issues, restorative models' flexibility allows the practitioner to adapt recommendations and procedures to account for any changes in capacity throughout the restorative process.

D. *Encouraging the Person Committing the Harm to Participate*

An additional challenge of using restorative processes to address elder abuse is encouraging the person who committed the harm to participate. Unlike in the criminal or civil litigation contexts, the person committing the harm faces no penalty or other repercussion if he refuses to participate.²⁹² A restorative process may be useful precisely *because* the person who has been harmed does not *want* to pursue criminal action or other punitive action.

Among restorative justice practitioners and scholars, there is debate about the need for "voluntary" participation by the person committing the harm. Ideally, that person would participate willingly.²⁹³ However, some argue that to insist on completely voluntary participation would consign restorative models to the margins.²⁹⁴ Others argue that effective restorative justice relies on coercion, given that it is often proposed as an alternative to the criminal process.²⁹⁵ Pete Wallis suggests a "continuum of voluntariness," with different ways of proposing the process, ranging from coercion to encouragement to a neutral offer.²⁹⁶

The restorative justice practitioner should assess the person's sincerity, wary of self-serving motives.²⁹⁷ The practitioner may offer incentives to encourage the person who committed the harm to participate, which might include opportunities to: (1) tell their story and confess to the person they hurt; (2) show themselves in a better light; (3) explain what happened and why, and answer questions; (4) offer help; (5) atone and find redemption; and (6) learn how the other person is doing.²⁹⁸

²⁹² This is true unless the older person ultimately pursues civil or criminal action.

²⁹³ See Wallis, *supra* note 99, at 101.

²⁹⁴ See *id.* (citing LODE WALGRAVE, *Integrating Criminal Justice and Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE* 560 (Gerry Johnstone & D. Van Ness eds., 2007)).

²⁹⁵ See *id.* at 101–02.

²⁹⁶ See *id.* at 102–03 (Wallis also acknowledges the risks involved of engaging in a restorative process with a reluctant participant).

²⁹⁷ See *id.* at 106.

²⁹⁸ See *id.* at 105.

Whether or not the person doing the harm is willing to participate in the process may be very circumstantial. For example, if the cause of financial exploitation is a lack of resources, additional social services support could enable the person doing the harm to live more securely and minimize the chances she would take the senior's property in the future. If the cause is an inability to meet the senior's needs or not knowing what constitutes abuse, education and support could be valuable incentives to participate. For those whose culpability is more deliberate, persuading them to participate may not be possible or advisable. The same could be true for those suffering from severe, untreated mental illness or active substance abuse.²⁹⁹

An additional consideration here is the *process* of engaging the parties' participation. The most significant challenge may be facilitating the initial conversation and the "restorative inquiry," and may begin with a gentle approach that encourages the person who committed the harm to participate while simultaneously assessing his empathy level.³⁰⁰ Identifying underlying needs that could lead to a desire for a restorative solution requires a skillful practitioner, patience, a trusting relationship with the person who committed the harm, and engagement at a deep level. However, bringing together a vulnerable senior and an unwilling or reluctant person who committed the harm risks enflaming their relationship and could result in future harm.

E. *Measuring Success*

A major challenge to the use of restorative models is accurately measuring their success. Most often, measures of success replicate those used in the criminal justice field.³⁰¹ However, restorative justice scholars critique these approaches for being too narrowly focused on procedures and descriptive indicia of restorative justice, and for failing to define the underlying notions of justice being measured.³⁰² Llewellyn and her colleagues reject traditional indices of measurement used in the criminal justice context, and recommend a "reimagining of success" in the restorative

²⁹⁹ See Labrum & Solomon, *supra* note 80.

³⁰⁰ See Wallis, *supra* note 99, at 76.

³⁰¹ See Llewellyn, *supra* note 101, at 308–09.

³⁰² See *id.* at 294–97.

justice context.³⁰³ As a foundation for measuring success, they offer a relational theory of justice:

Restorative justice takes the relational nature of human beings as a conceptual starting point for understanding the meaning and requirements of justice. From this starting point justice must take account of our connectedness to one another. Attention to the multiple and intersecting relationships in which we live makes clear the ways in which wrongdoing causes harm not only to the individuals involved but also to the connections and relationships in and through which individuals live. . . . A relational approach reveals that harms related to wrongdoing extend from the individual victim(s) and wrongdoer(s) to affect those connected with them, including their immediate communities of care and support, broader communities to which they belong, and ultimately the social fabric of their society.³⁰⁴

One component of that relational theory is “equality of respect, dignity, and mutual care and concern for one another.”³⁰⁵ These concepts expand beyond liberal notions of equality and dignity, “tak[ing] equality of *relationships* as its goal.”³⁰⁶ In this relational theory of justice, process and outcomes are integrally connected, and any measure of success must take account of both.³⁰⁷

Llewellyn and her colleagues argue that measures of success must consider whether the processes and outcomes further this alternative theory of justice. Therefore, they recommend alternative indicia of success, such as the restorative process’s impact on “social relationships, community-building, and skills that generate enhanced positive social attitudes and behaviours [sic]” and highlighting “the creation of a stronger, positive sense of community.”³⁰⁸ Noting the limitations of evidence-based research, they suggest evaluation models include “observational research, before

³⁰³ See *id.* at 309.

³⁰⁴ *Id.* at 297.

³⁰⁵ *Id.* at 298 (citing JENNIFER J. LLEWELLYN, *Restorative Justice: Thinking Relationally about Justice*, in BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY & HEALTH LAW AND POLICY 89 (2012)).

³⁰⁶ *Id.* at 299.

³⁰⁷ Llewellyn, *supra* note 101, at 300. (This relational theory of justice embodies seven principles: (1) relationship-focused; (2) holistic; (3) contextual and flexible; (4) inclusive and participatory; (5) dialogical and communicative; (6) democratic and deliberative; and (7) forward-focused and solution-focused.) *Id.* at 301–05.

³⁰⁸ *Id.* at 308.

and after measures of relationships, and ‘community’ studies,”³⁰⁹ evaluating the process’ impact on the larger community. With this framework in mind, the first relevant question relates to “success according to whom?” The older person, the person doing the harm, other family members, and service agencies may all have different definitions of success.

Focusing first on the older person, while she may be interested in being “made whole,” she may also desire an apology, an acknowledgement that abuse occurred, a restored relationship with the person who committed the harm, or harmony within the family. If a close family member commits the harm, improving that relationship and the overall family dynamic may be most important to the senior. If a friend or caregiver commits the harm, a mere acknowledgment may be sufficient. Other components of “success” might include whether the person harmed felt a reduced fear of revictimization and reduction in anger toward the other person.³¹⁰ Another aspect of the senior’s perspective relates to her reactions to the intervention itself, and whether or not it resulted in empowerment, greater resilience, or enhanced feelings of self-worth.³¹¹ Qualitative and observational research methods would obtain the seniors’ perspectives on such tangible and intangible outcomes.

Success from the perspective of the person who committed the harm could include that person’s acknowledgement of remorse or shame for his conduct.³¹² Other possible measures of success depend on the underlying situation that gave rise to the abuse. For example, in instances of financial abuse, if the person’s actions were due to that person’s legitimate inability to make ends meet, securing additional social and employment services as a result of this process would be a “success.” Success for a caregiver might

³⁰⁹ *Id.* at 310. See also KAREN STEIN, *Elder Abuse Prevention Initiatives*, in ELDER ABUSE: RESEARCH, PRACTICE AND POLICY 433, 452 (XinQi Dong ed., 2017) (recommending an emphasis on developing methodologies that recognize individualized change, acknowledging that no one intervention can be applied to every case).

³¹⁰ See LEENA KURKI, *Evaluating Restorative Justice Practices*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 293, 295 (Andrew von Hirsch et al. eds., 2003) (describing measures of success in the context of victim-offender mediation). See also Eur. Forum for Restorative Just, VICTIMS AND RESTORATIVE JUSTICE: AN EMPIRICAL STUDY OF THE NEEDS, EXPERIENCE, AND POSITION OF THE VICTIM WITHIN RESTORATIVE JUSTICE PRACTICES 140–41 (Inge VanFraechem et al. eds., 2015), http://www.euforumrj.org/wp-content/uploads/2015/05/report_victimsandRJ-2.pdf (finding, in studies of victim-offender mediation, that victims were typically satisfied with the restorative process and sincerity of offenders’ apologies, but less optimistic about long term effects on the offender and themselves).

³¹¹ See Păroșanu, *supra* note 97, at 23.

³¹² See Kurki, *supra* note 310.

mean additional resources to relieve the stress of caregiving, resources that benefit both the senior and the person who committed the harm.

Evaluations should also track the impact of the process on other participants, including community volunteers and others present in support of the person harmed or the person committing the harm.³¹³ They should assess the impact of interventions on community members' development of conflict resolution skills and their sense of responsibility toward those in crisis.³¹⁴

While the "relational theory of justice" approach provides a deeper vision of the potential for restorative justice, more traditional measures of success would complement this approach. For example, examining whether the person committed harm again, the number of future contacts with law enforcement, frequency of requests for services or interventions, and whether the older person feels safer are all additional indicia of "success."³¹⁵ Both quantitative and qualitative data will assist in evaluating the models' success.³¹⁶

Another question related to defining success is the length of the time horizon measured. Determining if restorative models result in lasting change requires longitudinal studies.³¹⁷ For intangible measures such as the feelings of either the person harmed or the one doing the harm, the duration of positive emotional changes will be significant.³¹⁸

A related challenge is the ongoing availability of the person who was harmed. Since older seniors are exploited more frequently than younger ones, some will pass away before meaningful

³¹³ Sasson & Sydow, *supra* note 113, at 22.

³¹⁴ *Id.* at 23.

³¹⁵ For discussion of approaches for evaluating success in the restorative context, see, e.g., James Bonta et al., *An Outcome Evaluation of a Restorative Justice Alternative to Incarceration*, 5 CONTEMP. JUST. REV. 319, 326; see also Kurki, *supra* note 310; MINISTRY OF JUST., RESTORATIVE JUSTICE VICTIM SATISFACTION SURVEY: RESEARCH REPORT 9 (2016); Llewellyn, *supra* note 101, at 306; Mark Umbreit & William Bradshaw, *Assessing Victim Satisfaction with Victim Offender Mediation and Dialogue Services: The Development and Use of the Victim Satisfaction with Offender Dialogue Scale (VSODS)*, CTR. FOR RESTORATIVE JUST. & PEACEMAKING 0, 1 (2000), http://rjp.umn.edu/sites/g/files/pua5026/t/media/assessing_victim_satisfaction.pdf (an example of one tool used in the context of victim-offender mediation noting that the failure to utilize consistent mechanisms to collect this data makes comparisons difficult).

³¹⁶ JEFFREY SONIA, *Survivor Studies: The Importance of Evaluating the Effects of Truth Commissions on Survivors of Human Rights Violations*, in ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 197 (Hugo van der Merwe et al. eds., 2009).

³¹⁷ *Id.* at 198 (describing the need for a longitudinal study if evaluating impact on those harmed).

³¹⁸ *Id.*

data can be collected. Similarly, people with dementia are more likely to be exploited, and some may lose the capacity to articulate their perspectives on the restorative process.³¹⁹ The shorter the time horizon, the more likely these participants will be available, resulting in a persistent tension in determining the duration of the study period.

The challenges noted above are not insurmountable, but they reflect necessary considerations for designing an effective restorative program most able to meet the needs of older people, those who committed harm, and the communities impacted by this problem.

VI. CONCLUSIONS AND RECOMMENDATIONS

Existing approaches for addressing elder abuse are inadequate to meet the needs of older people and fail to address the underlying relationships between those harmed and those who committed the harm. Restorative justice models undoubtedly provide a much-needed alternative mechanism for addressing and rectifying this harm. Below are recommendations for incorporating restorative processes into existing strategies, and for identifying the particular types of cases and situations in which these practices can be most advantageous.

A. *Expanded Interventions, Including Restorative Practices, Should be Piloted and Evaluated*

Existing civil and criminal remedies are inadequate responses to elder abuse and exploitation, and fail to meet the needs of older people who have been harmed. Additionally, they provide virtually no assistance to the person committing the harm and are slow and costly. Bluntly, we need more creative options. No single solution will be appropriate for every senior and every situation, so we should embark on an agenda of inquiry, flexibility, and inclusivity as we evaluate less traditional responses.

Restorative practices should be included among these new and creative responses. They are responsive to the needs of those

³¹⁹ The perspective of others in their lives on the “success” of the model will be informative, however.

harmed, those committing the harm, and communities. Because the objective is to repair relationships, the resulting solutions have the capacity to be transformative. The inclusive nature of the processes, allowing for the participation of other family members and social supports, provides accountability and resources to assist through that repair process. Finally, restorative practice models allow for flexibility that enables them to be tailored to the unique needs of the individuals and communities involved.

B. Restorative Practices are Appropriate for Some Elder Abuse Cases but Not All

Existing research on restorative practices offers guidance for when these processes are likely to be most effective. Success often relies on the willingness of the person who committed the harm to participate, honestly examining his role and relationship with the person harmed and working with the support of others to change his behavior. The senior must also be able to express her goals and be willing to work with the person who committed the harm and members of the community to develop a creative resolution. Participants in appropriate cases will require community support and adequate resources to enable them to transition to a new relationship.

In some situations, restorative practice will not be effective. Cases in which those committing the harm acted in premeditated and gross disregard for the needs of the senior are highly unlikely to be successful restorative practice cases. Additionally, a restorative process would not be appropriate for cases where the person who committed the harm is an active addict or has a serious, untreated mental illness. Except in rare circumstances, cases involving physical and sexual abuse also are not suitable due to the enhanced vulnerability of the older person and the situations' complexity.

C. Practitioners Must be Skilled and Specially Trained in Working with Older Adults

Older adults who have been harmed present unique and complex needs. Relative to those harmed in other settings, seniors are more likely to have physical and cognitive limitations, increased

dependence on the person who committed the harm, and fear of changed living situations, including institutionalization. Restorative justice practitioners addressing elder abuse should have specialized training in working with the elderly, and be knowledgeable about capacity issues, the many facets of the aging process, the dynamics of elder abuse, and available resources.

D. *Practitioners Must Engage in Careful Screening Processes*

Because restorative practice will not be appropriate for all elder abuse situations, participants need to be carefully screened. This is particularly important given that the visible abuse may be masking additional forms of abuse. Although restorative processes typically entail individual meetings with each participant in advance of the practice, these sessions should be more comprehensive and exploratory than in other restorative contexts.

E. *Restorative Models Most Appropriate for Addressing Elder Abuse*

Although this article only examined selected restorative practice models, some are better suited for addressing elder abuse than others. Peacemaking may be one of the most suitable models. Given the complex family dynamics often involved in situations of elder abuse, peacemaking is particularly helpful because it provides opportunities for all family members to participate and includes support people and community members. Family group conferencing, while potentially appropriate in some situations, runs the risk of perpetuating control issues and rivalries already negatively impacting the senior. Only in rare circumstances could most older adults resolve problems of elder abuse without the presence of a support person. Mediation's application in this context will depend on the type of mediation, the specific issues to be resolved, and the characteristics of the participants.

F. *Miscellaneous Other Recommendations*

Words matter. The terms “perpetrator,” “offender,” and “victim” have negative connotations that may dissuade the critical par-

ties from participating.³²⁰ Older adults may not want to be viewed as victims, particularly at the hands of family members or friends. Additionally, this labeling could impede progress at creating or re-creating healthy relationships.

Another consideration is time constraints. Restorative models, designed to address the root cause of problems, can be time consuming and protracted. Peacekeeping circles, for example, are designed to reach consensus and take as long as is necessary to achieve that goal.³²¹ Factors in any situation of elder abuse are the age and health of the senior. A successful process must balance a procedure that facilitates the development of a repaired relationship and recognizes of the older person's age and potential longevity, or lack thereof. Practitioners must be aware of both sets of factors throughout the process.

Adequate resources are necessary for restorative practices to achieve success. The most critical resources are those that enable the family member who committed the harm to access services that ensure he can honor commitments he made during the process. The person who was harmed also may need ongoing resources. Although restorative models may require more resources than a brief judicial proceeding, it is unlikely that restorative processes cost more than the combined efforts of law enforcement, the court system, and the penal system.

Restorative models of justice are not a panacea to elder abuse and exploitation. However, they represent an alternative to existing remedies. They are flexible. They are focused on the needs of the person who was harmed and offer a solution more palatable for those understandably reluctant to prosecute or even bring a civil action against a family member, friend or neighbor. They also address the needs of the person who committed the harm, and potentially provide resources not otherwise available to assist that person. Finally, they incorporate invaluable community members who can provide support, tangible and intangible, for all parties to reestablish a healthy relationship.

The new paradigm of “elder *restorative* justice” offers a potential solution to complex situations that have traditionally been diffi-

³²⁰ Zehr, *supra* note 92, at 14–15 (noting that labels are judgmental, and they oversimplify and stereotype).

³²¹ See, e.g., KAY PRANIS, *The Little Book of Circle Processes*, in THE BIG BOOK OF RESTORATIVE JUSTICE 321 (2015). See also Sasson & Sydow, *supra* note 113 (noting in a comparison of Washtenaw County's peacemaking program with mediation that peacemaking may involve multiple sessions and follow-up circles).

cult to resolve. New restorative projects should be designed, implemented, and evaluated. The status quo is unacceptable, and current approaches are inadequate to address this cataclysmic problem. There is nothing to lose, and potentially much to gain.

