



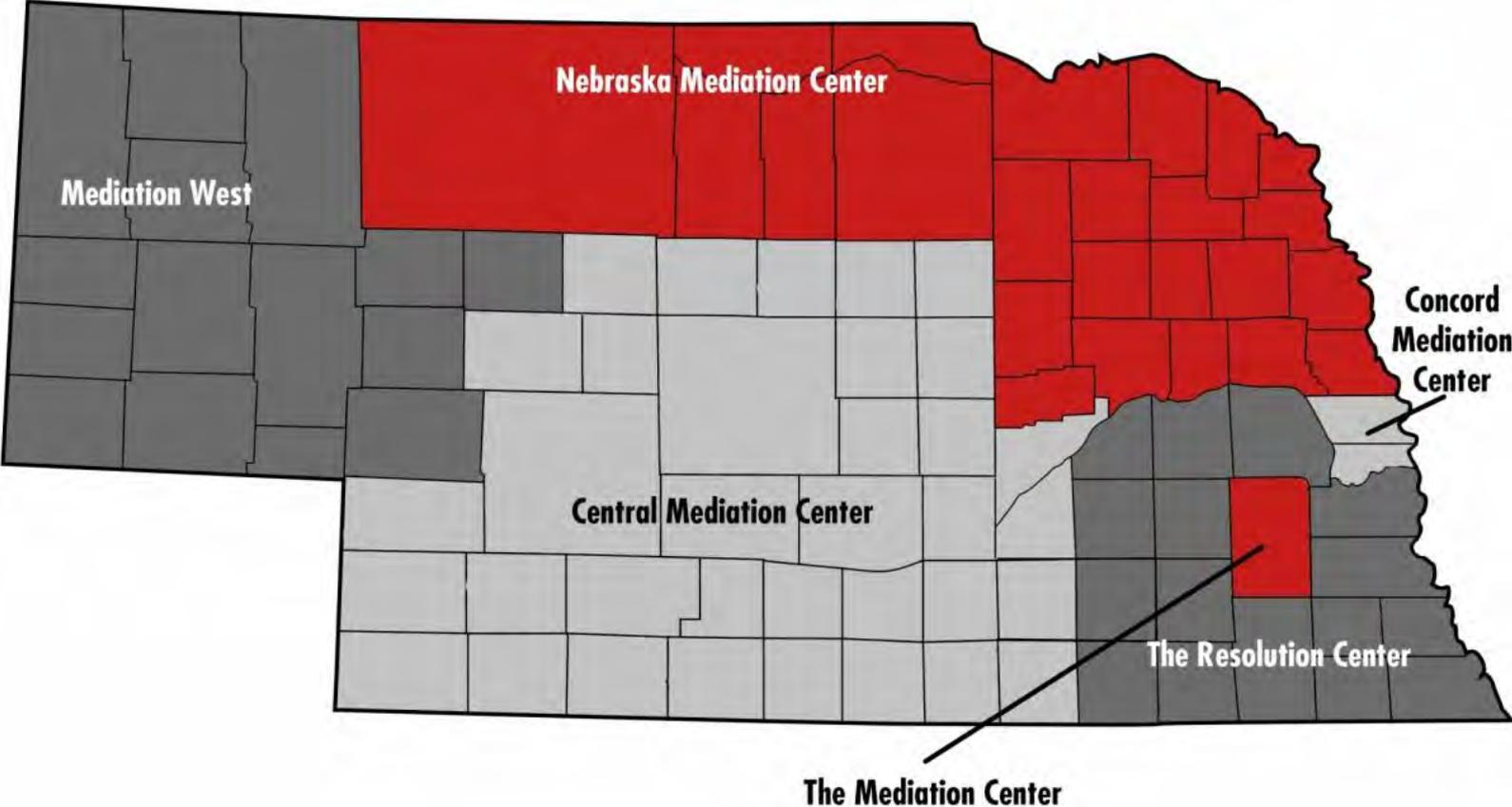
Lessons in Restorative Justice in Cases involving Youth: Nebraska's Experience and Beyond

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System Structure in Nebraska



Let's Begin with a Story . . .



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The Victim's Experience

Typical Needs at the Front-End

- Safety and security
- Supports and caring presence
- Validation and ventilation
- Assistance with daily tasks

Typical Needs During Resolution

- Information about the offender/case
- Good trust in support people
- Education about options throughout the process
- A significant voice in the process

Typical Needs at the Back-End

- Compensation of losses
- Regained trust in offender
- Sense-making out of everything
- Emotional closure (at any level)





Three Pillars of Restorative Justice



Why use Restorative Justice with Youth?



Empirical research demonstrates

- ✓ **Lower recidivism rates by the youthful offender (Schwalbe et al., 2012; Schwalbe et al., 2015; Wong et al., 2016)**
- ✓ **Improve level of satisfaction for the court process by both victims and youthful offenders (Latimer, Dowden, Muise, 2005)**
- ✓ **Increase restitution to the person(s) harmed (Latimer et al., 2005)**



The Process

Initial
Interview –
Person who
caused Harm

Initial
Interview –
Harmed Party

VYC – Together
or with
Surrogate



Three Conversations

1. *What happened?*

(Story-telling Discussion)

2. *What was the effect?*

(Impact Discussion)

3. *How can the situation be made better?*

(Reparations Discussion)



1. What happened?

Main Goal : Identify the relevant information and feelings about the offending incident and relate the issues to the present. (Discuss the facts, feelings, experiences, etc.)

- Offender (and sometimes victim) goes first to tell their story
- Other party is invited to ask any questions
- More storytelling is invited to cover feelings, motives, context, etc.
- Ideal is for both parties to talk directly back and forth to each other



2. What was the effect?

Main Goal : Discuss the impact and consequences of the offending incident on all parties and assist the parties in reaching a deeper understanding and connection. (Discuss the impacts and consequences.)

- Victim is invited to summarize how they were affected
- Offender is invited to respond or to echo back what was heard
- Facilitators extend conversation to how others were affected
- Ideal is for both parties to empathetically connect with each other



3. How can the Situation be made Better?

Main Goal : Address all possible solution ideas for reparation and determine which ones the parties mutually choose to put into a written agreement. (Discuss options and create agreements.)

- Victim is invited to share their requests for reparation
- Offender is asked to respond to those ideas and all present surface possible options before evaluating them
- Options that are **mutually agreeable** and **realistically achievable** are written eventually transferred to an agreement form



Possible Resolutions

- Apologies
- Accountability Statements
- Restitution – Lump Sum or Payment Plan
- Return or Replace Property
- Services for the youth
- Services to the Victim



Take a moment to reflect...

Think about a time during your adolescent years
(ages 10-25) when *YOU CAUSED HARM* or offended
someone OR *WHEN YOU WERE HARMED* or offended
by someone else.



Incentives to Participate

- Better Outcome for Youth Offender – Legally & Holistically
- Ability for Victim to Participate and Be Made Whole



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What if a victim declines?

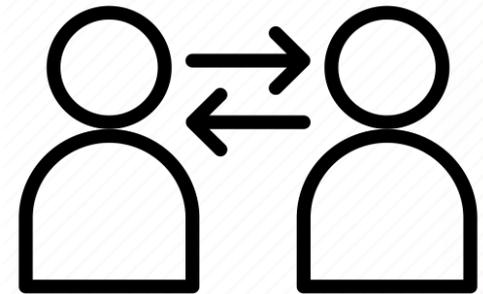
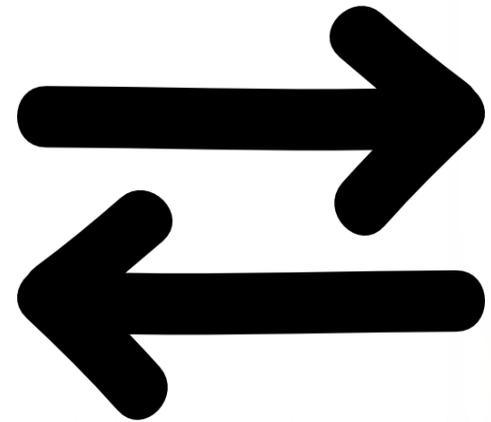
Surrogate Victims and Community Members can:

- Speak as a representative victim in a similar crime/offense.
- Speak as a representative of the community that is more widely impacted.
- Speak as an advocate for restorative outcomes



When face-to-face is inappropriate...

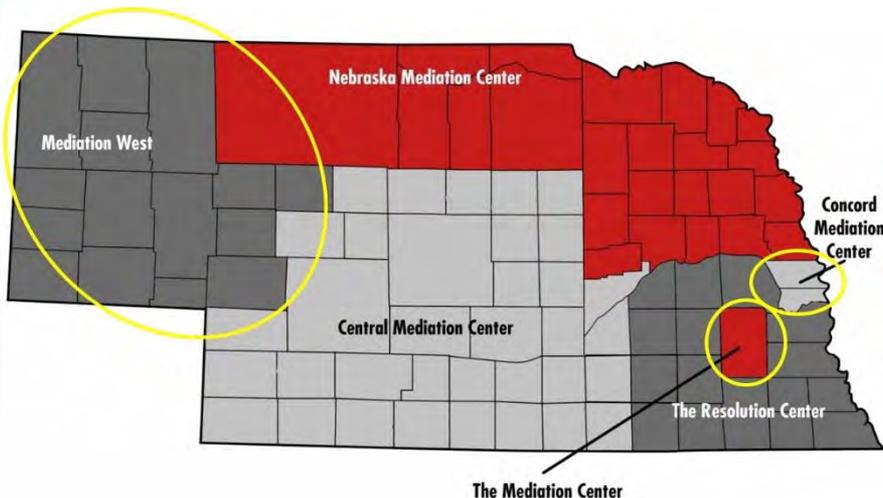
- **Victim Relay Option** – a facilitator receives and *relays* the victim's information during the conference.
 - Impact Statement
 - Restitution Request
- **Victim Surrogate Option** – a surrogate speaks about his/her own similar experiences when he or she was a victim to an offense.



2015-16 Pilot Project

- 71 Mediators Trained (5 Minorities)
- Pilot Locations (Funded by Sherwood Foundation)

- Omaha, Concord Ctr.
- Scottsbluff, Mediation West
- Later Added Lincoln, The Mediation Center (Funded by Outside Money)



VYC Expansion Program

- Include all six regional centers
- Unify program across the state
- Provide all centers with full-time RJ staff
- Expand referral sources
- Secure sustainable funds



Identified 3 Goals



1. VYC expansion: Reduce youth recidivism by expanding VYC to all six regional mediation centers (targeting all 12 judicial districts).



2. VYC training and education: train new facilitators and surrogates in the evidence based practice of VYC.



3. Build capacity and sustainability: Establish long-term systemic and financial stability to sustain the program beyond the grant period.

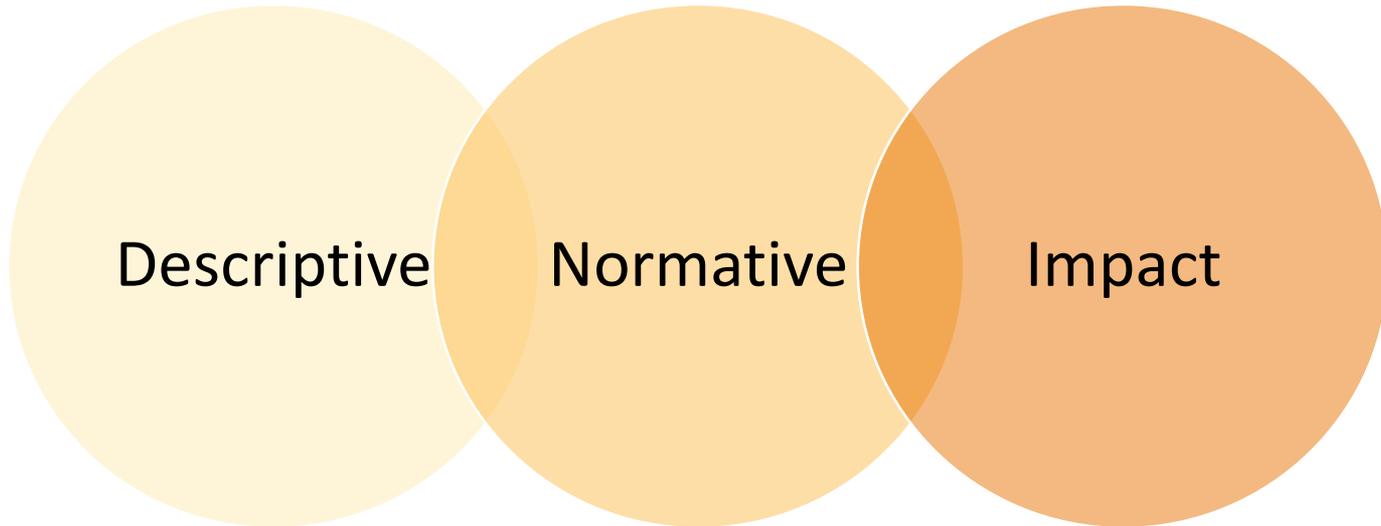


Participant Recruitment

- Mediation engaged in outreach to stakeholders statewide that resulted in an additional 12 counties prepared to refer youth to VYC in 2019
- Mediation Center staff reached out to 1,148 stakeholders, including courts, county attorneys, probation, schools, and city and county officials in 56 Nebraska counties through meetings and presentations to promote VYC and form partnerships.



Evaluation Questions



**Demographic
and program
specific data**
*Who is served
and under what
conditions?*

Process evaluation
*What's working,
what can be
improved and is
fidelity to best
practices
maintained?*

**Outcome
evaluation**
*What's different
as a result, why
and how do we
know?*



Maintaining Diverse Facilitators

- In one county, roughly 60 of the 164 youth participating in the program were minority youth
- Diversity of facilitators may make youth feel more at ease during the process
- Recruitment from communities including
 - The LGBTQ
 - Ethnic Minority Communities
 - Younger Facilitators
- Community Outreach

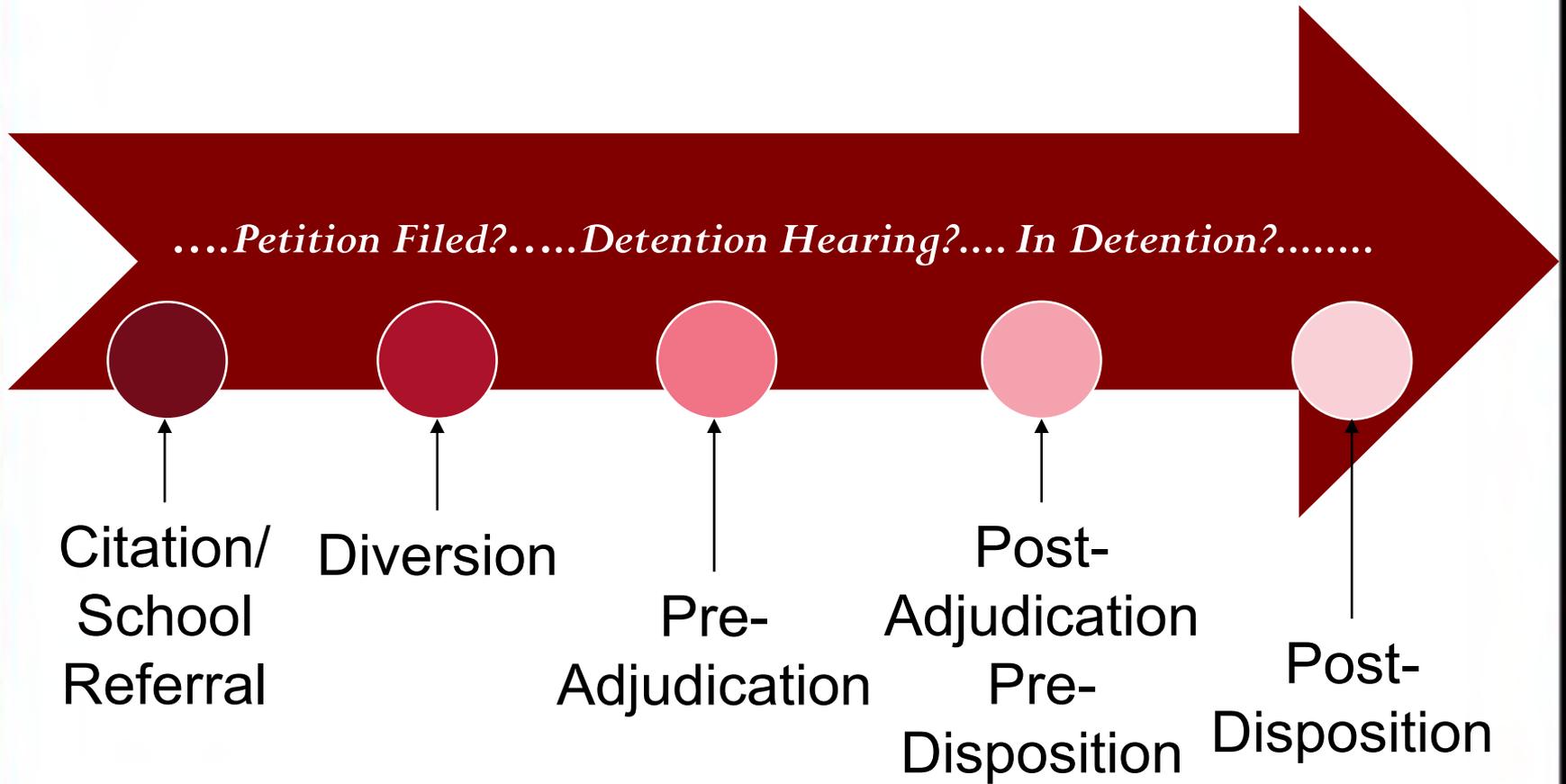


Program Management

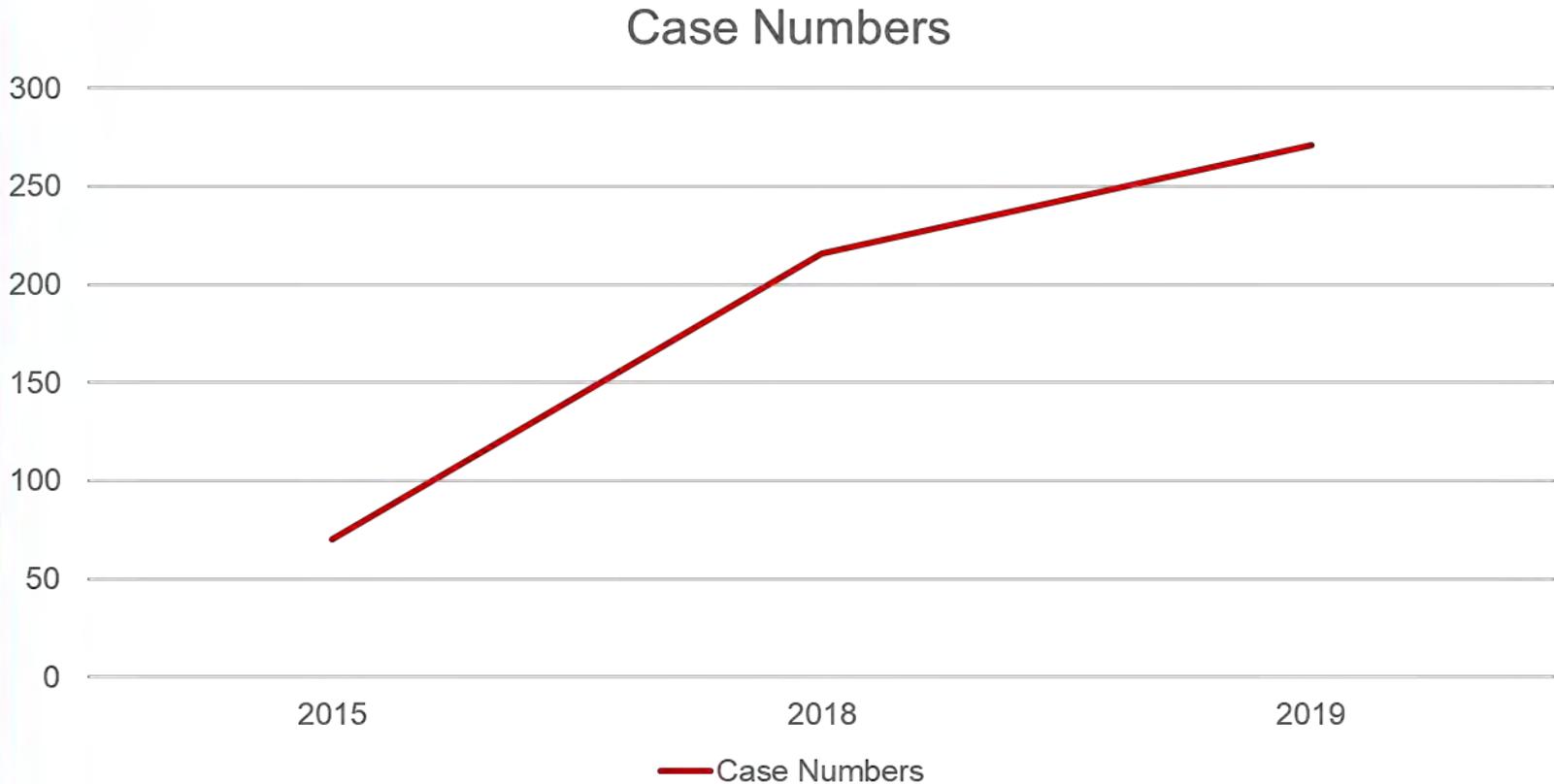
- Restorative Justice Coordinator (Center-based)
 - Engages in local outreach, manages RJ facilitators and affiliates, manages data-collection
- Restorative Justice Program Analyst (ODR)
 - Provides support to the six ODR-approved mediation centers in implementing the VYC program statewide , oversees system-wide data collection



Case Referral Sources



Case Numbers 2015 - 2019



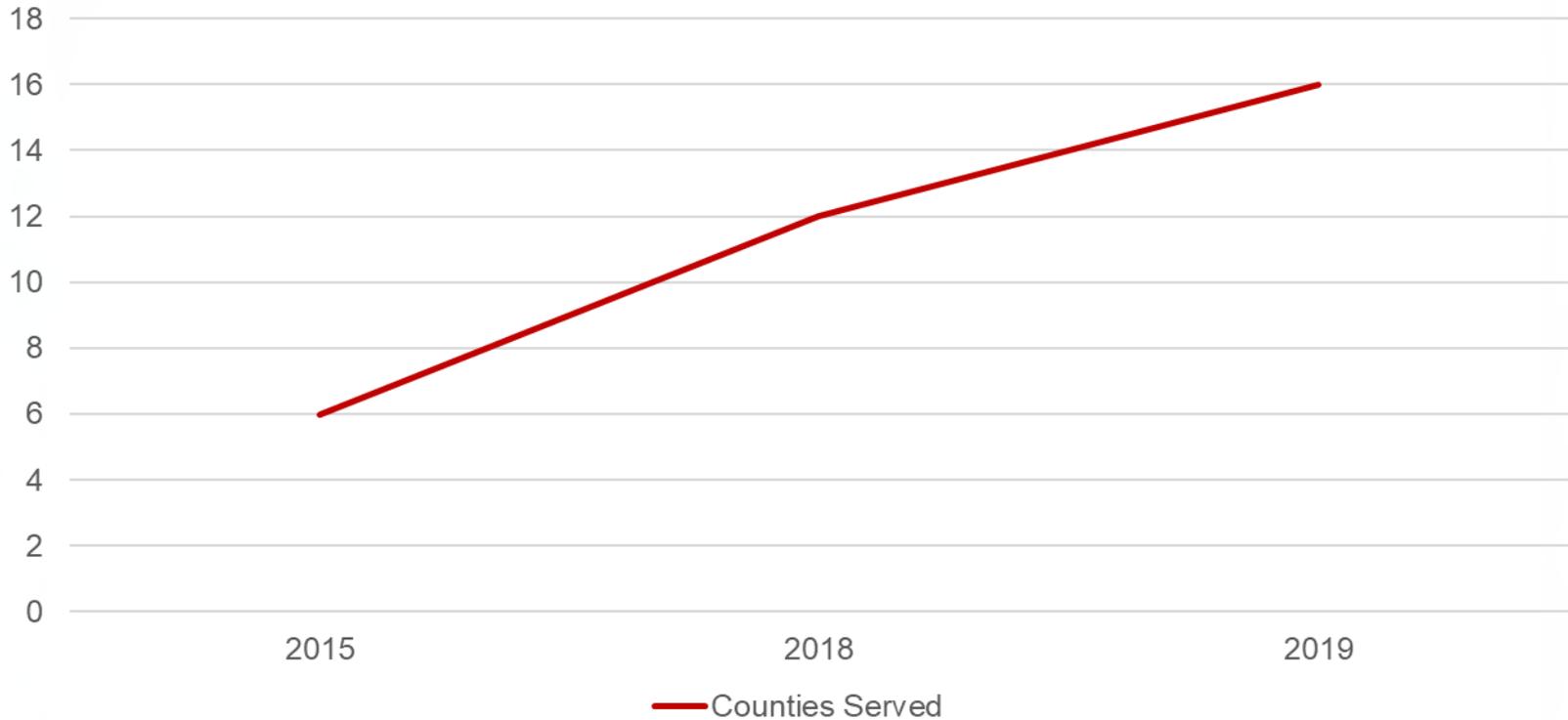
Populations Served since the VYC Program Began

	2015-2016	2016-2017	2017-2018	2018-2019	Totals since start of program
	Pilot	Pilot Extension	Year 1 Expansion	Year 2 Expansion	
Referrals	93	154	216	271	734
Actual VYC Conferences	70	142	159	222	593
Victims Served	114	199	223	127	663
Reparations Agreements	41	112	159	212	524

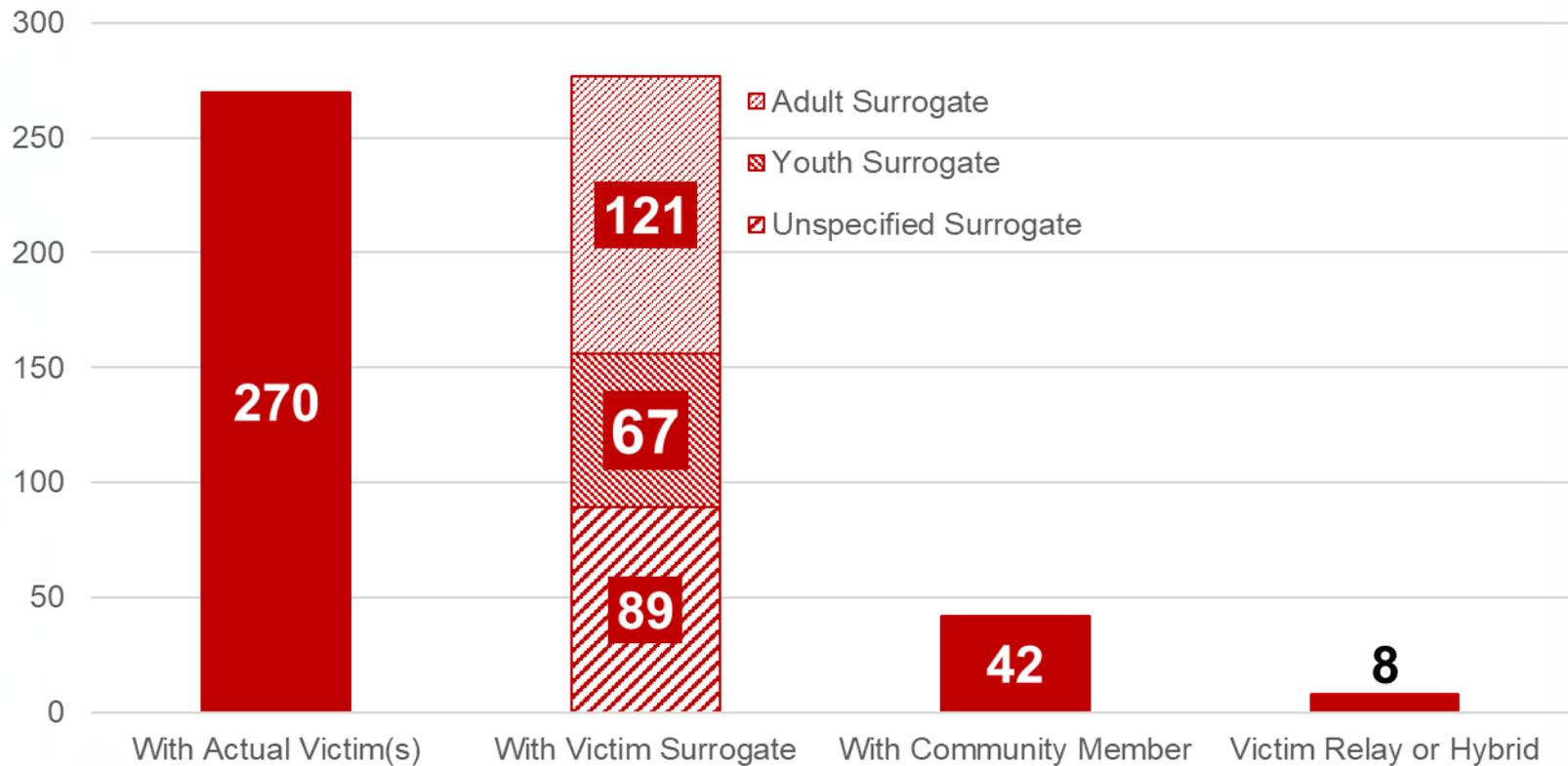


Counties Served 2015 - 2019

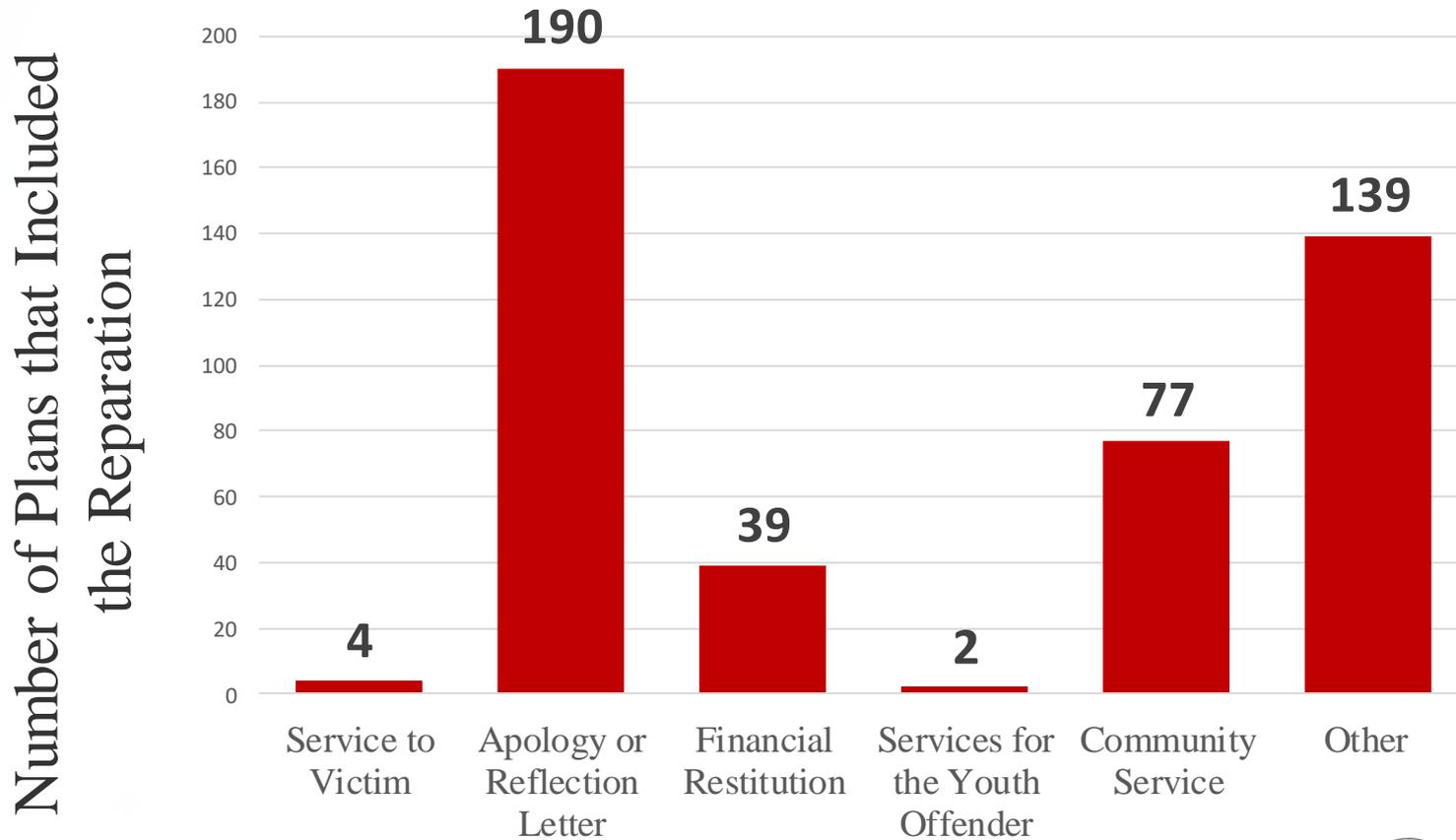
Counties Served



Frequency of VYC Conference Types (n=597)



Frequency Reparation Types During Statewide Expansion

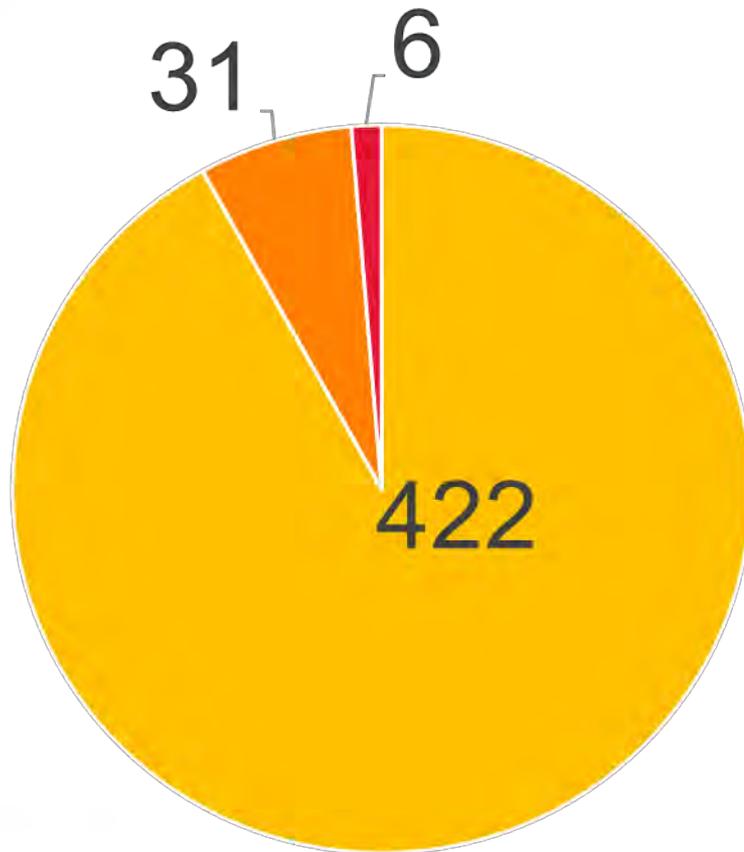


Type of Reparation



Reparation Achievement Outcomes

Success Rates for
Cases Closed between
Jan. 2015 and Dec.
2019 (n=422)

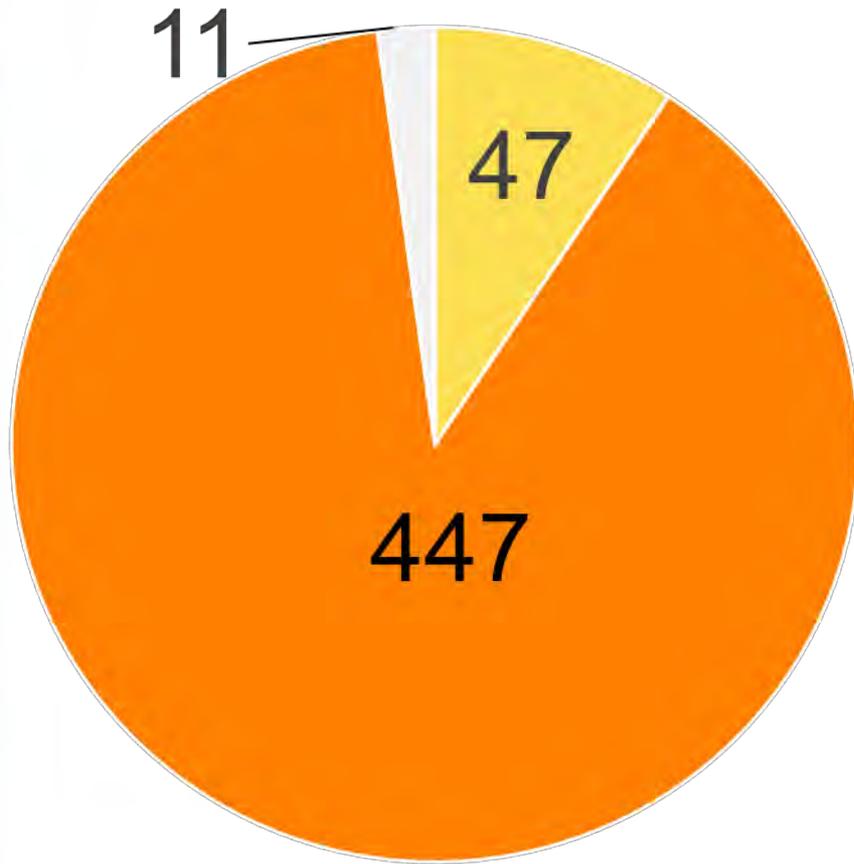


- Successful Fulfillment
- Partial Fulfillment
- Unsuccessful



Nebraska's Recidivism

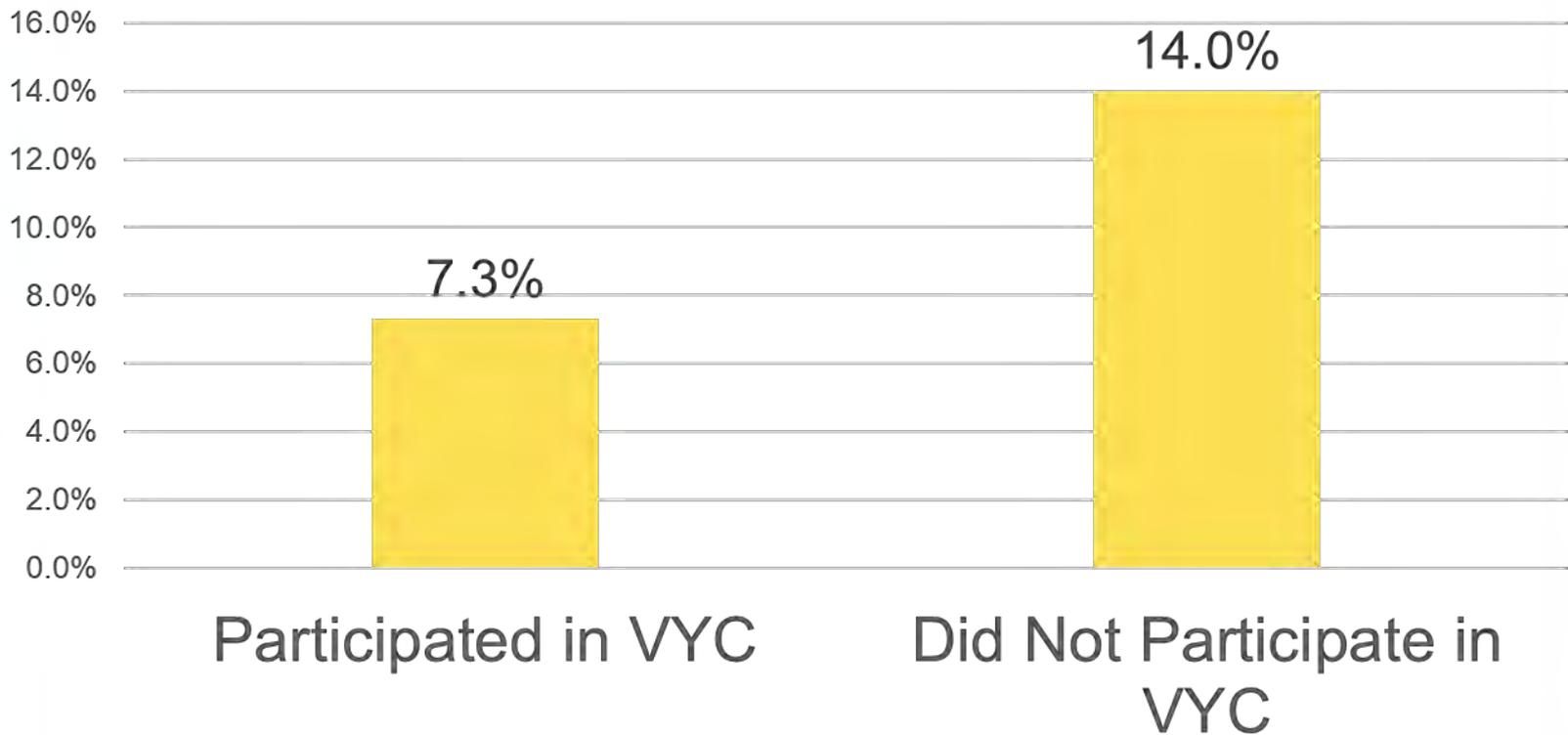
Recidivism Rates for
Cases Closed between
Jan. 2015 and Dec.
2018 (n=505)



- Recidivated
- Did Not Recidivate
- Unreported



Compares Rate of Recidivism for Youth who Participate



$\chi^2 = 5.801, p < .05$



Paving the Way – Creative Use of Surrogates



Growth Areas

1. Sustainability Funding
2. More “Victim” Parties to Table
3. Increase Diversity of Facilitators and Surrogates
4. Buy-In from Douglas/Sarpy county schools
5. Increased Education for Prosecutors, Judges, Educators, Probation
6. Long Term Tracking of Recidivism



Future of Restorative Justice in Nebraska?



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justice](https://supremecourt.nebraska.gov/programs-services/mediation-restorative-justice)



2019

Restorative Justice and Youth Offenders in Nebraska

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Restorative Justice and Youth Offenders in Nebraska

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Jeremy, a high school freshman, lives in Lincoln, NE.¹ He and his friends regularly visit one of the city pools in the summer and into the fall. One day, Jeremy discovers that his tennis shoes, his most prized possession, went missing from the locker room while he and his friends were swimming. Through the grapevine, Jeremy learns that Brandon, a classmate, might have taken them. At school the next week, Jeremy confronts Brandon at his locker. Brandon denies everything, and ultimately Jeremy punches Brandon in the face. A teacher witnesses the event; the students are taken into the principal's office and the police become involved.

Jeremy doesn't have prior involvement with the police and he is on the freshman basketball team. His coach and his parents are going to learn about this incident. Jeremy's biggest concerns are his basketball career and disappointing his mom. He also does not want to be labeled as a "criminal" in the eyes of his peers or the community.

Katie and Julie, current eighth graders, have been best friends since the first grade. They live across the street from one another and spend countless hours together. As Katie reached adolescence, her behavior became more erratic, and she now suffers from anger issues. On one summer day, the girls are together at Julie's house, hanging out in her room. The girls get into a terrible fight over a boy. Katie bursts out into a rage; she shouts and hits, scratches Julie's arm, and throws Julie's mobile phone into the wall, breaking the phone and damaging the wall. Julie's dad calls Katie's dad, and Katie's dad calls the police, turning in his own daughter.

Katie is truly sorry and her biggest concern is making up with her best friend. The incident, however, did not help her already rocky relationship with her parents. Katie's dad called the police because he is at his wit's end trying to discipline her at home. As with Jeremy, Katie has not had any prior contact with the police.

Ashlie is best friends with Carli, and they are both freshmen in high school. Carli recently broke up with Mason, a high school junior. All three students go to the same high school. One day in the hallway, Ashlie saw Carli crying. Ashlie just learned that Mason has been calling Carli a "slut" on social media. Ashlie gets very upset, storms out of the school, and takes her keys to the side of Mason's car. Ashlie's escapade causes about \$800 worth of damage, and she does not deny she caused the damage (that, and there was a video recording of the parking lot). The police are called into school.

1. The case stories in this introduction are fictionalized from real cases. All of the names and many of the facts have been changed to protect the confidentiality of the processes. NEB. REV. STAT. § 43-247.03(1) (Reissue 2016) (providing for confidentiality and privilege for mediations involving youth, including victim-offender mediations and family group conferences).

Ashlie's biggest concern is that her friend be treated with respect—Ashlie is loyal to a fault. Despite her protective nature, this incident is highly out of the norm for Ashlie, and it marks the first time she has ever had to talk to a police officer. In the back of her mind, Ashlie is worried about whether this incident will go on her permanent record or prevent her from going to college.

How should the law treat Jeremy, Katie, and Ashlie? Are they criminals? Juvenile delinquents? Young people who deserve to have a juvenile record, even if it is sealed because of their age? What kind of process should these youths endure? Should they hire lawyers, appear before juvenile judges, and be assigned probation officers? On the other hand, should they be given a pass? Chalk up their actions to youthful indiscretion? Further, who should decide how they are treated? School administrators? Police officers? County prosecutors? Their parents?

Juvenile courts were created to provide interventions for young people like Jeremy, Katie, and Ashlie in order to reduce the possibility of future law violations, or recidivism.² Once a youth is cited for an offense, several routes exist through which the state may respond. The traditional offender-offense focused method can be broken down into three primary phases: citation or detention, adjudication, and disposition. When a youth commits an offense, the youth may be cited or arrested by the responding officer. If the prosecuting attorney determines there exists enough evidence to successfully process the case, a petition is filed with the juvenile or county court and the youth appears before a judge in the adjudication stage. Following adjudication, the court may order a number of services prior to the disposition, including an investigation by probation to help the court determine the best course of action for the youth, an evaluation (e.g., psychological or mental health examination), probation supervision, or other services. Finally, during the disposition stage, the court may rely on the findings of the pre-disposition investigation to determine the best intervention for the youth, which may consist of probation, problem solving courts, or, in extreme cases, Youth Rehabilitation and Treatment Centers (YRTC) followed by re-entry programs. Although juvenile records are sealed in the state of Nebraska,³ it is clear that the traditional, formal processing would lead to a much deeper penetration into and more extensive contact with multiple parts of the juvenile justice system.

Luckily for Jeremy, Katie, and Ashlie, a local county attorney offers these youths the opportunity to participate in a victim-youth conference (VYC) as part of a pre-diversion or diversion program. If

2. NEB. REV. STAT. § 43-246(3) (Reissue 2016).

3. NEB. REV. STAT. § 43-2,108.04 (Reissue 2016).

they successfully complete the VYC, and any other relevant terms, they will neither be “charged” nor adjudicated. The remainder of their stories will be discussed throughout this Article.

VYC is one of a number of practices known as “restorative justice.” Restorative justice is a philosophy that has ancient roots in many different cultures,⁴ as well as modern application in today’s criminal contexts. Restorative justice programs give communities the opportunity to “actively and meaningfully participate in the criminal justice process,”⁵ and the programs are dialogue-driven, holistic in scope, and open to a wide variety of resolutions.⁶ For the most part, this Article focuses on restorative justice in cases involving youth offenders.⁷

This Article primarily serves as a case study for the recently implemented VYC program utilized in Nebraska for youth offenders

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4. See Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 304 (2003) (discussing roots of restorative justice in many cultures, including Greek, Roman, Arab, Germanic, Native American, South American, and others); Susan Hanley Duncan, *Restorative Justice and Bullying: A Missing Solution in the Anti-Bullying Laws*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 273 (2011) (“Restorative justice roots can be traced to very early cultures in all parts of the world.”); Annalise Buth & Lynn Cohn, *Looking at Justice Through a Lens of Healing and Reconnection*, 13 NW. J.L. & SOC. POL’Y 1, 2 (2017) (“Another challenge in explaining restorative justice is that it is a philosophy rather than a single practice or program.”).
 5. *State v. Pearson*, 637 N.W.2d 845, 850 (Minn. 2002) (Page, J., concurring); see also Maria R. Volpe, *Restorative Justice in Post-Disaster Situations: Untapped Potential*, 8 CARDOZO J. CONFLICT RESOL. 611, 613 (2007) (“Generally speaking, restorative justice is understood to involve a variety of informal justice processes that rectify harm and restore relationships by involving victims, offenders, and members of the community.”).
 6. Howard J. Vogel, *The Restorative Justice Wager: The Promise and Hope of a Value-Based, Dialog-Driven Approach to Conflict Resolution for Social Healing*, 8 CARDOZO J. CONFLICT RESOL. 565, 565 (2007) (“Restorative justice is a value-based, dialogue-driven approach to conflict resolution that is rooted in a wager about the nature of reality and the human condition, namely that ‘[e]very human being wants to be connected in a good way’ and in a ‘safe place’ we are able to take action through dialogue to build community so that all life might flourish.”) (emphasis omitted); see also Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 713 (2017) (“Restorative justice has no single definition or framework, but rather acts as a shorthand for a variety of approaches. It brings together and gives voice to multiple stakeholders in the aftermath of an offense, requires the responsible party to accept responsibility for the harm he caused, and uses collective decision making to determine how to restore the victim and community and to prevent the offense from reoccurring.”).
 7. The use of restorative practices for youth offenses is relatively uncontroversial. See, e.g., Golan Luzon, *Challenges Shared by Restorative Justice and Strict Liability in the Absence of Mens Rea*, 19 NEW. CRIM. L. REV. 577, 588 (2016) (“Because of their educational value, these programs are especially useful for diverting the cases away from the court and for providing alternatives to punishment, and especially incarceration, of the youths.”).

both in schools and in the community.⁸ To accomplish this goal, this Article proceeds as follows. Part I provides an overview of restorative justice to put the Nebraska program in context. Part II briefly discusses the history of restorative justice in Nebraska to demonstrate Nebraska's commitment to restorative processes in other areas of the law. Part III gives significant detail on the recent VYC program piloted in Nebraska, which is now being rolled out statewide. The Article highlights the successes of the program and discusses some of its shortcomings. The authors hope this Article showcases the good work currently being done while suggesting improvements to make the system even better.

I. INTRODUCTION TO RESTORATIVE PROCESSES

This opening section gives a brief overview of restorative justice, focusing on its purposes and its practices. Because the field of restorative justice is broad, this section can only begin to scratch the surface of the many types of practices that fall under this umbrella. The purpose of this section is to give greater context to Nebraska's new project detailed in Part III.

A. Underlying Purposes of Restorative Justice

Although a large number of processes are restorative, they serve many of the same purposes. Restorative processes consider a crime to involve not only the offender and the victim, but also the community.⁹ A Pennsylvania court noted that “unlike that of a retributive justice system where the crime is treated as against the government, punishment is imposed and the victim has a passive voice,” restorative processes give equal attention to each of these three stakeholder groups.¹⁰ The Minnesota Supreme Court recognized that these programs bring “victims and offenders together [to provide] an opportunity for offenders to better understand the impact of their conduct,

8. Nebraska cases enter the VYC program from one of three sources. First, the cases may be referred directly from a school. Second, the case may be a condition of a diversion program (a pre-adjudication process). Third, the case may be a condition of a youth's probation (a post-adjudication process). *See infra* subsection III.A.1.

9. *See* TALI GAL, CHILD VICTIMS AND RESTORATIVE JUSTICE 9–10 (2011) (defining restorative justice as not only “an act against the state, but an act against people and relationships”); MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION xxv (2001) (“In contrast to the offender-driven nature of our current system of justice, restorative justices focuses on three client groups: crime victims, offenders, and community members.”); *see also In re Clarke*, 61 Pa. D. & C. 4th 263, 268 (Pa. Com. Pl. 2003) (noting that restorative practices allocate “equal attention to the offender, victim and community”).

10. *Clarke*, 61 Pa. D. & C. 4th at 268.

and give[] victims a clear voice in the resolution of the offense.”¹¹ Social scientists, criminologists, anthropologists, lawyers, and others from around the world have long contributed to the literature, process design, and process evaluation of restorative justice programs. The following sections give additional detail on some of the most important characteristics of restorative justice.

1. *Focus on Accountability*

At their core, restorative justice programs center on healing and accountability. Offenders are expected to assume responsibility for the underlying delinquent action as a necessary first step to repairing the rift that the harmful conduct has caused to the victim and the community.¹² Professor Mark Umbreit discussed “accountability” in the context of restorative justice as “understanding [the] impact of [one’s] action and helping decide how to make things right.”¹³ Keeping with

11. *State v. Pearson*, 637 N.W.2d 845, 847 (Minn. 2002) (interpreting MINN. STAT. ANN. § 611A.775 (West 2018)). In *Pearson*, the defendant fraudulently misrepresented to the county that she was unemployed and eligible to receive certain welfare benefits when, in fact, she was employed full-time and ineligible. *Id.* at 846. Following a guilty plea, the case was referred to a sentencing circle, which involved over fourteen hours of meetings over five sessions. *Id.* The sentencing circle recommended a stay of adjudication, as well as restitution, credit counseling, community service, and other requirements. *Id.* The district court adopted the recommendations, but the government appealed on the basis that the trial court could not impose a stay of adjudication. *Id.* at 847. Given the significant flexibility afforded to restorative justice programs under the statute, the court reversed the court of appeals and reinstated the district court’s adoption of the sentencing circle’s recommendations. *Id.* at 849. In Pennsylvania, a court of common pleas eloquently summarized the policies underlying restorative processes in youth cases:

The foundation of Pennsylvania’s Juvenile Act consists of five principles: community protection, accountability, competency development, individualization and balance. Each principle is designed to implement a balanced approach for restorative justice. Restorative justice focuses on repairing the harm done to victims and communities. Offender accountability, under a restorative justice theory, is defined in terms of assuming responsibility and acting to repair harm. “Restorative justice emphasizes the importance of elevating the role of crime victims and communities in the process of holding offenders accountable for their behavior, while offering offenders the opportunity to make amends directly to the people and community they violated.” Therefore, victim and offender restoration are viewed as goals of community justice with the intent of improving the quality of life and increased safety.

Clarke, 61 Pa. D. & C. 4th at 266–67 (citations omitted).

12. *See, e.g., Luzon, supra* note 7, at 580 (“Assuming such responsibility is good for the victims, society, and the offenders because it combines responsibility for past actions with responsibility for present and future ones.”).

13. UMBREIT, *supra* note 9, at xxxi (found in Paradigm 11).

this goal, many programs disqualify offenders who maintain a position of innocence.¹⁴

As the name implies, the purpose of restorative justice is to make whole not only monetary and tangible losses, but also broken relationships and community bonds.¹⁵ These processes provide the opportunity to give “dynamically responsive” outcomes that fit the circumstances of the offense,¹⁶ as opposed to fixed sentences resulting from mathematical calculations. In this sense, there exists a strong connection between the damage done, the responsibility of the offender, the needs and interests of the victim, and the safety of the community.

Restorative processes are neither easy nor “soft.” In fact, taking accountability and making acknowledgement directly to the victim is difficult.¹⁷ The offender often feels shame, embarrassment, anger, regret, and other uncomfortable emotions while confronting the person or persons harmed.¹⁸ As discussed in the next section, the offender will further take responsibility through fulfilling reparation agreements.

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14. *See infra* note 74; *see also* Kaplan, *supra* note 6, at 713 (“A restorative justice process is only undertaken when the responsible party admits fault and is prepared to accept responsibility.”); Dena M. Gromet, et al., *A Victim-Centered Approach to Justice? Victim Satisfaction Effects on Third-Party Punishers*, 36 *LAW & HUM. BEHAV.* 375, 376 (2012) (“Before a restorative justice procedure can be initiated, offenders must admit their guilt.”).
 15. *See* JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 14–15 (2002) (writing that restorative values should include “the following values to be found in the international human rights agreements listed in number 1: Restoration of human dignity[;] Restoration of property loss[;] Restoration of injury to the person or health[;] Restoration of damaged human relationships[;] Restoration of communities[;] Restoration of the environment[;] Emotional restoration[;] Restoration of freedom[;] Restoration of compassion or caring[;] Restoration of peace[;] Restoration of empowerment or self-determination[;] Restoration of a sense of duty as a citizen.”); *see also* Garvey, *supra* note 4, at 304 (discussing what “restorative” means in the context of restorative justice).
 16. BRAITHWAITE, *supra* note 15, at 121.
 17. Duncan, *supra* note 4, at 276 (“Far from being easy, often facing a victim is one of the hardest things offenders have to do.”).
 18. *See, e.g.*, Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 *PSYCHOL. PUB. POL’Y & L. REV.* 142 (2008) (discussing the role of shame and guilt in restorative justice and cautioning program designers to account for the complexities of these emotions in specific programs); Victoria Pynchon, *Shame by Any Other Name: Lessons for Restorative Justice from the Principles, Traditions, and Practices of Alcohol Anonymous*, 5 *PEPP. DISP. RESOL. L.J.*, 299, 300 (2005) (“The concept of ‘reintegrative shaming’ was first introduced by restorative justice theoretician John Braithwaite as a means of distinguishing between shame that stigmatizes criminal offenders (and thus increases crime) from shame that condemns wrongdoing but forgives and respects the offender, thus hopefully reducing recidivism and decreasing crime.” (emphasis omitted)).

2. *Victim-Centered*

Compared to the traditional criminal justice system, the victim plays an essential role in the process of restorative justice. Modern juvenile and criminal processes significantly reduce the role of the victim,¹⁹ often to the role of a piece of evidence used at the prosecutor's discretion.²⁰ Restorative justice practices gained popularity as victims' rights organizations sought greater participation and voice by victims.²¹ When studied, restorative processes generally give the victim a sense of procedural justice through active involvement in the process.²²

The restorative justice conversations give victim parties the opportunity to pose questions directly to offender parties.²³ The traditional justice process does not usually allow such direct contact between offenders and victims, which can leave victims with a lot of unanswered questions.²⁴ Restorative processes give victims the ability to ask the "why" questions: Why did you choose (or target) me? Did you pick me at random? What were you thinking? Am I safe now?²⁵ These ques-

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19. See Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1255 (1994) ("By the early 1800s, however, imprisonment became the most prevalent form of criminal punishment and the victim's role diminished dramatically.").
 20. See UMBREIT, *supra* note 9, at xxvi (noting that "crime victims have virtually no legal standing in American courts . . . Individual crime victims and representatives of victimized communities are left on the sidelines, with little, if any, opportunity for input."); Duncan, *supra* note 4, at 277 ("The victim never obtains closure when the primary focus is to mete out punishment to the offender. In this system, the needs of the victim remain largely unknown and as a result unaddressed.").
 21. Brown, *supra* note 19, at 1256; GAL, *supra* note 9, at 10–11 ("The victims' rights movement has been another important force in the development of restorative justice theory."); UMBREIT, *supra* note 9, at xv–xviii (discussing the history of restorative justice and the role of the victims' rights movement).
 22. These findings are similar when dealing with both juvenile and adult offenders. GAL, *supra* note 9, at 72–78 (conducting a literature review of the benefits of procedural justice, particularly relating to child victims); UMBREIT, *supra* note 9, at xxvii ("Restorative justice is a victim-centered response to crime that gives the individuals most directly affected by a criminal act—the victim, the offender, their families, and representatives of the community—the opportunity to be directly involved in responding to the harm caused by the crime.").
 23. See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 20–21 (2003) (discussing victim dissatisfaction with the criminal justice system due to the lack of information and access to information).
 24. *Id.* at 20 ("Victims repeatedly say that one of the greatest sources of frustration to them is the difficulty in finding out from criminal justice authorities about developments in their cases. Indeed, some victims have said that is all they want from the justice system and would be satisfied simply to achieve that goal.").
 25. *Id.* at 28–29 (noting that in one study, victims of violent crime were five times more likely to feel as if they might be re-victimized in the court system, compared to those who participated in restorative processes).

tions have little consequence in the formal criminal justice system, so victims rarely learn the information that matters most to them.²⁶

Restorative justice practices offer outcomes not available in the criminal and juvenile justice processes.²⁷ Traditional retributive processes focus on the offender, the offense, and how the offender must be punished and pay back the state. By contrast, restorative justice practices largely focus on restitution or reparations to the victim—as an alternative to incarceration or fines to the state—and provide the offender an opportunity to make amends with the victim and community.²⁸ Through the process, the victim has control over the outcome by agreeing to certain types of restitution such as monetary compensation, an apology,²⁹ or other appropriate reparations. As discussed in more detail below,³⁰ common outcomes of restorative processes include apology statements or letters, restitution directly to the victim, return or repair of property, and community service obligations.

3. *Reintegration into the Fabric of Society*

A third underlying policy of restorative justice is the focus on reintegrating the parties back into society—both the victim and the offender. For the victim, two of the primary goals are for the victim to be made whole and to feel safe and secure again.³¹ In some cases, victims of crime have suffered significant trauma, which can cause them to

26. See Susan J. Szmania & Daniel E. Mangis, *Finding the Right Time and Place: A Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts*, 89 MARQ. L. REV. 335, 342 (2005) (“Ironically, the courtroom and public settings in which criminal defendants are expected to show remorse are also the very fora that most citizens are incapable of communicating effectively. The courtroom is a difficult and confusing environment particularly for untrained criminal defendants.”).

27. See *In re Kenroy C.*, 55 Misc. 3d 535, 541 (N.Y. Fam. Ct. 2017) (noting that a restitution award to a victim was outside the possible remedies for a youth in family court in New York, but such a remedy would have been available if the victim had chosen to take part in the available restorative justice program in the jurisdiction).

28. See GAL, *supra* note 9, at 10 (noting that under restorative justice regimes, “restitution is a preferred way of sanctioning offenders”); Kaplan, *supra* note 6, at 714 (comparing and contrasting the remedies available in the criminal justice system compared to the remedies available in a restorative justice system).

29. GAL, *supra* note 9, at 75–78 (conducting a literature review of the use of apologies in cases involving child victims); Lori Carroll, *Restoring the Weak and Victimized*, 1 INT’L J. THERAPEUTIC JURIS. 119, 124 (2016) (discussing studies demonstrating therapeutic value of restorative practices for the victims, noting that victims often feel great satisfaction from the process and considerably less hostile towards the offender following the process).

30. See *infra* section III.C.

31. John Braithwaite, *Criminal Justice that Revives Republican Democracy*, 111 NW. U. L. REV. 1507, 1520 (2017) (noting that victim parties often feel safer following completion of a restorative justice process).

withdraw from society. Through restorative processes, these victims can learn the answers to their questions, become a part of the solution, ideally feel restored and made whole, as well as reintegrate themselves back into society.³² Thus, the restorative processes must be sensitive to victims by limiting the potential of re-traumatization.³³

The programs also seek to reintegrate offenders back into society, reducing recidivism.³⁴ Offenders' active involvement creates buy-in into both the process and the outcome, and the supportive nature of the process removes some of the stigma associated with committing the offense.³⁵ Through the supportive and individual nature of restorative practices, offender parties will engage in serious reflection, restore relationships, and make better and healthier decisions when conflict arises in the future.³⁶ Furthermore, the healing that results from restorative practices allows offenders to redeem themselves and regain the trust of the community.³⁷

B. Types of Restorative Justice Processes

Restorative justice encompasses a large variety of processes dating back through most of the course of human history.³⁸ Although historical in nature, many modern restorative justice processes originated in

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32. *Id.* (reporting that victim parties who participate in restorative justice “experience reductions in post-traumatic stress disorder symptoms and feel less vengeful”).
 33. GAL, *supra* note 9, at 91–97 (discussing the potential for trauma, particularly for youth, who must participate in court proceedings as a victim). Of course, program designers must pay careful attention to the issue of re-victimization when determining the role of victim involvement. *See* BRAITHWAITE, *supra* note 15, at 139 (discussing the possibility of re-victimization during the restorative justice process).
 34. UMBREIT, *supra* note 9, at xxviii (“While denouncing criminal behavior, restorative justice emphasizes the need to treat offenders with respect and to reintegrate them into the larger community in ways that can lead them to engage in lawful behavior.”).
 35. GAL, *supra* note 9, at 11 (noting research “suggests that offenders who perceive their case as being dealt with fairly are less likely to reoffend; accordingly, it is argued that victims and offenders perceive restorative justice as fairer than criminal court processes because it involves people who support them rather than people whose role it is to stigmatize them. Therefore, restorative justice might be more effective in reducing crime.”).
 36. *See infra* section I.C (for a discussion of the empirical research supporting evidence of reintegration, particularly the recidivism rates).
 37. Gordon Bazemore, *Restorative Justice and Earned Redemption*, 41 AM. BEHAV. SCIENTIST 768 (1998).
 38. *See* 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, 530–31 (2010) (discussing the ancient and modern history of restorative justice processes).

the 1970s.³⁹ These processes can be tailored to meet the needs of individual communities, but certain processes have become more prevalent in the United States and around the world.⁴⁰ The following is a much oversimplified overview of some of the most prevalent restorative justice practices:

1. *Sentencing Circles or Peacemaking Circles*

Sentencing or peacemaking circles are a process in which the offender, victim, family members, community representatives, probation officers, and others meet in order to come to a group decision regarding the appropriate sentence for an offender.⁴¹ The participants sit in a circle (the facilitator is usually called a “circle keeper”) and the process often involves the use of a talking piece to encourage participation in an orderly manner.⁴² The goal of the process is the same regardless of the circle type—to create a platform for the participants to interact peacefully.⁴³ Sentencing circles engage everyone who was impacted by an offense, from community members to the criminal justice system, to decide an appropriate sentencing plan for the offender.⁴⁴

2. *Victim-Offender Mediation*

In victim-offender mediation, a victim and offender meet with a mediator to discuss the offense and determine how the offender can

39. Thalia González, *Reorienting Restorative Justice: Initiating a New Dialog of Rights Consciousness, Community Empowerment and Politicization*, 16 CARDOZO J. CONFLICT RESOL. 457, 458 (2015) (“Restorative justice initially emerged as an isolated initiative that, while grounded in ideas of restoring harm, was not captured as a ‘restorative justice’ concept. It is only since the late 1980s and early 1990s that a body of practices, social movements, theory-formation, ethical reflection, and empirical research has been collectively identified with the term restorative justice.”); Lode Walgave, *Investigating the Potentials of Restorative Justice Practice*, 36 WASH. U. J.L. & POL’Y 91, 94 (2011) (same); Buth & Cohn, *supra* note 4, at 3–4 (discussing the ancient and modern beginnings of restorative justice).

40. Duncan, *supra* note 4, at 274–75 (discussing the variable nature of restorative justice processes and the ability for individual communities to tailor the processes to their needs).

41. Kaplan, *supra* note 6, at 715 (defining sentencing circles as a process “in which a victim and responsible party, their friends and family, and community representatives collaborate to share their experiences and determine an appropriate sentence for a responsible party who is pleading guilty”).

42. KRISTEN M. BLANKLEY & MAUREEN A. WESTON, UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION 246–47 (2017) (discussing circle processes); Mark S. Umbreit & Marilyn Peterson Armour, *Restorative Justice Dialog: Impact, Opportunities, and Challenges in the Global Community*, 36 WASH. U. J.L. & POL’Y 65, 77–78 (2011) (discussing aspects of circle processes).

43. MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE (2010).

44. *Id.*

remedy the situation to repair the harm to the victim.⁴⁵ Victim-offender mediation is the most commonly utilized restorative practice.⁴⁶ Because this process is a form of mediation, it may be covered by local confidentiality or privilege laws.⁴⁷ In many instances, victim-offender mediation may be *part* of the overall consequences for an offender, and not a *replacement* for other appropriate sanctions, including sentencing.

3. *Victim-Offender Conferencing or Dialogue*

Victim-offender conferencing or dialogue is different than victim-offender mediation only by virtue of who participates. The terms “conferencing” or “dialogue” usually signal the involvement of participants in addition to the victim and offender.⁴⁸ Participants in victim-offender conferencing may include support personnel for the victim and offender, as well as interested community members.⁴⁹ Again, this is a process that may be part the justice system’s consequences for an offender.

4. *Family Group Conferencing*

Family group conferencing is a process that originates from New Zealand for cases involving youth (child welfare or juvenile justice).⁵⁰

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45. Jennifer Gerarda Brown & Liana G. T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 289 (2012) (“Beginning in the 1970s, victim offender mediation (“VOM”) was perhaps the first restorative process to find widespread adoption in western, industrialized cultures. As the name implies, the parties to these mediations are quite limited; the typical participants are the victim, the offender, and a mediator.”).
 46. Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 673 (2005) (noting that as of 2005, almost 400 victim-offender mediation programs were active in the United States) [hereinafter Reimund I].
 47. Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401 (2004) (discussing many of the legal and contractual complexities surrounding victim-offender mediation and cautioning that protections for restorative justice conversations may be jurisdiction specific).
 48. See, e.g., Garvey, *supra* note 4, at 312 (discussing the differences between mediation and conferencing).
 49. See Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1105 (2008) (“Discussion of what took place, who was affected and what must be done to make things right happens in a group comprising the victim, the offender, their supporters and the police mediator.”); Lorenn Walker & Hon. Leslie A. Hayashi, *Pono Kaulike: A Pilot Restorative Justice Program*, HAW. B. J., May 2004, at 4, 10 (“A Restorative Conference occurs when the defendant, victim, and supporters of both parties meet in a group. The group discusses how each member has been affected by the wrongdoing and how the harm may be repaired.” (emphasis omitted)).
 50. See Reimund I, *supra* note 46, at 676–77 (reporting that, as of 2005, ninety-four jurisdictions utilized family group conferencing in matters involving juveniles);

Often, a family group conference uses a facilitator to bring together parents, case workers, children (as appropriate), extended family members, guardians, lawyers, and other professionals to make decisions on issues such as living arrangements for a child (in child welfare) or repairing the harm in a juvenile offense.⁵¹ Facilitators conduct extensive preparations with all of the participants prior to bringing them all together in a meeting.⁵² The pinnacle of the family group conference is private family time, during which the family meets on its own to try to reach a consensus plan in the best interests of the youth.⁵³ The facilitator's preparation with the individuals and the group is essential for a successful conference. In child welfare cases, successful cases usually involve temporary placement of the children with extended family instead of formal foster care and an action plan for parental reunification.

5. *Problem-Solving Courts*

Problem-solving courts are specialized court programs that are focused on specific issues or specific populations.⁵⁴ Problem-solving courts focus on treatment and rehabilitation as opposed to incarceration.⁵⁵ These types of interventions are primarily rooted in the theo-

Robert Victor Wolf, *Promoting Permanency: Family Group Conferencing at the Manhattan Family Treatment Court*, 4 J. CENTER FOR FAM., CHILD. & CTS. 133, 134 (2003) (describing the use of family group conferences in both juvenile justice and child welfare cases).

51. See Jennifer Michelle Cunha, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT'L L. REV. 283, 285–86 (1999) (describing essential elements of family group conferencing); Laverne F. Hill, *Family Group Conferencing: An Alternative Approach to the Placement of Alaskan Native Children Under the Indian Child Welfare Act*, 22 ALASKA L. REV. 89 (2005) (discussing the use of family group conferences in child welfare cases in Alaska).
52. Hill, *supra* note 51, at 98 (discussing the preparation phase of the family group conferencing process).
53. See King, *supra* note 49, at 1104 (noting the use of private family time in family group conferencing, and noting that this is one of the distinctive characteristics of the process); Hill, *supra* note 51, at 90 (noting the acceptance and implementation of plans decided by families during the private family time).
54. See Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1055–56 (2003) (“The new courts, increasingly known as problem solving courts, are specialized tribunals established to deal with specific problems, often involving individuals who need social, mental health, or substance abuse treatment services. These courts also include criminal cases involving individuals with drug or alcoholism problems, mental health problems, or problems of family and domestic violence.”); Sorey Shdaimah, *Taking a Stand in a Not-So-Perfect World: What’s a Critical Supporter of Problem-Solving Courts to Do?*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 89, 89–91 (2010) (providing a background of problem-solving courts).
55. Winick, *supra* note 54, at 1060 (“The new problem solving courts are all characterized by active judicial involvement, and the explicit use of judicial authority to

ries of therapeutic justice,⁵⁶ but they are also restorative in nature, particularly relating to accountability of the offender, rehabilitation, and restoring the offender back into society.⁵⁷

6. *Truth Commissions*

Perhaps the most well-known “truth commission” is the Truth and Reconciliation Commission established after the abolition of apartheid in South Africa. The purpose of truth commissions is restorative—the victim and offender share information, and punishment is personalized to the situation.⁵⁸ Unlike many other types of restorative justice, truth commissions are public.⁵⁹

C. Established Success of Restorative Justice Practices

Although restorative processes are not without critiques and detractors,⁶⁰ they have largely proven successful when measured against a large number of criteria.⁶¹ Notably, most restorative justice

motivate individuals to accept needed services and to monitor their compliance and progress.”)

56. *Id.* at 1066–67 (discussing therapeutic justice concepts underlying restorative justice); Deborah Chase & Hon. Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 *FAM. CT. REV.* 209, 209–10 (2009) (same).
57. See David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 *IOWA L. REV.* 1473, 1504 (2014) (“These courts appear to be the very embodiment of the rehabilitative ideal. Rather than seeking to punish and incapacitate criminals, problem-solving courts aim to address the deeper social issues that underlie many criminal cases by providing various services and incentives for defendants to improve their lives and avoid recidivating.”).
58. See Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 *ANN. REV. L. & SOC. SCI.* 161, 169 (2007) (summarizing research on various truth commissions across the world).
59. See, e.g., Heather Parker, *Truth and Reconciliation Commissions: A Needed Force in Alaska?*, 34 *ALASKA L. REV.* 27, 31–34 (2017) (providing background on truth commissions).
60. See, e.g., Luzon, *supra* note 7, at 583 (expressing concern about admissions of guilt, particularly if restorative processes run parallel to criminal processes); Brown, *supra* note 19, at 1303 (concluding that restorative practices were not appropriate absent compelling and rigorous empirical evidence to the contrary); BRAITHWAITE, *supra* note 15, at 137–68 (dedicating a chapter of his book to the “Worries About Restorative Justice” and discussing potentially negative consequences to the process); Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 *CORDOZO J. CONFLICT RESOL.* 85, 86–87 (2006) (arguing that, by the mid-2000s, restorative justice programs were not held to sufficient accountability standards).
61. See, e.g., JOANNA SHAPLAND ET AL., *RESTORATIVE JUSTICE IN PRACTICE* 139–78 (2011) (describing the success in the eyes of both the victims and the offenders across multiple adult restorative justice programs in the United Kingdom); GAL, *supra* note 9, at 123–48 (reviewing literature from New Zealand, England, Australia, and other places that have largely shown positive outcomes); BRAITHWAITE, *supra* note 15, at 69 (“There do seem to be empirical grounds for optimism that restorative justice can ‘work’ in restoring victims, offenders, and

programs record good satisfaction levels of both offenders and victims.⁶² Empirical evidence demonstrates that restorative justice processes empower all parties.⁶³ Most studied programs show reduced recidivism rates for the offender.⁶⁴ Many theories exist for why these processes are so successful. The most consistent theories are the procedural justice theory (i.e., that participants feel like they are being treated fairly during the process)⁶⁵ and the theory of rehabilitation.⁶⁶

Past research demonstrates that many of the best established restorative justice practices evince successful “evidence-based” practices.⁶⁷ The label of evidence-based is particularly important for grant funders, governments, and others who fund programs. As Nebraska implemented its pilot program, it considered practices that had worked in the past, and the initial data on the program is detailed below.⁶⁸

communities.”); Thalia González, *Restorative Justice From the Margins to the Center: The Emergence of a New Form of School Discipline*, 60 *How. L.J.* 267, 279 (2016) (discussing a significant reduction in suspension days through using restorative processes in school discipline); Strang & Sherman, *supra* note 23, at 25 (“Increasing empirical evidence shows substantial benefits of restorative justice, with benefits outweighing the harms. The evidence now covers three continents over two decades.”).

62. *Id.*; UMBREIT, *supra* note 9, at xlv (discussing studies showing high levels of satisfaction among participants in restorative justice processes); Walgrave, *supra* note 39, 107 (“Satisfaction is one of the most general and stable findings. In general, victims’ satisfaction rates vary between 75 and 98 percent.”).
63. González, *supra* note 39, at 466 (“From an empirical standpoint it captures how restorative justice empowers people.”); Walgrave, *supra* note 39, at 106 (discussing willingness of victims to participate, and noting that participation is generally higher in cases involving juveniles).
64. BRAITHWAITE, *supra* note 15, at 69 (“[W]e have found that restorative justice shows great promise as a strategy of crime reduction.”); Walgrave, *supra* note 39, at 109–13 (discussing the generally good, but not wholly consistent, results in recidivism rates); Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 *HASTINGS RACE & POVERTY L.J.* 201, 208 (2010) (discussing reduced rates of recidivism in restorative justice programs); Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, 2003 *UTAH L. REV.* 439, 441 (2003) (noting that recidivism rates are generally good in restorative justice programs, even if restorative justice may have other failings).
65. BRAITHWAITE, *supra* note 15, at 78–79 (discussing the role of the procedural justice theory in restorative justice); Walgrave, *supra* note 39, at 120 (“The characteristics of a restorative justice meeting offer better conditions for the stakeholders to feel such procedural justice than traditional court proceedings.”).
66. *Id.* at 95–97 (discussing the role of rehabilitation in the success of restorative justice).
67. Mark S. Umbreit, et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 *CARDOZO J. CONFL. RESOL.* 511, 531–50 (2007) (providing an overview of studies lending credence to the claim that restorative processes are “evidence based”).
68. *See infra* sections III.B and III.D.

D. Authority to Engage in Restorative Justice Processes

By and large, courts have wide-ranging authority to require juvenile and criminal offenders to participate in restorative processes.⁶⁹ Many jurisdictions contemplate restorative processes by statute.⁷⁰ In addition to courts, cases can be referred to restorative justice by probation officers, prosecutors, police, community advocates, or other attorneys.⁷¹ Restorative processes can take place at any time in the life of a case, from pre-diversion to post-conviction, depending on the goals of the program.

When restorative practices are recommended by prosecutors or probation officers, courts by and large affirm those recommendations.⁷² As with other conditions of probation, diversion, or similar programs, a person may suffer consequences for failure to participate or complete the process.⁷³ Some courts may consider a participant's willingness to acknowledge fault prior to requiring a youth or an offender to participate in a restorative process.⁷⁴

II. HISTORY OF RESTORATIVE PRACTICES IN NEBRASKA

Nebraska has a long history of using restorative justice processes. This section gives an overview of three prominent restorative justice programs in Nebraska, but only scratches the surface in this area. Although these programs serve different communities, they share the

69. *State v. Manning*, 177 A.3d 513, 521 (Vt. 2017) (holding the trial court properly included a referral to a restorative justice program as a condition of probation, despite the defendant's insistence at trial and sentencing of his innocence); *State v. Hernandez*, No. C2-00-1039, 2000 WL 1528665 (Minn. Ct. App. Oct. 17, 2000) (affirming a sentence that included victim-offender mediation as a condition).

70. *See, e.g.*, 28 VT. STAT. ANN. tit. 28, § 2a (2018) (Restorative Justice); OR. REV. STAT. § 161.398 (2017) (restorative justice program for offenders found not guilty by reason of insanity); COLO. REV. STAT. ANN. § 13-3-116 (West 2017) (creating a restorative justice coordinating council); MASS. GEN. LAWS ANN. 276B § 2 (2018) (community-based restorative justice); MINN. STAT. § 609.092 (2016) (juvenile restorative justice); W.VA. CODE § 49-4-725 (2015) (restorative justice programs); FL. STAT. ANN. § 985.155 (West 2012) (neighborhood restorative justice); ALA. CODE § 45-28-82.25 (2013) (restorative justice initiative).

71. Gabbay, *supra* note 60, at 89 (discussing referral sources).

72. *See, e.g.*, *State v. Blais*, No. C1-00-1100, 2000 WL 1778385, at *3 (Minn. Ct. App. Nov. 21, 2000) (affirming the trial court's significant departure from the presumptive sentence, based in part, on defendant's completion of a restorative justice program).

73. *See, e.g.*, *State v. J.S.*, 189 A.3d 552 (Vt. 2018) (affirming the lower court's revocation of the youth's probationary status for failing to meet conditions of probation, including participating in a restorative justice program).

74. *See, e.g.*, *Watkins v. Bd. of Ed. of Harmony-Edge Sch. Dist. #175*, No. 5-17-0151, 2018 WL 1358947 (Ill. App. Ct. Mar. 13, 2018) (finding that a hearing board correctly determined that a restorative justice process was not appropriate in a workplace sexual harassment case when the offender party refused to acknowledge any wrongdoing).

same core values identified in the previous section. The new program in victim-youth conferencing is part of a history of supporting restorative practices, particularly for youth.

A. Family Group Conferencing

Nebraska began implementing family group conferencing (FGC) in the 1990s.⁷⁵ In 2008, Nebraska codified the practice and allowed juvenile courts to order FGCs in appropriate cases.⁷⁶ Under Nebraska law, a family group conference is a “facilitated meeting” involving the youth’s “family, the child or juvenile when appropriate, available extended family members from across the United States, other significant and close persons to the family, service providers, and staff members” from either the Department of Health and Human Services or the Office of Probation Administration “to develop a family-centered plan for the best interests of the child and to address the essential issues of safety, permanency, and well-being of the child.”⁷⁷ Between 2001 and 2017, Nebraska mediation community centers conducted 3,154 family group conferences.⁷⁸ During this time, only mediation centers conducted FGCs, so the 3,154 figure likely captures all of the cases occurring in the state over the sixteen year period.

Given the extensive nature of the family group conferences, Nebraska courts also utilize other, more simplified conferencing procedures. In some counties, courts utilize a conference procedure shortly after the point of removal (termed a “pre-hearing conference”).⁷⁹ Statewide, the community mediation centers conduct between 550 and 600 pre-hearing conferences each year.⁸⁰ Other conferencing in the child welfare arena includes conferencing (1) prior to the twelve month permanency review hearing (termed “pre-hearing permanency review” conference or “PHPR”), (2) shortly before a termination of parental rights (termed “termination of parental rights conference” or “TPR conference”), and (3) when a youth is at risk for removal either for child welfare or probation purposes.⁸¹

75. NEBRASKA OFFICE OF DISPUTE RESOLUTION, COLLABORATIVE CHILD WELFARE PRACTICES, 1 (2017), available at https://supremecourt.nebraska.gov/sites/default/files/Programs/mediation/CW_JJ/NE.ODR.CWCP_8-2017.pdf (last visited May 16, 2018) [<https://perma.unl.edu/F5ZT-NUCJ>].

76. NEB. REV. STAT. § 43-247.03(1) (Reissue 2016) (“In any juvenile case, the court may provide the parties the opportunity to address issues involving the child’s care and placement, services to the family, restorative justice, and other concerns through facilitated conferencing or mediation.”).

77. NEB. REV. STAT. § 43-247.03(2)(b) (Reissue 2016).

78. NEBRASKA OFFICE OF DISPUTE RESOLUTION, *supra* note 75.

79. *Id.*

80. *Id.*

81. See NEB. REV. STAT. § 43-247.03(1) (Reissue 2016) (“Facilitated conferencing may include, but is not limited to, prehearing conferences, family group conferences, expedited family group conferences, child welfare mediation, permanency pre-

B. Victim-Offender Mediation

Similarly, victim-offender mediations have occurred in Nebraska since at least the 1990s. Political and financial support for victim-offender mediation has ebbed and flowed over the years. In cases involving juveniles, the Nebraska Legislature codified the ability for county attorneys to recommend that a youth participate in a victim-offender mediation as early as 1998.⁸² In 2003, the legislature passed a statute allowing victim-offender mediation as part of a diversion program for juveniles.⁸³ The law also established training requirements for victim-offender mediators.⁸⁴ To date, all of the statutory authority for victim-offender mediation relates to juvenile, not adult, offenders.

While available statewide through the regional mediation centers, Nebraska's victim-offender mediation programs have been largely county-specific.⁸⁵ Some individual counties and school districts have found the process helpful, but sustaining these programs has proved difficult. Another problem in this area is the reality that many of the referrals are school, counselor, or teacher specific. When decisions to participate are left to the discretion of so few people, personnel changes can have a tremendous effect on referrals. The program described below is working to institutionalize victim-offender conferencing across Nebraska for more consistent use through stable funding and programming.

hearing conferences, termination of parental rights prehearing conferences, and juvenile victim-offender dialogue.”); NEBRASKA OFFICE OF DISPUTE RESOLUTION, COLLABORATIVE CHILD WELFARE PRACTICES (MEDIATION) (2017), https://supreme.court.nebraska.gov/sites/default/files/Programs/mediation/CW_JJ/NE_Juvenile_collaborative_practices_-_rev_061214_updated_8-2017.pdf (last visited May 16, 2018) [<https://perma.unl.edu/2D38-ATWK>].

82. NEB. REV. STAT. § 43-274(3)(a) (Reissue 2016 & Cum. Supp. 2018). The Nebraska Legislature protects juveniles in these proceedings, including the sealing of records relating to victim-offender mediation. NEB. REV. STAT. § 43-2,108.03(4) (Reissue 2016) (“Upon receiving notice under subsection (1), (2), or (3) of this section, the government agency or court shall immediately seal all records housed at that government agency or court pertaining to the citation, arrest, record of custody, complaint, disposition, diversion, or mediation.”); *see also* NEB. REV. STAT. § 43-247.03 (Reissue 2016) (providing that victim-offender mediation is confidential).
83. NEB. REV. STAT. § 43-260.06 (Reissue 2016) (discussing juvenile diversion agreements and their contents); NEB. REV. STAT. § 43-276(1) (Reissue 2016) (allowing a county attorney or city attorney to recommend victim-offender mediation in appropriate juvenile cases).
84. NEB. REV. STAT. § 43-245(15) (Reissue 2016) (specifying that mediators who mediate juvenile victim-offender mediations must complete the required “thirty hours” of basic mediation training, “eight hours of juvenile offender and victim mediation training,” and meet an apprenticeship requirement).
85. *See* Elizabeth R. Kozier, *Mediation in Nebraska: An Innovation Past, a Spirited Present, and a Provocative Future*, 31 CREIGHTON L. REV. 183, 198–99 (1997) (describing the sporadic nature of victim-offender mediation in Nebraska).

C. Problem-Solving Courts

More recently, Nebraska has developed, and continues to develop, specialized courts, known as “problem-solving courts.” The Nebraska Supreme Court Committee on Problem-Solving Courts was established in 2000.⁸⁶ Nebraska law authorized problem-solving courts beginning in 2004, when the Legislature found and “declare[d] that problem solving courts, including drug, veterans, mental health, driving under the influence, reentry, and other problem solving courts, are effective in reducing recidivism of persons who participate in and complete such courts.”⁸⁷ The problem-solving courts focus on treatment when the offender has issues with substance abuse or mental health issues.⁸⁸ Since 2000, the State has established drug courts, mental health courts, veterans’ courts, and re-entry courts.⁸⁹

The most populous communities across the state have problem-solving courts, with at least one in each of Nebraska’s twelve judicial districts.⁹⁰ Adult drug courts are the most common problem-solving courts, but some of the larger counties also have veterans’ courts, family drug courts, and juvenile drug courts.⁹¹ Over the last decade, the State’s problem-solving courts have engaged in strategic planning and outlining best practices to help ensure the success of these programs.⁹²

86. NEBRASKA SUPREME COURT COMMITTEE ON PROBLEM-SOLVING COURTS, <https://supremecourt.nebraska.gov/nebraska-supreme-court-committee-problem-solving-courts> (last visited May 16, 2018) [<https://perma.unl.edu/Z6JK-YT8Z>].

87. NEB. REV. STAT. § 24-1301 (Reissue 2016 & Cum. Supp. 2018) (legislative findings); *see also* NEB. CT. R. § 6-1202 (2019) (establishing rules for “programs established for the treatment of problems related to issues such as substance abuse, mental health, and domestic violence”).

88. NEB. REV. STAT. § 29-2246(12) (Reissue 2016) (discussing non-probation-based programs or services); NEB. CT. R. § 6-1206 (2019) (“[P]roblem-solving courts” means a postplea or postadjudicatory intensive supervision treatment program for eligible individuals. The purpose of the program is to reduce recidivism by fostering a comprehensive and coordinated court response composed of early intervention, appropriate treatment, intensive supervision, and consistent judicial oversight.”).

89. NEB. REV. STAT. § 24-1302 (Reissue 2016) (setting forth the legislative intent for establishing problem solving courts); NEB. CT. R. § 6-1208 (2019) (requiring best practice standards for Nebraska Drug Courts, Nebraska Veterans Treatment Courts, and Nebraska Reentry Courts).

90. NEBRASKA SUPREME COURT, NEBRASKA PROBLEM-SOLVING COURTS STATEWIDE MAP, https://supremecourt.nebraska.gov/sites/default/files/Programs/psc/psc_map.jpg (last visited May 20, 2018) [<https://perma.unl.edu/NJ2J-MSGX>].

91. *Id.*

92. ADMINISTRATIVE OFFICE OF THE COURTS/PROBLEM-SOLVING COURTS, 2013–2017 STRATEGIC PLAN FOR NEBRASKA PROBLEM-SOLVING COURTS (2012), <https://supremecourt.nebraska.gov/sites/default/files/psc-strat-plan-approved-nov-2012.pdf> (last visited May 20, 2018) [<https://perma.unl.edu/4SSW-XFZH>]; NATIONAL CENTER FOR STATE COURTS, NEBRASKA ADULT DRUG COURT AND DUI COURT BEST PRACTICE STANDARDS (2016), <https://supremecourt.nebraska.gov/sites/default/>

III. NEW VICTIM-YOUTH CONFERENCING INITIATIVES IN NEBRASKA

Given this background, this Article next details a new restorative justice program in Nebraska dealing with youth offenders across the state. Following a successful pilot program, these services embarked on a statewide rollout in January 2018. Building upon the incremental early work in victim-offender mediation, this program is dedicated to obtaining sustainability in referrals, funding, and integration into the juvenile justice arena.

This section provides a comprehensive overview of the victim-youth conferencing pilot program that began in 2015 through community mediation centers in Lincoln, Omaha, and Scottsbluff. Following a description of the program, this section reports on the evaluations completed to date regarding the successes and challenges of the program.

A. Victim-Youth Conferencing in Nebraska

One of the first decisions made by the program was the name of the process. Although some parts of Nebraska had utilized *victim-offender mediation* in the past, this program utilized a different name—*Victim-Youth Conferencing* (VYC). The program is defined as a:

[D]ialogue between a youth, victim (or victim surrogate), family and other support persons who come together during a joint conference to discuss how the crime affected each of them. This allows the victim to express themselves to the youth, and the youth to understand the full impact of their decision.⁹³

Two items are particularly noteworthy about the name of this program. First, the program utilizes the conferencing model, as opposed to the stricter mediation model. As the definition notes, the process is a “conference” or “dialogue” because of the inclusion of family, community, and support personnel.⁹⁴ In addition, the program does not use the word “offender”; instead, it uses the term “youth.” Although the youths in the program have been involved with chargeable offenses, the program name does not label the involved youths as offenders.⁹⁵

files/Programs/psc/Nebraska_Adult_Drug_and_DUI_Courts_Best_Practice_Standards_Revised_11-16.pdf (last visited May 20, 2018) [https://perma.unl.edu/D487-SWUQ]; NEBRASKA SUPREME COURT ADMINISTRATIVE OFFICE OF THE COURTS AND PROBATION, NEBRASKA VETERANS TREATMENT COURTS BEST PRACTICE STANDARDS (2016), https://supremecourt.nebraska.gov/sites/default/files/Programs/psc/Nebraska_Veterans_Treatment_Court_Best_Practice_Standards.pdf (last visited May 20, 2018) [https://perma.unl.edu/6NA2-Y7DC].

93. STATE OF NEBRASKA JUDICIAL BRANCH, RESTORATIVE JUSTICE, <https://supremecourt.nebraska.gov/programs-services/mediation/restorative-justice> (last visited May 21, 2018) [https://perma.unl.edu/ER7M-UZNW].

94. See *infra* subsection III.A.3.

95. Given the prevalence of the phrase “victim-offender mediation” historically and in the literature, this Article has used those terms up to this point. From this

1. Case Sources

To date, the Nebraska Office of Dispute Resolution's (ODR) six approved, regional mediation centers have administered all of the state's VYC cases.⁹⁶ The process primarily utilizes adult facilitators, although youth facilitators are slowly being introduced as co-facilitators at some of the centers. The facilitators are truly neutral because they are affiliated with the mediation centers, and are not school personnel or court officers.

Nebraska's ODR sought, and was awarded, grant funding to support the mediation centers in the administration and implementation of the program.⁹⁷ Such partnerships between the state and the mediation centers are possible under the 1991 Nebraska Dispute Resolution Act.⁹⁸ These community mediation centers reach every county across Nebraska to provide affordable mediation services to all citizens.⁹⁹

Cases in Nebraska's VYC program can be broadly classified into three distinct tiers.¹⁰⁰ Tier one includes pre-court referrals from the County Attorneys' offices after a school-based incident and usually involving a citation from law enforcement, tier two includes court diversion referrals from County Attorneys or Courts' pre-adjudication, and tier three includes court adjudicated cases referred by the courts for youth with or without probation. The three tiers can be generally summarized into three different sources: (1) schools, (2) the county attor-

point forward, this Article purposefully shifts to the use of the term "youth" or "youth who committed harm" to mirror the language that is used in the new program. This Article will retain the phrase "victim-offender" when citing to other sources that continue to use that terminology.

96. NEBRASKA OFFICE OF DISPUTE RESOLUTION, VYC FACT-SHEET WITH STATISTICS AND BASIC INFORMATION 2 (2017), https://supremecourt.nebraska.gov/sites/default/files/Programs/mediation/NE_VYC_Fact_Sheet_dd_rev_Oct_2017.pdf (last visited May 21, 2018) [<https://perma.unl.edu/8N29-AE6C>] [hereinafter VYC FACT-SHEET].
97. *See infra* subsection III.A.2.
98. NEB. REV. STAT. § 25-2901 et seq. (Reissue 2016) (creating the legal framework for partnerships between the then-newly-created Office of Dispute Resolution and non-profit community mediation centers throughout the state). For a map of the six approved community mediation centers and their service areas see NEBRASKA SUPREME COURT, NEBRASKA MEDIATION CENTER REGIONS <https://supremecourt.nebraska.gov/programs-services/mediation/odr-approved-mediation-centers> (last visited May 21, 2018) [<https://perma.unl.edu/2W3K-ES26>].
99. NEB. REV. STAT. § 25-2910 (Reissue 2016) ("A person shall not be denied services solely because of an inability to pay the fee."); *see also* Kozier, *supra* note 85, at 186 (describing the relationships between Nebraska Office of Dispute Resolution and the approved community mediation centers).
100. NEBRASKA ODR-APPROVED MEDIATION CENTER STATISTICAL REPORTS, VICTIM YOUTH CONFERENCING (VYC) CUMULATIVE STUDY (2018) [hereinafter 2018 CUMULATIVE STUDY] (on file with authors).

ney (usually as a component of diversion), and (3) judges (as a term of probation).¹⁰¹ Each referral source is discussed in turn.

a. Schools

Schools are a natural referral source for VYC cases. Dean Jennifer Brown and attorney Liana Wolf noted that “[s]chools, for example, provide particularly fertile ground for restorative justice principles. Introducing children to restorative justice at a young age can help to foster restorative approaches in the broader context of general social control.”¹⁰² Schools have jurisdiction to refer cases to mediation when the offense occurs on school grounds and during the school day. The types of offenses that occur at school may include bullying, assaults, property destruction, vandalism, and thefts.¹⁰³ When an offense occurs at school, often both the offender and the victim are youths (but not always). In the examples at the beginning of this Article, all three cases involved youth-on-youth incidents. Two of the three examples would be considered “school” cases; Jeremy committed an assault on school property and Ashlie’s vandalism of the boy’s car also occurred on school property.

During the pilot program (and to this date), Lincoln Public Schools has had the most robust referral program. During the initial pilot project, Lincoln Public Schools referred approximately twenty of the ninety-three cases statewide to The Mediation Center in Lincoln, Nebraska.¹⁰⁴ Coincidentally, The Mediation Center was not originally

101. VYC FACT-SHEET, *supra* note 96, at 2 (reporting that cases can be referred to the centers from “1. Schools (pre-arrest/pre-charge), 2. Law Enforcement (diversion), 3. County Attorneys (diversion), 4. Courts (pre-adjudication), 5. Probation (condition of court sentence), 6. Post-sentencing (for severe crimes)”).

102. Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 287 (2012) (“Restorative processes have been implemented to deal with bullying, drugs, property theft, bomb threats, and disrespectful behavior—all to repair the harm that has been done to an individual and to the school community.”); *see also* Brenda Morrison, *Schools and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 325 (Gerry Johnstone & Daniel W. Van Ness, eds. 2007) (describing the history of restorative justice in schools). A school-based restorative justice program in Oakland was so successful that the school district noticed behavioral changes across the student body as a response to the program. González, *supra* note 61, at 288–89.

103. *See* Morrison, *supra* note 102, at 326. In her chapter, Professor Morrison notes that early research on school conferencing shows “encouraging” results, but she noted some inadequacies of the research methods and expressed concern about tension among restorative justice policies and practices in these programs. *Id.* at 334–37 (discussing “community conferencing”).

104. Jennifer Blevins, *Juvenile Victim Offender Conferencing Pilot Program: A Year in Review, Evaluation of the Pilot First Year for the Office of Dispute Resolution*, 17 (Nov. 2016), https://supremecourt.nebraska.gov/sites/default/files/Programs/mediation/CW_JJ/nebraska_juvenile_voc_evaluation_report_11.15.16.pdf (last visited May 23, 2018) [<https://perma.unl.edu/9R5P-MYDT>].

chosen to be one of the pilot sites, but Lincoln Public Schools independently began a relationship with The Mediation Center to work on youth cases, so ODR added the Lincoln center to the pilot program.¹⁰⁵ The program with Lincoln Public Schools is called Project Restore (originally called Project Success),¹⁰⁶ and youth without a prior record between the ages of twelve and fifteen are eligible, provided that the offense does not include “sexual assault, serious injury or gangs.”¹⁰⁷ Given the qualifying ages for youth to participate in the program, The Mediation Center worked with both middle and high school youth across the city of Lincoln.

Although Project Restore cases originate in the schools, the schools do not make the referrals. Project Restore is a collaborative project with the Lancaster County Attorney’s Office,¹⁰⁸ and during the evaluation of the pilot program, the researcher considered Project Restore cases as County Attorney referred.¹⁰⁹ What that means for Ashlie is that although the offense occurred on school property, the police and

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105. Margaret Reist, *Project Helps Young People Find Solutions to keep Them Out of Court System*, LINCOLN J. STAR (May 19, 2017), http://journalstar.com/news/local/education/project-helps-young-people-find-solutions-to-keep-them-out/article_339adb63-f85d-5b99-848b-0fc4247bd1f4.html (last visited May 23, 2018) [<https://perma.unl.edu/786A-QVWZ>]. At the same time that the State of Nebraska began looking at VYC processes, Lincoln Public Schools was looking at alternatives to addressing racial disparities in juvenile offenses, as well as ways to hold youth accountable for offenses without incentivizing students dropping out. *Id.*
106. The Project Restore program is modeled after the School-Justice Partnership Model developed by the Honorable Judge Steven Teske of Clayton County, Georgia. See generally NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, DEVELOPING A MEMORANDUM OF UNDERSTANDING (MOU) FOR SCHOOL-JUSTICE PARTNERSHIPS: TECHNICAL ASSISTANCE TOOLS, available at http://www.ncjfcj.org/sites/default/files/Toolkit_for_Creating_an_MOU_Clayton_County_School-Justice_Toolkit.pdf [<https://perma.unl.edu/FU7U-Y3SZ>].
107. *Id.* Since its inception, Project Restore has increased the eligibility of students who can participate, allowing for more high school youth to participate.
108. *Id.* Across Nebraska, County Attorneys are the primary referral source for any juvenile diversion referral. For instance, in 2016, County Attorneys referred 3,584 youths to various diversion services, which constituted 91% of the total number of youths referred to diversion services. DARRELL FISHER & AMY HOFFMAN, NEB. CRIME COMM’N, JUVENILE DIVERSION IN NEBRASKA: 2016 ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE, at 5 (2017) [hereinafter CRIME COMMISSION REPORT], available at <https://ncc.nebraska.gov/sites/ncc.nebraska.gov/files/doc/2016-Diversion-Report.pdf> (last visited Aug. 17, 2018) [<https://perma.unl.edu/2P6L-WVC9>].
109. Blevins, *supra* note 104, at 17 (showing a graphic with referral sources, and referring to this group of cases as “County Atty - Project Success”). The involvement of the county attorney is not uniform in pre-diversion programs across the country. For example, Fairfax County, Maryland, home to the nation’s tenth largest school district, utilizes police officer referrals to the program, and youth do not have contact with a prosecuting attorney if they successfully complete the process. Megan G. Johnson & David T. Deal, *Working Together for Youth: Multi-Agency Integration of Restorative Justice Programming*, ACRESOLUTION MAG., Winter 2017, at 30 (describing the referral process).

the Lancaster County Attorney will be notified, and the County Attorney will determine whether or not she qualifies for the program. Although technically not “diversion,” the program serves the same function as diversion, and the youth will avoid prosecution by completing this program.

During the pilot project, the only school referrals came through Project Restore. Lincoln Public Schools generally considers the program successful to date,¹¹⁰ and the ODR expressed hope that additional school districts would consider using this model to deal with offenses occurring on school property.¹¹¹ Because as many as one-third of juvenile arrests originate from incidents occurring at school, the school districts and mediation centers are natural partners in this venture.¹¹²

b. *Diversion*

The second referral source is also from the county attorneys, but these referrals are in a formal diversion program.¹¹³ If a youth completes a diversion program, then the county attorney will not press charges.¹¹⁴ Youth diversion programs can encompass any number of services, and the programs are generally considered quite successful.¹¹⁵ Nebraska law authorizes county attorneys to establish and re-

110. Reist, *supra* note 105 (“Because of the success of the program—93 percent of the cases completed resulted in agreements by the young offenders to make amends to their victims—state court officials hope to take the broader program statewide.”).

111. *Id.* (“Project Restore works with students before they land in juvenile court, and because of its success—as well as similar projects in other states—[Deborah] Denny [Director of the Office of Dispute Resolution] said she would like to see other counties reach out to schools.”).

112. *Id.* (“Because a third of the arrests stemmed from incidents at school, that’s where officials focused their efforts.”).

113. See CRIME COMMISSION REPORT, *supra* note 108, at 5.

114. Black’s Law Dictionary defines “diversion program” as follows:

1. A pretrial program that refers certain criminal defendants, esp. youth offenders and first-time offenders, to rehabilitative community programs, the charges being placed on hold until, and ultimately reduced or dismissed after, benchmarks such as counseling for mental health, drug abuse, or employment are met. . . . 2. A community-based program or set of services designed to prevent the need for court intervention in matters of child neglect, minor juvenile delinquency, truancy, or incorrigibility. Sustained by government funding, the program provides services quickly and in a nonadversarial manner so that there is no need for a formal court trial.

Diversion program, Black’s Law Dictionary (10th ed. 2014).

115. See, e.g., Cheri Panzer, *Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community’s Involvement*, 18 J. JUV. L. 186 (1997) (“These pre-trial diversionary programs have been shown to be effective and potentially low cost alternatives to the traditional juvenile justice system in reducing juvenile recidivism.”); S’Lee Arthur II Hinshaw, *Juvenile Diversion: An Alternative to Juvenile Court*, 1993 J. DISP. RESOL. 305, 315 (1993) (“There is not one ‘best’ way to

fer cases to juvenile pretrial diversion, including restorative justice programs.¹¹⁶ The Nebraska Legislature indicated that the goals of a juvenile pretrial diversion program include giving youth alternatives to court, reducing recidivism, reducing caseloads for the judiciary, and promoting the collection of restitution.¹¹⁷ Nebraska law requires that the county attorney maintain program data and report annually to the state Director of Juvenile Diversion Programs.¹¹⁸

When the pilot program began, the ODR and community mediation centers expected probation offices to be the primary stakeholders and referral sources.¹¹⁹ Through early meetings with Douglas County (i.e., Omaha) agencies, “it was determined that diversion programs through the county attorneys’ office were essential front-end referral sources.”¹²⁰ In the initial pilot program, only 6% of cases came into the program from diversion.¹²¹ These referrals, however, have increased following the conclusion of the pilot program in certain counties throughout the State.

Returning to the cases in the introduction, Katie’s case would be referred to VYC through either a diversion program or a probation program. Katie’s offense of personal and property damage occurred off school property, and the police were called to her friend’s house.

c. Probation

In contrast to diversion referrals, referrals from probation are post-adjudication referrals, meaning that the youth has gone through the juvenile justice system and either pled guilty or was found guilty of a criminal offense.¹²² The courts must approve the placement of the ju-

divert youths. The diversion program into which a juvenile is placed depends upon the youth and upon the objectives of the diversion. For diversion to be particularly useful, several diversion alternatives should be available.”)

116. NEB. REV. STAT. § 43-260.02 (Reissue 2016) (“A county attorney may establish a juvenile pretrial diversion program with the concurrence of the county board.”); NEB. REV. STAT. § 43-260.04 (Reissue 2016) (noting discretion of the county attorney in determining which cases are eligible for diversion, and giving criteria on which county attorneys may consider in exercising such discretion); NEB. REV. STAT. § 43-260.06 (Reissue 2016) (listing the types of terms and programs that are available for youth pretrial diversion, including writing apology letters, attending educational programs, attending school, and participating in victim-youth conferencing).

117. NEB. REV. STAT. § 43-260.03 (Reissue 2016) (titled “Juvenile pretrial diversion programs; goals”).

118. NEB. REV. STAT. § 43-260.07 (Reissue 2016).

119. Blevins, *supra* note 104, at 17.

120. *Id.*

121. *Id.*

122. Patricia Lee Madison, *Note: The Constitutionality of Probation Conditions That Allow For Electronic Searches of Juvenile Probationers*, 40 T. JEFFERSON L. REV. 171, 177–78 (2018) (discussing the purposes and laws of juvenile probation).

venile on probation and the terms of the probation.¹²³ Under Nebraska law, the courts have the power to require any juvenile to participate in victim-youth dialogue.¹²⁴

In the pilot program, the largest percentage of cases arose from “courts/probation,” which is a somewhat ambiguous category of cases.¹²⁵ Given that probation offices were identified early in the pilot program as a key stakeholder, it is unsurprising that 59% of cases originated from this group.¹²⁶ Although the “probation” notation indicates that a juvenile is on probation, the report is unclear whether the “court” notation might encompass any additional cases outside of the context of probation. Youth on probation often have a large number of requirements to complete, and the VYC is just one part of a more holistic rehabilitation plan.

2. Funding Sources

The Nebraska ODR is part of the State Court Administrator’s Office and under the authority and supervision of the Nebraska Supreme Court.¹²⁷ The ODR approves and sets policies for mediator ethics, training, and related standards for the ODR-approved regional mediation centers.¹²⁸ The Nebraska legislature allocated funds to the ODR to subsidize some costs to mediation centers for the participation in restorative justice programs, including VYC.¹²⁹ ODR maintains a fund¹³⁰ with proceeds from a dispute resolution filing fee,¹³¹ and ODR grants the community mediation centers funds for them to use at their

123. See NEB. REV. STAT. § 43-286(1)(a)(ii)(A) (Reissue 2016 & Cum. Supp. 2018) (giving courts the ability to put juveniles on probation); *In re Katrina R.*, 281 Neb. 907, 912–17, 799 N.W.2d 673, 677–80 (2011) (discussing the ability of courts to place juveniles on probation); see also, Patrick S. Metzger, *Plugging the School-to-Prison Pipeline by Improving Behavior and Protecting Core Judicial Functions: A Constitutional Crisis Looms*, 45 ST. MARY’S L.J. 37, 63 (2013) (discussing the court’s role in juvenile probation cases).

124. NEB. REV. STAT. § 43-247.03(1) (Reissue 2016) (noting that an order for victim-youth dialog may be ordered in any case under the juvenile code).

125. Blevins, *supra* note 104, at 17.

126. *Id.*

127. NEB. REV. STAT. § 25-2904 (Reissue 2016) (“The Office of Dispute Resolution is hereby established in the office of the State Court Administrator.”).

128. NEB. REV. STAT. § 25-2908 (Reissue 2016) (outlining the duties of the Office of Dispute Resolution).

129. NEB. REV. STAT. § 25-2909(1) (Reissue 2016) (“The office shall annually award grants to approved centers. It is the intent of the Legislature that centers be established and grants distributed statewide.”).

130. NEB. REV. STAT. § 25-2921 (Reissue 2016) (“The Dispute Resolution Cash Fund is created. The State Court Administrator shall administer the fund.”).

131. NEB. REV. STAT. § 33-155 (Reissue 2016) (“[A] dispute resolution fee of seventy-five cents shall be taxed as costs for each case filed in each county court and district court, including appeals to such courts”). The \$0.75 filing fee was enacted in 2003 and has not been raised since.

discretion. Currently, ODR grants each of the six centers \$45,000 per year to cover operating and other expenses.¹³² Notwithstanding, the ODR and regional centers actively seek funding partnerships with a variety of federal, state, and private agencies including the Nebraska Crime Commission, the Nebraska Juvenile Services Division of Probation Administration, and the Sherwood Foundation.¹³³

The Nebraska Crime Commission administers state funds that have been designated by the state legislature to assist communities in implementing and operating juvenile justice programs or services, including VYC.¹³⁴ Counties may apply for Juvenile Service Grant funds annually through a competitive application process and may use the funds for services identified in the county's three-year comprehensive plan. Counties that have been granted those funds may use them to partner with the regional mediation center to implement VYC through juvenile diversion. Several counties across the state have already taken advantage of the funds. Counties may access the funding for VYC through juvenile diversion or through a pre-diversion program that they may establish in the local schools. To date, The Mediation Center in Lincoln has had the most success in securing Crime Commission funds to support the VYC program.

The Nebraska State Probation Office provides juvenile and adult probationers with access to services grounded in evidence-based practices to address their criminogenic needs. Nebraska juvenile probation actively seeks meaningful services that rehabilitate juvenile probation clients. VYC achieves probation's goal of using the least intrusive and least restrictive approaches to maintain the youth's and community's safety. The courts and probation have been tasked with assessing the cost of such programs to reduce the financial burden on the youth and their parents. Juvenile probation funds the cost for juvenile probation clients to participate in the VYC program.

The Sherwood Foundation is a Nebraska-based nonprofit organization that promotes and funds social justice initiatives for the local communities of Nebraska.¹³⁵ The Foundation has sponsored three re-

132. NAT'L ASS'N FOR CMTY. MEDIATION, STATE FUNDING FOR COMMUNITY-BASED DISPUTE RESOLUTION CENTERS 6 (2017), https://cdn.ymaws.com/www.nafcm.org/resource/resmgr/news_uploads/State_Support_for_Community_.pdf (last visited Aug. 18, 2018) [<https://perma.unl.edu/JJB9-LGP9>].

133. NEB. REV. STAT. § 25-2910 (Reissue 2016) ("An approved center may use sources of funds, both public and private, in addition to funds appropriated by the Legislature. An approved center may require each party to pay a fee to help defray costs based upon ability to pay. A person shall not be denied services solely because of an inability to pay the fee.")

134. NEB. REV. STAT. § 43-260.06 (Reissue 2016).

135. *About Us*, SHERWOOD FOUND., <https://sherwoodfoundation.org/about-us/> (last visited August 19, 2018) [<https://perma.unl.edu/X8RK-346Q>] ("The Sherwood Foundation® promotes equity through social justice initiatives enhancing the quality of life in Nebraska.")

storative justice initiatives in support of the VYC program due to its demonstrated success over time. The Foundation funded a pilot study to evaluate the use of victim-youth conferencing at three of the six ODR-approved regional mediation centers from 2015 to 2016 that demonstrated VYC's utility as a juvenile justice program.¹³⁶ Due to the growing momentum surrounding the VYC, the pilot was extended for another year, through June 2017. During the pilot extension year, the number of youths served doubled from seventy in year one to one hundred fifty-four in year two. In the fall of 2017, the Nebraska ODR submitted a grant proposal to the Sherwood Foundation to fund a three-year VYC Enhancement Initiative that aimed to integrate the restorative juvenile justice program across the state.¹³⁷ The grant was awarded in December 2017. The three-year grant provides over one million dollars to ODR and the mediation centers to expand the use of VYC across the state with the ultimate goal of incorporating the process into all twelve judicial districts by the end of the year 2020. The Judicial Branch identified six primary goals for the Sherwood grant: (1) providing access to swift, fair justice, (2) protecting children and vulnerable adults, (3) addressing community safety, (4) being accountable to the public, (5) strengthening communication with citizens and government, and (6) regulating the legal profession.¹³⁸ Other target outcomes include reducing youth recidivism, reducing disproportionate minority contact, and closing the school-to-prison pipeline through early intervention juvenile restorative justice practices.

3. VYC Process

Before the community mediation centers began offering victim-youth conferencing services under this process, facilitators underwent specialized training. The Nebraska ODR contracted with the Center for Restorative Justice and Peacemaking (CRJP) at the University of Minnesota School of Social Work to have Professors Mark Umbreit and Ted Lewis conduct a two-day (sixteen hour) training. Although the mediators had varying experiences, they all had previously completed basic mediation training.¹³⁹ Each of the six community mediation centers were asked to identify current mediators who would be good candidates to facilitate VYC mediations. During the pilot project,

136. See Blevins, *supra* note 104 (reporting overall positive findings of the pilot program).

137. The Sherwood Foundation rarely awards multi-year grants, which speaks quite highly of the VYC program and the initial pilot project. *What We Fund*, SHERWOOD FOUND., <https://sherwoodfoundation.org/what-we-fund/> (last visited August 19, 2018) [<https://perma.unl.edu/Y6VZ-M8V7>] (follow "Urban Community Partnerships" hyperlink) ("Multiple-year grant requests are accepted for program/project grants, but rarely do we make multi-year gifts.").

138. See Blevins, *supra* note 104.

139. See *supra* note 84.

Umbreit and Lewis trained sixty-five service providers over three trainings across the state.¹⁴⁰ Of those trained, five of the mediators were from minority populations.¹⁴¹ Mediators representing all of the mediation centers across the state received training. The following subsections detail the process used at the community mediation centers to conduct victim-youth conferences.

a. Intake and Initial Sessions with the Youth and Victim

After the community mediation center receives a case, either the center's Restorative Justice Coordinator or a mediator contacts the youth by mail within two working days and contacts the victim within two weeks. Initial contact is made with the youth before the victim to determine if the youth is interested in participating and willing to meet program requirements. If the youth does not qualify for the program or is not interested in participating, there will be no need to contact the victim.¹⁴² The letters invite the youth and victim to participate in the VYC and if the parties do not initiate contact, the facilitator will contact them by phone within one week of mailing the initial letter.¹⁴³ During the initial phone call, the facilitators work to build trust with the parties and gather information about the case. At the conclusion of the call, the facilitator schedules an appropriate time and place for an initial private session (IPS) with the youth and the victim separately. The IPSs are critical pre-conference steps before bringing all of the parties together. Nebraska community mediation centers are familiar with the concept of an IPS because Nebraska law requires them in cases involving parenting plans.¹⁴⁴ Because the VYC cases involve youth, a parent or guardian is always invited to participate with his or her child.

140. Blevins, *supra* note 104, at 9 (“During the pilot . . . 71 people attended one or more VOC training sessions . . . in June 2015, October 2015, and March 2016. Of the 71, five were ODR staff, one was a probation administrator, and 65 were service providers in some capacity (mediators and facilitators, center staff, volunteers, attorneys, and advocates).”). One of the authors of this Article attended this initial training.

141. *Id.* (noting that the goal of having at least six minority mediators participate was only 83% successful).

142. *See* UMBREIT, *supra* note 9, at 26–27 (discussing order of initial meetings with the parties).

143. *See id.*, at 37 (suggesting that telephone contact be made with the parties one week after an introductory letter if the parties do not respond).

144. NEB. REV. STAT. § 43-2939(1) (Reissue 2016) (requiring an initial private session for the purposes of, among other things, determining whether the parties have a history of power and control). Many mediators refer to these sessions as “initial private sessions,” although the statute refers to them as “initial screening sessions.”

The initial meeting accomplishes several goals.¹⁴⁵ First, the IPS clarifies the role(s) of the facilitator or co-facilitators to the parties. Facilitators do not function in a legal or adjudicatory capacity, but instead as an impartial third-party who facilitates a constructive conversation between the victim and youth. Many of the children participating in this process are youths in their early teens who may not expect that adult facilitators would (or could) take on a neutral role. Consequently, this meeting also serves the purpose of establishing rapport.

Second, the IPS is used to gather more detailed information about the case and each party's experiences. This conversation allows the facilitator to begin gauging the emotional state of the victim and the youth who committed the act. With this better understanding of where each party is mentally (and, in some instances, cognitively or even financially), the facilitator may be able to better identify any special preferences and necessary support persons who should be present on the day of the conference. Under Nebraska law, all parties to mediation are entitled to bring another person for support.¹⁴⁶ Often, the youth attends the facilitation with a parent or guardian, but the victim may also wish to bring someone to the conference, such as a spouse. In other circumstances, the IPS may uncover that school personnel (e.g., teacher, counselor, coach, etc.) or a guardian *ad litem* should also attend.

The facilitator also reviews the basic process of a VYC so the parties better know what to expect when they arrive at the table. Before the conclusion of the IPS, each party is asked to sign a consent form acknowledging their understanding that participation in the VYC is completely voluntary. Occasionally in high-conflict or very emotional cases, the facilitator may schedule additional follow-up sessions prior to the conference.

As part of the screening process, facilitators are responsible for determining the appropriate style of VYC for a given case. The type of conference largely hinges on whether the actual victim is present. The most ideal form of VYC is to have the actual victim and youth participate in the conference; however, there are some circumstances where the facilitator may deem the standard form of VYC inappropriate due

145. See UMBREIT, *supra* note 9, at 39 (“The purpose of the individual premediation interviews with victim and offender is to learn their experience of the crime, explain the mediation process in detail, and assist the parties in deciding whether or not to participate in mediation.”).

146. NEB. REV. STAT. § 25-2939 (Reissue 2016) (“An attorney may represent, or other individual designated by a party may accompany the party to, and participate in a mediation. A waiver of representation or participation given before the mediation may be rescinded.”).

to safety concerns.¹⁴⁷ In any victim-focused justice proceedings, there lies the risk of re-traumatizing or re-victimizing the victim. This occurs when the process exacerbates, rather than reduces, the victim's stress.¹⁴⁸ Each VYC facilitator is trained in victim sensitivity and trained to identify sensitive cases where the face-to-face meeting between victim and youth is more harmful than productive.¹⁴⁹

When the victim explicitly states he or she has no desire to participate in the conference or when the facilitator deems the victim inappropriate for the conference, the parties have three alternate VYC processes from which to choose: (1) victim-surrogate conference, where the youth meets with a trained stand-in who has had similar experiences to the victim; (2) victim-relay, where the youth meets with a surrogate or substitute who relays information provided by the actual victim; and (3) youth-community member conference, where a representative from the community stands in on behalf of the community (often used in victimless crimes).

In some cases, the youth is not comfortable in the same room as the injured party. A request by the youth may be more common in cases that have an element of bullying or when both parties are victims and both parties have contributed to the wrongful conduct. For example, in Ashlie's case, she specifically requested not to be in the same room as the boy whose car she damaged because she viewed him as a bully and not someone with whom she wanted to meet face-to-face.

The initial meeting also has an educational goal. The facilitator who conducts the IPS uses at least part of the meeting time to explain the process to the participants. The facilitator will ask the parties to think about the "three questions": (1) What happened? (2) How did this situation affect me and others? and (3) How can the situation be

147. Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 359–60 (2005) (noting the need to assess the risk of revictimization in restorative processes); see also Kristen Blankley, *How to Make Mediation Safer in Cases of High Conflict*, MEDIATE.COM (August 2016), available at <https://www.mediate.com/articles/BlankleyK1.cfm> (last visited May 27, 2018) [<https://perma.unl.edu/WVG9-UN3Y>] (discussing safety and giving practical advice for ensuring safety in mediations of any type).

148. Victim sensitivity is an issue long-discussed in mediation literature. In addition to restorative justice cases, mediators also often receive education on victim sensitivity in cases involving domestic violence. See, e.g., Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOT. L. REV. 265, 286 (2001) (discussing the necessity of victim safety to prevent re-victimization); Jennifer Kerrigan, *It's Not World Peace, But . . . Restorative Justice: Analysis of Recidivism Rates in Campbell Law School's Juvenile Justice Project*, 30 CAMPBELL L. REV. 339, 347 (2008) ("The mediator is always cognizant of not re-victimizing the victim.").

149. See *id.*

made better?¹⁵⁰ These questions will form the framework for the conference, so discussing them in a preliminary manner will make the conference run more smoothly. Generally, the IPS for each party takes roughly an hour.

For Jeremy, Katie, and Ashlie, the facilitator will meet with each of them (and a parent) prior to meeting with the victim in each of their cases. The facilitator will ask if the youth are willing to participate in the process and if they are willing to take accountability for their actions. In these particular cases, no safety concerns arise, but the facilitator learns that the victim in Jeremy's case does not want to participate. Jeremy's case will still proceed, but using a victim surrogate. In Ashlie's case, Ashlie does not want to be in the same room as her best friend's ex-boyfriend. Her case will also proceed, but with the parties in separate rooms. The use of surrogates is described in more detail below.¹⁵¹ For Katie, she and her friend are both willing to meet together in the VYC process. Following these assessments, the mediator will introduce these young people, their parents, and the victims to the three questions, and ask them to start thinking about how everyone can move forward from the past.

b. Victim-Youth Conference

The purpose of a VYC is to help the parties find genuine healing and move forward from the offense through a dialogue. The conference usually begins with the facilitator's introduction, which includes a brief snapshot of the case history, a review of the parties' preparation meetings, and a brief overview of the restorative justice process. The facilitator reminds the participants of the voluntary and confidential nature of the conference before getting into the merits of the issue. The following subsections outline the "three questions" approach and how the format is used with the fictionalized stories.

i. What Happened?

The VYC moves to the first question: what happened?¹⁵² Although the "what happened" question is a basic one, it serves an important function. Different participants bring different perspectives to the conference. As noted above,¹⁵³ the VYC will give the parties the opportunity to exchange information regarding the incident. In some cases, the timelines for the different parties will be dramatically different.

150. See UMBREIT, *supra* note 9, at 41–44 (discussing how the facilitator can educate the parties on how the mediation will occur).

151. See *infra* section III.C.

152. See UMBREIT, *supra* note 9, at 52–54 (referring to this portion as the "storytelling and dialogue" portion of the mediation).

153. See *supra* note 23 and accompanying text (discussing informational value of the process to victims).

For example, in cases involving theft and vandalism, the timeline for the youth will include the decision (or impulse) to commit the action and the actual commission of the offense. For the victim, the timeline might begin with the discovery of the event, which might be hours or days later.

Information that has no legal relevance might be crucial to the participants. The parties might all gain valuable insight if they learn about things such as a fight that the youth had with his or her parents moments before, the death of a loved one, or a divorce in the family that was on the mind of the youth when the problem occurred. The victim might want to share details relating to his or her life that also might not be legally relevant, such as a connection to property vandalized or relationships among or between the participants. The purpose of this information is for everyone to gain greater understanding of the situation—not to make excuses.

Consider Jeremy's story, for example. Jeremy's "what happened" story started at the pool. Jeremy described taking his younger brother to the pool on a hot, late summer day. He told the participants about his new, expensive name brand shoes and how they went missing. Jeremy recounted how he saved his lawn mowing money for two months to be able to afford those shoes and how his parents were not in a position to help him pay for them. Then, he relayed the gossip he heard that Brandon stole the shoes. He described going to school, the anger rising throughout his body, and then slugging Brandon during the confrontation. If Brandon had participated in the conference, he would have talked about being accused out of the blue at his locker; about defending his ground and being punched for "no reason." Instead, the community surrogate, rather than Brandon, spent his time talking about a time when he was the victim of a crime. The surrogate told a story of being the victim of assault when he was in high school. Jeremy's parent was invited to share, but his mother declined.

*ii. What Was the Effect?*¹⁵⁴

The second part of the conference considers the effect of the act on all participants. Again, the purpose for this conversation is to give context to the action and to demonstrate that one action can have a broad impact on a wide variety of people. Although an outsider might expect this portion of the VYC to center on the victim party, learning about the effects on the offending party is another key to resolving the dispute.

This conversation will likely include elements of emotional impacts, material/financial/physical impacts, relational impacts, commu-

154. UMBREIT, *supra* note 9, at 52–54 (referring to this portion as the "storytelling and dialogue" portion of the mediation).

nity impacts, and other consequences. Emotional impacts might include fear of safety or security, doubt or distress, depression, anxiety, or heightened agitation. Material, financial, and physical impacts might include broken or vandalized property, medical or other bills, or physical pain and suffering. Relational impacts usually center on damaged relationships as a result of the incident. Although the obvious relational impact is between the victim and the youth, the incident might have an effect on parent-child relationships, relationships within groups of friends, relationships with teachers or the police, and relationships within the community. In some cases, community relationships might be impacted, including relationships among teammates in school sports or relationships among neighbors, friends, or the broader family. Finally, the parties might have other types of consequences based on specific circumstances, such as a youth losing a scholarship or a victim having to pay more for car or homeowners' insurance.

During the conference with Katie, her friend Julie, and their parents, everyone shared impacts of the fight and the resulting call to the police. Julie discussed the impact to her cell phone, which was damaged when Katie threw it against the wall. She also discussed chips in paint to the wall in her bedroom. Julie talked about the impact of being hit by someone who was her best friend—both the physical and emotional pain she experienced—focusing on the feelings of disappointment and betrayal. Katie acknowledged the effects mentioned by Julie, and talked about how this event impacted her—the damage to the friendship, and the strain this incident had on her relationship with her parents. Katie's mom echoed the deterioration of the relationship between her daughter and herself, and Julie's mom disclosed that she was embarrassed when the police showed up to her house and she had to give explanations to the onlooking neighbors.

iii. How Can the Situation Be Made Better?

The final part of the VYC considers how the situation can be made better for the future.¹⁵⁵ In most cases, this portion of the conversation shifts to apologies and restitution. The participants may make oral apologies in the conference if both the victim and youth are participating. If the victim does not appear in person, the youth might agree to write and deliver a letter of apology to people outside of the conference. In cases with a monetary component, the youth might agree to make restitution, to replace damaged property, to clean up vandalized property, or to engage in community service. During this portion, the victim can accept or reject offers by the youth to make the situation right. Ultimately, the county attorney signs off on the plan, but

155. *Id.* at 54–57 (discussing having conversations about losses, generating options, and articulating an agreement).

rarely—if ever—objects to the agreed solution. Mediated agreements are either signed and distributed on the spot or the center staff might draft the agreement for distribution within days of the conference.

Because the Nebraska program deals with youth, the mediators often spend some portion of this component of the VYC discussing how the youth will deal with a similar situation in the future. Mediators might ask the youth what he or she will do the next time the strong feelings of anger or rage arise. The participants might talk about cooling off techniques and resources at school or in the community that are available to help the youth deal with anger, depression, or other underlying root causes that led to the incident.

At Ashlie's VYC, she participated with her mom and the best friend's ex-boyfriend and his mom participated from a different room. During the IPS, the mediators learned how much money he spent to repair the paint damage to his vehicle and the mediators understood that being repaid was his most important interest. Ashlie agreed to make restitution in the full amount, but she needed time to make payments. She discussed how she just started a new job and that she could afford around \$100 per month until the debt is repaid. Although Ashlie admitted that her actions were wrongful, she was not sorry for defending the honor of her best friend. Her agreement involved restitution only, but the victim and the county attorney found her agreement acceptable.

c. Follow-Up

Although parties typically leave the conference with good intentions, there can be considerable disconnect between what the parties agree to do and what actually occurs. Programs that incorporate a follow-up process with the parties are more likely to see follow-through to completion of the reparation agreement. This final stage of the VYC process is important to ensure the victim's and community's trust are restored. The centers make an effort to invest in the parties after the facilitated conference for several reasons. First, facilitator follow-up after the conference leads to greater accountability and increased likelihood of success. Second, the facilitators are in a unique position to accomplish this goal given the trust they have built. Finally, the facilitators' role demonstrates the role of community and accountability in the restorative justice process.

Follow-up may also involve additional sessions to allow the parties an opportunity to further process their experiences.¹⁵⁶ At times, parties have unanswered questions or may need assistance in translating

156. *Id.* at 58–59 (discussing follow-up in all its forms, including having multiple sessions and determining whether or not the parties have followed the terms of the agreement).

what occurred in the session to their lives post-conference. Another session may be necessary for logistical reasons, such as the youth being unable to complete reparations as agreed. The use of future sessions is left to the discretion of the trained facilitators who are best equipped to determine if they are necessary to complete the healing process.

The county attorneys and probation officers associated with these cases will also monitor completion of the cases for their own records. Most of the data collected so far in this program has been with the assistance of the referring entities, such as county attorneys.

d. Confidentiality and Privilege

VYC processes in Nebraska have confidentiality and privilege protections. Multiple statutes effectuate these protections. Most directly, the statute providing for victim-youth conferencing states that such process “shall be considered confidential and privileged communications”¹⁵⁷ In addition, because the process occurs at the statewide community mediation centers, the facilitations would also be confidential under the 1991 Dispute Resolution Act,¹⁵⁸ and privileged under the 2004 Uniform Mediation Act (UMA).¹⁵⁹ The UMA contains a limited exception for mediation communications not otherwise discoverable upon a showing of a heightened burden of need in cases involving felonies.¹⁶⁰ Currently, this exception would not apply to the program cases because the youth involved in the program are not facing felony charges.

Significant policy reasons underlie the confidentiality and privilege protections. Protecting mediation communications encourages “full and frank discussion” of the matter that is being mediated.¹⁶¹ Regarding VYCs, confidentiality and privilege allow all participants—notably the youth—to discuss their wrongful conduct or less-than-stellar con-

157. NEB. REV. STAT. § 43-247.03 (Reissue 2016). No confidentiality exists for previously unknown allegations of child abuse otherwise reportable under Nebraska’s mandatory reporting statute.

158. NEB. REV. STAT. § 25-2914 (“Any verbal, written, or electronic communication made in or in connection with matters referred to mediation which relates to the controversy or dispute being mediated and agreements resulting from the mediation, whether made to the mediator, the staff of an approved center, a party, or any other person attending the mediation session, shall be confidential. Mediation proceedings shall be regarded as settlement negotiations, and no admission, representation, or statement made in mediation, not otherwise discoverable or obtainable, shall be admissible as evidence or subject to discovery.”).

159. NEB. REV. STAT. § 25-2933(a) (“Except as otherwise provided in section 25-2935, a mediation communication is privileged as provided in subsection (b) of this section and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 25-2934.”).

160. NEB. REV. STAT. § 25-2935(b)(1).

161. See BLANKLEY & WESTON, *supra* note 42, at 96.

tribution to the situation. Confidentiality and privilege also help facilitate apologies.¹⁶² On the rare occasion that the VYC process is unsuccessful, the mediation communications are protected and generally cannot be used against the affected youth. One exception to the confidentiality rule is any resulting agreement, which will be shared with the county attorney, probation officer, or other official personnel, including courts, in appropriate cases.¹⁶³

B. Outcomes of Victim-Youth Conferencing

Occasionally, a VYC concludes and both parties leave the table completely restored. In the majority of cases, however, the youth and the victim negotiate the terms of a reparation agreement that lays out a number of reparation activities the youth will complete in the future. In restorative justice practices, several forms of reparations have been identified in the literature as effective means to make the victim whole and hold the youth responsible for his or her actions, notably restitution, apologies, and community service. The parties to the conference sign the agreement before leaving the table and the VYC case closes when the conditions of the reparation agreement have been satisfactorily fulfilled. In Nebraska, VYC participants may include several potential reparations in the final agreement: service to the victim, service to the community, an apology or apology letter, financial restitution, services for the youth to take advantage of, or any other activity agreed upon by the two parties. A copy of the signed final agreement is provided to the parties and the referral source for later reference. In order to bolster the likelihood that participants will adhere to the terms laid out in the reparation agreement, facilitators help guide the parties in establishing "SMART" agreements. That is, the reparations agreed upon by the parties should be specific, measurable, attainable, realistic, and timely.¹⁶⁴

Restorative justice recognizes the youth as the party responsible to repair the harm he or she caused. This can be accomplished through symbolic reparations, such as apology or community service, or through literal reparations, such as restitution. The various types of reparations are intended to heal the victim's harm, restore interpersonal relationships, and hold the participant accountable for his or her harm through adherence to the principles of restorative justice.¹⁶⁵

162. *Id.*

163. Nebraska law contains an exception to privilege for mediation agreements, and that exception should apply here. NEB. REV. STAT. § 25-2935(a) ("(a) There is no privilege under section 25-2933 for a mediation communication that is: (1) in an agreement evidenced by a record signed by all parties to the agreement.").

164. UMBREIT & ARMOUR, *supra* note 9.

165. Proper restorative justice programs should take into account the victim's treatment. Several accounts of what constitutes restorative justice principles have

The victim's participation intends to restore the victim through the reparations made and by having an element of control over the appropriate consequences for the action. The remainder of this section discusses these major categories of reparation options.

1. *Restitution*

Restitution is a form of monetary compensation awarded to a victim of an offense who experienced a material economic loss. The victim may not feel the situation is completely restored to the condition before the crime as a result of restitution, but the act demonstrates accountability and responsibility on behalf of the youth.¹⁶⁶ For example, a victim may have suffered monetary losses of \$200 when she was mugged at the bus stop and the youth may agree to pay back the \$200, but the repayment of the money may not repair the victim's continuing feelings of insecurity on her commute home from work using public transportation after dark.

Historically, participation in VYC processes has been associated with offenders expressing higher levels of adherence to an agreed upon restitution agreement.¹⁶⁷ Restitution is one of the most widely accepted restorative remedies used in the criminal and juvenile justice systems and is frequently utilized by judges who do not necessarily endorse restorative justice principles. When the victim has experienced a material harm, restitution is often incorporated into the conditions of the reparation agreement. It refers directly to the offense in an attempt to repair the precise harm.

In some jurisdictions, the ideal amount of restitution is predetermined prior to the VYC conference in the initial session with the victim. In Nebraska, whether a victim should receive restitution is a discussion topic to be assessed between the parties at the table. The amount of restitution is determined by the parties during the conference and is mutually agreed upon before the conference concludes. The amount may be equivalent to the amount lost, though victims (and their parents) may consider the ability of the youth to pay.¹⁶⁸

been developed over the years. One recitation of the principles suggests restorative practices should "(1) evidence respect for victims' personal experiences, needs and feelings; (2) acknowledge the harm or loss they have suffered; (3) recognize their claim for amends; (4) provide an opportunity for communication with the person who caused the harm, if that person is willing; and (5) recognize that the victims are the primary beneficiaries of the restorative process and are entitled to reparations." Jung Jin Choi & Margaret Severson, "What! What Kind of Apology is this?": *The Nature of Apology in Victim Offender Mediation*, 31 CHILD. YOUTH SERV. REV. 813 (2009).

166. UMBREIT & ARMOUR, *supra* note 9.

167. *Id.*

168. JOANNA SHAPLAND ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM (Aldershot: Gower Publishing 1985).

Though individuals may be interested in material compensation, studies of restorative justice suggest the attitude of the youth is, at times, more important. Restitution need not be paid in a lump sum. Part of the VYC conversation usually involves the elements of a payment plan, such as the amount of money the youth can pay per month, and how the youth will deliver the payments to the victim.

Returning to our examples from the introduction, Ashlie agreed in the VYC to repay Mason for the paint damage done to his car. Ashlie just started a new job at the local fast food restaurant, and unfortunately, she did not have the \$800 for the needed repairs right away. She agreed to repay the damages on a payment plan of \$100 per month for the next eight months.

2. *Apologies*

A variety of definitions have been offered for the term *apology* in the restorative justice literature, but three common characteristics seem to be necessary to constitute a proper apology: (1) sincerity, (2) empathy, and (3) expression of regret *without* excuses.¹⁶⁹ In the context of restorative justice, apologies represent the youth's acceptance of and accountability for the actions that harmed the victim. Victims tend to consider this symbolic form of reparation as significant to the restoration process as monetary restitution, if not more significant. Apologies can be therapeutic for the victim and offender alike, particularly when the apology is well-received and the victim senses sincerity.¹⁷⁰ Apologies, however, are a very complex tool. This subsection focuses on the benefits of apologies to the various stakeholders, and the downsides of apologies are discussed in the following subsection.¹⁷¹ Despite their complicated nature, apologies are paramount to the process.

In Jeremy's case, apologies were a natural outcome of the VYC. Jeremy agreed to write a letter of apology to Brandon, the victim of the assault. Jeremy also agreed to make an in-person apology to his basketball coach for disappointing him and risking his eligibility to play for the school team. He also apologized to his parents for the stress this situation caused his family.

a. *Benefits to Victim*

Traditional criminal justice is not designed with the victim in mind; instead, the state takes on the role of the victim and the actual

169. Choi & Severson, *supra* note 165. The complexities of apologies will be discussed in the next section.

170. *Id.*

171. *See infra* subsection III.E.1.

victim to an offense is often removed from the conversation.¹⁷² Following a victimizing criminal offense, a person may experience physical or financial losses, such as loss of money or property. Victims may suffer physical injuries or mental trauma from the incident. Victimization may also lead the victim to experience emotional or psychological consequences, which may be exacerbated when unaddressed. Some victims develop resentment towards the youth and the situation, which could in turn wear on the mental health of the victim. Feelings of resentment may cause a victim to ruminate on the past event, recalling and recounting it repeatedly. Victims may also experience feelings of confusion or helplessness due to the inability to understand why he or she was targeted. A failure to understand the youth's motives behind the offense may cause the victim to self-blame and attempt to change his or her behavior to avoid a recurrence of a similar offense in the future.¹⁷³

Victim-youth conferences provide the victim a voice. As opposed to blaming him or herself, apologies afford the victim the opportunity to assign culpability to the youth and the youth has the opportunity to be accountable for the consequences of his or her actions. The victim is further empowered with the discretion to grant forgiveness to the youth, reinstating a sense of control in the victim's life.¹⁷⁴ The victim may find the apology empowering such that he or she can move on from the event. In some instances, the victim specifically bargains for an apology, which may be empowering in and of itself.

b. Benefits to Youth Offender

Contrary to the traditional adversarial juvenile justice processes, apologies and restorative justice distinguishes the youth and the offense committed. The act of apologizing requires the youths to admit wrong and humble themselves before their victims, taking blame for the physical, emotional, mental, and economic impact their offenses had on the victims. The 'apology' reparation humanizes the youths by requiring them to set aside pride and demonstrate that despite their criminal transgressions, they still possess a sense of morality.

The youths may agree to make multiple apologies to people with varying involvement in the incident. For instance, a youth may agree to write an apology letter to a teacher, principal, or even the school resource officer for disrupting the school day when the incident oc-

172. Victims tend to express feelings of being "insignificant in the process" and "feeling completely erased." Susan L. Miller & M. Kristen Hefner, *Procedural Justice for Victims and Offenders?: Exploring Restorative Justice Processes in Australia and the US*, 32 JUST. Q. 1, 142, 149. (2009).

173. Choi & Severson, *supra* note 165.

174. *Id.*

curred. In these situations, the youth can realize the wide-ranging impact of a single incident.

c. Benefits to Community

The youth's original offense disrupts the sense of safety and security within the community and results in harmed relationships between victim and youth. Apologies help everyone involved be more future-focused as they move on from the offense. In situations where the victim and youth had pre-existing relationships prior to the offense, the apologies help lay the foundation for restoration in the relationship.

3. Community Service

Unlike with restitution and apologies, community service has no direct bearing on the actual offense. Community service allows the youth to restore the community that was harmed and may help reintegrate the youth and strengthen the community's potential.¹⁷⁵ Similar to the other reparations, the victim and the offender negotiate and agree on the appropriate community service activity and the number of hours dedicated to completing the activity. Despite the frequent disconnect between the offense and the community service activity, there still exists some room to address the communal harm by selecting activities linked to the harm. In this sense, the community service activity can symbolically repair communal harm by increasing the youth's knowledge of the associated risks of the activity, thereby reducing the risk of future transgressions.

The parties can agree to a variety of types of community service, from serving meals at a soup kitchen to picking up trash in a park. In some instances, the victim asks the youth to do community service for an institution that means something to the victim. For example, a victim who has a fondness for animals may request that the youth dedicate the community service hours to a local animal shelter.

4. Other Remedies

The VYC process is designed to provide the victims, youth, and community with a voice in the best way to restore a harm done. In Nebraska, reparation agreements may also include conditions requiring the youth to complete acts of service for the victim (e.g., mowing the victim's lawn or washing the victim's car), enrolling in other services to assist in the rehabilitation and treatment of the youth (e.g., individual therapy or counseling), or even writing short reflection essays so the youth can think about the situation more deeply.

175. David R. Karp, *Harm & Repair: Observing Restorative Justice in Vermont*, 18:4 JUST. Q., 727-57.

Returning to our final example, the damage that Katie caused was the destruction of Julie's phone and a hole in the wall in Julie's bedroom. At the VYC, Katie agreed that she would give Julie a used mobile phone that her family already had, and she agreed to personally patch up the bedroom wall.

C. Use of Surrogates in Victim-Youth Conferencing

The most ideal form of VYC is a face-to-face dialogue between the victim and the offender. However, in some cases it is inappropriate for the victim and youth to meet at the table (e.g., if the victim is not interested in participating or if the case is emotionally charged). When a standard VYC is not possible, a youth may instead participate in a victim-relay conference or in a victim-surrogate conference, where the youth meets with a victim surrogate or substitute. Victim surrogates are trained volunteers who participate in the VYC in place of the actual victim. Surrogates do not *represent* the victim, but instead engage the youth in a dialogue about the impact of the offense. The role of the surrogate is to speak freely as an individual who could be impacted by the youth's offense and help determine a fair reparation agreement for the youth. Surrogates may be asked to stand in to represent the community impacted in an offense as well. When a mediation center has determined a youth's case is eligible for a VYC but the victim does not wish to participate in the VYC process, a surrogate will be assigned so the youth does not forfeit the opportunity to participate in the conference.

If a party wants to participate but does not want to meet with the victim or is simply unable to attend the conference, the victim may agree to have his or her statements about how he or she was impacted by the offense relayed to the youth. In those cases, the victim will prepare impact statements and restitution requests prior to the conference and will communicate them to the facilitator. A surrogate will usually attend the conference, but the facilitator will receive and relay the victim's information. At the conclusion of the conference, the victim surrogate will sign the restitution agreement on the victim's behalf and the facilitator will communicate outcomes to the victim.

In Nebraska, Mediation Center staff recruit and train adult and youth surrogates to maintain congruency with the experiences of the actual victim. In cases involving youth-on-youth offenses, the preference is to have a youth surrogate. An adult surrogate will be used if necessary so that the youth can meet the participation requirement. Youth surrogates are not only more realistic in cases involving youth-

on-youth crime but also provide a second teen in the room when the other participants are adults.¹⁷⁶

When the program first began, the restorative justice coordinators were surprised at how few victims wanted to participate. Compared to other programs around the country, the use of surrogates in Nebraska is far higher than in other places. Most likely, this phenomenon is due to the large number of cases involving youth-on-youth crime, where one or both youth do not want the other to participate. At The Mediation Center in Lincoln, Nebraska, youth who went through the program and had a good experience wanted to give back. The program director recognized that these youth could benefit the program as youth surrogates. After the success of the first few VYC youth acting as successful surrogates, the coordinator began to identify and train additional youth to enrich the program.

At this point, we are unaware of any other program nationwide that identifies and trains former youth offenders to be victim surrogates in other cases.¹⁷⁷ The preliminary reporting on this aspect of the program has been quite positive. Rehabilitated youth trained as surrogates are now helping other youth complete the program, which provides a unique perspective for all of the youths (surrogates and offenders alike) in the program.

D. Pilot Project Results and Additional Research and Assessment Findings to Date

This section summarizes the findings of the VYC pilot project from 2014 until 2015. At the outset, the pilot was intended to achieve three primary goals: (1) work with key stakeholders to create foundational policies, referral and practice protocols, and forms necessary to implement juvenile VYC cases in the target districts with high fidelity to evidence-based VYC best practices; (2) train a minimum of twenty-four facilitators in the evidence-based practice of VYC, including a minimum of six ethnically diverse facilitators; and (3) provide VYC services to ninety youths under probation case management and ninety victims by the completion of the program. As the pilot

176. GAL, *supra* note 9, at 151–52 (discussing literature concerned that children might be “silenced by adults” and feel unwilling to participate in the process, especially if everyone else in the room is an adult).

177. In some domestic violence restorative justice programs around the country, perpetrators of domestic violence and victims of domestic violence will meet for a dialogue, but the victims meet with offenders who committed crimes against different women. *See, e.g.*, Judge Bennett Burkemper & Nina Balsam, *Examining the Use of Restorative Justice Practices in Domestic Violence Cases*, 27 ST. LOUIS U. PUB. L. REV. 127, 128 (2007) (discussing the construction of the program). In these programs, however, the victims are all surrogate victims and the offenders are all offenders. None of the participants change roles from offender to victim or surrogate.

progressed the goals were revised to better reflect the needs of state stakeholders. The scope of target youths was broadened to include any youths involved with the juvenile justice system, from diversion through probation, and the target number of youths served was reduced to seventy.¹⁷⁸ The revised scope also incorporated a partnership between The Mediation Center and the county attorney's diversion program with Lincoln Public Schools.¹⁷⁹

The Center for Restorative Justice and Peacemaking (CRJP) worked with ODR to educate key stakeholders (e.g., judges, probation, attorneys, and youth workers) and facilitators on the principles and protocols of restorative justice and victim-youth conferencing. The CRJP was tasked with developing the VYC program and designing and evaluating program goals and outcomes using quantitative and qualitative methods. The CRJP compiled a two-part evaluation plan that described the process evaluation and outcome evaluation protocols and goals. Included in the plan were a logic model and a program description. For the process evaluation, the evaluation team documented program activities, such as contacts, discussions, agreements, and implementation plans.

The pilot program achieved each of the target goals identified at the start. The CRJP evaluation team, together with the mediation centers and ODR, engaged many important stakeholders over the course of the two-year pilot, including county judges, county attorneys, probation chiefs and staff, diversion programs, public school administrators, guardians *ad litem*, and nonprofit social services agencies. To achieve the first pilot goal, the VYC program was presented at several conferences, including the Nebraska State Bar Association Annual Conference, the Heartland Juvenile Services Association Conference, and the Omaha Public Schools Best Practices Summit. Although the pilot team achieved significant levels of outreach, the effort to invite more counties and school districts to incorporate VYC into various points in the juvenile justice process is ongoing.

During the pilot period, the CRJP evaluators successfully developed policies, protocols, forms, evaluation tools, and a training manual for Nebraska's VYC program to satisfy the second goal. The new program manual was used to train seventy-one individuals over the course of three VYC training sessions, five of whom were of an ethnically diverse background. Training attendees included ODR staff, probation administrators, and service providers (e.g., mediators, volunteers, attorneys, and advocates). Finally, the revised third goal of serving seventy offending youth and the victims of their offenses was achieved. A total of ninety-three youth were referred to the three

178. NEBRASKA JUVENILE VOC EVALUATION REPORT JENNIFER BLEVINS, JUVENILE VICTIM OFFENDER CONFERENCING PILOT PROGRAM: A YEAR IN REVIEW 4-5 (2016).

179. *Id.* at 5.

regional centers for participation in the VYC program between March 2015 and July 2016. Twenty-three referrals did not result in a VYC, but the remaining seventy cases completed the VYC process. The largest number of youth who participated in a VYC were white (43%)¹⁸⁰ and male (83%), and between the ages of thirteen and fifteen years (49%). A total of 114 victims were served by VYC conferencing, the majority of whom were adults (68%).

Results of the pilot showed the majority of youth (81%) and victims (89%) who participated in the VYC conference reported feeling the juvenile justice system was responsive to their needs. Ninety-three percent of completed VYC conferences resulted in reparation agreements and more than 85% of the reparation agreements were successfully fulfilled by the youth. In terms of recidivism, 84% of the youth did *not* re-offend a year after successfully completing the program. All victim participants and 97% of youth participants and their parents would recommend participating in VYC to other youth involved in similar cases. Over the course of the two-year pilot the ODR and mediation centers were able to build stronger relationships with judges, probation officers, county attorneys, and juvenile diversion offices. During the pilot period state level stakeholder's interests have grown and reflect more favorable political support for the VYC program.

The results of the pilot were very promising and outlined the need for further expansion of restorative justice practices in Nebraska, beginning with VYC. The ODR and the University of Minnesota developed a strategic plan for expanding VYC to the remaining six ODR-approved regional mediation centers in Nebraska.

Following the pilot, the Sherwood Foundation granted the ODR over one million dollars to expand and implement VYC programs across the state. The ODR set out to achieve three primary goals: (1) increase the number of youth served by the VYC process and reduce recidivism, (2) train more facilitators in the evidence-based practice of VYC, including members of diverse backgrounds, and (3) build the ODR's and the six regional mediation centers' capacity to implement and sustain VYC as a prevention and intervention strategy. More specifically, the evaluators and research team hypothesize that the VYC Enhancement Initiative will contribute to long term improvements in the juvenile justice system, such as reducing the overall number of court youth, increasing the return on the social and financial investment per case for Nebraska courts, and closing the disparity gap between ethnic minority youth and white youth in the judicial system. Preliminary findings for the VYC Enhancement Initiative sug-

180. During the pilot project, The Mediation Center and the Lancaster County Attorney's Office did not track the race of the participants. Blevins, *supra* note 104, at 12. At this point, The Mediation Center is collecting this data on all VYC cases.

gest the mediation centers are on track to achieve the goals set out by the research team.

The VYC program is operating in more than fifteen counties across the state. During the first year of the enhancement initiative in 2018, the six regional mediation centers reportedly facilitated 221 VYC cases. As many as 580 participants were served by the VYC process, including 162 juvenile and 3 adult offenders and more than 105 identified victims. The majority of the sample were male (56.6%), with a mean age of 15.5 years. Of those individuals who reported race, 105 youth (47.5%) were white, 28 were black/African American (12.7%), 29 were Hispanic/Latino (13.1%), 3 were Asian (1.4%), 4 were American Indian or Alaska Native (1.8%), 1 was native Hawaiian or Pacific Islander (<1%) and 10 identified as Other (4.5%). Race and ethnicity were not reported for 41 youth (18.5%). Since the start of the enhancement grant, diversion referred the largest number of cases (35.9%) with 94 referrals. Other referral sources included 35 school referrals (29.9%), 21 probation cases (17.9%), 17 from the county attorney (14.5%), and 2 from court referrals (1.8%). Fifty-six victims and one offender chose not to participate in the VYC conference. Preliminary analyses based on the first six months of service show that none of the youth who completed a VYC conference have reoffended; however, final recidivism analyses cannot be assessed until a youth surpasses one year post-completion. Each of the VYC conferences resulted in a reparation agreement between the two parties, and of those, 143 (64.7%) have been successfully fulfilled, 15 (6.8%) have been partially fulfilled, and 5 (2.3%) were unsuccessfully fulfilled. Thirty-eight cases (17.2%) are still pending completion.¹⁸¹

Each of the mediation centers actively engage in local outreach in order to improve diversity in the VYC facilitator recruitment. The CRJP administered two regional basic VYC mediation trainings in September 2018; each mediation center sponsored four to five new facilitators at the VYC training. Twenty-four mediators participated in the sixteen-hour, two-day training that included discussions of VYC methodology and restorative justice principles, as well as role-play facilitations. A secondary aspect of goal two was to train six to twelve mediation staff as future trainers. In consultation with Dr. Mark Umbreit and Ted Lewis from the Center for Restorative Justice and Peacemaking, one resident VYC facilitator from each center participated in a train-the-trainer training and co-trained with the training consultant. During training, each co-trainer prepared and led at least one session. Finally, a third aspect of the second goal is to expand outreach and increase stakeholder education about VYC. The ODR and mediation center staff presented informational sessions to county offi-

181. Blevins, *supra* note 104.

cials across the state at five regional Nebraska Association of County Officials conferences.

E. Critiques of the Program

Despite the successes of the program, it is certainly not flawless. As described below, some of the shortfalls of the program are structural and present in restorative justice programs worldwide. Other critiques are more specific to the Nebraska program, and those are categorized as “programmatically critiques.”

1. Structural Critiques

In many ways, a restorative justice program is designed for optimal success, and the resulting evaluations of the program may include an artificially high amount of success. This section explores some of those structural issues that may bias the data of any restorative justice program.

a. High Incentives to Participate and Complete the Program

Many restorative justice programs, such as the one instituted in Nebraska, receive case referrals from law enforcement, prosecutors, or courts as part of a diversion (or pre-diversion) or probation program. Youth who complete the program as part of a diversion (or pre-diversion) program have a high incentive to actually participate, come to an agreement, and complete the requirements of the agreement. Youth who have successfully completed the program will then not be charged with a crime. Until the process is complete, the specter of a criminal prosecution looms over the youth, and the youth knows that having a record may jeopardize college applications, sport participation eligibility, and other important things for young people. To the extent the youth’s parents are also involved in the process, the youth may feel extra pressure to complete the program from them.

The incentives for post-adjudication VYC (i.e., probation programs) are also high. A youth who does not successfully complete all of the elements of a probation plan may face significant consequences, such as potential out-of-home placement (at a juvenile detention facility or foster care placement), longer amounts of time on probation, or other penalties that a judge may see fit. Again, parents may also pressure a youth to complete not only the VYC but also any resulting reparation agreement in order to avoid these types of consequences.

b. Participants Admit Fault

Another reason that the program evaluation numbers appear so successful is due in part to case screening. Case screening is important and necessary for the program, but screening in and of itself may

skew data from restorative justice programs. Ensuring that cases are a good “fit” for restorative justice might serve valuable goals in ensuring that the right cases are utilizing the best processes for the situation,¹⁸² but from a research standpoint, no true “control group” exists for data analysis.

The restorative justice coordinators at each mediation center across Nebraska do intake with the youths at the beginning of each individual case. During that intake process, the coordinator discusses the concepts of fault and accountability, and youth who maintain an “actual innocence” stance are not admitted into the program.¹⁸³ These coordinators also work with the youths before the conference to discuss likely consequences, such as repayment of money or performance of community service. In this regard, the issue of liability or fault is already agreed, and the groundwork is already laid for a reparation agreement. From a mediation standpoint, these cases are “easy” because the parties already agree on responsibility and the only true mediatable issue is the type and amount of reparations.¹⁸⁴ That said, many of these cases are still extraordinarily difficult due to the emo-

182. The concept of “appropriate dispute resolution” has existed for decades, and the concept of the multi-door courthouse is among the quintessential examples of a way to help ensure that the right problems are resolved in the best way for the individual case. See Frank E. A. Sander, *Varieties of Dispute Processing*, THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 84 (Leo A. Levin & Russel R. Wheeler eds. 1979) (recording the speech that Frank Sanders gave envisioning a court screening process that would work to match the right disputants to the right process).

183. In his *Handbook of Victim Offender Mediation*, Professor Mark Umbreit recommends that the “director of the program will work . . . to determine appropriate cases to refer. Suitability usually depends on . . . admission of guilt by the offender.” UMBREIT, *supra* note 9 at 36 (emphasis added); see also Richard Cohen, *Taking Responsibility: One Difference Between Mediation and Restorative Conferencing*, ACRESOLUTION MAG., Winter 2017, at 14 (“[M]any restorative process can’t even begin unless an offending party (or parties) has taken responsibility for the harm they have caused.”). Other types of selection criteria also exist, such as first-time offenses or referring “less serious” crimes to the process. See, Lode Walgrave, *Investigating the Potentials of Restorative Justice Practice*, 36 WASH. U. J.L. & POL’Y 91, 103 (2011) (discussing how programs may “screen out cases that they consider—rightly or not—inappropriate for restorative justice. In the majority of programs, for example, serious cases are not referred, because it is believed that those who commit severe crime are not approachable with such programs and that ‘no risk’ can be taken.”).

184. Generally, an issue is one that can be mediated if it is (1) capable of more than one outcome (i.e., not take-it-or-leave-it), (2) tangible enough to be negotiated, and (3) within the ability and control of the parties to resolve. DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* 209–10 (2d ed. 2012). Most of the restorative justice process, however, grapples with non-mediatable discussions. Issues of historical fact, parties’ feelings and emotions, and party interests, are not mediatable. *Id.* That said, having a discussion about all of those things is still valuable in restorative justice for the reasons noted in the policy sections above.

tional content involved and the gravity of the situation for these young people.

c. Apologies May Be Insincere

If youth have such strong outside factors weighing in on their decision to participate, that leads to another question—how likely is it that apologies given from the youth are sincere?¹⁸⁵ Certainly, they are never *required* to apologize as part of the program,¹⁸⁶ but many of them make an apology as part of the process. At present, the Nebraska program is not asking recipients of apologies to rate the sincerity of the apologies, but the preliminary assessments show that the victims are satisfied with the process and the outcomes.¹⁸⁷ Apologies are a difficult topic to research because sincere apologies may be mistakenly observed as insincere, while well-delivered insincere apologies may satisfy the other party to the dispute.

Outside of Nebraska, other researchers have considered these issues. In one study, researchers examined the extent to which participation in a VOC (VYC) met the victim's need for a satisfactory apology.¹⁸⁸ The study found that the victims and youths demonstrated divergent perceptions of the genuine nature of apologies. Although several youths expressed learning and feeling remorse as they prepared apology letters for the victims, the victims in the same cases did not perceive the apologies as satisfying.¹⁸⁹ Most of the youths and their parents reported difficulty in preparing the apology letters and reported completing several drafts before arriving at a final version. Youths also expressed difficulty reading the letter and facing their victims face-to-face. They varied in the method of presentation to the victims; some read the letters aloud quickly, while others avoided eye contact. Youths also varied in the structure of the final draft; some were as short as half a page, while others were as long as two single-spaced pages. Regardless of the degree of sincerity that youths felt they emoted during the presentation of the apology letter, some victims felt the letters were insincere and did not believe the youths fully accepted responsibility. When expressing why the letters felt insincere, the victims referred to nonverbal cues, such as body language

185. See, e.g., Carren S. Oler, *Unacknowledged Shame, Unresolved Family Cases*, 28 MD. B.J. 12, 16 (May/June 2005) (“An apology which appears insincere, or contrived, communicates disrespect.”).

186. Researchers have identified the issue of whether “offenders feel coerced to confess, apologize, and waive the rights of the criminally accused” as an area in need of additional research. Menkel-Meadow, *supra* note 58, at 165 (citing multiple empirical studies raising this question).

187. See *supra* section III.D.

188. Choi & Severson, *supra* note 165, at 813. This study involved thirty-three conferences and thirty-seven unique participants.

189. *Id.*

and facial expressions, as well as verbal cues, such as making excuses.¹⁹⁰

If Nebraska has concerns about the apologies being given in the VYC process and their reception by the victims, program evaluators could begin surveying the participants in this regard. The researchers could also ask what would have made for a better apology to give additional context to the inquiry.

2. *Programmatic Critiques*

In addition to the concerns that are inherent in any restorative justice program, this section considers some issues that have arisen regarding Nebraska's specific program. These areas are ones that the statewide program and the outside researchers will want to monitor as the program moves forward.

a. *Low Case Volume Outside of Lancaster County/Lincoln Area*

Although the restorative justice pilot program began in March 2015,¹⁹¹ only one county has developed a substantial load of cases more than three years later. During the pilot project, Lancaster County documented 22 cases in Project Restore (then called "Project Success"), and an additional 27 cases referred from other sources.¹⁹² By the end of the 2017–2018 school year, The Mediation Center in Lincoln reported a case volume of 164 cases.¹⁹³ Of those cases, 70 came directly from Project Restore, and the remaining cases came to the center on a more formalized diversion (44) or probation (18) program.¹⁹⁴ Ensuring that Project Restore is a successful program, the stakeholders in Lincoln, Nebraska began to meet regularly and develop trust and rapport among school officials, county attorneys, probation officers, and mediators.

By contrast, the Concord Center, serving Omaha, and Mediation West, serving the most Western parts of the state, only had case volumes of 18 and 5 cases, respectively.¹⁹⁵ Both of these mediation centers have been involved in this effort since the 2015 pilot project. During the pilot project, these centers handled 16 and 7 cases, respec-

190. *Id.* (The results of the study demonstrate the complex nature of writing an apology, including the manner in which a presentation is presented and the context in which it is presented.).

191. *See* Blevins, *supra* note 104, at 8.

192. *Id.* at 12.

193. 2018 CUMULATIVE STUDY, *supra* note 100.

194. *Id.* In addition to these newly opened cases in the fiscal year July 1 to June 30, The Mediation Center closed some holdover cases, and they received a small number of cases with other referral sources.

195. *Id.*

tively.¹⁹⁶ Additionally, both of these centers hired full-time staff with grant funds to grow the programs, but they appear to have run into difficulty making the right connections to support the program thus far given that the case load numbers are stagnant from year one to year three.¹⁹⁷ These numbers are particularly surprising for Omaha, given that the greater Omaha area is the most populous area of the state.¹⁹⁸ The lack of diverse neutrals may be a contributing factor to the low number of referrals, which is discussed in more detail below.

A number of reasons may explain the low case volume numbers in Omaha and in Western Nebraska. For instance, the Concord Center underwent management changes over the last fiscal year, focusing much of its energy on hiring a new Executive Director.¹⁹⁹ The rural nature of Mediation West's geography may be a limiting factor in its progress.

The three mediation centers that were not part of the pilot project are seeing various levels of success in getting case referrals. Although those centers also have full-time staff dedicated to the VYC project, those staff were hired later in time than the staff associated with the pilot centers. At the close of fiscal year 2017–2018, Central Mediation Center in Kearney reported a case volume of 34 cases; Nebraska Mediation Center in Fremont had 18; and The Resolution Center in Beatrice had 3.²⁰⁰

As this program moves forward, researchers should follow the case volume and learn from the restorative justice coordinators at each center what is working or not working in those communities. To the extent that successful measures can be replicated throughout the state, the mediation centers can hopefully learn from each other and grow the program throughout the state. Following the pilot program, the outside researchers suggested not only relationship-building, but also making “the case for [VYC] being a greater value than perhaps another service on the long list” of services available for youth.²⁰¹ In

196. Blevins, *supra* note 104, at 12.

197. The initial pilot review hoped that the 2015–2016 numbers could be used as “baseline” numbers to be improved upon in the coming years. Other than The Mediation Center, the mediation centers have not grown their referrals. *See id.* at 16.

198. The United States Census Bureau estimates that Douglas County, Nebraska (home to Omaha) has a population of roughly 560,000 people. U.S. Census Bureau, *Douglas County, Nebraska*, QUICKFACTS, <https://www.census.gov/quickfacts/fact/table/douglascountynebraska/PST045217> (last visited Sept. 9, 2018) [<https://perma.unl.edu/RWW3-RDRU>].

199. *See* Press Release, Concord Mediation Ctr., New Executive Director Named (July 1, 2018), at <http://concordmediationcenter.com/new-executive-director/> (last visited Sept. 9, 2018) [<https://perma.unl.edu/N8L8-TDJJ>].

200. 2018 CUMULATIVE STUDY, *supra* note 100.

201. Blevins, *supra* note 104, at 26. Another way to make inroads is to educate the general public about restorative justice and its benefits. If the public as a whole

addition, the researchers noted that many service providers operate in this area and that the mediation centers may need to tread a “fine balance” of respecting the other service providers and compete for a finite number of cases.²⁰²

b. Low Facilitator Diversity

A second programmatic difficulty is the lack of diverse neutrals to work as facilitators with the youth in the program. At the initial VYC facilitator trainings, the program trained seventy-one unique participants.²⁰³ Of those individuals, only five were from minority backgrounds: one Native American, two Latin Americans, and two African Americans.²⁰⁴ The study does not track whether the ethnically diverse mediators are actually facilitating or the type of case volume those facilitators maintain.

In contrast, the most recent data from the ODR shows that a significant number of youth participating in the program are part of an ethnic minority. In Lincoln, roughly 60 of the 164 youth participating in the program were ethnic minorities, with the largest representation from the African American community.²⁰⁵ Roughly half of the cases at the Concord Center involved minority youth.²⁰⁶ The numbers at the other mediation centers did not reflect a significant number of minority participants.

Diversity of facilitators may make youth feel more at ease during the process. The VYC process is neither easy nor comfortable (by design), but placing a minority youth in a room with non-diverse facilitators may be particularly uncomfortable. Although the program does not contemplate that every conference involving a minority youth must involve a minority facilitator, increasing the diversity of the facilitators will help provide a more inclusive process. Anecdotally, the ODR has fielded some concerns about the reflection of diverse facilitators in the more diverse regions of the state, especially in counties with large African American, Latino, and Native populations.

supports the program, raising money for the program may be easier. See Christy Barbee, *Starting a Restorative Justice Program: Begin By Getting to Know Your Community's Needs*, ACRESOLUTION MAG., Winter 2017, at 8–9.

202. Blevins, *supra* note 104, at 26.

203. *Id.* at 9.

204. *Id.*

205. 2018 CUMULATIVE STUDY, *supra* note 100. The Mediation Center reported the following demographic information: American Indian (4), Asian (2), Black (29), Hispanic (15), and Other (9). Another 19 youths did not respond to the demographic questions.

206. *Id.* The Concord Center reported the following demographic information: Black (6) and Hispanic (1). Another 6 youths did not respond to the demographic questions. The Concord Center data is difficult to analyze given the low caseload. With such a small caseload, one or two cases can greatly skew the data.

The program should certainly continue monitoring the diversity of the facilitator pool and the participants as it goes forward. In 2018, the ODR held two regional trainings for which a concerted effort was extended to increase centers' facilitator diversity. Thirty new facilitators, representing the six regions of the state, were trained in restorative justice practices. The Concord Center sponsored eight facilitators, three of whom were of diverse ethnic backgrounds, and the Central Mediation Center sponsored four facilitators, two of whom were of ethnically diverse backgrounds. The centers and ODR will continue providing additional VYC training, particularly for diverse neutrals to add to the rosters at the centers across the state.

In addition to racial and ethnic diversity, the program could consider tracking the gender diversity of the facilitators. A majority of the youth participating in the program are male,²⁰⁷ but most of the facilitators are women. During the 2018 regional trainings, men made up approximately 38% of the attendees. Gender diversity has long been a best practice of mediation,²⁰⁸ and this program should continue to strive for increased diversity in these areas.

c. No Permanent Funding (Yet)

Finally, the program suffers from not having permanent funding. The outside evaluators of the pilot program recommended that the program should seek sustainable funding through "an appropriation in the Judicial Branch and State budget" or by looking at other resources that can be "redirected for [VYC] in the future."²⁰⁹ The current lack of permanent, state-based funding may contribute to the low case volume, particularly if stakeholders such as county attorneys and probation offices have any concerns about the availability of the program going into the future. Seeking permanent funding, either through legislation or through a reappropriation of other funds is vital for the program's strength and continuity.²¹⁰ Admittedly, the program

207. *Id.* The 2018 data shows the split of male participants to female participants as seventy-three to fifty-six in Lincoln and fifteen to two in Omaha.

208. *See, e.g.*, David A. Hoffman & Katherine Triantafillou, *Cultural and Diversity Issues in Mediation*, in *MEDIATION: A PRACTICAL GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS*, Ch. 8 (2013) (discussing the importance of cultural competency and diversity in the field); Sharon Press, *Court-Connected Mediation and Minorities: Has Any Progress Been Made?*, 19 No. 4 *DISP. RESOL. MAG.* 36 (Summer 2013) (discussing issues involving diversity in court-connected and community mediation).

209. Blevins, *supra* note 104, at 30.

210. An example of successful funding can be seen in the neighboring state of Colorado. Denver Public Schools followed a successful restorative justice pilot program with a few innovations that helped pave the way for wider spread adoption of restorative practices. First, the district revised its policies regarding "zero tolerance" punishment to allow more restorative practices. Later, the legislature

is still very much in its infancy, and permanent funding sources may be interested in a longer track record of success.²¹¹

IV. CONCLUSION

Although Nebraska's statewide VYC program is developing, the program is promising and offers some opportunities for other restorative justice programs around the country. The success of the program is consistent with restorative justice research around the world.

Some characteristics of the program are unique and will provide guidance for future developments in restorative justice. In the United States, this program appears to be one of the first, if not the first, statewide program. Most programs have geographical limitations, such as a single county or even a single school district. Nebraska's program is significantly more ambitious in scope than other programs, and it may set a precedent for other states. In addition, Nebraska has both rural and urban experiences, which may inform future statewide programs elsewhere in the United States.

Perhaps the most promising aspect of Nebraska's program is the use of surrogates, particularly youth surrogates. Because many of the state's cases involve youth-on-youth crime, youth surrogates have become an important part of the program. As the program continues to grow, the results of the program evaluations in this area may also prove highly useful to other programs.

voted to phase out such "zero tolerance" programs and began funding restorative programs throughout Colorado. González, *supra* note 61, at 290–92.

211. In recent years, Chicago Public Schools have seen increases in funding for restorative justice programs; however, that school system's pilot program ran roughly five years before seeing an influx of funding. *Id.* at 292–93.

Expanding Options for Restorative Justice

When a Victim Decides Not to Participate, the Use of Surrogates Can Bring Cases to the Table

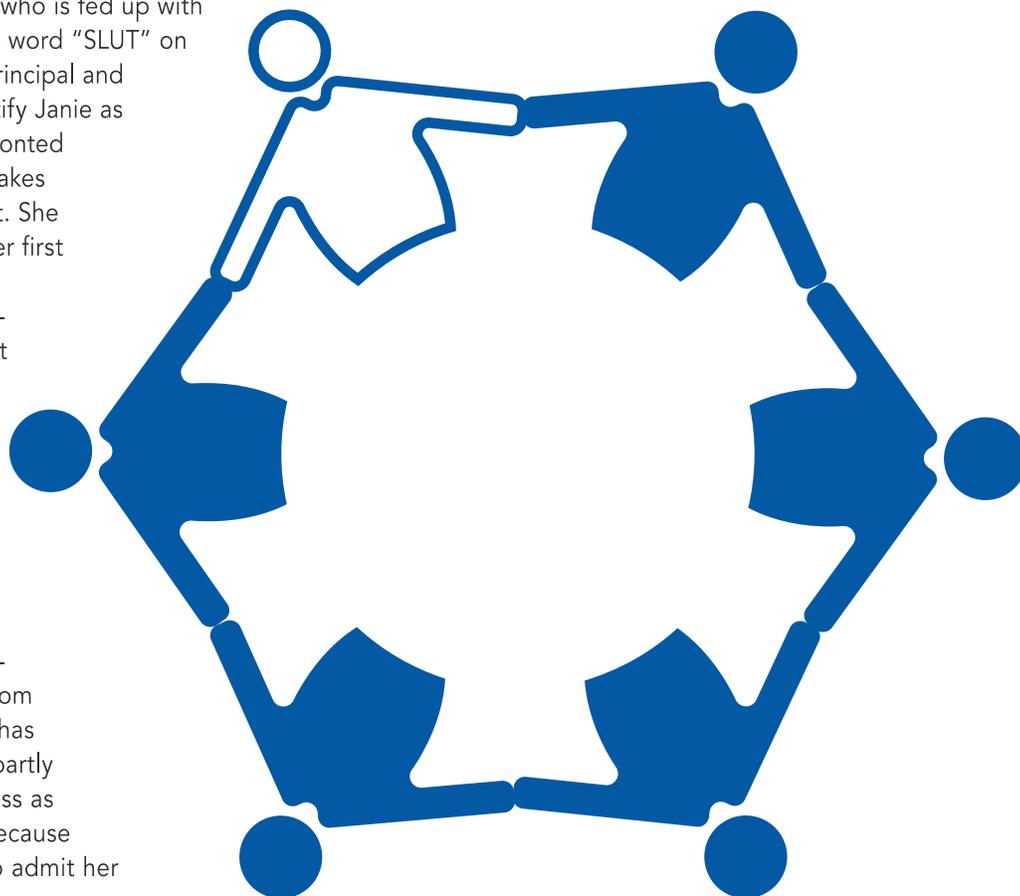
By Kristen M. Blankley

Janie is a high school sophomore who never quite fit in. Unlike most of the other girls at her suburban school, she is being raised by a single mom with little disposable income. Janie doesn't wear the latest fashions or have the newest smartphone. Ever since sixth grade, Alyssa has picked on Janie, making fun of her clothes, her hair, and her lack of a boyfriend. One day, Janie, who is fed up with the bullying, spray paints the word "SLUT" on Alyssa's locker. The school principal and resource officer quickly identify Janie as the "offending" youth. Confronted and asked to explain, Janie takes responsibility for the incident. She is charged with vandalism, her first offense in or out of school.

As part of a diversion program, the court in the district where Janie goes to school allows first-time youth offenders to participate in a restorative justice (RJ) process such as victim-offender mediation or conferencing. Janie is interested, but still stinging from Alyssa's longtime taunting, she refuses to sit in a room with her schoolmate. Alyssa has no interest in participating, partly because she views the process as a waste of time and partly because she knows she might have to admit her

bullying. Should Janie be prohibited from participating in the restorative justice program — and possibly gaining the benefits of diversion — because Alyssa declines to participate?

Traditional mediation programs require the voluntary participation of both parties, and one party's



refusal to participate in the process is usually grounds to terminate the process. Restorative justice processes, however, have different underlying philosophies and goals that can still be applied and accomplished without the participation of the person who was wronged. This article discusses how the principles of restorative justice are achievable through the use of victim surrogates and suggests some best practices for the use of surrogates.

Using surrogates in restorative practices

Unlike traditional criminal justice, restorative justice focuses on the accountability of the person who caused the harm, the needs of the wronged party, and the reintegration of both into society.¹ Restorative processes seek to account for the needs of the person who caused the harm, the person or persons harmed, and the community, with the ultimate goal of repairing relationships and reducing recidivism. Through dialogue, the offending party can express accountability or remorse, and the victimized party may be able to speed the process of healing through understanding and restitution.

One of the most common RJ processes is victim/offender mediation or conferencing, which is a process in which the wronged party and offending party meet together to discuss the event and determine the best resolution.² Early versions of these programs used the term “victim/offender” mediation, focusing on the categorization of the parties as if they were in criminal court. Today many programs today use terminology such as the “person who caused harm” or the “victimized party” to emphasize the relationship between the two, as opposed to their procedural labels. Whatever the program is called, during the in-person meeting, the parties generally have three conversations, each from their own perspective: 1) What happened? 2) What are the effects of the incident? And 3) How can the situation be made better?³

“ Unlike traditional criminal justice, restorative justice focuses on the accountability of the person who caused the harm, the needs of the wronged party, and the reintegration of both into society. ”

Successful conferences usually result in reparation agreements, which might include apologies, restitution, community service, or other terms agreed on by the parties.

Intake processes determine whether cases are eligible for RJ. Some programs, for example, require a participant to admit fault or responsibility as a condition of participating.⁴ Using RJ is a challenge when an alleged offending party maintains innocence, although some programs allow participation if that party acknowledges accountability but not true remorse. Intake is also an excellent time to learn whether all the parties are interested in participating in the process and whether they can have a conversation and sit together.

Some parties may be willing to attend only if they can participate from different rooms, as happens in a caucus-based mediation. In other instances, a party, usually the wronged party, may not be willing to participate in a conference at all, as happened with Alyssa. Sometimes the wronged party has experienced trauma from the incident or is simply afraid of sitting in a room with the person responsible for the original harm. Occasionally, the person who was harmed may not appreciate the process, as Alyssa indicated, and its potential value to both parties. In cases involving youth-on-youth incidents, the underlying relationships may be complicated, as they were with Janie and Alyssa, with some level of fault

“ When the person who was harmed refuses to participate, the use of a victim surrogate allows an offending party to participate in the process — and gain from its benefits. ”

“ The use of surrogates can bring more restorative justice cases to the table, but people facilitating RJ dialogues must devote special care to finding, training, and choosing surrogates. ”

or responsibility on both sides. Even if a party does not participate in the conference, during the intake process the facilitator can still determine what the person who was harmed would like to see out of the process — such as restitution, an apology letter, or other terms that are satisfactory to all concerned.

When the person who was harmed refuses to participate, the use of a victim surrogate allows an offending party to participate in the process — and gain from its benefits. A victim surrogate stands in the shoes of *but does not role-play* as the person who was harmed. The most effective victim surrogates are those who have lived through a situation similar to the case at hand. In the case of Janie and Alyssa, a good surrogate would be someone around their age who has endured bullying or a hateful act. The victim surrogate participates in the conference by sharing the surrogate’s own story and how it affected the surrogate. The surrogate will know in advance the type of remedy that the person who was harmed is seeking and will be authorized to agree to a resolution on that person’s behalf.

Even with a stranger sitting in the chair of the person who was harmed, the person who caused the harm can still realize many of the benefits of the RJ process. The offending party must still account for his or her actions leading up to the incident and must listen to the surrogate’s story about being the victim of a crime. In listening, the offending party may be able to empathize with the surrogate’s situation and draw comparisons to his or her own past experience. Because the surrogate has authority to agree to a reparation agreement, the person who caused the harm will still be accountable to the harmed party and attempt to make that person whole.⁵

Best practices

The use of surrogates can bring more restorative justice cases to the table, but people facilitating RJ dialogues must devote special care to finding, training, and choosing surrogates. While best practices and standards for surrogates are still emerging, some basic principles are worth noting.

Prior to their use in any case, surrogates should receive training in restorative justice, including specific training on the processes in which they will participate. Program administrators should begin by teaching surrogates the underlying purposes and values of restorative justice and the surrogate’s role within that program. Surrogates should be instructed to share their own experiences and not to role play for the victimized person. In addition, surrogates should receive training on their specific role in the process, including what they are expected to contribute to the conversation. Surrogates need not be trained in mediation, although those who have been through mediation training may need less direction in how to approach RJ processes.

Any effective restorative justice program should strive to have a broad roster of surrogates. The program should seek to recruit surrogates with diverse ages, genders, races, ethnicities, and sexual orientations. Surrogates who have a variety of experiences as victims of crime can provide real detail and immediacy. Depending on the program, surrogates may be recruited from schools, including colleges and universities, community organizations, and mediation organizations.

When an RJ program has broad diversity within its surrogate pool, the program administrator can use a surrogate in an individual case who shares salient traits with the person who was harmed. If the offense involves burglary of a home of an 85-year-old woman, a surrogate in a resulting restorative process should be an older woman, particularly one who was the victim of a crime involving property. If the offense involves the theft of name-brand tennis shoes from a 20-year-old man, the surrogate’s age, gender, and experience should all reflect those facts and circumstances as closely as possible. In cases involving victimized parties who are young, the surrogates should be from the same general age group, as an

“ The use of a community surrogate makes the experience for the party who caused the harm less immediate and is certainly not a perfect solution, but with one, the offending party can still be asked to engage in a dialogue about the specific harm caused, the effect of that harm, and a reparation plan.”

older surrogate’s story would necessarily be a very different one.

A restorative justice program in the school system in Lincoln, Nebraska, innovated surrogate practice when it began training youth who had caused harm in the past to serve as victim surrogates. Project Restore, an RJ program run in Lincoln Public Schools,⁶ began this practice when a young woman contacted the program coordinator asking how to give back to a program that had helped her at a very difficult time. The program thereafter began recruiting other young people who had gone through the program to volunteer as surrogates, which helped diversify the pool of available surrogates with real-life experience (and the added benefit of firsthand knowledge of RJ processes).

No program will ever be able to find and use a surrogate who is a perfect match for the victimized party in every case. In cases where a close-match surrogate is not possible, a surrogate can still stand in for the victimized party to allow the cases to proceed, but the surrogate should take on the role of an interested community member who can impart some thoughts on the effect of crime generally or within a given community. The use of a community surrogate makes the experience for the party who caused the harm less immediate and is certainly not a perfect solution, but with one, the offending party can still be asked to engage in a dialogue about the specific harm caused, the effect of that harm, and a reparation plan.

Conclusion

In Janie’s case, the RJ facilitator met with Janie and Alyssa separately and quickly ruled out the option of a joint conference. The facilitator learned that Alyssa was interested in receiving a written apology, as well as in Janie’s performing community service at an animal shelter, a cause close to Alyssa’s heart. Janie attended the conference, where she met Caitlin, a youth trained in RJ who had been bullied in the past. Janie and Caitlin participated in the conference, discussed the events and consequences from their own point of view, and both gained new perspectives. Ultimately, Janie agreed to write the letter of apology to Alyssa and volunteer at the local no-kill animal shelter.

The refusal of a victimized party to participate no longer need be an automatic disqualifier for RJ cases. As more RJ programs incorporate the use of surrogates, exercising care in selecting and using them, more individuals who caused harm will be able to benefit from the very real, long-lasting benefits of restorative justice. ■

Endnotes

1 Kristen M. Blankley & Alisha Caldwell Jimenez, *Restorative Justice and Youth Offenders in Nebraska*, 98 Neb. L. Rev. 1 (2019).

2 MARK UMBREIT, *THE HANDBOOK OF VICTIM-OFFENDER MEDIATION* (2001).

3 *Id.* at 52-54.

4 See, e.g., *Watkins v. Bd. of Ed. of Harmony-Edge School Dist. #175*, 2018 WL 1358947 (App. Ct. III. Mar. 13, 2018) (finding that a hearing board correctly considered a restorative justice process to be problematic in a workplace sexual harassment case when the offender party refused to acknowledge any wrongdoing).

5 Blankley & Jimenez, *supra* note 2.

6 Margaret Reist, *Project Helps Young People Find Solutions to Keep Them Out of the Court System*, Lincoln Journal Star (May 19, 2017).



Kristen M. Blankley is a Professor of Law at the University of Nebraska College of Law, where she teaches, writes about, and practices dispute resolution and restorative justice. Professor Blankley can be reached at kristen.blankley@unl.edu.



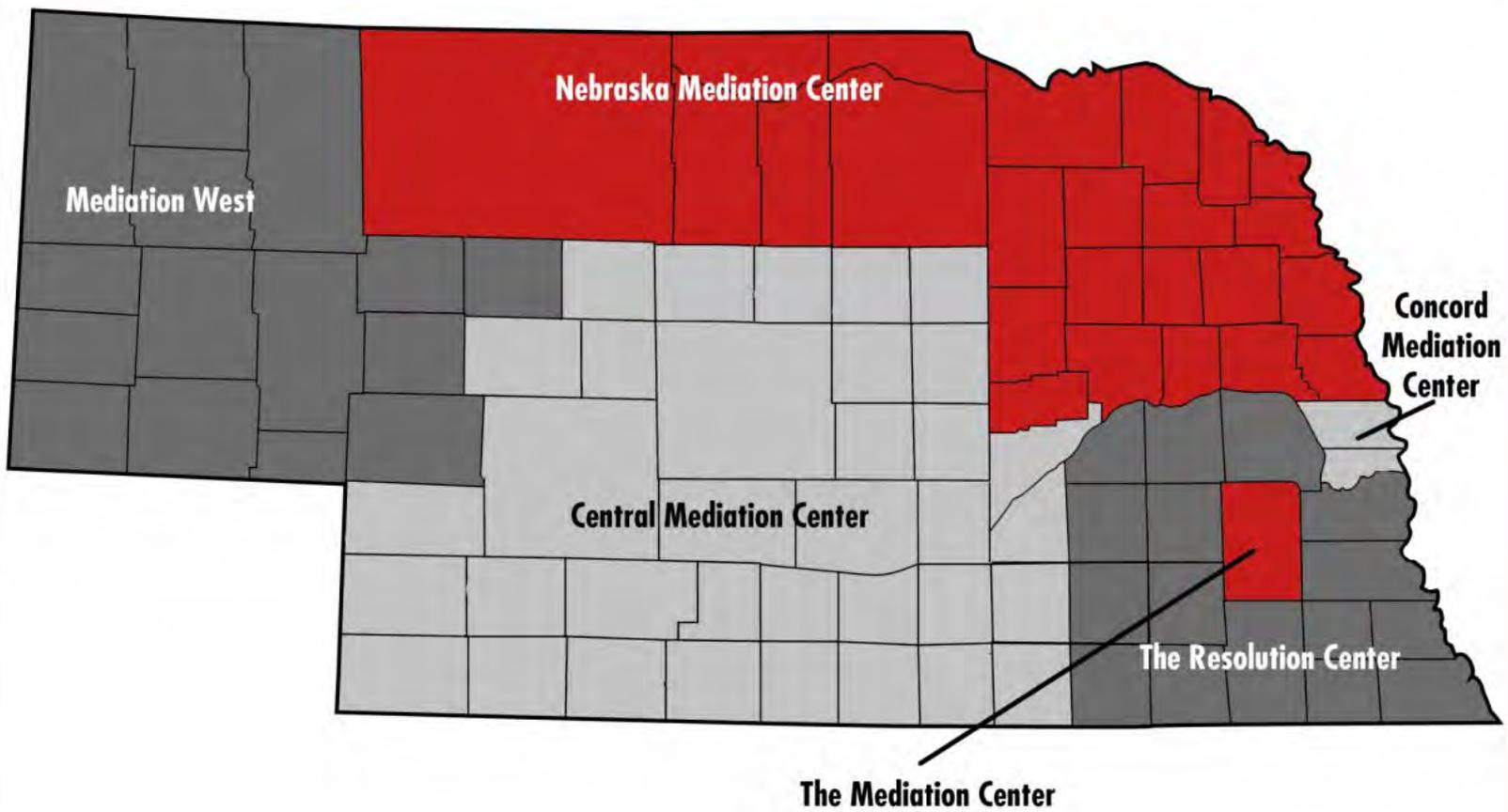
Lessons in Restorative Justice in Cases involving Youth: Nebraska's Experience and Beyond

Kristen M. Blankley
Professor of Law

Alisha C. Jimenez
RJ Program Analyst



System Structure in Nebraska



Let's Begin with a Story . . .



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The Victim's Experience

Typical Needs at the Front-End

- Safety and security
- Supports and caring presence
- Validation and ventilation
- Assistance with daily tasks

Typical Needs During Resolution

- Information about the offender/case
- Good trust in support people
- Education about options throughout the process
- A significant voice in the process

Typical Needs at the Back-End

- Compensation of losses
- Regained trust in offender
- Sense-making out of everything
- Emotional closure (at any level)





Three Pillars of Restorative Justice



Why use Restorative Justice with Youth?

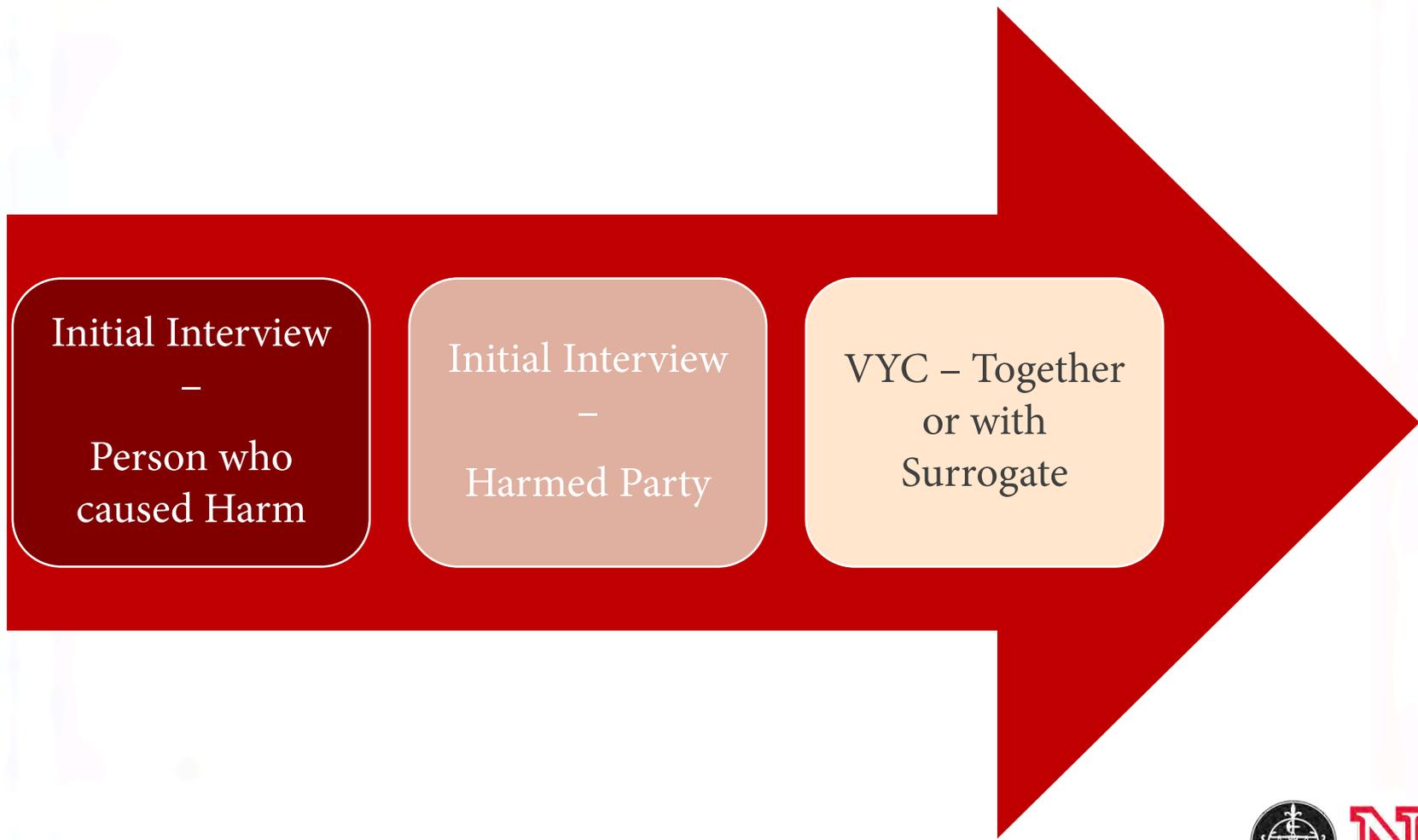


Empirical research demonstrates

- ✓ **Lower recidivism rates by the youthful offender** (Schwalbe et al., 2012; Schwalbe et al., 2015; Wong et al., 2016)
- ✓ **Improve level of satisfaction for the court process by both victims and youthful offenders** (Latimer, Dowden, Muise, 2005)
- ✓ **Increase restitution to the person(s) harmed** (Latimer et al., 2005)



The Process



Initial Interview

–

Person who
caused Harm

Initial Interview

–

Harmed Party

VYC – Together
or with
Surrogate



Three Conversations

1. What happened?

(Story-telling Discussion)

2. What was the effect?

(Impact Discussion)

3. How can the situation be made better?

(Reparations Discussion)



1. What happened?

Main Goal : Identify the relevant information and feelings about the offending incident and relate the issues to the present. (Discuss the facts, feelings, experiences, etc.)

- Offender (and sometimes victim) goes first to tell their story
- Other party is invited to ask any questions
- Mores storytelling is invited to cover feelings, motives, context, etc.
- Ideal is for both parties to talk directly back and forth to each other



2. What was the effect?

Main Goal : Discuss the impact and consequences of the offending incident on all parties and assist the parties in reaching a deeper understanding and connection. (Discuss the impacts and consequences.)

- Victim is invited to summarize how they were affected
- Offender is invited to respond or to echo back what was heard
- Facilitators extend conversation to how others were affected
- Ideal is for both parties to empathetically connect with each other



3. How can the Situation be made Better?

Main Goal : Address all possible solution ideas for reparation and determine which ones the parties mutually choose to put into a written agreement. (Discuss options and create agreements.)

- Victim is invited to share their requests for reparation
- Offender is asked to respond to those ideas and all present surface possible options before evaluating them
- Options that are **mutually agreeable** and **realistically achievable** are written eventually transferred to an agreement form



Possible Resolutions

- Apologies
- Accountability Statements
- Restitution – Lump Sum or Payment Plan
- Return or Replace Property
- Services for the youth
- Services to the Victim



Take a moment to reflect...

Think about a time during your adolescent years
(ages 10-25) when *YOU CAUSED HARM* or offended
someone OR *WHEN YOU WERE HARMED* or offended
by someone else.



Incentives to Participate

- Better Outcome for Youth Offender – Legally & Holistically
- Ability for Victim to Participate and Be Made Whole



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What if a victim declines?

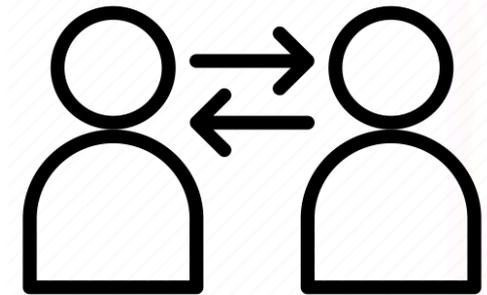
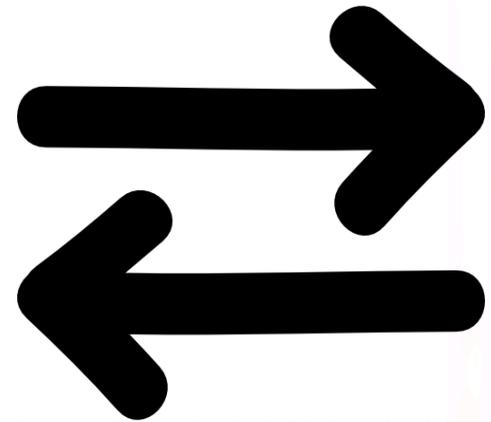
Surrogate Victims and Community Members can:

- Speak as a representative victim in a similar crime/offense.
- Speak as a representative of the community that is more widely impacted.
- Speak as an advocate for restorative outcomes



When face-to-face is inappropriate...

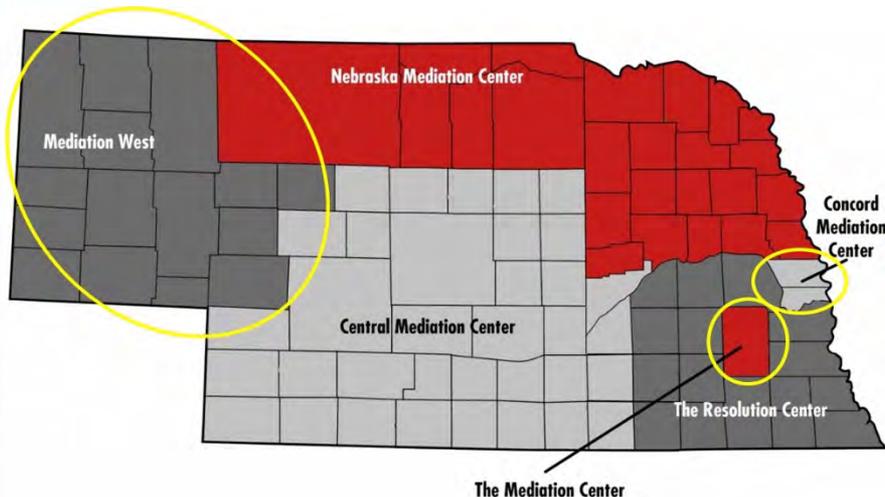
- **Victim Relay Option** – a facilitator receives and *relays* the victim's information during the conference.
 - Impact Statement
 - Restitution Request
- **Victim Surrogate Option** – a surrogate speaks about his/her own similar experiences when he or she was a victim to an offense.



2015-16 Pilot Project

- 71 Mediators Trained (5 Minorities)
- Pilot Locations (Funded by Sherwood Foundation)

- Omaha, Concord Ctr.
- Scottsbluff, Mediation West
- Later Added Lincoln, The Mediation Center (Funded by Outside Money)



VYC Expansion Program

- Include all six regional centers
- Unify program across the state
- Provide all centers with full-time RJ staff
- Expand referral sources
- Secure sustainable funds



Identified 3 Goals



1. VYC expansion: Reduce youth recidivism by expanding VYC to all six regional mediation centers (targeting all 12 judicial districts.



2. VYC training and education: train new facilitators and surrogates in the evidence based practice of VYC.



3. Build capacity and sustainability: Establish long-term systemic and financial stability to sustain the program beyond the grant period.

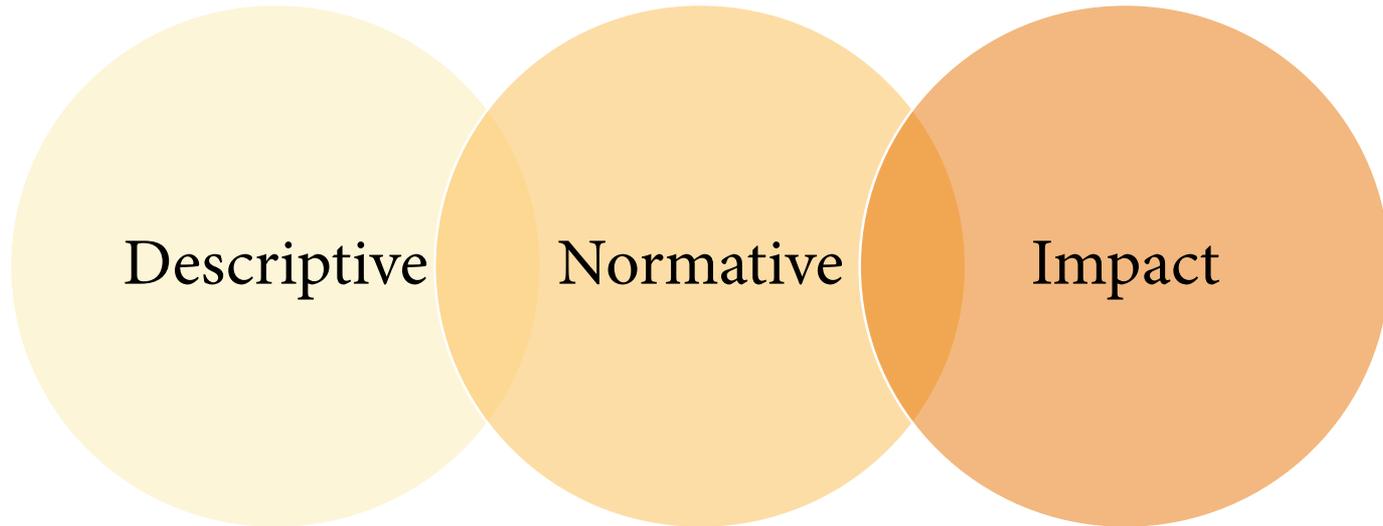


Participant Recruitment

- Mediation engaged in outreach to stakeholders statewide that resulted in an additional 12 counties prepared to refer youth to VYC in 2019
- Mediation Center staff reached out to 1,148 stakeholders, including courts, county attorneys, probation, schools, and city and county officials in 56 Nebraska counties through meetings and presentations to promote VYC and form partnerships.



Evaluation Questions



**Demographic
and program
specific data**
*Who is served
and under what
conditions?*

Process evaluation
*What's working,
what can be
improved and is
fidelity to best
practices
maintained?*

**Outcome
evaluation**
*What's different
as a result, why
and how do we
know?*



Maintaining Diverse Facilitators

- In one county, roughly 60 of the 164 youth participating in the program were minority youth
- Diversity of facilitators may make youth feel more at ease during the process
- Recruitment from communities including
 - The LGBTQ
 - Ethnic Minority Communities
 - Younger Facilitators
- Community Outreach

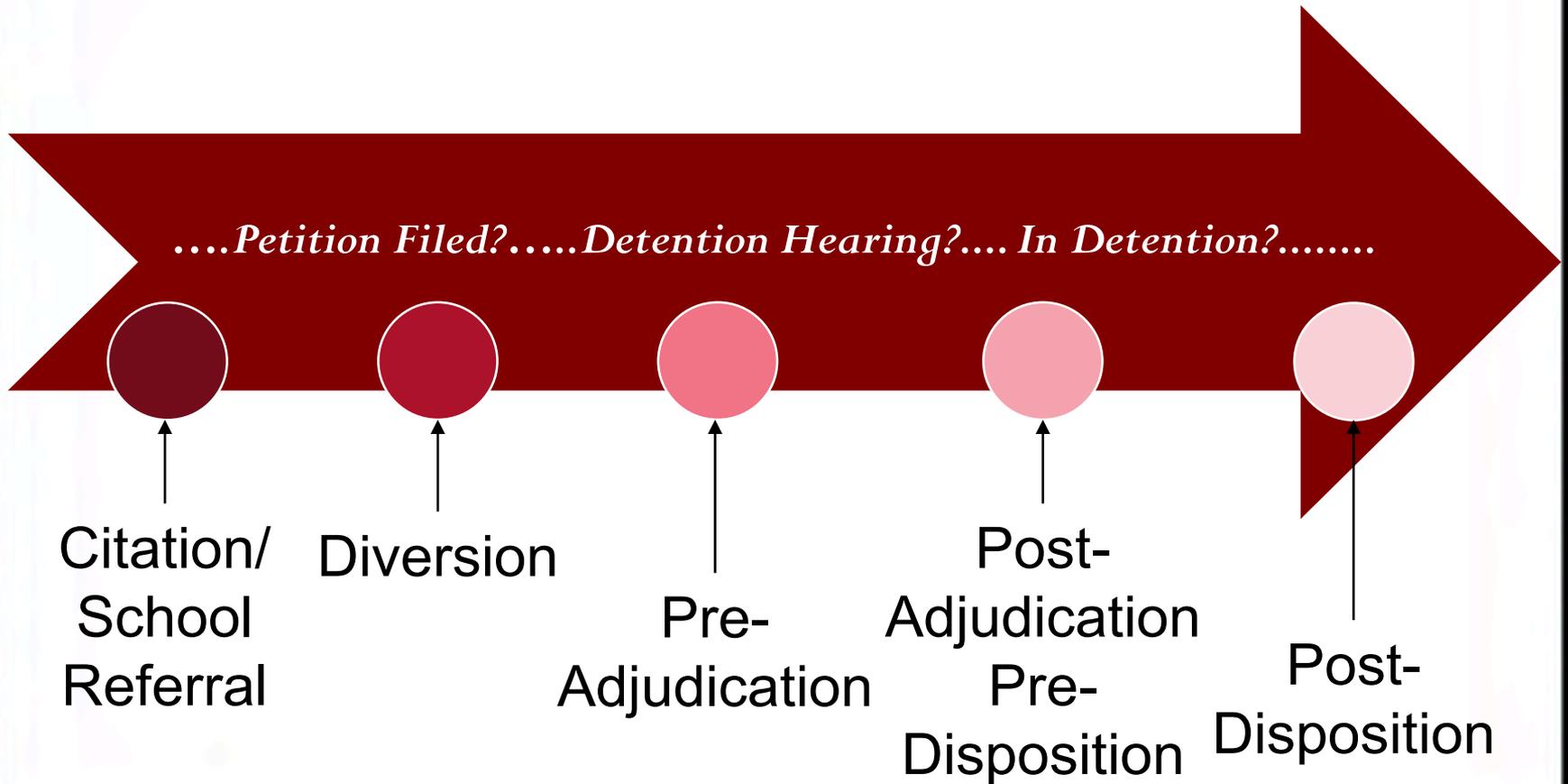


Program Management

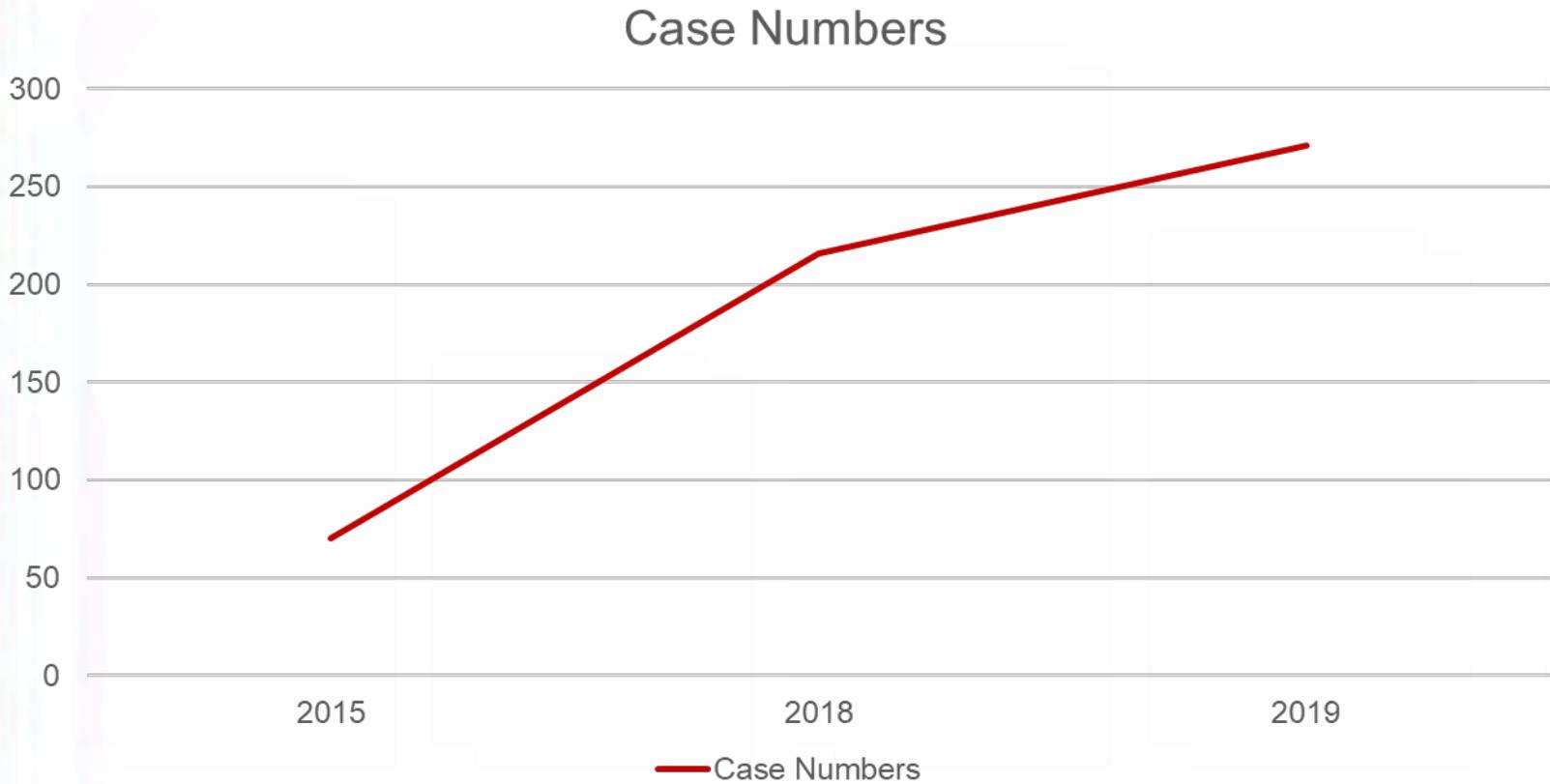
- Restorative Justice Coordinator (Center-based)
 - Engages in local outreach, manages RJ facilitators and affiliates, manages data-collection
- Restorative Justice Program Analyst (ODR)
 - Provides support to the six ODR-approved mediation centers in implementing the VYC program statewide , oversees system-wide data collection



Case Referral Sources



Case Numbers 2015 - 2019

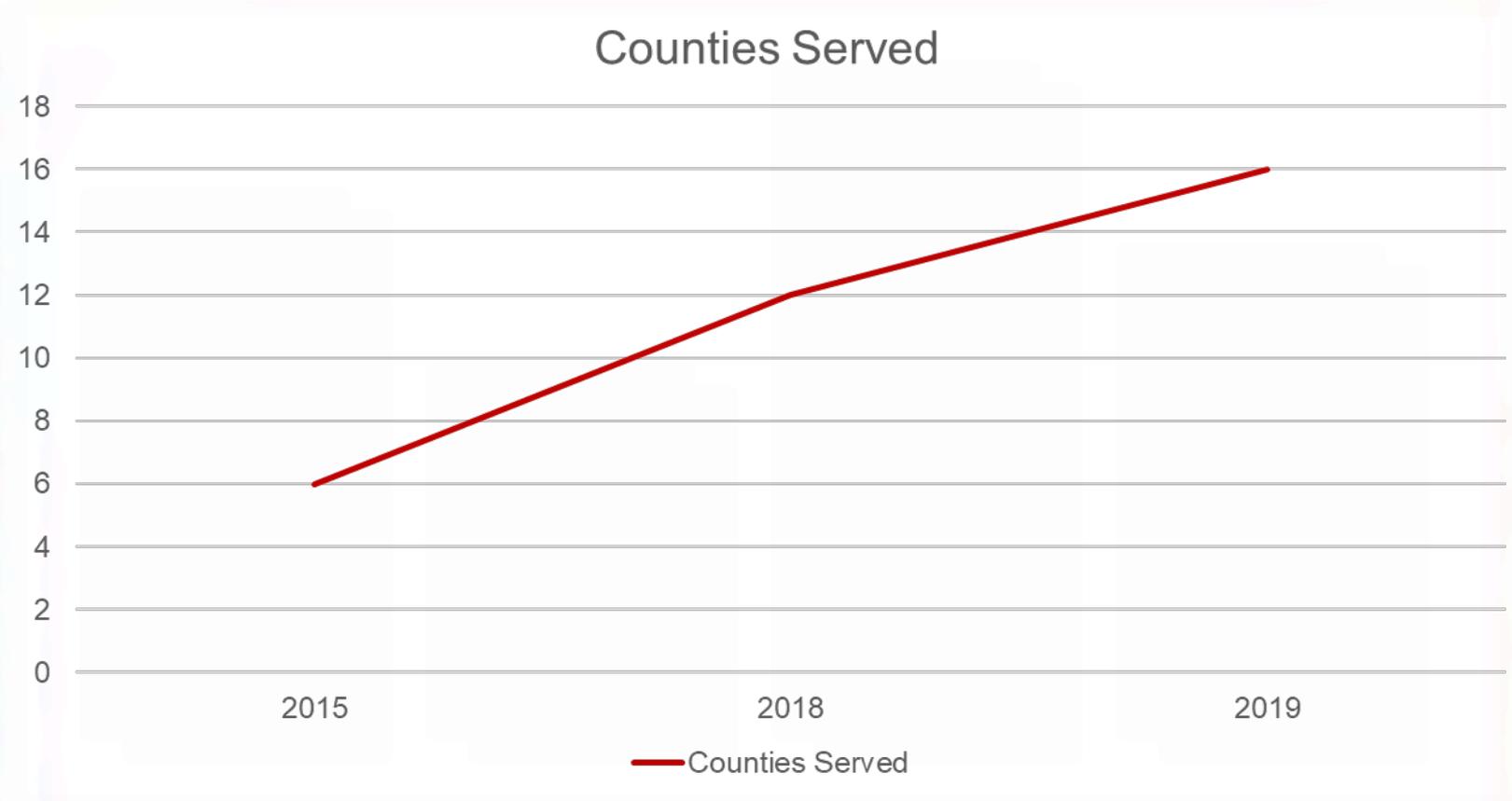


Populations Serve since the VYC Program Began

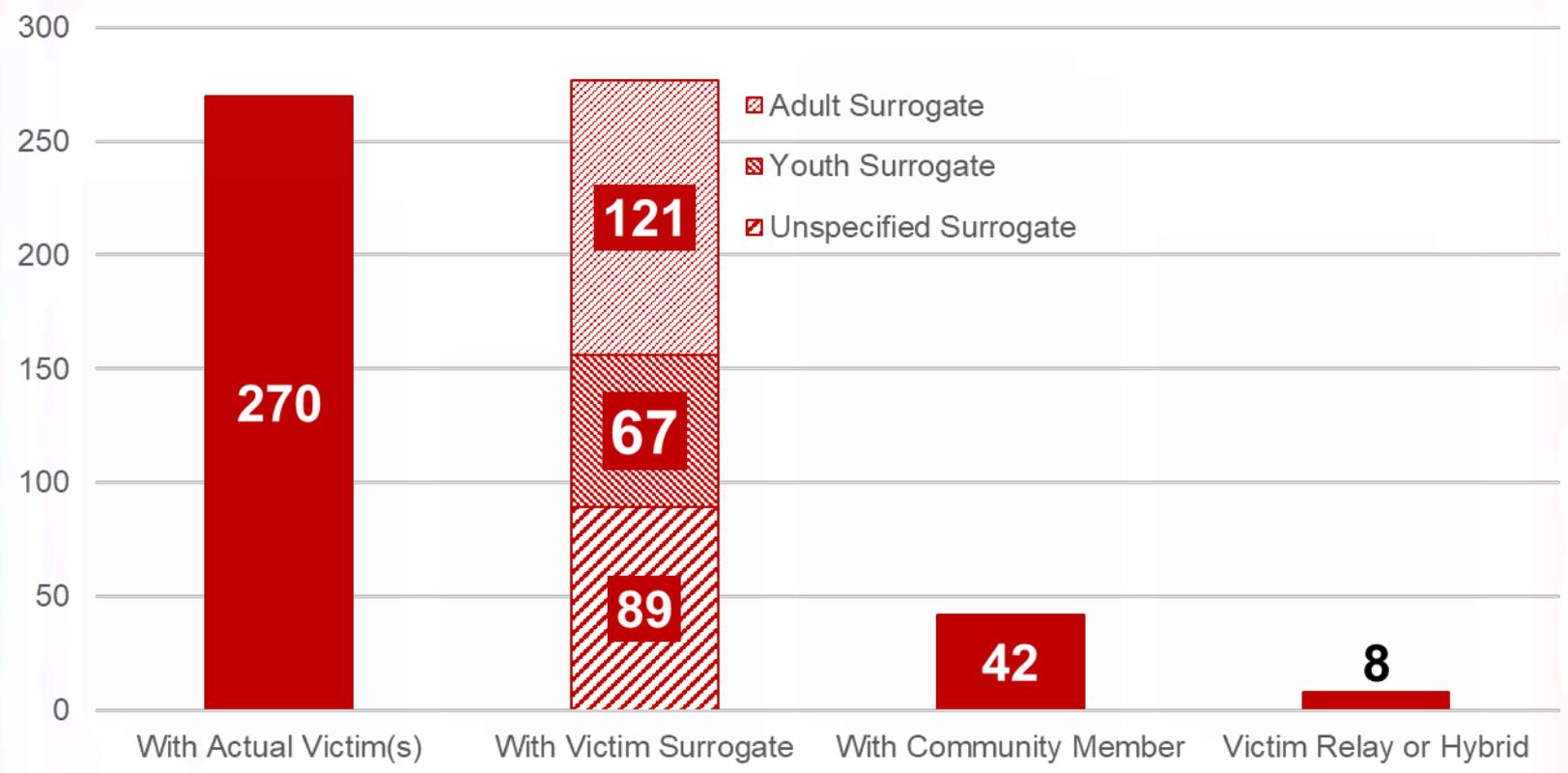
	2015-2016	2016-2017	2017-2018	2018-2019	Totals since start of program
	Pilot	Pilot Extension	Year 1 Expansion	Year 2 Expansion	
Referrals	93	154	216	271	734
Actual VYC Conferences	70	142	159	222	593
Victims Served	114	199	223	127	663
Reparations Agreements	41	112	159	212	524



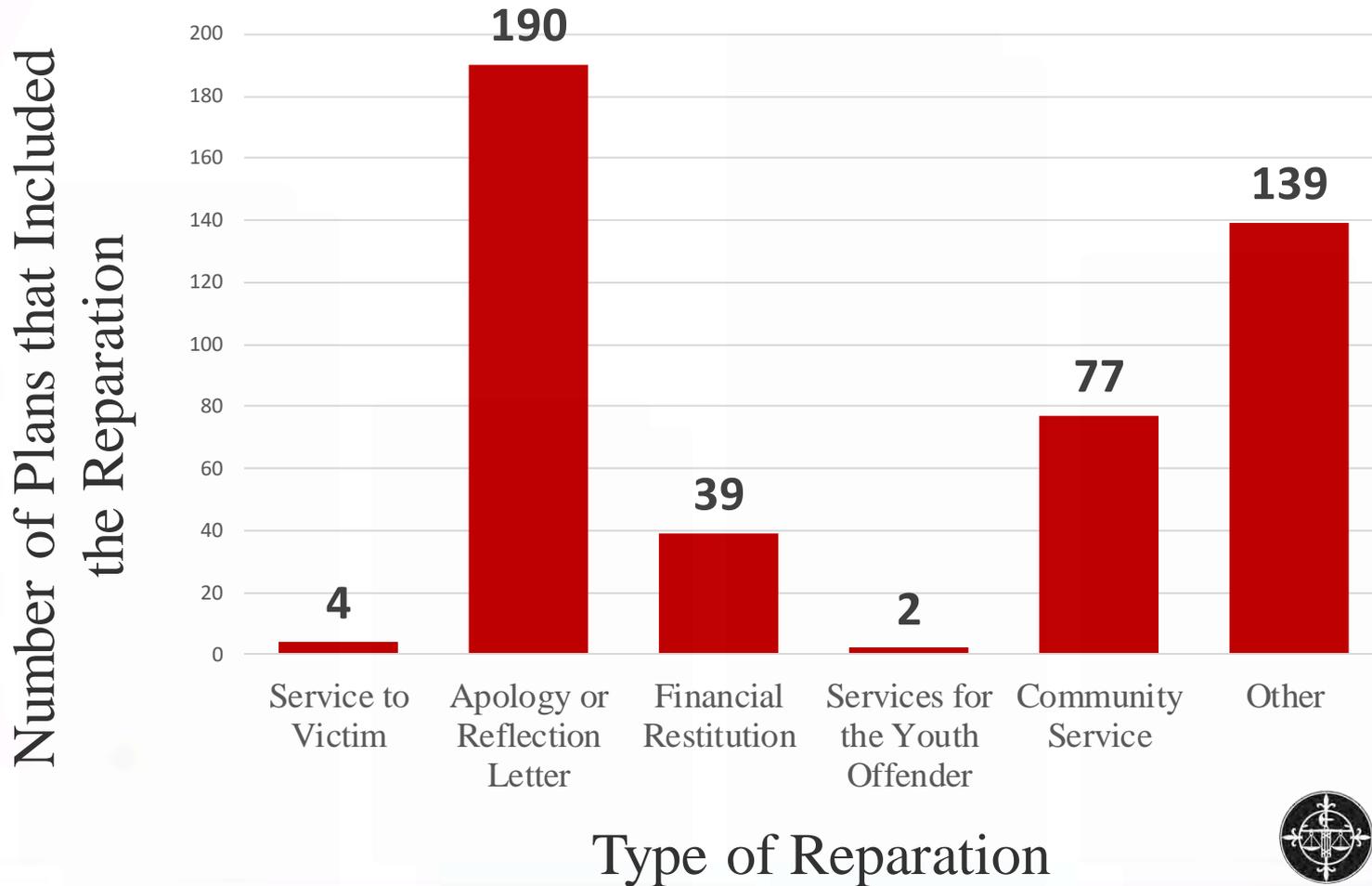
Counties Served 2015 - 2019



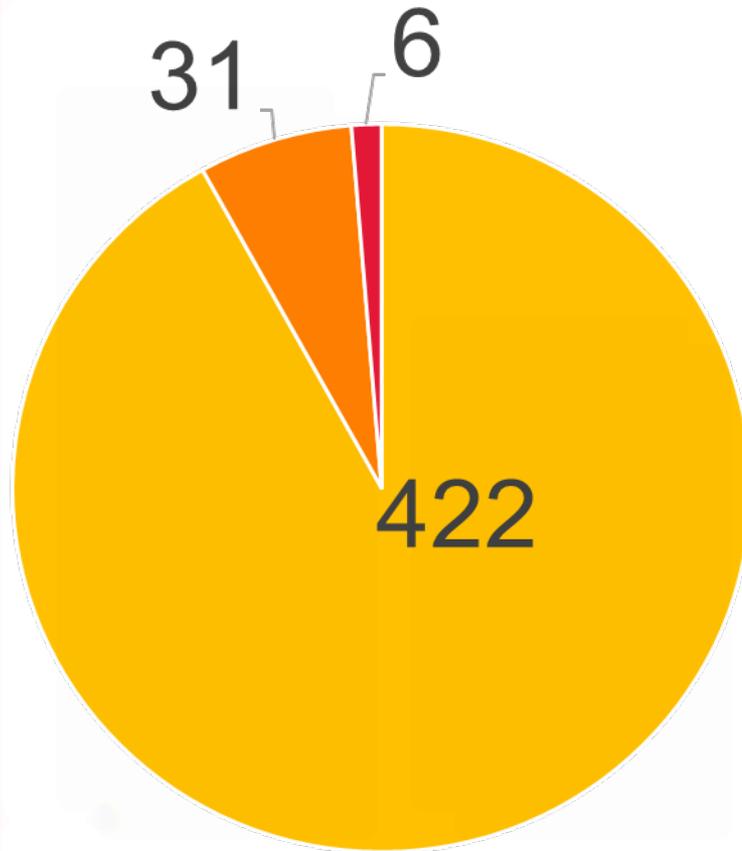
Frequency of VYC Conference Types (n=597)



Frequency Reparation Types During Statewide Expansion



Reparation Achievement Outcomes



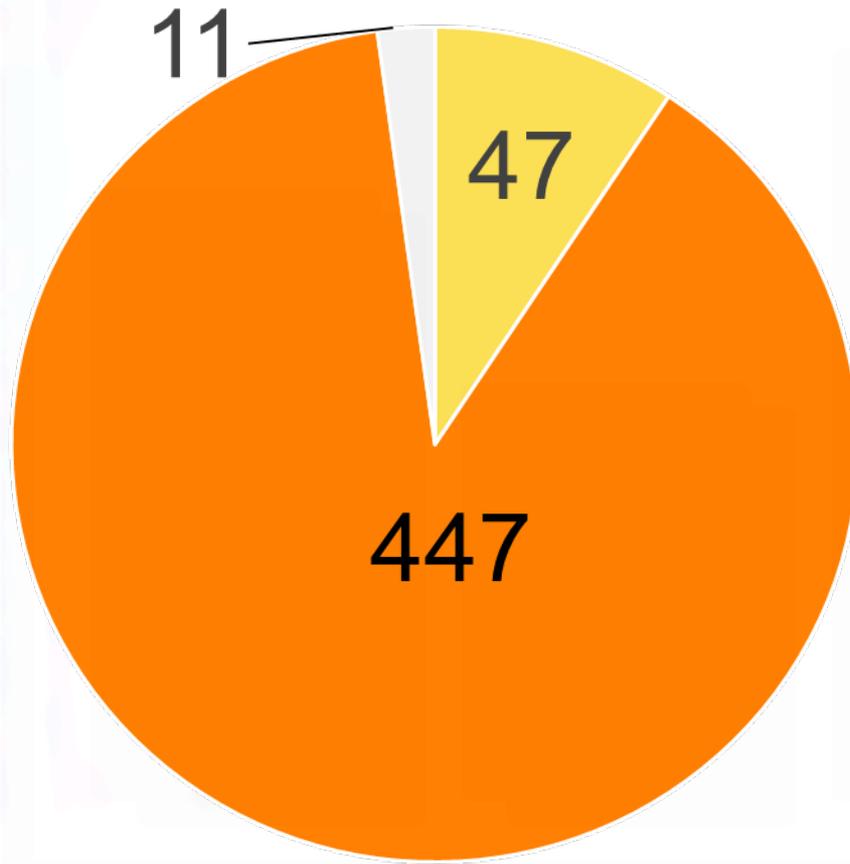
Success Rates for
Cases Closed between
Jan. 2015 and Dec.
2019 (n=422)

- Successful Fulfillment
- Partial Fulfillment
- Unsuccessful



Nebraska's Recidivism

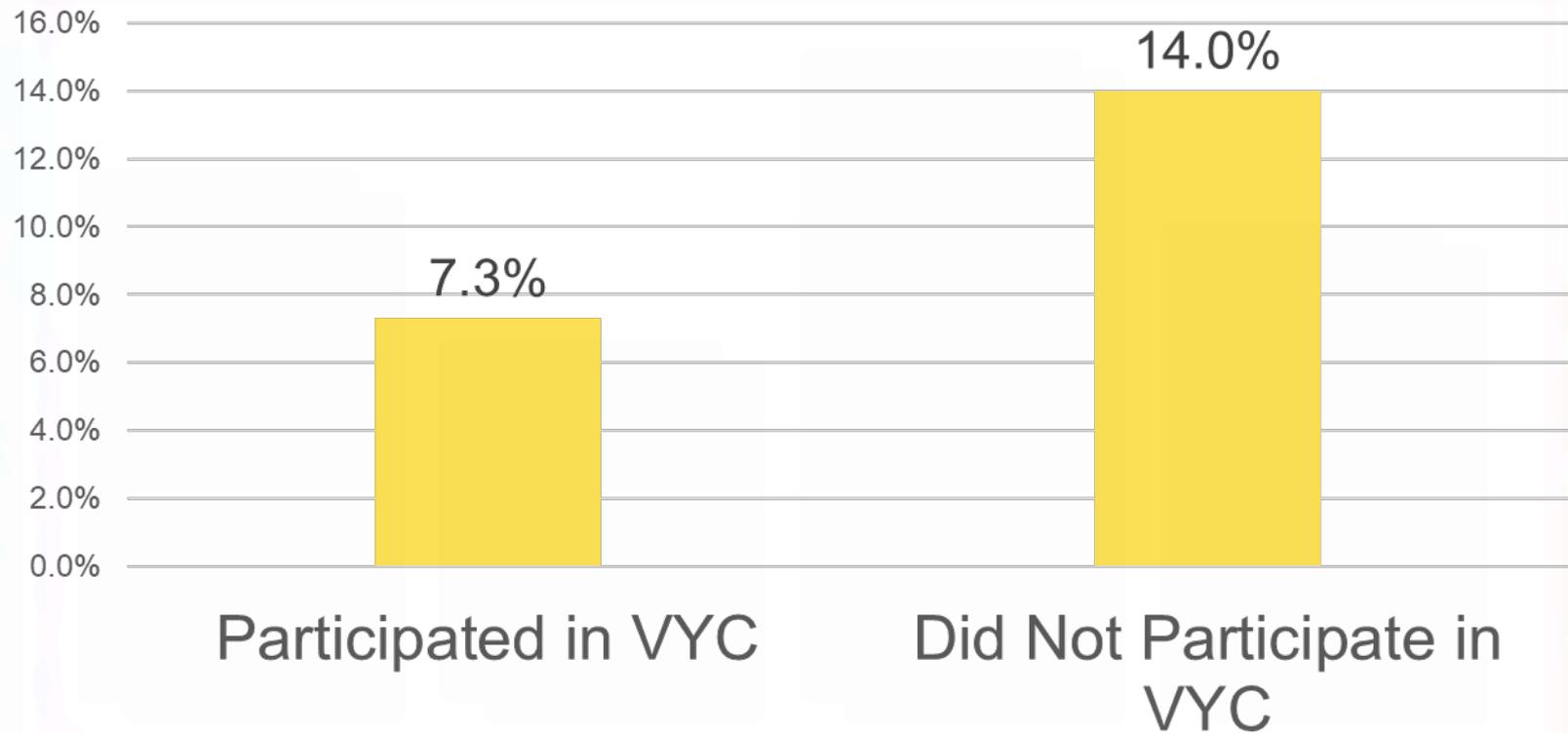
Recidivism Rates for
Cases Closed between
Jan. 2015 and Dec.
2018 (n=505)



- Recidivated
- Did Not Recidivate
- Unreported



Compares Rate of Recidivism for Youth who Participate



$\chi^2 = 5.801, p < .05$



Paving the Way – Creative Use of Surrogates



Growth Areas

1. Sustainability Funding
2. More “Victim” Parties to Table
3. Increase Diversity of Facilitators and Surrogates
4. Buy-In from Douglas/Sarpy county schools
5. Increased Education for Prosecutors, Judges, Educators, Probation
6. Long Term Tracking of Recidivism



Future of Restorative Justice in Nebraska?



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