UNEARTHING ORIGINAL DISPUTES IN CRIMINAL ADJUDICATION

Criminal prosecution is rampant within the United States.[1] Politicians, legal scholars, and activists have cried for reform or abolition.[2] Some of those cries have resulted in the implementation of diversion programs to avoid incarceration.[3] But these programs fail to correct the overbearing and disruptive nature of traditional prosecution. When day-to-day disputes include criminal activities, policymakers identify such activities as criminal victimizations, with at least one disputant named an offender and another named a victim.[4] Each year, such disputes number in the millions.[5] But prosecution of offenders makes resolution of these original disputes far less feasible. Instead, a state-created criminal dispute revokes access to original disputes. It forces the parties into a new process with potential resolutions far removed from the particularities of the original incident.

Relying upon alternative dispute resolution scholarship and criminal legal theory, this Note pursues abolition by interrogating the theory and practice of prosecution. While short of arguing for outright decriminalization, this Note provides some theoretical groundwork for policymakers to tap into an array of decarceral options. It does so by first demonstrating that prosecution disrupts an original dispute. In place of resolving an original dispute, prosecution creates and attempts to resolve an artificial dispute.

The imagery of a displacing dispute pushing aside an original dispute reflects what occurs in courtrooms and at prosecutors' desks every day in the United States. While many of these new criminal disputes might

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[1] Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 397–98 (2017).

[2] *See generally*, *e.g.*, Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN FOR PRESIDENT, https://joebiden.com/Justice [https://perma.cc/5TY8-HBUD]; Ram Subramanian et al., *A Federal Agenda for Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (Dec. 9, 2020), https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform [https://perma.cc/PF73-Y939].

[3] *See* Micah W. Kubic & Taylor Pendergrass, *Diversion Programs Are Cheaper and More Effective than Incarceration. Prosecutors Should Embrace Them.*, ACLU (Dec. 6, 2017, 12:45 AM), https://www.aclu.org/blog/smart-justice/diversion-programs-are-cheaper-and-more-effective-incarceration-prosecutors [https://perma.cc/TA42-X3RL].

[4] *See* RACHEL E. MORGAN & JENNIFER L. TRUMAN, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION, 2019, at 17 (2020), https://bjs.ojp.gov/content/pub/pdf/cv19.pdf [https://perma.cc/V4W6-KYNA].

[5] In 2019, an estimated 12.8 million U.S. households experienced property victimizations, and 5.8 million U.S. people experienced violent victimizations. *Id.* at 3–4. The same survey estimates that, in 2019, forty-one percent of violent victimizations and thirty-three percent of property victimizations were reported. *Id.* at 8.

appear to reach resolution at the end of a trial or the acceptance of a plea, many original disputes throughout criminal law remain unresolved.[6] States may proclaim that justice has been served by the outcome of a dispute that the prosecutorial system alone has created. But those robbed are often not repaid, and their violations are not corrected. People who have suffered harm remain without individually tailored responses to their damage or grief. And the battered are left with injury that the criminal legal system has not healed.

This Note supports the use of dispute resolution methods such as restorative justice circles, victim-offender mediation, and private negotiations for restitution. But it does not prescribe these processes for specific crimes. Implementation of such processes would require an analysis of targeted crimes as specific communities experience them,[7] an account of scholarship concerning the limitations of alternative dispute resolution when mandated by the state,[8] and a design informed by community members.[9]

Instead of such an endeavor, this Note demonstrates that, although an original dispute is often the crux of a criminal trial and the substance upon which criminal pretrial negotiations are poised, prosecution does not resolve it. Finding that the prosecutorial framework is generally unsatisfying, this Note then argues for a framework of "primary dispute resolution." Primary dispute resolution incorporates alternative dispute resolution techniques but attends to the original dispute and acts as the primary method of response to crime. The nature of the relationship between traditional prosecution and original disputes warrants such a reevaluation of the primacy of traditional methods to adjudicate crime. And demotion of the traditional criminal process beneath processes more closely tailored to the resolution of an original dispute benefits the disputants and their respective communities.

Part I identifies the mechanics of dispute displacement and the theoretical frameworks that justify it. Part II shows the current persistence of displacement even alongside tort systems and the use of diversion programs. Part III establishes that dispute displacement is harmful for parties involved in or affected by original disputes. And Part IV demon-

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[6] *Cf.* M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 137 (2016) ("The outcome of an adversarial trial . . . may do nothing to reconcile people involved in the litigation and may instead exacerbate tension and strife.").

[7] *Cf.* N.Y. PENAL LAW § 1.05(5) (Consol. 2021) (A "general purpose[]" of the criminal code is "[t]o provide for an appropriate public response to particular offenses. . . .").

[8] *See generally, e.g.*, Hanan, *supra* note 6.

[9] *See generally, e.g.*, Malcom M. Feeley, *Private Alternatives to Criminal Courts: The Future Is All Around Us*, 119 COLUM. L. REV. ONLINE 38 (2019) (analyzing a program for private administration of shoplifting claims and extrapolating how segmentation and stratification can make particular crimes and claims against particular types of individuals ripe for such privatization).

strates that primary dispute resolution is appropriate and offers two basic templates for it.

I. IDENTIFYING DISPUTE DISPLACEMENT IN CRIMINAL LAW

Policymakers have long adjudicated crime through a coerced dispute resolution process between the state and an offender, also known as prosecution.[10] The denomination of this process, often "State v. Defendant," illuminates its priority. That priority is the resolution of a dispute[11] between a government institution and an offender subject to that institution's coercion.

Prosecution acts as a domination-form[12] system of resolution that displaces original disputes. The mechanics of prosecution — the assumptions that undergird it, the statutes that actualize it, and the agency relationships that facilitate it — all confirm its role as a dispute resolution system displacing an original dispute. The theories of punishment that justify prosecution illustrate the distinction between original disputes and displacing disputes.

A. Mechanics of Dispute Displacement in Criminal Law

1. Displacing Original Victims. — Prosecution displaces original disputes and their potential resolution through two consecutive assumptions. First, the state assumes that the harm that the original dispute created is harm to the community, not only to a victim.[13] This assumption arises less from the recognition of harm to the community than from the mere fact that behavior within the dispute was illegal. Second, the state assumes a position both as the representative for the community and as the community itself.[14] Through these steps, the state

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[10] *Cf.* Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 7–8 (1977) ("It is the Crown that comes into the spotlight, not the victim, . . . describes the losses, . . . appears in the newspaper, . . . [and] talk[s] to the offender . . . .").

[11] A dispute is "an activated conflict in which someone has experienced a wrong and named it, blamed someone or [some] entity and claimed against them in a formal way." Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 13, 14 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (alteration in original) (internal quotation marks omitted) (citing William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635–37 (1980)).

[12] Domination is a form of dispute resolution through which one disputant asserts control by "force or other superior power." *Id.* at 15.

[13] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *5 ("In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community."); HOWARD ZEHR, CHANGING LENSES 81–82 (1990).

[14] *See* ZEHR, *supra* note 13, at 81–82. The state assumes these positions through the three primary decisionmaking roles. Local prosecutors are elected or selected to argue on the community's behalf. Jurors are selected to play a decisionmaking role as specific peer-like representatives

"activate[s]" the "conflict"[15] so that it may appropriately apply its domination-form resolution system. Generally, these assumptions are inappropriate.

Although the state asserts that it properly represents the community, the community does not practically participate through state actors.[16] It is *possible* that the harm within an original dispute injures an entire community, but an assumption that criminalization of an activity accurately indicates that it always inflicts community harm is ungrounded.[17] And even when there is harm to the community warranting the community's participation, the greater poignancy of the victim's harm makes resolution of the victim's dispute more important.

If the saliency of community harm is greater than that of harm to a victim, then displacement may be appropriate. Such crimes might include mass murder, threats to political leaders or institutions, or public corruption, to name a few. But most crimes create narrowly targeted harms: crimes such as trespass, larceny, assault, battery, or domestic abuse.[18] Such crimes often create harm experienced by one or a few people and largely unnoticed by other community members.

2. Displacing Original Incidents. — The state that has drawn these assumptions effectively uses criminal statutes to create a displacing dispute, establishing itself as the new victim regardless of harm.[19] Statutory prohibitions authorize the state to align the new disputants against each other and attempt to resolve the dispute through the prosecutorial process.[20] Although adjudicators couch the substance of this new dispute in witness descriptions and evidence regarding an original

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from the community. Judges are often locally elected. While all these individuals are community members, they are all also state actors having assumed these positions on behalf of the state.

15 Menkel-Meadow, *supra* note 11, at 14.

16 *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 179 (1989); *see also* Christie, *supra* note 10, at 8 ("A further general loss . . . for society . . . is again the possibilities for personalised encounters . . . ."); *infra* section III.C, pp. 730–31.

17 Yet traditional criminal prosecution requires such an assumption if one adheres to legal positivism's view that law ultimately arises from citizens, *see* Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2065, 2109 (1995), and its necessary implication that the vehicle of law arising in a democracy is a legislature. While arguably tangible community harm such as diminishing property values or costs of security measures might result from all "bad" activities, state prosecution targets only perpetrators of activities that legislation has defined as crimes.

18 Although social costs to an entire community can arise from even these crimes, *see* Aaron Chalfin, *Economic Costs of Crime*, *in* THE ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1, 3 (Wesley G. Jennings ed., 2016), communities may bear these costs voluntarily and indirectly while victims' costs are more often involuntary and direct.

19 *See* Hanan, *supra* note 6, at 149 ("[C]riminal justice addresses a violation of law in which the victim is the state and guilt and punishment must be determined . . . .").

20 Some scholars hesitate to consider the criminal process to be a true system of dispute resolution because of the imbalance of power and the vast moral high ground that the state possesses. *See* Michael M. O'Hear & Andrea Kupfer Schneider, *Dispute Resolution in Criminal Law*, 91 MARQ. L. REV. 1, 2 (2007) (analyzing plea bargaining). But their hesitancy relates to whether the system can reach true resolution rather than whether there is a dispute in the first place.

incident, the dispute's substance is not really about the incident. Prosecution provides a forum for a battle of narratives regarding the similarities of the incident and the statutory elements of criminalized behavior.[21] But it does so only to administer punishment to the offender. As a result, the offender, not the original substantive dispute, is the center of the traditional criminal process.[22]

3. Displacing Original Interests. — Issues of agency create further displacement and confirm prosecution's role as a new dispute. Agents, including public defenders, criminal defense attorneys, prosecutors, judges, and jurors, make the communications and assertions to resolve the dispute. But interests of principals and agents may not align.[23] And an agent's repetitive role in courts may weaken the adequacy of their representation.[24]

The prevalence of plea bargaining effectuates both displacement of original disputes and manifestation of new disputes. Because most criminal cases evade trial by reaching conclusion through a bargained guilty plea,[25] agents effectively engulf original disputes. Ignoring issues that might remain between victims and offenders, agents negotiate new interests and options. For example, prosecutors seek to lower caseloads by avoiding trial,[26] and the offenders' counsel seek both low sentences and goodwill with prosecutors.[27] All these mechanics of prosecution reveal it as a displacing dispute pushing aside an original dispute.

B. Theories of Punishment and the Supplanting Nature of Prosecution

Theories of punishment that validate prosecution establish its role as a displacing tool. Four theories commonly justify traditional prosecution: retributivism, deterrence, incapacitation, and rehabilitation.[28]

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[21] *Cf.* PETER L. MURRAY, BASIC TRIAL ADVOCACY 8–11 (Tower Publ'g 2010) (1995).

[22] *See* Nicola Lacey & Hanna Pickard, *A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility Without Blame*, 27 J. POL. PHIL. 229, 239 (2019).

[23] *See* Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 19–24 (1967); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 668–72 (1990).

[24] *See* Charles David Phillips & Sheldon Ekland-Olson, *Repeat Players in a Criminal Court: The Fate of Their Clients*, 19 CRIMINOLOGY 530, 531–33 (1982) (discussing the effect of the repetitive nature of legal representation in criminal courts).

[25] *See* LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., PLEA AND CHARGE BARGAINING 1 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf [https://perma.cc/Y9AC-Y5HL].

[26] *See* Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 263–64 (2011) ("Excessive caseloads lead to long backlogs in court settings, including trials, and bottom-line plea bargain offers." *Id.* at 263.).

[27] *See* Phillips & Ekland-Olson, *supra* note 24, at 531–33.

[28] Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 381 (1979).

Despite the complexity of each theory,[29] a cursory analysis demonstrates how they cause traditional prosecution to pursue goals unrelated to an original dispute. Adherence to these theories validates displacement and ultimately undermines resolution of original disputes captured within a criminal legal system.

1. Retributivism. — Under retributivism, prosecution is the process by which punishment is duly provided for an action that has created harm to society.[30] Retributivism justifies punishment by the measurement of an offender's moral culpability.[31] Taking such an approach, a society that suffers some harm will repay it with new harm.[32]

Retributivism causes the prosecutorial system to displace the original dispute by exchanging the previous harm and original victim for a new harm — punishment — delivered by a new disputant — the state. It dispenses this repayment against the offender through an artificially created second dispute. Although the first harm is the reason that the new harm is applied, the first harm does not receive resolution but only response — and response by the state as an institutional third party. Retributivism may underpin the state's reasoning for displacing an original dispute, but it also explains why a victim would allow the state to displace their dispute. The retributivist desires that an initial harming person gets their just deserts.[33] And a victim who concludes that state-administered punishment is the just desert of their opposing disputant will likely welcome any process that gives the state this task.

2. Deterrence and Incapacitation. — Under deterrence theory, lawmakers attempt to hinder future crimes by applying punishments at magnitudes high enough to discourage other community members from engaging in those prohibited activities.[34] Similarly, incapacitation encourages the prevention of future harms at the cost of addressing present ones. It hinders an offender from creating future harm by physical confinement or state monitoring.[35]

Deterrence and incapacitation cause displacement by inserting a societal goal into a situation that most often should concern only two disputants. Restricting people from prohibited activity may prevent future

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[29] Each is too complex and interwoven for this Note to provide a complete assessment. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 401–02 (1958).

[30] *See* Pugsley, *supra* note 28, at 398.

[31] *Id.*

[32] *See id.*

[33] *See* MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 87 (1997).

[34] *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 950 (2003).

[35] *See* Pugsley, *supra* note 28, at 387.

harm.[36] But it does not provide correction or healing for the present harm perpetrated between the disputants. Rather than orienting the criminal legal response around present issues, deterrence and incapacitation are entirely anticipatory.

3. Rehabilitation. — By rehabilitation, society treats individuals so that they either avoid committing such crimes again or live upon release in a manner that society deems contributory and successful.[37] A future-oriented goal,[38] rehabilitation leads to displacement by distracting from the present dispute and focusing a criminal legal response upon the offender.[39] While rehabilitation arguably may provide healing for the offender, it does not provide appropriate healing for the victim.

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Each of these objectives adds to an understanding that prosecution is a criminal dispute superseding an original dispute. Policymakers make the new dispute publicly accessible to deter future crime.[40] They apply an unbalanced legal framework and limited options to realize goals of incapacitating, rehabilitating, and giving retribution. Such results may arguably be in the state's interest, but they are not directly related to the original disputants' interests, which might include restoration of their relationship or apology for inflicted harm.

II. PERSISTENCE OF DISPUTE DISPLACEMENT IN CRIMINAL LAW

Current systems that might respond to displacement fail to address original disputes adequately. Tort litigation provides an opportunity for disputants to attend to their dispute but fails to do so effectively on several accounts. Diversion programs sometimes aim to resolve original disputes, but their entanglement with prosecution hinders their ability to achieve resolution.

A. Tort Law's Inefficacy in Capturing Disputes Displaced by Prosecution

The availability of tort remedies does not excuse criminal law's displacement. Indeed, if tort law effectively resolved original disputes, prosecution's displacing nature might be acceptable, but to do so, the

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[36] *But see* Madeline W. Goralski, Note, *Let the Judge Speak: Reconsidering the Role of Rehabilitation in Federal Sentencing*, 89 ST. JOHN'S L. REV. 1283, 1287–88 (2015) (acknowledging the difficulty of measuring deterrence and predicting future criminal conduct).

[37] *See* MICHAEL S. MOORE, LAW AND PSYCHIATRY 234 (1984).

[38] *See* Albert W. Alschuler, Essay, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 2 (2003) ("[C]riminal punishment should look forward, not backward.").

[39] *See* Goralski, *supra* note 36, at 1288 ("Rehabilitation . . . focuses on the individual defendant.").

[40] *Id.* at 1287.

tort system would need to cover the same behavior as criminal law and violations in tort statutes would need to mirror those in criminal statutes. If so, even displaced disputants could successfully rely on tort remedy. But tort law does not consistently capture disputes that include criminalized behavior. Even if it did, tort claims still suffer from inaccessibility.

While tort law is better at responding to original disputes than criminal law, it is not always available. Both systems mandate that individuals bear the burden of some harm[41] and are designed to counteract nonpreferred behavior.[42] But criminal law uses punitive consequences to prohibit behavior, and tort law uses monetary damages to price behavior.[43] While criminal law displaces the original dispute, tort law retains the dispute and channels it through a judicial process. Some disputes may result in criminal prosecution, others in civil tort litigation, and many in both. Crimes such as negligent endangerment, misrepresentations, and many "victimless" crimes that veil reporting disputants may displace original disputes without an available tort claim.[44] Instead of welcoming encroachment by tort law to capture these claims, criminal law has encroached on tort law.[45] Today, criminal prohibitions cover not only traditional torts but also activities not captured by tort remedy.[46]

Inaccessibility further weakens the tort system's ability to address original disputes. Even when lawmakers use the same language to authorize criminal prosecution as they use to authorize civil remedies,[47] difficulties in using the system arise from its reliance on monetary compensation from the wrongdoer. Victims may struggle to pay high legal

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[41] *See* R.A. Duff, *Torts, Crime, and Vindication: Whose Wrong Is It?*, *in* UNRAVELLING TORT AND CRIME 146, 146–48 (Matthew Dyson ed., 2014) (comparing and contrasting the burdens imposed by tort and criminal law).

[42] *See* Richard A. Epstein, *Crime and Tort: Old Wine in New Bottles*, *in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 231, 232 (Randy E. Barnett & John Hagel III eds., 1977).

[43] *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 225–28 (1991).

[44] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 516–18 (2001); *see also* Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 754 (1943) ("Many interests established by the criminal law have no counterpart in or connections with any branch of private law.").

[45] *See* Coffee, *supra* note 43, at 200–01 (examining the detriment to criminal law's socialization ability when not used parsimoniously).

[46] *See* Stuntz, *supra* note 44, at 515–17 (collecting examples of the breadth of criminal law).

[47] *See* Coffee, *supra* note 43, at 199 & n.20 (citing United States v. Ward, 448 U.S. 242, 249–51 (1980) (permitting the use of a civil penalty although the civil statute was practically identical to a criminal statute)); Hall, *supra* note 44, at 753.

costs and court fees.[48] Deduction of those costs from final judgments and settlements[49] discourages potential claimants. And victims may settle for less than full compensation because of their circumstances.[50]

B. Diversion Programs' Failure to Prevent Dispute Displacement

Diversion programs are schemes that aim to bypass aspects of prosecution but still result in dispute displacement where used. Programs vary widely.[51] Some are merely nonincarceration solutions such as drug rehab programs or state supervision, and others are resolution processes that relate to an original dispute, such as community-based problem-solving panels or restitution agreements.[52] While the former kind of diversion program resembles only a nonprosecution agreement, the latter appears to provide a process of resolution to an original dispute. But even while targeting underlying problems of crime,[53] such diversion programs serve prosecution's displacing aims in practice. Both the inequality of access and the coercion usually inherent in diversion schemes reflect displacement's tenacity.

Selective implementation of diversion programs restrains them so that the state, rather than original disputants, exercises ultimate control over access to the programs. Local prosecutors, judges, or police refer individuals to programs.[54] Of these, local prosecutors generally have the most discretion.[55] And they are rarely subject to any judicial oversight in their decision to divert.[56] Prosecutors might discriminatorily label some individuals as too "deviant" for a place in a program.[57] Even with evidence-based guidance to select program participants, prosecutors might engage in a kind of "moral sorting" so that they categorically shut out potential candidates.[58] Additionally, exorbitant fees attached

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[48] Joe Palazzolo, *We Won't See You in Court: The Era of Tort Lawsuits Is Waning*, WALL ST. J. (July 24, 2017, 5:09 PM), https://www.wsj.com/articles/we-wont-see-you-in-court-the-era-of-tort-lawsuits-is-waning-1500930572 [https://perma.cc/9N99-RDA4].

[49] *See* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 594 (1985).

[50] *Id.* at 593–94.

[51] *See* Kubic & Pendergrass, *supra* note 3.

[52] *Cf.* S'Lee A. Hinshaw II, Comment, *Juvenile Diversion: An Alternative to Juvenile Court*, 1993 J. DISP. RESOL. 305, 315–16 (describing diversion programs in the juvenile context).

[53] *See* Kubic & Pendergrass, *supra* note 3.

[54] *Cf.* Hinshaw, *supra* note 52, at 314.

[55] *See* Charles E. MacLean, James Berles & Adam Lamparello, *Stop Blaming the Prosecutors: The Real Causes of Wrongful Convictions and Rightful Exonerations*, 44 HOFSTRA L. REV. 151, 156 (2015).

[56] *Cf.* Hinshaw, *supra* note 52, at 314. Judges may have influence in one direction: they can deny selection for diversion, but they may receive criticism for granting diversion over a prosecutor's rejection. *See* Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 840 n.66 (1974).

[57] *Cf.* Hinshaw, *supra* note 52, at 311.

[58] Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 81–82 (2017) (discussing how veterans courts set aside special

to the programs deter poorer candidates.[59] These issues arise because displacement has already foreclosed immediate resolution of original disputes so that the state must selectively grant access to those disputes again.

Because prosecutors offer the programs, they effectively coerce alleged offenders into implicit or explicit guilty pleas. By threatening completed prosecution, prosecutors shuttle offenders into programs within which offenders may worry that a confession or incriminating evidence revealed throughout program participation might indicate guilt in later adversarial proceedings.[60] Even without such evidence, mere participation in a diversion program may create an implicit assumption of guilt.[61] Some jurisdictions require a guilty plea before allowing an offender to participate in a diversion program, while others require an acknowledgment of responsibility for the offense.[62] And participants that fail a program may find themselves with a more severe punishment at the hands of the very same prosecutors who offered them mercy.[63] Such requirements reveal that diversion programs may better facilitate prosecution than actual resolution of an original dispute.

Both punitive coercion and selective implementation infect any process used alongside prosecution. Unequal access arises in part from prosecutorial participation. Coercion arises because of prosecutorial compulsion. And as a result, diversion programs intended to avoid dispute displacement continue to exhibit the influence of the overpowering prosecutorial dispute.

III. HARMS OF DISPUTE DISPLACEMENT

Criminal law's displacement of original disputes can leave participants within that system unsatisfied. The interests of victims likely suffer the most acute oversight within prosecution because their participation is often extraneous at best. But dispute displacement also creates negative effects for offenders. And displacement's failure to effectively involve community interests also harms third parties.

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processes for veterans because of potential PTSD while refusing the opportunity for other citizens with comparable PTSD).

59 Shaila Dewan & Andrew W. Lehren, *No Money, No Mercy: After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html [https://perma.cc/Y3DP-MGWT] ("Diversion, interviews and case records show, can be revoked for failure to pay, or never even offered to defendants deemed too poor to afford it.").

60 *See* Scott-Hayward, *supra* note 58, at 83. *But see infra* note 135.

61 *See* Note, *supra* note 56, at 834.

62 *Id.* at 833.

63 *See* Scott-Hayward, *supra* note 58, at 83–84.

A. Limitations on Victim Participation in Criminal Law

Over time, the displacement of original disputes has included a displacement of victims. Legal systems that predated modern Western law viewed a crime as an offense against a victim and a victim's family, with implications for the community.[64] Systems required offenders and their families to settle accounts with victims and their families.[65] What mattered in these conflicts was the actual harm inflicted, rather than any abstract legal, social, or moral violation.[66] Many victims brought action in courts for criminal acts that they suffered,[67] resulting in unique solutions.[68] Around the twelfth century, this practice began to change.[69] But remnants of this early evolution of criminal law remained. Private prosecution[70] was common enough that public prosecution was the exception rather than the norm in the seventeenth and eighteenth centuries.[71] In fact, private prosecution in some forms can still be discovered today.[72] But it had mostly dissipated by the end of the nineteenth cent-

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[64] DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE 6 (1997) ("The goal of the justice process was to make things right by repairing the damage to [victims, their families, and the community].").

[65] *Id.* at 7.

[66] ZEHR, *supra* note 13, at 99 ("[A] typical outcome of the justice process was some sort of settlement" consisting of "[r]estitution.").

[67] Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359 (1986) ("The practice of allowing crime victims to initiate private prosecutions is a long-held English tradition, based on the common belief that the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family.").

[68] *See* ZEHR, *supra* note 13, at 99. Such solutions were not always preferable, sometimes resulting in perpetrators paying a slain person's kin or in the grant to such kin of the right to slay a perpetrator. *See* Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 MICH. L. REV. 413, 417 (1976). And solutions were not equally available to victims in different situations. *See* Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 238 (2005). Without time and resources, some victims were not able to prosecute effectively. *Id.* But potential negotiated solutions such as restitution or reconciliation that may not have been suitable for every crime were more readily available for disputants if they determined the solutions were appropriate. *See* ZEHR, *supra* note 13, at 99.

[69] *See* 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 481 (2d ed., Liberty Fund 2010) (1895).

[70] Private prosecution is criminal prosecution led by a private individual. *See* Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 665–66 (2010). It has mostly been replaced by public prosecution, which is led by a state or local prosecutor. *See id.* at 673–83.

[71] *See* Douglas Hay & Francis Snyder, *Using the Criminal Law 1750–1850: Policing, Private Prosecution, and the State*, *in* POLICING AND PROSECUTION IN BRITAIN: 1750–1850, at 3, 21–24 (Douglas Hay & Francis Snyder eds., 1989) ("[The] responsibility for the initial expense and entire conduct of the prosecution was thrown on the victim or his or her family." *Id.* at 23.).

[72] *See* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 423 (2009).

ury as local prosecutors gained sole discretion for the hearing of criminal complaints.[73]

Criminal legal processes today push victims to more tangential roles. For example, victims participate in public prosecution not as moving parties, but as witnesses.[74] They may give impact statements that sometimes influence the severity of sentencing.[75] But instead of addressing the specific concerns of victims,[76] courts limit victim participation to helping the state to punish and seeking compensation in a separate tort law system. Thus, prosecution sidelines victims so that the few remaining displays of victim participation constitute resistance to its disruption.

Prosecutors' outsized influence within displacing disputes also eclipses the few remaining avenues for victim participation. Prosecutors remove victims from the criminal legal process in several ways.[77] They have power to determine the crimes with which they should charge an offender by selecting from a criminal code filled with charging options by a legislature.[78] Victims may provide their narratives to prosecutors, and prosecutors often use those details as evidence against the offenders.[79] But prosecutors control how victims' narratives might be weaponized.[80] Nowhere is the prosecutor's power more focused than during the plea bargaining process. Prosecutors may conduct plea negotiations completely outside of the influence or awareness of victims.[81] Yet plea negotiations determine the outcome of around ninety-five percent of criminal cases.[82] By circumventing a trial, plea negotiations easily circumvent even the elements of participation still available.

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[73] *See* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1327 (2002).

[74] *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 483 (2005).

[75] *Victim Impact Statements*, U.S. DEP'T OF JUST. (Dec. 14, 2020), https://www.justice.gov/criminal-vns/victim-impact-statements [https://perma.cc/K9AC-TSJB].

[76] *See* O'Hara, *supra* note 68, at 239–40.

[77] *See* Christie, *supra* note 10, at 3 (discussing how each party's participation is limited by legal representation and how a victim's "representation" is so thorough that the victim is "pushed completely out" of it).

[78] *See* Stuntz, *supra* note 44, at 518–20 ("[The] common pattern is a few general offenses with a host of more targeted crimes, and the targeted crimes themselves overlap." *Id.* at 518.).

[79] *See* ZEHR, *supra* note 13, at 30 ("[Victims] are taken into account only if they are needed as witnesses.").

[80] *See* Hanan, *supra* note 6, at 127–28 ("The aggrieved person loses almost all power over the course and outcome of the prosecution . . . ." *Id.* at 128.).

[81] Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 438 n.120 (2008) (observing that "[v]iewing plea bargains as consensual transactions . . . disregards the interests of third parties such as victims . . . whose consent is not required to consummate a plea deal").

[82] *E.g.* Missouri v. Frye, 566 U.S. 134, 143 (2012) (noting that guilty pleas account for ninety-four percent of state criminal convictions and ninety-seven percent of federal criminal convictions); Hanan, *supra* note 6, at 165.

Because victims participate so minimally, prosecutions rarely redress victims' harms[83] but do magnify them. Many victims have resented the options available in the criminal legal system and do not expect authorities to be responsive to their needs.[84] Within the prosecutorial process, scholars have shown that victims who are denied participation may suffer increased psychological harm.[85] These effects of displacement relate not only to restrictions on victims but also to restraints on offenders' abilities to respond as opposing disputants.

B. Denial of Offenders' Opportunity to Correct Harm

Dispute displacement harms offenders by removing the opportunity for them to directly seek resolution alongside opposing disputants. Prosecution tends to hide both the original dispute and the other disputes that arose before it, failing to consider that the community or victim may have previously harmed the offender.[86] Social, moral, and personal factors relevant to the offender are only meaningfully included in the prosecutorial process if they are legally relevant.[87] As a result, traditional prosecution overlooks the offender's full narrative.

Additionally, displacement allows punishment's negative effects to proliferate in the lives of offenders and related parties when the harm of the original dispute might have abated through the dispute's resolution.[88] Punishment of an offender and its collateral consequences are less necessary when disputants resolve original disputes. Although punishment theorists find it appropriate to exercise retribution or create

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[83] *See* Kaelyn Forde, *Why More Women Don't Report Sexual Assaults: A Survivor Speaks Out*, ABC NEWS (Sept. 27, 2018, 10:40 AM), https://abcnews.go.com/US/women-report-sexual-assaults-survivor-speaks/story?id=57985818 [https://perma.cc/H6SH-78HP] ("[Law enforcement's] role is not to facilitate the continued well-being of the victim's experience. . . . [W]e can't guarantee that because that's not how the system is built . . . ." (quoting Keeli Sorensen, Vice President, Rape, Abuse & Incest Nat'l Network)).

[84] *See* Cardenas, *supra* note 67, at 357–58.

[85] O'Hara, *supra* note 68, at 244.

[86] *See* Hanan, *supra* note 6, at 131.

[87] *See* ZEHR, *supra* note 13, at 80–81 ("Training in law is training in simplifications. It is a trained incapacity to look at all values in a situation, and instead to select only the legally relevant ones, that is, those defined by the high priests within the system to be the relevant ones." (quoting NILS CHRISTIE, LIMITS TO PAIN: THE ROLE OF PUNISHMENT IN PENAL POLICY 57 (Wipf & Stock 2007) (1981))).

[88] *See, e.g.*, Rucker C. Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, *in* DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM 177, 199, 202 (Steven Raphael & Michael A. Stoll eds., 2009) (demonstrating the relationship between parental incarceration and childhood behavioral issues); Steven Raphael, *The Impact of Incarceration on the Employment Outcomes of Former Inmates*, *in* MAKING THE WORK-BASED SAFETY NET WORK BETTER 185, 196 (Carolyn J. Heinrich & John Karl Scholz eds., 2009) (demonstrating the relationship between high incarceration rates and unemployment outcomes of men who have not been to prison in the same demographic subgroup).

harm as a deterring force,[89] these reasons are less convincing when the original dispute becomes resolved.[90] But if the original dispute is displaced, then giving just deserts and creating an example of the offender become more logical solutions.

C. Revocation of Practical Community Access to Disputes

Dispute displacement effectively revokes community access to disputes in which they may have some interest. Community members may still vote for their district attorney and participate by representation through the prosecutor.[91] But some prosecutors are appointed rather than elected,[92] and even elected prosecutors are rarely challenged or assessed on a values basis by the community.[93] Community members may watch a public criminal trial or they may participate on a jury. But most cases completely circumvent the trial stage when the state reaches a plea agreement with the offender.[94] So the traditional process generally does not provide community members a meaningful role.

Without such a role, community members lose the opportunity to adjust customs, policies, practices, and distribution of resources accordingly to make disputes less likely. These are adjustments that could occur among disputants' close relationships or at neighborhood or municipality levels. Community participation in crafting sanctions also better serves the community's interest in lowering crime.[95] But when prosecution displaces an original dispute, community members are no longer procedurally poised or substantively connected to use any of their resources to resolve underlying issues or craft sanctions.

III. PRIMARY DISPUTE RESOLUTION TO AVOID DISPLACEMENT

Primary dispute resolution — that is, preferring resolution of the original dispute over resolution of a state's displacing dispute — may be a better response to criminal behavior. Policymakers that implement primary dispute resolution processes would find them helpful for in-

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89 *See* Pugsley, *supra* note 28, at 391–404.

90 *Cf.* Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms*, 34 VT. L. REV. 563, 576–77 (2010) (arguing that when a sentencing provision retains consideration of causal factors, a "solely utilitarian or solely retributive punishment system is inadequate," *id.* at 577).

91 *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581 (2009) ("[T]he public guards against abusive prosecutors through direct democratic control.").

92 *Id.* at 589 (discussing, for example, how federal prosecutors are appointed).

93 *Id.* at 582–83 ("Incumbents and challengers have little to say about the overall pattern of outcomes that attorneys in the office produce or the priorities of the office. The debates do not pick up genuine ideological differences among candidates; they are misguided attempts to measure non-ideological competence.").

94 *See* DEVERS, *supra* note 25, at 1.

95 *See* BRAITHWAITE, *supra* note 16, at 69 ("[S]anctions imposed by relatives, friends or a personally relevant collectivity have more effect on criminal behavior than sanctions imposed by a remote legal authority.").

volved parties. They would discover an effective way to respond to criminalized behavior. And although they would encounter concerns, these would be surmountable. Two specific ways that policymakers could implement primary dispute resolution are by engaging processes before prosecution or by replacing prosecution with those processes altogether.

A. Benefits of Avoiding Displacement to Attend to Original Disputes

Victims, offenders, communities, and the administration of criminal legal response benefit from a criminal legal system that gives original disputes primacy over displacing disputes. While prosecution disempowers victims, resolution of original disputes keeps victims' interests at the forefront. It better addresses the interests and needs of the offender as well as both the community's culpability in the harm and the community's responsibility to contribute to resolution. Such processes more readily allow the input and participation of community members. Avoiding displacement diminishes problems associated with diversion programs. And policymakers can implement processes in a variety of ways that attend to underlying circumstances.

While prosecution restricts victims, processes that aim to resolve original disputes retain victims' participation and power. They demand victims' inclusion not only for the poignance of their narrative but also for properly appropriating reparatory action.[96] The narrative of the victim centers in and permeates throughout an appropriate dispute resolution process.[97] And the likelihood that victims' narratives would reveal their interests in dispute resolution increases the chance that the final resolution would directly provide them "reassurance, reparation, vindication, empowerment, . . . [and] meaning."[98] Victims may already be in vulnerable and disadvantaged positions.[99] Whereas the traditional legal process victimizes an individual a second time by removing their power, a process that incorporates their input toward the resolution of their own harm empowers them.[100]

Processes that address the original dispute draw attention to the social history and environmental risk factors that led to it.[101] Lifting the veil on these factors provides an opportunity to alleviate them while also

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[96] *See* Christie, *supra* note 10, at 10 (arguing that a victim-oriented process would ask what could be done for the victim by the offender, the local neighborhood, and the state).

[97] *See* ZEHR, *supra* note 13, at 194 ("[Victims] must be a key in determining what their needs are, how they should be met, and when they should be addressed.").

[98] *Id.*

[99] *See, e.g.*, Hanan, *supra* note 6, at 128.

[100] ZEHR, *supra* note 13, at 203–04. *But see* Hanan, *supra* note 6, at 145–49 (critiquing some restorative justice practices for disempowering disputants).

[101] *See* Grace, *supra* note 90, at 589–90 (providing examples of how consideration of environmental risk factors and social history is integrated into alternative dispute resolution processes).

allowing communities more easily to recognize both complicity in sustaining an environment that would tolerate such factors and opportunity to appropriately respond to them alongside disputants. Within such processes, questions arise such as: who has been harmed, what are their needs, and who carries the obligations to meet those needs.[102] Answering these questions increases the community's capacity to both recognize and attend to the underlying implications.[103]

Another benefit is that resolution processes may afford the community more participation and power. In circumstances where a dispute substantially harms a community, significant community participation might be appropriate. Some dispute resolution processes aim to focus energy toward community building.[104] The community may take a direct and active role in open discussion with the disputants to bring about their holistic integration and achieve consensus on an appropriate outcome.[105] For example, an offense committed in a classroom could lead to a restorative justice circle in which disputants and community members share their narratives, harms, and hopes for resolution.[106]

By withholding displacement, policymakers can avoid the negative implications at hand in diversion programs that empower prosecutors. For instance, to avoid discriminatory selection, policymakers could automatically implement a process devoid of displacement for individuals accused of selected crimes. And although coercion is inherent in any criminal legal process that forces accountability and different future behavior,[107] policymakers could substantially diminish punitive coercion in chosen dispute resolution processes by separating prosecutors or threats of punishment from processes.[108]

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[102] Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 258 (2005).

[103] *See id.*

[104] Grace, *supra* note 90, at 566 ("[A]dvocates hoped to empower communities to resolve conflicts away from the state's influence and to shift the focus from the offender's individual rights towards community building.").

[105] *See, e.g.*, *id.* at 567 n.22 (citing Bruce P. Archibald, *Let My People Go: Human Capital Investment and Community Capacity Building via Meta/Regulation in a Deliberative Democracy — A Modest Contribution for Criminal Law and Restorative Justice*, 16 CARDOZO J. INT'L & COMP. L. 1, 53 (2008)).

[106] David Knight & Anita Wadhwa, *Expanding Opportunity Through Critical Restorative Justice: Portraits of Resilience at the Individual and School Level*, 11 SCHS.: STUD. EDUC. 11, 15–16 (2014). Restorative justice is a process that puts offenders, victims, and community members in conversation to seek healing from harm suffered, recognize present needs, and address obligations. Umbreit et al., *supra* note 102, at 256.

[107] *See* Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 491 (1968).

[108] Such processes could create incentives to participate through the encouragement of family members, friends, administrative fines, acts of shaming, or a culture of participation in similar processes.

Last, by avoiding displacement, policymakers can discover a spectrum of available dispute resolution processes.[109] Communities have taken numerous paths toward resolution, and today, alternative dispute resolution processes abound in form and name.[110] For example, victim-offender mediation is more private in design,[111] but some processes are distinctly public.[112] Some, like restorative justice, benefit from the disputants' membership in an insular community. Process design and selection may reflect disputants' prior relationship, lack thereof, or interest in participation.[113] While prosecution narrowly pushes disputants into a one-size-fits-all system, shedding displacement and attending to original disputes is more customized.

B. Concerns of Primary Dispute Resolution

Despite the benefits of giving primacy to original disputes, some concerns inform the implementation of any dispute resolution process. This Note would be remiss not to mention these concerns. Attending to an original dispute might result in a privatized process, despite it having public dimensions and provoking community interest. The use of private processes and semipublic processes might diminish the normative role of criminal law. And communities may hesitate at replacing a traditional process that boasts uniformity and appeals to society's general desire for fairness.

1. Privatization. — Although policymakers may have concern over processes such as mediation[114] that are private in nature, they may appropriately select a process with community participation that reflects the magnitude of community harm. If policymakers use only private methods, community harm might receive an unsatisfying response.[115] While the parties would gain an opportunity to resolve their dispute, the

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[109] *See generally* Terenia Urban Guill, Comment, *A Framework for Understanding and Using ADR*, 71 TUL. L. REV. 1313 (1997) (collecting alternative dispute resolution (ADR) methods).

[110] *See, e.g.*, *Explore the RJ Library*, CTR. FOR JUST. & RECONCILIATION, https://restorativejustice.org/rj-library/#sthash.vpTJxzBY.dpbs [https://perma.cc/KQD3-JKKQ] (collecting a library of restorative policies, practices, and programs).

[111] *See, e.g.*, Josep Tamarit & Eulalia Luque, *Can Restorative Justice Satisfy Victims' Needs? Evaluation of the Catalan Victim–Offender Mediation Programme*, 4 RESTORATIVE JUST. 68, 83–84 (2016).

[112] *See, e.g.*, Anne K. Krüger, *From Truth to Reconciliation: The Global Diffusion of Truth Commissions*, *in* 2 RECONCILIATION, CIVIL SOCIETY, AND THE POLITICS OF MEMORY 339, 340–41 (Birgit Schwelling ed., 2012).

[113] *See, e.g.*, Hanan, *supra* note 6, at 157 ("Factors influencing suitability [of a mediation] include . . . the willingness of both the defendant and the complaining witness to participate.").

[114] See Tamarit & Luque, *supra* note 111, for a study of victim-offender mediation. See Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 763–71 (2000), for a critique of the practice.

[115] *Cf.* OWEN FISS, THE LAW AS IT COULD BE 10–13 (2003) ("[T]he judicial task should be seen as giving meaning to our public values, and adjudication should be seen as the process through which that meaning is revealed or elaborated." *Id.* at 12.); Grace, *supra* note 90, at 568–69.

community might not receive a remedy to its harm.[116] This concern arises from the assumption that criminal acts create enough community harm to justify public prosecution. And such an assumption is overbroad and ungrounded.[117] But various crimes may still cause different amounts of actual community harm. Many crimes, such as assault and battery, cause indirect harm to witnesses, family members, friends, and neighbors' senses of security. Other offenses indeed create significant harm to the public. Although avoiding displacement to focus on original disputes may privatize responses to criminal harms, many crimes do not have communal impact salient enough to render them irreparable by processes that are private or semipublic.

Policymakers may therefore ensure their responses are appropriate based on the nature of community harm from a particular crime. For crimes that create community harm to ascertainable community members, policymakers may use processes such as restorative justice that involve the participation of those community members. Such processes invite them to join in discussion of harm, formulate plans for reparation, and directly receive penitent communications or commitment to obligations from offenders.[118] But for crimes creating significant harm to the general community, policymakers may appropriately consider applying traditional prosecution.

2. The Normative Role of Criminal Law. — The concern that communities implementing primary dispute resolution will lose the benefits of a norm-producing process[119] is related to the state's interest in general deterrence, but the flexibility of a primary dispute resolution framework assuages both issues. The state has both an interest in creating norms so that community members do not consider committing crimes and an interest in offering threats so that community members who do consider crimes decide not to commit them. Both fall under the umbrella of general deterrence.[120] Although many crimes do not result in readily tangible community harm, some argue that any violation of the interest of general deterrence is a harm to which prosecution justifiably responds on behalf of the public.[121] This Note questions the occurrence of such broadly defined harm,[122] but, even so, scholars debate the efficacy of

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116 Grace, *supra* note 90, at 568.

117 *See supra* pp. 713–14.

118 Umbreit et al., *supra* note 102, at 256.

119 *See* Grace, *supra* note 90, at 569–70.

120 *See* Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766 (2010).

121 *See* Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 250–51 (2021) (discussing offenders' failure to self-apply legal norms as a contribution to criminality for which punishment for the purpose of general deterrence is an appropriate response).

122 *See supra* pp. 713–14. At the very least, the harm is constructed to justify a perceived need for deterrence. *See* Bronsther, *supra* note 121, at 233.

punishment in achieving general deterrence.[123] Still, one cannot absolutely deny the state's interest in deterrence.

Policymakers may indeed assess specific crimes according to their need for general deterrence. Communicating societal norms and threats is very important for some crimes. But for others, society's norms are already self-evident, and preventing future crime depends on adjusting the offender's perspective on those norms.[124] Frequency of crime, gravity of harm, and general expectations of a community may cause policymakers to select traditional prosecution because of its goal of general deterrence. But policymakers should consider whether individuals engaging in criminal activity — rather than society at large — should be the primary targets of norm inducement. Such norm inducement for offenders is already a usual consideration: rehabilitation remains a goal of traditional criminal adjudication.[125] But rehabilitation has become a secondary goal at best.[126] In primary dispute resolution processes, it cannot similarly take a back seat. Whereas the primary vehicles of rehabilitation in prosecution are expulsion and punishment,[127] primary dispute resolution may better serve offenders' interests with tools like education and communication.[128] Such tools have significant potential for reducing recidivism of offenders.[129]

Where relevant community members would benefit from norm inducement, policymakers can select processes that involve community participation.[130] Indeed, there are some crimes that may arguably require general norm inducement or general threats that dispute resolution does not effectively provide. Where necessary, policymakers may select displacement, but they should also peruse available primary dispute resolution processes to select one that effectively deters those for whom deterrence is most necessary.

3. Uniformity. — Although some may have concern with the lack of uniformity in dispute resolution processes, prosecution undermines other measures of fairness. Prosecution displaces original disputes and

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123 *See, e.g.*, Paternoster, *supra* note 120, at 818–23; NAT'L INST. OF JUST., U.S. DEP'T OF JUST., FIVE THINGS ABOUT DETERRENCE 1 (2016), https://www.ojp.gov/pdffiles1/nij/247350.pdf [https://perma.cc/PT3B-Q5K8].

124 *See* Grace, *supra* note 90, at 584–86.

125 *See* MOORE, *supra* note 37, at 234. *But see* Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279, 286 (1977).

126 *See* Barnett, *supra* note 125, at 286 ("There is simply no incentive for prison authorities to educate and train.").

127 *See* Pugsley, *supra* note 28, at 383.

128 *See* Gabriel Hallevy, *Therapeutic Victim-Offender Mediation Within the Criminal Justice Process — Sharpening the Evaluation of Personal Potential for Rehabilitation While Righting Wrongs Under the ADR Philosophy*, 16 HARV. NEGOT. L. REV. 65, 81–82 (2011).

129 *See id.* at 81.

130 *See* Christie, *supra* note 10, at 8.

replaces similar instances of criminalized behaviors with a process believed to be uniform. This uniformity appeals to a general desire for fairness.[131] Regardless of the success of prosecution's intended uniformity,[132] it fails to meet measures of fairness and satisfaction that can only be found in processes tailored to the situations of the victim, offender, and community. Primary dispute resolution can take the form of various processes including restorative justice, mediation, and negotiation. This variety attends to the myriad of circumstantial factors that influence disputes.[133] Remedies offered can be as disparate as substance use treatment programs, restitution, community service, and mental health services. Here again, participants can consider situational factors to increase fairness and satisfaction for disputants and their communities. These levels of variety allow primary dispute resolution to achieve the aforementioned benefits of direct community participation, community response, restoration for disputants, and realization of unique offender obligations. While primary dispute resolution may vary in form, participants may find it to be fairer than prosecution.

C. Repositioning or Replacing Prosecution

Policymakers can achieve primary dispute resolution by implementing processes before the prosecutorial process begins. Unlike the case with a diversion program, a prosecutor would not have discretion to select candidates. Rather, the primary dispute resolution process would precede a prosecutor's introduction to the case. If the process reaches successful resolution, the victim might no longer wish to bring a criminal complaint. If the process fails, then a prosecutor may find that it is in the best interest of the community and the disputants to begin displacement by bringing charges.[134] Ideally, policymakers could also design the

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131 *See* ZEHR, *supra* note 13, at 79–80 (discussing how justice is defined by process more than circumstances or outcome).

132 Although such uniformity is attractive, prosecution does not actually realize the uniformity that it boasts. In many cities, sentence lengths depend on the judge assigned to the case. U.S. SENT'G COMM'N, INTRA-CITY DIFFERENCES IN FEDERAL SENTENCING PRACTICES: FEDERAL DISTRICT JUDGES IN 30 CITIES, 2005–2017, at 7 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190108_Intra-City-Report.pdf [https://perma.cc/P5FS-WE3Z]. And scholars have provided significant evidence of disparities in the experiences of offenders of different races. *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16 (1998) ("At every step of the criminal process, there is evidence that African Americans are not treated as well as whites — both as victims of crime and as criminal defendants."). Such disparities reveal an inequality of outcome or circumstance that is veiled by purported uniformity of process. *Cf.* ZEHR, *supra* note 13, at 79–80 (describing how uniformity maintains "existing social and political inequities," *id.* at 79).

133 *See* Hanan, *supra* note 6, at 157 ("Factors influencing suitability might include the nature of the dispute, safety concerns, and the willingness of both the defendant and the complaining witness to participate." (footnote omitted)).

134 Such a prosecutor should consider factors such as desires of the victim, accounts of process participants, and referral from dispute resolution program administrators.

program so that, upon failure, there would be no effect on the offender's defense in later prosecution. A local prosecutor should not direct the process, impose his will upon it, suspend it, or communicate with the offender before it is completed or abandoned. And after a failure, the prosecutor should not use the process to gather evidence against the offender.[135] Without prosecutorial interference, the original dispute could more easily reach resolution through whatever process policymakers mandate.

Policymakers should also consider whether disputants and their communities would entirely replace prosecution for selected crimes. Today, disputants engaging in or subject to criminalized behavior are frequently left with only limited options: refusing to report the crime,[136] reporting and submitting their dispute to displacement by prosecution,[137] or experiencing forced cooption of their dispute through a report from another community member or an arrest by a police officer. Potential disputants and communities dissatisfied with these limited options may lobby their representatives to implement programs to supplant prosecution for all qualifying disputes involving the criminal behavior. While nonprosecution or decriminalization are already available to many communities, implementation of formal resolution processes may be a more palatable middle ground.[138]

CONCLUSION

Many agree that criminal actors need to be held accountable for their violations. But in the traditional criminal legal process, "holding each other accountable" does not resemble any "holding of each other." Instead, we discard the original dispute, and along with it, the opportunity to hold and heal each other. We discard the interests of the disputants, and we overwhelm them with an artificial dispute that is designed for neither healing nor resolution. In the end, we discard a criminal. This artificial dispute has long-lasting consequences for those directly or indirectly involved. And those consequences amount to a

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[135] Legislatures ideally could create statutes specifying that statements from a preprosecution dispute resolution process should be inadmissible. *Cf.* KAN. STAT. ANN. § 22-2910 (West 2021) (proscribing the admissibility of statements from pretrial diversion programs); KY. REV. STAT. ANN. § 533.258(3) (West 2021) (same). *But see* Hanan, *supra* note 6, at 152–53 (discussing self-incrimination concerns and other constitutional implications from restorative justice programs).

[136] *See* Cardenas, *supra* note 67, at 357–58.

[137] *Cf.* Forde, *supra* note 83 (profiling the experience of a woman who reported sexual assault).

[138] Enforcement of participation in such processes may depend on the crime targeted. Policymakers could respond to some crimes with voluntarily available resolution processes. They may enforce participation for others through the threat of a fine or confinement.

multiplication of harm when communities would prefer that harm be diminished.[139]

When policymakers view criminal law through the lens of the original dispute, they can address the most present harms. And they can recognize prior harms that cause criminal behavior to arise. A participating community can discover factors such as economic inequity, social accessibility, racial oppression, and other destabilizing circumstances.[140] And it can immediately respond to those circumstances on behalf of the disputants and include those circumstances in any assessment of further response. Attending to the original dispute creates opportunities that are closed by the dispute's displacement by prosecution. Behind that open door, primary dispute resolution empowers and restores victims and offenders, communities control resolution processes and learn from them, and traditional criminal legal processes begin to lose their necessity.

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139 *See, e.g.*, CHI. CMTY. BOND FUND, MONEY FOR COMMUNITIES, NOT CAGES: THE CASE FOR REDUCING THE COOK COUNTY SHERIFF'S JAIL BUDGET 3 (2018), https://chicagobond.org/wp-content/uploads/2018/10/money-for-communities-not-cages-why-cook-county-should-reduce-the-sheriffs-bloated-jail-budget.pdf [https://perma.cc/3PE2-FRDT] (describing how the incarceration of pretrial detainees at Cook County Jail meant "hundreds of thousands of lives were needlessly destabilized, in turn further destabilizing their communities, which are already under-resourced due to systemic inequities and racist policing practices that thrive on economic and racial segregation").

140 *See* Christie, *supra* note 10, at 10 (arguing that discussion of restoration for a victim would "expose[] [an offender's] needs for social, educational, medical[,] or religious action").