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## Reclaiming Restorative Justice: An Alternate Paradigm for Justice

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# RECLAIMING RESTORATIVE JUSTICE: AN ALTERNATE PARADIGM FOR JUSTICE

*Shailly Agnihotri & Cassie Veach*<sup>†</sup>

## CONTENTS

I. LANDSCAPES OF RESTORATIVE JUSTICE AND THE CRIMINAL JUSTICE SYSTEM .....	326
A. <i>Restorative Justice</i> .....	326
1. What is Restorative Justice? .....	326
2. Other Practices Often Categorized as Restorative Justice .....	327
B. <i>The Criminal Justice System</i> .....	329
1. Constitutional Foundations and Purpose of the Criminal Justice System .....	329
2. How the Criminal Justice System Functions in Practice .....	331
II. COURT-BASED RJ PROGRAMS .....	335
A. <i>Rights of the Accused</i> .....	336
1. Due Process and Coercion .....	337
2. Right against Self-Incrimination .....	338
3. Right to Counsel .....	339
4. Confidentiality .....	339
B. <i>Cooptation of Restorative Justice</i> .....	340
1. Control, Marginalization, and Criminalization .....	341
2. Voluntariness .....	342
3. Power-Sharing .....	343
C. <i>Conclusion</i> .....	344

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III. QUASI-COURT-BASED RESTORATIVE JUSTICE PROGRAMS ..	344
A. <i>Impact on Restorative Justice Values</i> .....	345
B. <i>Limits of Quasi-court-based Model</i> .....	346
IV. COMMUNITY-BASED RESTORATIVE JUSTICE .....	347
A. <i>Location of Power and Relationship to the State</i> .....	347
B. <i>Limits of a Community-based Model</i> .....	348
V. CONCLUSION .....	350

Restorative Justice (“RJ”) is a rapidly growing field of study and practice that cuts across disciplines, from criminal law and criminology to education and social work. It has become a catchall term which may describe a theory of justice, particular practices or outcomes, the mobilization of restorative practices in a particular place,<sup>1</sup> or a social movement seeking to transform the way society conceives of justice.<sup>2</sup> There are programs springing up in schools, workplaces, courtrooms, and prisons.<sup>3</sup> States have passed legislation to incorporate restorative practices into various points in the criminal system.<sup>4</sup> There are trainings, conferences, institutes

<sup>1</sup> Some practitioners understand RJ as a model which exists wholly within the criminal justice system, while the application of RJ practices outside of the courtroom is labeled Transformative Justice. This article does not make such a distinction in terminology, but seeks to analyze the effects of state power on court- and community-based RJ programs.

<sup>2</sup> CHRIS CUNNEEN & CAROLYN HOYLE, *DEBATING RESTORATIVE JUSTICE* 102 (2010) (“Restorative justice can be defined in a number of ways—as a process, for instance, or as a set of values or goals, or more broadly as a social movement seeking specific change in the way criminal justice systems operate.”).

<sup>3</sup> See, e.g., TREVOR FRONIUS ET AL., WESTED JUSTICE & PREVENTION RESEARCH CTR., *RESTORATIVE JUSTICE IN U.S. SCHOOLS: A RESEARCH REVIEW* (2016), [http://jpic.wested.org/wp-content/uploads/2016/02/RJ\\_Literature-Review\\_20160217.pdf](http://jpic.wested.org/wp-content/uploads/2016/02/RJ_Literature-Review_20160217.pdf) [<https://perma.cc/Z3WY-WZK3>] (RJ in schools); AM. BAR ASS’N, *MEDIATION IN CRIMINAL MATTERS: SURVEY OF ADR AND RESTORATIVE JUSTICE PROGRAMS* (2009), <http://www.americanbar.org/content/dam/aba/publications/criminaljustice/mediationsurvey.authcheckdam.pdf> [<https://perma.cc/B2QG-5KGB>] (RJ programs in criminal justice matters); *NYC Programs and Institutions Implementing and/or Promoting Restorative Practices*, RESTORATIVE JUST. INITIATIVE, <http://www.restorativejustice.nyc/restorative-justice-nyc/> [<https://perma.cc/Q2H2-3CSX>] (detailing programs in the New York City area which implement RJ in a variety of contexts); *Restorative Justice*, IOWA DEP’T CORRECTIONS, <https://doc.iowa.gov/victim-services/restorative-justice> [<https://perma.cc/53EY-H2BP>] (RJ in prisons); *Restorative Justice*, MO. DEP’T CORRECTIONS, <http://doc.mo.gov/OD/DD/RJ.php> [<https://perma.cc/XY4F-PYM5>] (RJ in prisons); *Restorative Justice*, MONT. DEP’T CORRECTIONS, <https://cor.mt.gov/Victims/Restorative> [<https://perma.cc/T4AH-B68V>] (RJ in prisons); *Restorative Justice*, VT. DEP’T CORRECTIONS, <http://doc.vermont.gov/justice/restorative-justice> [<https://perma.cc/UF99-GT7A>] (RJ in prisons).

<sup>4</sup> See, e.g., COLO. REV. STAT. § 24-4.1-303(11)(g) (2016); FLA. STAT. § 985.155 (2014); HAW. REV. STAT. § 353H-31 (2013); MINN. STAT. § 611A.775 (1998), MINN. STAT. § 609.092 (2009); VT. STAT. ANN. tit. 28, § 2a (2011); VT. STAT. ANN. tit. 24, §§ 1962-1967 (2015).

and academic journals devoted to RJ.<sup>5</sup> Program models are being exported across the nation and the globe.<sup>6</sup> Large sources of funding are being offered to develop restorative programming both domestically and internationally.<sup>7</sup> The ABA has a committee addressing RJ and a UN working group has issued guidelines for best practices.<sup>8</sup>

The growth of RJ has been fueled by different motivations both inside and outside of the courtroom. While these motivations have shaped the current landscape of RJ, this article provides an analytical framework to evaluate the impact of restorative justice programs regardless of the intentions guiding them. This framework considers three models of RJ based on their relationship with State power, as manifested by the criminal justice system (“CJS”). At one end of the spectrum are court-based RJ

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<sup>5</sup> See, e.g., *Center for Restorative Justice and Peacemaking*, U. MINN., <http://www.cehd.umn.edu/ssw/rjp/> [<https://perma.cc/B46F-2ZCM>] (offering RJ trainings); *Training Center*, N.Y. PEACE INST., <http://nypeace.org/trainings/> [<https://perma.cc/4TG9-UD6H>] (offering RJ trainings); INT’L INST. FOR RESTORATIVE PRACTICES, <http://www.iirp.edu/> [<https://perma.cc/3LUD-UXH8>] (offering RJ trainings); *Contemporary Justice Review*, TAYLOR & FRANCIS ONLINE, <http://www.tandfonline.com/toc/gcjr20/current> [<https://perma.cc/FF7C-NADU>] (journal devoted to RJ); *Restorative Justice: An International Journal*, TAYLOR & FRANCIS ONLINE, <http://www.tandfonline.com/toc/rrej20/current> [<https://perma.cc/TF4R-C2LA>] (journal devoted to RJ); *6th National Conference on Community and Restorative Justice*, NAT’L ASS’N COMMUNITY & RESTORATIVE JUST., [http://nacj.org/index.php?option=com\\_content&view=article&id=87&Itemid=715](http://nacj.org/index.php?option=com_content&view=article&id=87&Itemid=715) [<https://perma.cc/ZT5U-383S>] (holding annual conferences); *3rd International Symposium on Restorative Justice*, RESTORATIVE JUST. FOR ALL, <http://www.rj4all.info/content/RJsymposium2016> [<https://perma.cc/XFL4-TBZ7>] (promoting RJ Conference). The Department of Justice has also adopted various RJ practices under both the auspices of Community Oriented Policing Services and the Office of Juvenile Justice and Delinquency Prevention. See, e.g., CAROLINE G. NICHOLL, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, TOOLBOX FOR IMPLEMENTING RESTORATIVE JUSTICE AND ADVANCING COMMUNITY POLICING (1999), <http://restorativejustice.org/am-site/media/toolbox-for-implementing-restorative-justice-and-advancing-community-policing.pdf> [<https://perma.cc/95CH-3NMQ>]; KAY PRANIS ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, GUIDE FOR IMPLEMENTING THE BALANCED & RESTORATIVE JUSTICE MODEL (1998), <https://www.ncjrs.gov/pdffiles/167887.pdf> [<https://perma.cc/ZTS9-8EGY>].

<sup>6</sup> See, e.g., U.N. OFFICE ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES, U.N. Sales No. E.06.V.15 (2006), [https://www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf) [<https://perma.cc/DK9U-4ZEW>]; CTR. FOR JUST. & RECONCILIATION, <http://restorativejustice.org/> [<https://perma.cc/K867-48R3>].

<sup>7</sup> See, e.g., JUSTICE CTR., COUNCIL OF STATE GOV’TS, FEDERAL FUNDING OPPORTUNITIES TO SUPPORT SCHOOL DISCIPLINE, CLIMATE AND SAFETY IMPROVEMENTS (2014), <https://csgjusticecenter.org/wp-content/uploads/2014/05/FederalGrantProgramsChart.pdf> [<https://perma.cc/A5AU-MFBG>].

<sup>8</sup> *Criminal Justice Section: Alternative Dispute Resolution and Restorative Justice Committee*, AM. B. ASS’N (Sept. 26, 2016), <http://apps.americanbar.org/dch/committee.cfm?com=CR100000> [<https://perma.cc/S637-74LV>]; U.N. OFFICE ON DRUGS & CRIME, *supra* note 6.

programs, which are fully embedded within the CJS. At the other end of the spectrum is a wholly independent community-based model of RJ. A hybrid quasi-court model of RJ describes programs that intersect with the CJS, but are not fully contained by it.

This article examines the current landscape of restorative justice programs, compares their philosophical foundations, and offers a structure for analysis. Section I presents the landscapes of RJ and the CJS. Section II evaluates the court-based model of RJ. Section III considers the quasi-court-based model for RJ. Section IV discusses the independent community-based model of RJ. Considered under this framework, establishing RJ practices within the CJS cannot transform the overarching criminal system. Rather, in the court-based model, the values of restorative justice are co-opted and used to expand the power of the State. However, as a free-standing, community-based model, restorative justice has the potential to flourish as an alternative pathway to justice.

## I. LANDSCAPES OF RESTORATIVE JUSTICE AND THE CRIMINAL JUSTICE SYSTEM

### A. *Restorative Justice*

“Circles move like waves and function as prisms which make spectrums visible. Lines clear-cut, divide, conquer. Circles meander and move in response to the terrain shaped by voices that generate unique contours and infinite variation. Lines are limited to agendas harboring specific meaning and interpretation. Circles generate meaning as a conduit for open interpretation. A line is a means to an end. Circles are ends in themselves. They ripple out, rather than cut through.”

—John Delk<sup>9</sup>

#### 1. What is Restorative Justice?

Restorative Justice means many different things to different people. Indeed, “turning to the restorative justice movement for clarity can be disheartening because we discover that there exist nearly as many definitions of restorative justice as there are people offering them.”<sup>10</sup> In our view, RJ is a mechanism for communities to come together around an issue in a way that allows emergent wisdom to surface and to guide decision-making. It is based on the

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<sup>9</sup> THE RESTORATIVE CTR., *THE NEWBURGH MODEL OF COMMUNITY CIRCLES: ESSAYS AND WORKBOOK 9* (2d ed. 2015).

<sup>10</sup> DENNIS SULLIVAN & LARRY TIFFT, *RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES* 32 (2001).

values of shared power, voluntary participation, and equal voice. Though there are a range of practices broadly categorized as RJ, we understand RJ as a circle-based process, which is able to fully manifest these values.<sup>11</sup> The circle process is a facilitation model where participants gather in a circle and speak, one at a time, going repeatedly around the circle. A circle is a way to hold space for people to come together “as equals to have honest exchanges about difficult issues and painful experiences in an atmosphere of respect and concern for everyone.”<sup>12</sup> Circles may be used to address conflict, but also for celebration, support, and community building.

As circles frequently require participants to honestly discuss serious and challenging issues, participation in a circle must be voluntary. A facilitator, or circle keeper, may guide the dialogue through the use of a talking piece, which represents the power sharing within the circle. The circle keeper does not have an agenda in resolving the matter in any particular way.<sup>13</sup> When someone has the talking piece, they may speak at length without interruption, hold silence, or pass the talking piece without speaking. Each person has the opportunity to speak. A circle thus creates a space for people to share freely and listen deeply. This process allows the emergent wisdom of the participants to surface. A circle is “a container strong enough to hold: anger[,] frustration[,] joy[,] pain[,] truth[,] conflict[,] diverse worldviews[,] intense feelings[,] silence[,] paradox.”<sup>14</sup>

## 2. Other Practices Often Categorized as Restorative Justice

In addition to circles, a range of other practices have been categorized under the RJ umbrella. While some define RJ broadly to include the practices of victim-offender<sup>15</sup> mediation (“VOM”)<sup>16</sup>

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<sup>11</sup> It is important to note that not all discussions that take place in circles are restorative justice. Group therapy, for instance, may follow this format, but it is focused on behavioral modification of participants and not about building awareness of the community.

<sup>12</sup> KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING* 6 (2005).

<sup>13</sup> This process is distinguished from an elder circle, where particular individuals facilitate the conversation and are expected to disseminate their wisdom among the group.

<sup>14</sup> PRANIS, *supra* note 12, at 9.

<sup>15</sup> The terms “victim” and “offender” are used in this piece to the extent that they are used in CJS and some restorative practices. Though far from unproblematic, these terms are used when necessary to provide clarity about the various models. A further critique of how these terms have been used in restorative practices is articulated in section II.B.3, below.

<sup>16</sup> Here, VOM is used as a catchall to encompass programs labeled Victim-Of-

and reparative boards, these fall outside the circle-based definition used here.

VOM is often heralded as the origin of the court-based RJ model and VOM programs have been widely adopted across the country.<sup>17</sup> This practice was influenced by the victim's rights movement and Mennonite beliefs about the moral benefits of apology and forgiveness.<sup>18</sup> However, we see a fundamental difference in the process of mediation and do not consider mediation-based models to be Restorative Justice. Though some advocates of VOM seek to distance themselves from mediation and to situate themselves fully in the RJ camp, others accept the mantle of mediation and the additional confidentiality protections that it may afford.<sup>19</sup> Like traditional mediation, VOM programs are designed to bring about facilitated resolution of conflict by finding a middle ground that both sides can agree to.<sup>20</sup> In contrast, RJ is a model of shared justice that goes beyond the directly impacted individuals to other interested parties and community members. In the authors' view, RJ attempts to get to the deepest reservoir of connection among people in a circle to create the conditions for emergent wisdom to arise. While mediation seeks to resolve conflicts, RJ seeks a deeper engagement with the philosophical underpinnings of conflict—humans' lack of empathy and understanding of another's point of view.

Community boards<sup>21</sup> likewise fall outside this definition of RJ. In this model, a panel of community volunteers meets with an offender diverted from the CJS to determine the conditions of the diversionary program or probation. Though codified by Vermont statute as "restorative justice,"<sup>22</sup> these Boards do not reflect the

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fender Reconciliation Programs (VORP), Victim-Offender Dialogue (VOD), and Victim-Offender Conferencing (VOC).

<sup>17</sup> 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).

<sup>18</sup> See, e.g., Howard Zehr, *Changing Lenses: Restorative Justice for Our Times* 129-57, 159-66 (4th ed. 2015).

<sup>19</sup> See generally Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 *J. DISP. RESOL.* 401, 405; UNIF. MEDIATION ACT § 8 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2003), [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf) [<https://perma.cc/RA4D-X3XC>].

<sup>20</sup> HOWARD ZEHR WITH ALI GOHAR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 51, 60 (2003); MARK S. UMBREIT & JEAN GREENWOOD, *CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE I* (2000), [https://www.ncjrs.gov/ovc\\_archives/reports/96517-gdlines\\_victims-sens/ncj176346.pdf](https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/ncj176346.pdf) [<https://perma.cc/9GF7-NXDW>].

<sup>21</sup> These are also sometimes termed reparative or restorative boards, restorative panels, or reparative probation.

<sup>22</sup> See, e.g., VT. STAT. ANN. tit. 24, §§ 1961-1967 (2015).

goals of shared power and equal voice. Though they may achieve a non-retributive outcome (e.g. no criminal record, no prison time), these Boards rely on a hierarchal power dynamic and act as a sort of community-based lay court to impose sanctions like community service, victim restitution, or additional programming requirements.<sup>23</sup>

### B. *The Criminal Justice System*

#### 1. Constitutional Foundations and Purpose of the Criminal Justice System

At best, the American criminal justice system is the unfolding of modulated State power to fairly address accusations of unlawful behavior against members of the populace.<sup>24</sup> By function, there are only two powers in the CJS—the State and the accused. All shifts or exchanges in criminal justice dynamics are thus a recalibration of these two powers.<sup>25</sup> In this two-power system, loss of power of the accused is reflected by a corresponding gain in the power of the State and vice versa. The parties in the adversarial system are represented by professionals, who navigate the complex legal and administrative systems and argue for their side to prevail with the judge acting as referee.<sup>26</sup> By design, there are limited opportunities for impacted people to speak on their own behalf.

In criminal proceedings, the State has a monopoly on the

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<sup>23</sup> Indeed, this program developed as a result of a poll circulated by the Vermont Department of Corrections, which indicated a desire for more community control over the criminal court process. See Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 65-66 (2003).

<sup>24</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”); see also *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964) (“[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.” (footnote omitted)).

<sup>25</sup> See generally Brooke D. Coleman, *Prison Is Prison*, 88 NOTRE DAME L. REV. 2399, 2400 (2013) (exploring the impact of the Supreme Court’s differing views of state power in the criminal and civil contexts as they impact the right to counsel).

<sup>26</sup> Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge As the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 945-47 (2008).



power to charge people with crimes.<sup>27</sup> Concerned about the potential for tyrannical abuse of state power, the writers of the Constitution enshrined a series of powerful protections for the accused when the State exercises its police and prosecutorial powers.<sup>28</sup> The first protection in the adversarial system is the codification of the presumption of innocence.<sup>29</sup> The State must prove its case in a public forum, with evidence untainted by unlawful searches or seizures and with testimony from witnesses who are sworn to tell the truth.<sup>30</sup> The accused has the right to cross-examine any witnesses and present their own evidence, but the State cannot compel the accused to testify or to incriminate himself. A jury of the accused's peers is charged with determining whether the State has met its high burden of proving every element of the charges beyond a reasonable doubt.<sup>31</sup> Only then can the State impose the stigma and penalty of a conviction. The degree to which the State should err on the side of innocence is emphasized by Blackstone's formulation that "it is better that ten guilty persons escape, than that one innocent suffer."<sup>32</sup> Benjamin Franklin's iteration of this maxim increases this ratio by a magnitude, noting, "it is better a hundred guilty persons should escape than one innocent person should suffer . . . ."<sup>33</sup>

In cases where the State is able to establish guilt, whether through plea or conviction, it has the authority to impose sanctions on the offender. Under the theory of retribution or "just deserts," the moral culpability of the offender gives the State a duty to impose punishment.<sup>34</sup> Under this theory, those who have caused suffering morally deserve suffering and the scales of justice are rebalanced by meting it out.<sup>35</sup> This exercise of state-sanctioned punishment should be proportionate to the severity of the offense

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<sup>27</sup> The advent of modern criminal law began with the Norman Conquest of Britain in the twelfth century. Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 6 (2004). This transformed the view of crime as a conflict between individuals to a breach of the king's peace, giving the monarch increased power over the people. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999).

<sup>28</sup> U.S. CONST. amends. IV-VI, VIII; *id.* art. III, § 2.

<sup>29</sup> 29 AM. JUR. 2D *Evidence* § 250 (2016).

<sup>30</sup> U.S. CONST. amends. IV-VI, VIII.

<sup>31</sup> U.S. CONST. art. III, § 2; *In re Winship*, 397 U.S. 358, 368 (1970).

<sup>32</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*358.

<sup>33</sup> 11 BENJAMIN FRANKLIN, WORKS 13 (John Bigelow ed., 1904) (letter from Benjamin Franklin to Benjamin Vaughan dated Mar. 14, 1785).

<sup>34</sup> THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: COMPACT EDITION 602 (Stephen Michael Sheppard ed., 2011).

<sup>35</sup> *Id.*

and the blameworthiness of the offender.<sup>36</sup> Under the theory of utilitarianism, punishment is justified by the useful purpose that punishment serves such as deterrence, incapacitation, rehabilitation, and restitution.<sup>37</sup> The CJS has adopted a huge array of possible sanctions under the principles of these different theories of punishment, which are frequently incompatible with one another.<sup>38</sup>

## 2. How the Criminal Justice System Functions in Practice

Though the constitutional foundations for the CJS demand that the State meet this high burden to impose punishment, in practice, the carefully crafted balance of power has shifted. Today, very few criminal cases go to trial and the vast majority are resolved through guilty pleas.<sup>39</sup> By forgoing the right to trial and the protections that it affords, the accused nearly always waives at least some of the rights designed to protect them and to balance the scales against state tyranny.<sup>40</sup> Though the accused may validly waive some of these rights, the reliance on pleas to resolve most cases means that the State rarely needs to meet its high burden to prove guilt. Rather, practices like selective policing, charge stacking, pre-trial detention, cash bail, and the trial tax allow the State to put its thumb on the scale and exert pressure on the accused to plead early.<sup>41</sup> In cases where the accused demands that the State meet their burden, the wheels of the system turn slowly.<sup>42</sup> Thus, whenever the State is able to avoid the rigors of trial, State power is enhanced.

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<sup>36</sup> *Id.*; Hadar Dancig-Rosenberg & Tali Gal, *Criminal Law Multitasking*, 18 LEWIS & CLARK L. REV. 893, 912 (2014); Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2333 (2013).

<sup>37</sup> Samantha Buckingham, *Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing*, 46 LOY. L.A. L. REV. 801, 847 (2013).

<sup>38</sup> CUNNEEN & HOYLE, *supra* note 2, at 170.

<sup>39</sup> Sources estimate upwards of 90% of state and federal criminal cases are resolved through guilty pleas. *See, e.g.*, LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/7QJY-KC5R>]; Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <http://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/943Q-84D9>].

<sup>40</sup> Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 393 (2015).

<sup>41</sup> *Id.* at 428; Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 407 (1992).

<sup>42</sup> *See* Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223, 227 (2015).

Victims' rights reforms of the CJS have further shifted the balance of power against the accused. The victims' rights movement has advanced the notion that the victim is a party to the proceeding and not merely a witness<sup>43</sup> — for example, giving the complaining witness the right to speak at public hearings involving release, plea, sentencing, and parole.<sup>44</sup> In the balance between the State and the accused, enhancing the role of a victim to aid in prosecution increases the power of the State, which, in a two-party system, can only come at the expense of the accused.

Unsurprisingly, this increase in State power has not been evenly borne, but reflects societal structures of oppression and domination. "Power has an infinite number of ways of regenerating its strategies and justifications for its continued existence, all to protect the status, prestige, and position of the power-wielder, the ownership and control of the power process, and privileged access to benefits that were and continue to be collectively-produced."<sup>45</sup> By turning its "gaze to select marginalized populations", the CJS is able to "mask the effects" of its power within overarching patterns of oppression.<sup>46</sup> In an imperialist, capitalist, white supremacist, ableist, cis-hetero-patriarchy, those targeted by the State are therefore disproportionately poor people, people of color, Native Peoples, people who are trans and gender non-conforming, and people with mental illness.<sup>47</sup> Through the criminalization of pov-

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<sup>43</sup> Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 176-78 (1984); see also Christa Obold-Eshleman, Note, *Victims' Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 584-85 (2004). Obold-Eshleman distinguishes that while some measures have been designed to reduce the fear and traumatization of victims (such as confidentiality of personal information and counseling records), others were intended to increase the victim's power to assist in the prosecution or to impose harsher penalties against the alleged offender. *Id.* at 584-85.

<sup>44</sup> 18 U.S.C. § 3771(a)(4) (2015). In addition to incorporating victims' rights provisions in the federal system, every state has adopted, by legislation or constitutional amendment, some reforms increasing victim participation in the criminal process. Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 32-33 (1999).

<sup>45</sup> SULLIVAN & TIFFT, *supra* note 10, at 134 (citation omitted).

<sup>46</sup> *Id.* at 158.

<sup>47</sup> See, e.g., BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 92 (1984); BELL HOOKS, *THE WILL TO CHANGE: MEN, MASCULINITY AND LOVE* 17, 29 (2004); CAROLINE WOLF HARLOW, *BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1* (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> [<https://perma.cc/5SXY-BWQN>] (showing that the majority of people accused of crimes rely upon indigent defense services); MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY* (2007), <http://www.sentencingproject.org/wp-content/uploads/2016/01/>

erty, the selective enforcement of crime, the militarization of the police, and the rise of state surveillance, the State has been able to increase its own power at the expense of those individuals who are least able to defend themselves against it.<sup>48</sup> The result of this has been the explosion of the adult prison population to over two million and nearly seven million under some form of community supervision.<sup>49</sup>

This current crisis of mass incarceration is evidence of the CJS trend toward increased punitiveness.<sup>50</sup> However, the diversity of strategies for punishment allow the State, and to a lesser extent individual courts, to choose from a large menu of possible sanctions.<sup>51</sup> For example, in addition to sentencing individuals to imprisonment<sup>52</sup> the state may impose fines, community service, or

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Uneven-Justice-State-Rates-of-Incarceration-by-Race-and-Ethnicity.pdf [https://perma.cc/4BQ5-YQPL] (on racial disparities in incarceration); LAKOTA PEOPLE'S LAW PROJECT, NATIVE LIVES MATTER (2015), <http://www.docs.lakotalaw.org/reports/Native%20Lives%20Matter%20PDF.pdf> [https://perma.cc/2Y75-KTAM]; Jon Marcus, *Bringing Native American Stories to a National Audience*, NIEMAN REP. (Feb. 11, 2016), <http://niemanreports.org/articles/bringing-native-american-stories-to-a-national-audience/> [https://perma.cc/GK54-EHRD] (noting disproportionate incarceration of Native people); FORGE, CRIMINAL JUSTICE?: NEW FAST FACTS ABOUT TRANSGENDER PEOPLE, POLICE, AND INCARCERATION (2011), <http://forge-forward.org/wp-content/docs/fast-facts-police1.pdf> [https://perma.cc/KA79-NZY5] (statistics on the incarceration of transgender and gender non-conforming people); SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (2003), <https://www.hrw.org/sites/default/files/reports/usa1003.pdf> [https://perma.cc/HHH9-X9KJ] (on the incarceration of people with mental illness).

<sup>48</sup> See, e.g., Sarah Childress, *The Problem with "Broken Windows" Policing*, PBS.ORG: FRONTLINE (June 28, 2016), <http://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/> [https://perma.cc/9QTD-LBJ8]; KAREN DOLAN & JODI L. CARR, INST. FOR POLICY STUDIES, THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY (2015), <http://www.ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf> [https://perma.cc/B4RL-LMUF]; Dexter Filkins, "Do Not Resist" and the Crisis of Police Militarization, NEW YORKER (May 13, 2016), <http://www.newyorker.com/news/news-desk/do-not-resist-and-the-crisis-of-police-militarization> [https://perma.cc/H32X-6YEM]; Glenn Greenwald, *New Study Shows Mass Surveillance Breeds Meekness, Fear and Self-Censorship*, INTERCEPT (Apr. 28, 2016, 11:03 AM), <https://theintercept.com/2016/04/28/new-study-shows-mass-surveillance-breeds-meekness-fear-and-self-censorship/> [https://perma.cc/3A6F-XCE4].

<sup>49</sup> LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 1-2 (2014), [www.bjs.gov/content/pub/pdf/cpus13.pdf](http://www.bjs.gov/content/pub/pdf/cpus13.pdf) [https://perma.cc/9FD8-6AD9] (reporting 2,220,300 people incarcerated and 6,899,000 adults under supervision).

<sup>50</sup> Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 913 (2007).

<sup>51</sup> CUNNEEN & HOYLE, *supra* note 2, at 170 (citing O'Malley).

<sup>52</sup> See, e.g., N.Y. PENAL LAW § 70 (McKinney 2009). Additionally, in some jurisdictions, the death penalty remains an available punishment. DEATH PENALTY INFO. CTR.,

probation.<sup>53</sup> In other cases, the accused may be offered a diversionary program, where in exchange for a guilty plea and successful completion of the program, the charges are dismissed.<sup>54</sup> However, if an individual does not complete the program to the satisfaction of the court, the conviction stands and the accused faces the traditional penalty of incarceration.<sup>55</sup> Diversionary programs often purport to be rehabilitative and seek to break cycles of crime by providing counseling, job training, and drug treatment services, among others.<sup>56</sup>

The presence of what are perceived to be softer options can be used to secure “the hegemony of law by making the harsher aspects of the criminal justice system more palatable, particularly its racialised, gendered and class-based effects . . . .”<sup>57</sup> Though programs which are based on the principle of rehabilitation may at first glance seem beneficial to all involved, problem-solving or treatment-based approaches which are contingent upon a guilty plea also require that the accused waive constitutional rights.<sup>58</sup> The treatment paradigm may give the State more power to impose programming requirements and justify increased monitoring.<sup>59</sup> In

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FACTS ABOUT THE DEATH PENALTY (2017), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/G3S7-3LL9>].

<sup>53</sup> See, e.g., N.Y. PENAL LAW §§ 65, 85 (McKinney 2014).

<sup>54</sup> Debra T. Landis, Annotation, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant’s Consent to Noncriminal Alternative*, 4 A.L.R.4th § 2(a) (1981); Shaila Dewan & Andrew W. Lehren, *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/76LJ-WV8F>]. Programs labeled alternatives to incarceration (ATI) frequently fit into the diversionary scheme when offered, not as a sentence itself, but as part of an agreement to defer sentencing. RACHEL PORTER ET AL., VERA INST. OF JUSTICE, *BALANCING PUNISHMENT AND TREATMENT: ALTERNATIVES TO INCARCERATION IN NEW YORK CITY* 24 (2002), [http://archive.vera.org/sites/default/files/resources/downloads/Balancing\\_ATI.pdf](http://archive.vera.org/sites/default/files/resources/downloads/Balancing_ATI.pdf) [<https://perma.cc/XZX6-S8TL>].

<sup>55</sup> N.Y. PENAL LAW § 65.05 (McKinney 1992); Dewan & Lehren, *supra* note 54.

<sup>56</sup> PORTER ET AL., *supra* note 54, at 4-5.

<sup>57</sup> CUNNEEN & HOYLE, *supra* note 2, at 164.

<sup>58</sup> Namely, the right against self-incrimination, the right to a jury trial, and the right to confront one’s accusers. See generally *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (holding that a knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one’s accusers); *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973) (“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.”). As a condition of many plea bargains, the accused must also often waive their right to appeal. Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 873 n.24 (2010).

<sup>59</sup> Holly Catania & Joanne Csete, *Drug Courts and Drug Treatment: Dismissing Science*

drug courts in particular, there are concerns that courts are “playing doctor” by requiring offenders to complete programming that may not comport with medical consensus and may even be exacerbating patterns of addiction.<sup>60</sup> Though rehabilitation-based programs may provide some people with helpful tools, these programs cannot overcome the processes of criminalization and coercion that have corrupted the larger system.

## II. COURT-BASED RJ PROGRAMS

“Only free men can negotiate. Prisoners cannot enter into contracts.”

—Nelson Mandela<sup>61</sup>

RJ programs in the court-based model are diversionary programs, which are offered as post-plea, pre-sentence alternatives to incarceration. In this model, the offer of RJ is used as an inducement for the accused to plead guilty. Rather than face the lengthy and uncertain result of proceeding to trial, the accused may waive their right to make the State prove the charges against them, on the understanding that they will receive more limited sanctions. In this model, the court must grant permission for the accused to participate in an RJ program. Typically, the accused must admit responsibility for the alleged conduct and may need to demonstrate their willingness to apologize to any victims. If an agreement cannot be reached in an RJ process, the State retains power to impose traditional penalties. Additionally, the State may also set limits on what falls within the range of acceptable outcomes for a restorative encounter. These limits are usually imposed by courts to prevent outcomes they perceive to be too lenient.<sup>62</sup>

What constitutes “successful” completion of a program varies. It may require the victim and offender to come to a restitution agreement or for the offender to apologize to the victim. By in-

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*and Patients' Rights*, OPEN SOC'Y FOUND.: VOICES (Jan. 10, 2014), <https://www.opensocietyfoundations.org/voices/drug-courts-and-drug-treatment-dismissing-science-and-patients-rights> [<https://perma.cc/V6AF-LHEZ>].

<sup>60</sup> *Id.*

<sup>61</sup> Zindzi Mandela, Statement by Nelson Mandela at a UDF Rally to Celebrate Archbishop Tutu Receiving the Nobel Peace Prize (Feb. 10, 1985), [http://db.nelsonmandela.org/speeches/pub\\_view.asp?pg=item&ItemID=NMS013](http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS013) [<https://perma.cc/2RXE-A6JE>].

<sup>62</sup> JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 147 (2002). Braithwaite quotes Declan Roche, who noted that internal (restorative) mechanisms intervene to prevent outcomes that are too harsh; external (court) mechanisms prevent outcomes that are too lenient.

serting RJ within the CJS, these programs are attempting to shift the focus from the relationship between the State and the accused to the human relationships impacted by the crime. In this model, the State is attempting to substitute its own version of justice with RJ practices. For the CJS, justice is achieved when the power of the state is held to the standard of proving the guilt of the accused, beyond a reasonable doubt in an open forum, under sworn testimony, and with a jury of their peers concluding whether the state has met its burden. In contrast, court-based RJ programs are primarily concerned with returning to the pre-crime status quo by making parties whole, through material and/or symbolic restitution. These programs purport to provide space “for healing” and give impacted parties the opportunity to “put things right.”<sup>63</sup>

However, the danger with this approach is that it seeks to restore humanity to a system that was not designed to be human. Because the court-based model of RJ remains embedded in the CJS, it is fully contained within the hierarchical system of power manifested in the CJS. These models have a direct effect on the balance between State power and the rights of the accused. This complex interchange often leads to the diminished rights of the accused and the enhanced rights of the state.<sup>64</sup> In addition to implicating the rights of the accused, the court-based model co-opts RJ to serve the needs of the CJS. In this model, access to RJ is controlled and confined by the larger system it inhabits. Court-based RJ models must accept certain realities of the CJS in order to operate within it. In this model, elements of the CJS permeate RJ, preventing it from operating on its own terms. As this section demonstrates, the good intentions propelling this model are thus incentivizing the displacement of the adversarial system configured to regulate the power of the State.

#### A. *Rights of the Accused*

Those critical of the court-based model raise concerns about the ability of these programs to adequately protect the Constitutional rights of the accused.<sup>65</sup> Proponents are quick to cite the possibilities of reduced criminal penalties, reduced recidivism, low

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<sup>63</sup> ZEHR WITH GOHAR, *supra* note 20, at 18, 25, 54-55.

<sup>64</sup> Reimund, *supra* note 17, at 681-82.

<sup>65</sup> See, e.g., *id.* at 683; Buckingham, *supra* note 37, at 876-77; C. Quince Hopkins, *The Devil is in the Details: Constitutional and Other Legal Challenges Facing Restorative Justice Responses to Sexual Assault Cases*, 50 CRIM. L. BULL. 478 (2014); Reimund, *supra* note 27.

costs, and increased community connections as benefits.<sup>66</sup> Substantively, they argue, court-based RJ provides a more holistic model of accountability, which meets basic human needs left unaddressed by the traditional CJS model. Nonetheless, RJ programs “stand on constitutionally questionable ground,” and rest on the accused’s willingness to forgo an array of Constitutional protections.<sup>67</sup> By waiving these rights, the accused cedes some of their power, thus enhancing the power of the state. Though this trade-off marks a general trend in the operation of the CJS—all plea deals, which resolve the vast majority of criminal cases, rely on similar waivers—restorative justice should not be used to legitimate this broadening of state power.

RJ programs in this model implicate the right of due process (particularly freedom from coercion), the right against self-incrimination, the right to counsel, and confidentiality.<sup>68</sup>

### 1. Due Process and Coercion

One of the key concerns about restorative programs within the criminal system is the presence of coercion, which is protected against by the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>69</sup> The accused’s waiver of constitutional protections must be voluntary and not coerced.<sup>70</sup> A plea is not voluntary if induced by threats, misrepresentations, or bribes.<sup>71</sup> However, the bar for demonstrating that a plea is involuntary is fairly high.<sup>72</sup> Concerns about coercion are particularly salient during diversions, which take place early in the criminal process and encroach on the

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<sup>66</sup> CUNNEEN & HOYLE, *supra* note 2, at 25, 33-34; Braithwaite, *supra* note 27, at 18; Buckingham, *supra* note 37, at 854-57.

<sup>67</sup> Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 760 (2000).

<sup>68</sup> Others have raised concerns about how court-based RJ programs may limit opportunities to challenge evidence obtained through an unlawful search or seizure. Cases diverted out of the system through pleas increase the risk that the State will not be held accountable for abuses of this power.

<sup>69</sup> See, e.g., *Brady v. United States*, 397 U.S. 742, 755 (1970).

<sup>70</sup> *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *McCarthy v. United States*, 394 U.S. 459, 470-72 (1969).

<sup>71</sup> See *Brady*, 397 U.S. at 755 (“(A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).” (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957))).

<sup>72</sup> See, e.g., *Corbitt v. New Jersey*, 439 U.S. 212 (1978); *North Carolina v. Alford*, 400 U.S. 25 (1970).



presumption of innocence.<sup>73</sup> Where the accused lacks information about the likely outcome of their case, their fear can be more easily exploited to secure cooperation in restorative programs.<sup>74</sup> Where RJ is offered as an alternative sentence, these concerns are less pronounced, but offenders often still feel compelled to participate in these programs when they are offered.<sup>75</sup> When the accused is held in state custody due to an inability to afford bail, an offer that would allow them to get out of jail creates a strong incentive for participation.

Most proponents of restorative practices argue that the incentives to accept these programs are no greater for restorative programs than for any other diversionary program or a plea bargain. However, unlike a program for drug-treatment or defensive driving, “successful” completion of a restorative program generally requires the consensus of all of the participants.<sup>76</sup> Though some suggest that this requirement will ensure that only those offenders who are “serious” about a restorative option will pursue this course, the threat of additional penalties may encourage participants to perform contrition or whatever the restorative program requires to be deemed a success. Even if the inducement does not rise to the level of coercion, these programs still raise due process concerns because they circumvent a legal procedure that might have resulted in acquittal.<sup>77</sup>

## 2. Right against Self-Incrimination

The right against self-incrimination is also implicated in the court-based model. One scholar estimates that roughly half of the RJ programs operating in the US require the accused to admit guilt to participate in the program,<sup>78</sup> thus waiving their right against self-incrimination, which would otherwise be in effect through sentencing.<sup>79</sup> If the RJ process is not successful, the case is referred back to the CJS, and any statements that the accused made could be used against them.<sup>80</sup> In addition to the instant offense, it is possible that the offender or other participants may admit to other criminal

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<sup>73</sup> Dancig-Rosenberg & Gal, *Restorative Criminal Justice*, *supra* note 36, at 2322.

<sup>74</sup> *Id.*

<sup>75</sup> Reimund, *supra* note 17, at 684.

<sup>76</sup> OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 5, at 9-15 (listing various programs which require an agreement among participants).

<sup>77</sup> Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 78 (1998).

<sup>78</sup> Reimund, *supra* note 27, at 8.

<sup>79</sup> *Mitchell v. United States*, 526 U.S. 314, 325 (1999).

<sup>80</sup> Landis, *supra* note 54.

acts. The absence of guarantees about confidentiality means that any information shared at an RJ process would open the door for attorneys to question and cross-examine participants about any such acts.<sup>81</sup> Where RJ programs require facilitators to be mandated reporters, certain admissions by participants would be referred to the authorities by design.

### 3. Right to Counsel

The right to counsel is also implicated in many programs in this model. The right to counsel is guaranteed by the Sixth Amendment and applies at every “critical stage” of criminal proceedings.<sup>82</sup> Though programs which take place in the corrections context, after a prisoner has exhausted all of their legal remedies, would not implicate this right, programs which take place at any point before this may. Though some restorative programs allow participants’ attorneys to attend, others do not,<sup>83</sup> finding their participation to be at odds with the informal and non-adversarial nature of most restorative practices. Nonetheless, programs in this model deprive the accused of the benefit of the advice of counsel that they would have received in the CJS.

### 4. Confidentiality

The question of confidentiality occupies murky territory in court-based RJ processes. There is no constitutional or statutory guarantee to confidentiality in restorative programs.<sup>84</sup> The ABA tried to address this particular challenge, issuing a guideline that “statements made by victims and offenders and documents and other materials produced during the mediation/dialogue process [should be] inadmissible in criminal or civil court proceedings.”<sup>85</sup> Still, such guidelines are not binding and attorneys could later use

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<sup>81</sup> Crawford v. Washington, 541 U.S. 36, 57-59 (2004) (collecting cases where courts have admitted testimonial hearsay into evidence despite the lack of opportunity to cross-examine the out-of-court witness).

<sup>82</sup> United States v. Wade, 388 U.S. 218, 228 (1967).

<sup>83</sup> Tina S. Ikpa, Note, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL’Y 301, 313 (2007).

<sup>84</sup> To the extent that RJ is a type of mediation, one avenue for protection is the Uniform Mediation Act, which several states have adopted. Despite such protections, mediation records may still be vulnerable to subpoena, and there are questions about whether restorative practices can be properly classified as mediation. See Reimund, *supra* note 17, at 686, 686 n.140.

<sup>85</sup> RANDOLPH N. STONE, AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES (1994), [https://www.americanbar.org/content/dam/aba/directories/policy/1994\\_am\\_101b.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/1994_am_101b.authcheckdam.pdf) [<https://perma.cc/W368-7D8M>].

information learned in restorative processes to question and cross-examine participants. Additionally, the use of mandated reporters as facilitators explicitly rejects any confidentiality guarantees where a participant makes certain admissions.

This uncertain state of confidentiality also raises concerns for defense attorneys representing an individual who is considering participating in a restorative process. Though the duty of confidentiality is an ethical requirement and not an explicit Constitutional guarantee,<sup>86</sup> a breach of this duty could lead to a claim of ineffective assistance of counsel, thereby rendering counsel's assistance constitutionally deficient in the criminal context.<sup>87</sup> To retain attorney-client privilege, communication between the parties must be kept private,<sup>88</sup> which is the source of the ubiquitous advice to the accused to not discuss a pending case with others. Restorative practices, which depend on dialogue among the parties, are in direct conflict with this advice.

Proponents of the court-based model have called for increased protections for confidentiality in restorative encounters, in the form of legislation or cooperation from prosecutors not to use statements made during the process.<sup>89</sup> However, no legislation can extinguish the accused's right to cross-examine witnesses against them in a criminal trial, and prosecutors would be reluctant to surrender their access to RJ proceedings if a defense attorney could use a diversionary restorative process to gather information, return to the adversarial process, and use information to the benefit of the accused. Many programs thus rely on cooperation with the prosecutor and the court to preserve some sense of confidentiality. Even if these promises are always honored, the unsettled matter of confidentiality gives prosecutors broad discretion to limit when RJ is used in the court-based model.<sup>90</sup>

### B. *Cooptation of Restorative Justice*

In addition to concerns about the rights of the accused, the court-based model gives the court the power to control how RJ is utilized. This control has marginalized RJ within CJS, making it available to a limited class of alleged offenders, and only when a

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<sup>86</sup> MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

<sup>87</sup> *Strickland v. Washington*, 466 U.S. 668, 669 (1984).

<sup>88</sup> Thomas M. Geisler, *Proof of Waiver of Attorney-Client Privilege*, 32 AM. JUR. 3D *Proof of Facts* § 189 (2017).

<sup>89</sup> Hopkins, *supra* note 65, § II.B.

<sup>90</sup> Indeed, the increased confidentiality provisions in CJS proceedings involving youth may be a factor in limiting court-based RJ programs to young offenders.

court or prosecutor grants permission.<sup>91</sup> This model also requires RJ programs to accept the overarching CJS framework, though the values of the two systems are inherently contradictory. Constrained by the larger system, court-based RJ programs are unable to operate on their own terms and are coopted to achieve the objective of the CJS—namely to meet its goals of crime control and restore the negative image of the CJS itself.

Indeed, RJ programs in this model sometimes seek to emphasize their toughness to appeal to the CJS—both in terms of the emotional toll on the offender and increased accountability in completing any restitution or community service agreements.<sup>92</sup> Seeking to bridge the gap between the goals and values of the CJS and RJ, some proponents have gone so far as to state that “restorative justice is not an alternative *to* punishment but an alternative form *of* punishment.”<sup>93</sup> Likewise, pressures on RJ to demonstrate that these programs meet CJS goals, such as cost-efficiency and reduced recidivism, may lead proponents of this model to adopt a narrow view of how RJ programs should be deployed in order to allow them to maintain their position within the courts.

### 1. Control, Marginalization, and Criminalization

Within the CJS, the state controls when and for whom restorative practices may be used, keeping them marginalized within the broader system. Despite the widespread growth of RJ as a discipline,<sup>94</sup> it maintains only a toehold in the US criminal system.<sup>95</sup> RJ interventions in the CJS are often limited to the “shallow end” of criminal justice and are frequently limited to cases where: the offender is a youth; the offense is a low-level (typically non-violent) crime; and/or it is the person’s first offense.<sup>96</sup> This sort of risk management approach bifurcates the criminal system, separating those who would, in the State’s view, benefit from a restorative approach and those who deserve punishment. This bifurcation allows the State to point to the existence and benefits of court-based RJ

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<sup>91</sup> Landis, *supra* note 54 (“Prosecutors have long employed diversion on an informal, individual basis by deferring prosecution if, for example, the accused entered the military or agreed to undergo rehabilitative treatment.”).

<sup>92</sup> BRAITHWAITE, *supra* note 62, at 149.

<sup>93</sup> CUNNEEN & HOYLE, *supra* note 2, at 44.

<sup>94</sup> Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 520-21 (2007).

<sup>95</sup> CUNNEEN & HOYLE, *supra* note 2, at 185.

<sup>96</sup> *Id.* at 48.

programs to restore its own image, while retaining control over who is diverted from more punitive sanctions.

Programs in this model also implicitly accept the CJS's process of criminalization and serve to naturalize practices that bring an offender to the attention of restorative programs within the courts.<sup>97</sup> The process of criminalization is shaped both by the types of harms that the CJS addresses and the communities that are disproportionately targeted by selective policing. Structural violence—social arrangements which allow some to thrive at the expense of others—is not considered to be a violation of the law.<sup>98</sup> This distinction is what allows society to view someone subject to street violence as “worthy of our concern, empathy, and attention,” while someone subject to structural violence is “unworthy, even of the designation of victim.”<sup>99</sup> Limiting the use of RJ as a state-sanctioned response to certain types of harm greatly limits the potential of RJ to address the broader context in which crime occurs. If the goal of this model is to restore participants to the pre-crime status quo, restoring someone to an environment of pervasive structural violence can provide limited benefits, at best.

## 2. Voluntariness

Another fundamental principle of RJ is that participants appear in circle on a voluntary basis. This freedom of presence creates the bases for the actualization of one's own power to speak and make choices within the group. This foundational principle of RJ cannot exist when it is vested within the CJS. No one voluntarily becomes the accused in CJS. There is a dishonesty in claiming that the accused voluntarily waives their constitutional rights to participate in RJ circle, when their presence in the court is due to the state. Though the waiver of constitutional rights may not be the result of outright coercion, most practitioners and courts know that the result of any guilty plea is the result of many coercive, systematic pressures toward the least injurious resolution of a case.<sup>100</sup> In the court-based model, the notion that all parties are participat-

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<sup>97</sup> *Id.* at 164.

<sup>98</sup> SULLIVAN & TIFFT, *supra* note 10, at 157.

<sup>99</sup> *Id.* at 158 (citation omitted).

<sup>100</sup> Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 856-59 (1998) (discussing the coercive pressure of defense counsel on defendants' pleading decisions, as recognized by courts); *see also* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 69-70 (2011).

ing voluntarily creates an obstacle to the honest manifestation of a circle.

### 3. Power-Sharing

The court-based model imposes serious limitations on the ability of RJ programs to create an experience of shared power, as the framework of the CJS imputes significant power to the victim at the expense of the accused. Acceptance of the CJS's identity-fixing labels of "victim" and "offender" as valid and meaningful legitimates the state's process for identifying and classifying people in conflict and only serves to "separate, brand, marginalize, control, and constrain" the possibilities.<sup>101</sup> Within the criminal system, these terms establish roles which create a dichotomy where one party should be "blamed or pitied" and the other should be "sanctioned, controlled, and surveilled."<sup>102</sup> Even where the terms victim and offender are rejected, programs in this model may adopt the roles of "the person who has been harmed" or "the person who has harmed."<sup>103</sup> While these terms do strive to re-center the humanity of participants beyond the labels imposed by the CJS, this framework still adopts the binary of the criminal courts and imputes the power to define the harm to one party. This power is antithetical to the value of equal voice and power sharing required by RJ. Fixing these roles prior to an RJ encounter risks closing the door to conversations about past harms among participants or structural harms that underlie the immediate dispute.

Though parties may be permitted to speak in turn, the defendant is sitting in the circle with a case pending in the superseding court system. Though they can speak freely, the defendant is the only one facing criminal prosecution at the conclusion of the circle. If there is anything that the criminal justice system is good at, it is to inform all of the participants of what the effects of their words and actions within the system would be, so that all participants quickly learn what needs to be said in front of the judge, for the purpose of a plea, and even to their lawyers. It is hard to conceive of a situation where a person facing a criminal conviction would participate in an RJ circle and feel free to point out how the behavior of the identified victim mitigates the defendant's own actions or may have even provoked the situation.<sup>104</sup> The person with the most

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<sup>101</sup> SULLIVAN & TIFFT, *supra* note 10, at 80.

<sup>102</sup> *Id.* at 82.

<sup>103</sup> *See, e.g., id.* at 80.

<sup>104</sup> *See generally* Joseph Robinson & Jennifer Hudson, *Restorative Justice: A Typology*

power in the CJS circle is the victim. The person designated as a victim is in a place of extreme protection and privilege in the court-based model.<sup>105</sup> Indeed, most circles within CJS will not convene unless the accused has made a full admission of guilt and expressed willingness to apologize to the victim.<sup>106</sup> In some ways, the programs in this model are nearly as theatrical and scripted as the roles in the CJS system. All parties are aware of what they should say to achieve the best outcomes for themselves.

### C. Conclusion

In the court-based model, RJ is, at best, a court-sanctioned diversionary program for certain offenders deemed worthy of a restorative approach. At worst, offenders may be coerced into waiving Constitutional rights with the promise of reduced criminal penalties, denying them both essential rights in the criminal arena and the opportunity for a truly restorative process.

## III. QUASI-COURT-BASED RESTORATIVE JUSTICE PROGRAMS

In this model, RJ programs do not reside within the criminal justice system, but seek to address the ancillary fallout of the CJS and mitigate the impact of interacting with the CJS. It is a hybrid of the purely court-based or community-based models. The entryway into these systems is the exit point away from the CJS. Though these RJ models do not fall squarely within the CJS power dynamic, due to their close proximity to and intersection with the CJS, they often reflect the power interplay of the courts.

As hybrid models, quasi-court programs have considerable variation, and the extent of the State's influence depends on the stage of criminal proceedings where the RJ intervention occurs.<sup>107</sup>

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*and Critical Appraisal*, 23 WILLAMETTE J. INT'L L. & DISP. RESOL. 335, 351 (2016) ("When victims' narratives and needs are institutionally dominant, offenders' needs may suffer a concomitant loss. This criticism is especially acute when offenders are ordered or incentivized to participate in RJ. Victim-lecturing, in which the victim harangues and verbally abuses the offender, may be more commonplace than is generally assumed and results in a negative and disempowering experience for the offender.").

<sup>105</sup> Ikpa, *supra* note 83, at 313-15.

<sup>106</sup> See, e.g., Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL. PUB. POL'Y & L. 142, 156 (2008) ("[R]emember that during restorative justice conferences the apologies of the offender to the victim are an essential part of symbolic reparation.").

<sup>107</sup> See, e.g., Kate E. Bloch, *Reconceptualizing Restorative Justice*, HASTINGS RACE & POVERTY L.J. 201, 211 (2010); GORDON BAZEMORE & MARK UMBREIT, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, A COMPARISON OF FOUR RESTORATIVE CONFERENCING MODELS 7 (2001), <https://www.ncjrs.gov/pdffiles1/>

Programs in this model include pre-charge diversions; programs which do not require a plea of guilty, but hold the outcome of a case in abeyance pending successful completion of an RJ program; circles convened outside the courts to develop recommendations for sentencing; or RJ programs operating within prisons to foster dialogue among those impacted by crime or preparing for re-entry. Rather than attempting to reform the CJS, programs in this model tend to focus on harm reduction or mitigating the impact of involvement with the CJS.<sup>108</sup> These programs are often designed to address the punitive tendencies of the CJS, such as the prosecution of youth in adult courts, lengthy prison sentences, and lack of rehabilitative programming for prisoners.<sup>109</sup>

Though programs in this model may implicate some of the rights of the accused, since they frequently take place pre-charge or post-conviction, they do not implicate the full array of rights required during a pending criminal case. Additionally, as programs within this model view the CJS as the primary mechanism for justice, RJ programs in this model tend to be more focused on restoring human connections than providing a substitute for the CJS. Though the proximity to the CJS may impact the values of RJ programs in this model, these programs do not allege that they are diverting State power and tend to acknowledge the extent to which they are constrained by it.<sup>110</sup> The primary concerns with this model are net-widening and the inability of this model to address the larger process of criminalization, which brings people to the attention of the CJS, and thus this hybrid model, in the first place.

#### A. *Impact on Restorative Justice Values*

The issues around voluntariness and power-sharing in the court-based model are not as pronounced in the quasi-court-based

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ojjdp/184738.pdf [https://perma.cc/7FEN-D46H ] (“The models differ in point of referral and in structural relationship to formal court and correctional systems. The models also differ in eligibility, which ranges from minor first offenders to quite serious repeat offenders (in the case of circle sentencing).”).

<sup>108</sup> BRAITHWAITE, *supra* note 62, at 155-56 (“[I]t may be important to think of restorative justice in terms of avoiding harm more than in terms of doing good. . . . Hence the most important ways restorative justice may be able to reduce social injustice involve reducing the impact of imprisonment as a cause of the unequal burdens of unemployment, debt with extortionate interest burdens, suicide, rape, AIDS, hepatitis C, and . . . multiple-drug-resistant tuberculosis . . .”).

<sup>109</sup> See, e.g., ZEHR WITH GOHAR, *supra* note 20, at 54 (describing alternative and diversionary programs that “aim to divert cases from, or provide an alternative to, some part of the criminal justice process or sentence”).

<sup>110</sup> See, e.g., *id.* at 24 (discussing the relationship between restorative justice and the state).



model. In this model, there is no assumption of voluntariness because the process itself is designed to mitigate the effects of the CJS and to soften its impact on the accused.<sup>111</sup> The extent to which power can be shared in this model varies, particularly where some participants are incarcerated and others are at liberty. However, as there are typically not criminal charges hanging over anyone's head in this model, participants are more able to engage in a process that fosters human connection.

*B. Limits of Quasi-court-based Model*

In pre-charge diversion programs, there are concerns about net-widening. Net-widening refers to processes that widen the net of State social control and result in a greater number of people being controlled by the CJS.<sup>112</sup> In this model, police may refer people suspected of committing crime to a restorative process, rather than pursue criminal charges.<sup>113</sup> This allows police to exercise discretion about who is referred to these alternatives, and it runs the risk of involving more people in the system in situations where authorities previously may not have pursued any action. These programs usually require an admission of responsibility, compelling the alleged offender to admit guilt and accept any consequences imposed, without the advice of counsel, which raises due process concerns.

Programs in this model identify potential participants based on their position in the CJS. Though programs in this model may not need to rely on permission from the court to engage in RJ, the scope of this model is limited by the policies of criminalization which disproportionately bring people from marginalized communities into the CJS.<sup>114</sup>

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<sup>111</sup> *Id.* at 53-55 (describing the purposes behind different models of restorative justice).

<sup>112</sup> Matthew C. Leone, *Net Widening*, in *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 1087, 1087-88 (David Levinson ed., 2002). In RJ in particular, net-widening may occur by "dragging into the justice system people or behaviours that would otherwise be left alone on the grounds that the system has something beneficial to offer them." CUNNEEN & HOYLE, *supra* note 2, at 45.

<sup>113</sup> See, e.g., 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, 39 (2008); *Lesson 5: Implementation Issues: Net Widening or Diversion*, *CTR. FOR JUST. & RECONCILIATION*, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-5-implementation-issues/diversion-or-net-widening/> [<https://perma.cc/HMV5-U7VE>].

<sup>114</sup> See generally *THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* 1 (2d. ed. 2008),

## IV. COMMUNITY-BASED RESTORATIVE JUSTICE

In the community-based model, RJ is a free-standing paradigm for seeking justice, distinct from the CJS. In this model, the power to engage in restorative justice is inherent in humankind, and there is no need to seek or get permission from the State to address and resolve matters between people. When a circle is convened, power is shared equally among participants and the facilitator. The justice that comes forth is a shared justice based on the emergent wisdom of those who participate in the process. In community-based RJ, the ideal outcome is the profound understanding that crime and other harms occur as a result of the “us versus them” binary attitude that reflects a lack of human connection. As a manifestation of community dynamics, the responsibility of addressing conflict likewise rests with communities themselves.

Community-based RJ programs can be based in schools, workplaces, neighborhoods, places of worship, or any other place outside the purview of the CJS. Schools are an increasingly popular location for community-based RJ, as educators seek methods to address conflict beyond suspension and there is some established sense of community.<sup>115</sup>

A. *Location of Power and Relationship to the State*

The community-based model can be framed as returning conflicts to the communities that they impact.<sup>116</sup> However, a frequent critique of RJ is that it relies on a notion of community that is now obsolete. Critics argue that prior to the State monopoly on crime, communities that relied on practices that would now be termed restorative justice were small and tightknit. The realities of post-

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<http://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf> [https://perma.cc/Q4YW-9SB6]; Jeremy Prichard, *Net-Widening and the Diversion of Young People from Court: A Longitudinal Analysis with Implications for Restorative Justice*, 43 AUSTRALIAN & N.Z. J. CRIMINOLOGY 112, 114 (2010) (describing negative externalities like increased police power).

<sup>115</sup> See, e.g., JESSICA ASHLEY & KIMBERLY BURKE, ILL. CRIMINAL JUSTICE INFO. AUTH., IMPLEMENTING RESTORATIVE JUSTICE: A GUIDE FOR SCHOOLS (2009), <https://www.scc.gov.org/sites/pdo/ppw/SEAP/Documents/SCHOOL%20RJP%20GUIDEBOOK.pdf> [https://perma.cc/9XQC-8UHZ]; Susan Dominus, *An Effective but Exhausting Alternative to High-School Suspension*, N.Y. TIMES MAG. (Sept. 7, 2016), <https://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html> [https://perma.cc/7R36-L2B3]; Eric Westervelt, *An Alternative to Suspension and Expulsion: ‘Circle Up!’*, NPR (Dec. 17, 2014), <http://www.npr.org/sections/ed/2014/12/17/347383068/an-alternative-to-suspension-and-expulsion-circle-up> [https://perma.cc/XV2N-2JT8].

<sup>116</sup> Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 6 (1977).

industrialization have rendered communities segregated and diffuse. Typically, we know other people as roles rather than as full human beings. Where our relationships with people are less comprehensive, we accept the notion that only trained experts are qualified to evaluate someone's individual competence.<sup>117</sup> This has resulted in the surrender of our shared right to conflict. We have been willing to outsource our complaints to professionals, dealing at arm's length with those involved in a conflict, where prosecutors label the harm and judges passively pronounce the norms.<sup>118</sup>

Though contemporary communities may be more diffuse than in years past, returning conflicts to communities can be a source of revitalization for communities where the connections among people are weakened or absent. In this way, community-based RJ is a recursive process that relies on communities to address conflict and strengthens community ties in the process.<sup>119</sup> In some instances, a community may exist prior to the commencement of an RJ process; in others, a community may converge and develop during the process.

#### B. *Limits of a Community-based Model*

While RJ provides broader opportunities for engagement in terms of participants and types of conflicts, its reach is not limitless. Conflicts which are in the process of being adjudicated in the criminal justice system will likely be outside the reach of an RJ intervention, where it would implicate the accused's Constitutional rights.

While this may appear to exclude many eligible conflicts from the purview of community-based RJ, it is important to remember that the CJS is also constrained in the cases it prosecutes. Many crimes go unreported, and many reported crimes go unsolved.<sup>120</sup> The offender-focus of the CJS means that it cannot deliver its version of justice as punishment where an offender is unknown or unidentified. A victim of crime has no right to petition the state for restitution.<sup>121</sup> In the community-based model, the victim could convene a circle to address the harms they have encountered and

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<sup>117</sup> *Id.* at 5.

<sup>118</sup> Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms*, 34 VT. L. REV. 563, 568 (2010).

<sup>119</sup> Christie, *supra* note 116, at 5.

<sup>120</sup> BRAITHWAITE, *supra* note 62, at 138.

<sup>121</sup> The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, 35 Op. O.L.C. 1, 6 n.5 (2010) ("[R]estitution, unlike many of the other rights provided in section 3771(a), necessarily depends on the existence of a predicate conviction . . . .")

seek community support, though the perpetrator may be unknown. While a restorative process may be more resonant where all of the relevant stakeholders are present, it is not essential.

The primary limits of this model are internal. People are accustomed to handing conflicts over to professionals to resolve on their behalf.<sup>122</sup> Engaging in RJ requires time and a willingness to listen to others and to speak honestly about difficult topics. As participation is strictly voluntary, there must be people willing to participate in a community-based model for it to thrive. Some have suggested that RJ remains limited because people want retribution, they want to see offenders punished.<sup>123</sup> While this may be the case, people are not as punitive as we often think. The general public is more likely to support harsher penalties in the abstract, but not when applied to specific facts, and they are less punitive than judges and prosecutors.<sup>124</sup> Additionally, it is crucial to remember that punishment itself is “counterviolence, a variant of the violence that required corrective action in the first place . . . .”<sup>125</sup> By perpetuating this cycle:

We become a variant of the person who subdues other face-to-face; we share in the destruction of life by chiseling away at the foundations of the kind of community we say we desire. The only difference is that we do not get to see clearly who or what we have become and what kind of community we are in fact creating because the justifications that vengeance and retribution offer us sedate our consciousness.<sup>126</sup>

Community-based RJ creates the potential to build community, to seek constructive solutions to conflict, and to challenge oppressive societal structures.<sup>127</sup> By developing a model that operates outside the auspices of the CJS, the decision-making power of the community is not confined to the legal issue identified by the courts. Though RJ cannot transform the criminal justice system from within, the development of a robust community-based alternative has the potential to transform how we approach justice as a society. If individuals in conflict could request an independent RJ

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<sup>122</sup> Christie, *supra* note 116, at 9; *see also* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 426 (2007) (noting the common “perception that defendants who represent themselves are foolish at best and mentally ill at worst”).

<sup>123</sup> ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* 51 (2004).

<sup>124</sup> BRAITHWAITE, *supra* note 62, at 148.

<sup>125</sup> SULLIVAN & TIFFT, *supra* note 10, at 5.

<sup>126</sup> *Id.* at 9.

<sup>127</sup> Reimund, *supra* note 27, at 2.

process rather than rely on police and prosecutors to address the issue, reliance on the criminal justice system may decrease.<sup>128</sup> We can only discover the full potential of RJ as an alternate paradigm for justice by collectively investing in it.

#### V. CONCLUSION

For restorative justice to take root and flourish as an alternative paradigm for justice, it must be community-based and distinct from the criminal justice system. Though programs in the quasi-court model may provide some measure of relief from the consequences of CJS involvement, RJ is not designed to transform the criminal justice system. Though advocates for merging the two paradigms argue that restorative justice can improve the criminal system, it stands little chance of fundamentally changing the way society deals with crime within the power dynamics of the CJS. Rather than reforming the criminal justice system, attempts to “soften” the inherent nature of the adversarial system by implementing RJ within its structure actually function to expand the powers of the State. If restorative justice is to transform how society responds to crime, it must be on its own terms, as an alternate path to justice.

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<sup>128</sup> Reimund, *supra* note 17, at 671.