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## International Lessons in the Systematic Adoption of Felony Restorative Justice in Chicago

Sean Hux

### RESTORATIVE JUSTICE AS AN ALTERNATIVE

Restorative Justice (RJ) is an alternative method of justice to the traditional, trial based, criminal justice system used in the United States and throughout much of the western world. Illinois Balanced and Restorative Justice (IBARJ) describes the difference between these two systems by comparing their ultimate questions to one another.<sup>1</sup> The traditional criminal justice system asks the questions, “What law was broken? Who broke it? How are we going to punish them?”<sup>2</sup> Instead, a restorative justice process asks, “Who was harmed? How will the harm be repaired? Who is responsible for repairing the harm?”<sup>3</sup> Not only does RJ change the frame of inquiry, it also changes the list of active participants.<sup>4</sup> “Restorative justice turns those traditional observers of the criminal justice system – victims, offenders, and their families and friends – into participants. . . victims, offenders, and their respective supporters meet face-to-face [in a meeting convened by a third party], to discuss the circumstances, causes, consequences, and responses to crimes.”<sup>5</sup>

One of the principal philosophies of restorative justice is to repair existing damage in the administration of justice, not to create more.<sup>6</sup> ‘Sanctions’ are agreed upon by the circle or conference of affected parties.<sup>7</sup> The goal of these ‘sanctions’ is to affect the offender no more or less than what is necessary to restore the victim and the community.<sup>8</sup> Frequently, this results in payments of compensation or restitution, and performance of community service and edu-

<sup>1</sup> Sarah Balgoyen, *Restorative Justice in Communities*, ILLINOIS BALANCED AND RESTORATIVE JUST., <https://ibarj.org/communities.asp> (last visited Aug. 1, 2019).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> DECLAN ROCHE, *ACCOUNTABILITY IN RESTORATIVE JUSTICE*, 9 (Oxford Univ. Press 2003).

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

<sup>6</sup> ROSS LONDON, *CRIME PUNISHMENT AND RESTORATIVE JUSTICE: FROM THE MARGINS TO THE MAINSTREAM*, 33 (FirstForumPress 2011).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

cation programs.<sup>9</sup> Only in the most serious cases do they include incarceration.<sup>10</sup>

Despite what many would consider more lenient outcomes compared to traditional and punitive sentencing, statistical consensus is that restorative justice results in a lower chance of recidivism among offenders than terms of probation or incarceration.<sup>11</sup> The offender's direct participation in the restorative justice process allows for the operation of a psychological principal known as reintegrative shaming.<sup>12</sup> As a result of this direct reintegration process, "victims leave restorative justice meetings fearing revictimization less than do those victims whose cases are processed by a court, and . . . when an offender makes an agreement in a restorative justice meeting. . . he or she is much more likely to honour that agreement than offenders subject to court orders. Other evaluations also show that restorative justice programmes can reduce reoffending rates for some types of crime, notably those where there is a direct victim who has suffered serious harm."<sup>13</sup> Despite the fact that RJ is particularly effective in situations where the victim has been subjected to serious harm and violence at the hands of an offender, the use of RJ for such cases is rare in the United States and Canada.<sup>14</sup>

#### USE OF RESTORATIVE JUSTICE IN THE ADULT VIOLENT FELONY CONTEXT

There are only a handful of systematized restorative justice programs that regularly deal with serious adult felony offenders in countries with a common law justice system.<sup>15</sup> In contrast to the systematized type of RJ process, there is also a more traditional process of RJ that exists entirely outside the criminal

<sup>9</sup> Lawrence W. Sherman, *Are Restorative Conferences Effective in reducing Repeat Offending? Findings from a Campbell Systematic Review*, 31 J. OF QUANTITATIVE CRIMINOLOGY 1, 2-3 (2015).

<sup>10</sup> London, *supra* note 6, at 168-171.

<sup>11</sup> Sherman, *supra* note 9, at 19-20; Alana Saulnier and Diane Sivasubramaniam, *Restorative Justice: Underlying Mechanisms and Future Directions*, 18 N. CRIM. L. REV. J. 510, 516 (2015); Judy C. Tsui, *Breaking Free of the Prison Paradigm: Integrating Restorative Justice Techniques into Chicago's Juvenile Justice System*, 104 J. OF CRIM. L. AND CRIMINOLOGY 635, 641 (2014).

<sup>12</sup> Roche, *supra* note 4, at 28.

<sup>13</sup> Roche, *supra* note 4, at 11.

<sup>14</sup> Don Clairmont, *Penetrating the Walls: implementing a system-wide restorative justice approach in the justice system*, in NEW DIRECTIONS IN RESTORATIVE JUSTICE: ISSUES, PRACTICE, EVALUATION 245, 247-48 (Elizabeth Elliot and Robert M. Gordon ed., 2005).

<sup>15</sup> Roche, *supra* note 4, at 70.

justice system and is operated by community organizations alone.<sup>16</sup> Furthermore, there are numerous RJ programs across the United States (U.S.), and the world, which operate in juvenile contexts.<sup>17</sup> The handful of RJ programs in the U.S. which do take adult cases are mostly restricted to non-violent and relatively minor offenses.<sup>18</sup>

RJ processes that deal in adult felonies tend to be those more systemized in the criminal justice system where they are located, as opposed to diversionary programs or completely community based conferences or circles.<sup>19</sup> There are many of these programs associated with a Native American, First Nation, Maori, or Aboriginal community or state.<sup>20</sup> Restorative justice in New Zealand originated from the Maori tradition and is largely practiced by community organizations, such as the Mana Social Services Trust in Rotorua, who are in turn employed by the courts.<sup>21</sup> Of all the programs researched for this piece, only one was a governmental office *within* the court system of its jurisdiction. This was the Peacemaking Program of the Judicial Branch of the Navajo Nation, which takes all types of cases.<sup>22</sup>

It is much more common for RJ programs, especially in Canada and the United States, to be treated as external diversionary systems, altogether separate

<sup>16</sup> Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME AND JUST. 235, 236-40 (The Univ. of Chicago Press 2000).

<sup>17</sup> Roche, *supra* note 4, at 6; Clairmont, *supra* note 14, at 245.

<sup>18</sup> Roche, *supra* note 4, at 11.

<sup>19</sup> Roche, *supra* note 4, at 69-70.

<sup>20</sup> *The Peacemaking Program of the Navajo Nation*, CTS. OF THE NAVAJO NATION, <http://www.navajocourts.org/indexpeacemaking.htm> (last visited Jul. 30, 2019); *Community Council Program*, ABORIGINAL LEGAL SERV., <http://aboriginallegal.ca/community-council-program.html> (last visited Oct. 6, 2019); *2011 Presentation*, MI'KMAW LEGAL SUPPORT NETWORK, <http://www.iirp.edu/pdf/Nova-Scotia-2011-Presentations/Nova-Scotia-2011-Amaral-Campbell.pdf> (last visited Oct. 6, 2019); *Restorative Justice*, MAORI MANA SOC. SERVS. TR., [http://www.manasocialservicestrust.org.nz/services\\_rj.php](http://www.manasocialservicestrust.org.nz/services_rj.php) (last visited July 30, 2019); MARGARITA ZERNOVA, *RESTORATIVE JUSTICE: IDEALS AND REALITIES*, 7-8 (Ashgate 2007).

<sup>21</sup> MAORI MANA SOC. SERVS. TR., *supra* note 20; N.Z. MINISTRY OF JUST., *List of Restorative Justice Providers*, <https://www.justice.govt.nz/about/lawyers-and-service-providers/service-providers/restorative-justice-providers/list-of-rj-providers/> (last visited July 30, 2019).

<sup>22</sup> CTS. OF THE NAVAJO NATION, *supra* note 20; The RJ process can be utilized at the pre-trial, post-conviction, and post-sentencing phases, and can also be used in conjunction with probation services. The procedural structure of the program and its interaction with other offices, rights of confidentiality, and even limits on the power of the traditional judiciary are all pre-conceived and codified in the statute law of the Navajo Nation. 2 N.N.C. 10/409-13 (2010); 2 N.N.C. 10/1716 (2010), available at: <http://www.navajonationcouncil.org/Navajo%20Nation%20Codes/V0020.pdf> (last visited July 29, 2019).

from the courts.<sup>23</sup> However, these programs tend to restrict services to juveniles or low-level adult offenders. The Red Hook RJ community program in New York and the Lawndale Community Court in Chicago are examples of these.<sup>24</sup> The reason that many American RJ programs are limited to juvenile and minor adult offenses seems to be the result of system actors' and policy makers' unfamiliarity or lack of confidence in the program's ability to handle more serious cases.<sup>25</sup> However, clinical and field research continues to suggest, in numerous contexts, that RJ procedures are most effective in serious cases where the victim, the offender, and harm are the clearest.<sup>26</sup> Understandably, policy makers are usually hesitant to enact sweeping reform off of purely theoretical models and small scale successes alone, especially when being pressured to maintain a stance that's 'tough on crime.'<sup>27</sup> Fortunately, systemized restorative justice has achieved great success with adult felony cases on a large scale already.<sup>28</sup> New Zealand and Nova Scotia have each instituted sweeping restorative justice programs which have become an important part of their respective criminal justice systems. The design, establishment, and implementation of these programs have important lessons for policy makers and RJ advocates who wish to replicate them.

#### CASE STUDY – NEW ZEALAND

The transition into greater usage of restorative justice processes, in a systemized fashion, greatly relies on the acceptance and support by system actors not only of the program itself but of the underlying principles of restorative

<sup>23</sup> Clairmont, *supra* note 14, at 246.

<sup>24</sup> *Red Hook Community Justice Center*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/red-hook-community-justice-center/more-info> (last visited Jul. 30, 2019); *Restorative Justice Community Court arrives in North Lawndale*, CIR. CT. OF COOK COUNTY (July 20, 2017), available at <http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2564/Restorative-Justice-Community-Court-arrives-in-North-Lawndale.aspx>.

<sup>25</sup> Tsui, *supra* note 11.

<sup>26</sup> Donald W. Shriver, Jr. & Peggy L. Shriver, *Law, Religion, and Restorative Justice in New Zealand*, 28 J. L. AND RELIG. 1, 147 (Cambridge Univ. Press 2013).

<sup>27</sup> Tsui, *supra* note 11, at 656.

<sup>28</sup> Don Clairmont & Kit Waters, *The Nova Scotia Restorative Justice Program: Assessment of Current Status and Future Directions*, ATL. INST. OF CRIMINOLOGY OF DALHOUSIE U. <https://dalspace.library.dal.ca/bitstream/handle/10222/64610/Assessment%20of%20the%20NSRJ%20Program%202015.pdf?sequence=1> (last visited Nov. 12, 2019); Shriver, *supra* note 26.

justice.<sup>29</sup> The reality is that these actors, predominantly prosecutors and judges, but also legislators, hold the keys to the traditional criminal justice system.<sup>30</sup> In effect, these actors are the gatekeepers.<sup>31</sup> However, once these gatekeepers become supporters of a policy of restorative justice, real public benefits have been achieved.

The stories of success of RJ in New Zealand demonstrate the impact of a well implemented and systemized restorative justice policy. Restorative justice in New Zealand has its roots in the native Maori traditions of justice that have been practiced for hundreds of years.<sup>32</sup> However, these traditions have only been formally systemized in New Zealand's criminal justice system within the past few decades.<sup>33</sup> The adoption of systemized restorative justice was largely a response to an era of very punitive criminal justice policy.<sup>34</sup> Much like the United States, New Zealand implemented a criminal justice policy in the 1970s and 1980s that exponentially increased the ratio of incarcerated people against the total population.<sup>35</sup> In 2010, the United States incarcerated 750 for every 100,000 citizens in the country, easily making it the most carceral nation in the world.<sup>36</sup> However, during the early 2000s, New Zealand was actually the second most carceral nation among developed western nations with 150 for every 100,000 citizens incarcerated with the rate of imprisonment of the indigenous Maori people approaching the United States' ratio.<sup>37</sup>

While the United States has largely continued this program of mass incarceration, New Zealand has made great strides to shift its stance on criminal justice.<sup>38</sup> This change was so dramatic that by 2009, the Chief Justice of New Zealand publicly concluded that "penal policy is largely irrelevant to reduction of crime and to making our communities safest."<sup>39</sup> Two years later, New Zealand's Minister of Finance publicly stated that "Prisons are a fiscal and moral

<sup>29</sup> Kathleen Daley, *Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects*, in *RESTORATIVE JUSTICE FOR JUVENILES* 59, 60 (Allison Morris and Gabrielle Maxwell eds., 2001).

<sup>30</sup> Clairmont, *supra* note 14, at 249.

<sup>31</sup> *Id.*

<sup>32</sup> Zernova, *supra* note 20, at 10.

<sup>33</sup> *Restorative Justice Best Practices*, N.Z. MINISTRY OF JUST., <https://www.justice.govt.nz/assets/Documents/Publications/RJ-Best-practice.pdf> (last visited Oct. 6, 2019).

<sup>34</sup> Shriver, *supra* note 26, at 149.

<sup>35</sup> *Id.* at 146.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Drew Kann, *5 facts behind America's high incarceration rate*, CNN (Apr. 21, 2019), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html>.

<sup>39</sup> Shriver, *supra* note 26, at 149.

failure.”<sup>40</sup> These sentiments appear to have reflected the opinions of a great deal of the bench in New Zealand as well, where judges have adopted restorative justice circles and conferences as an alternative to traditionally punitive sentencing in most types of cases.<sup>41</sup>

Restorative justice in New Zealand began to be applied by individual judges on an ad hoc basis throughout the 1990s.<sup>42</sup> Their efforts and success were noticed by New Zealand’s legislature in the early 2000s. Restorative justice became recognized as a formal part of the criminal justice system for the first time in 2002, with the Sentencing Act, the Parole Act, and the Victims’ Rights Act.<sup>43</sup> In 2007, a massive international survey on the results of restorative justice vs. criminal justice systems stated “The evidence on RJ [in New Zealand] is far more extensive, and positive, than it has been for many other policies that have been rolled out nationally. RJ is ready to be put to far broader use.”<sup>44</sup> Since then, the place of restorative justice in the courts of New Zealand has been progressively expanded with legislative amendments in 2014 and the increased usage of RJ programs throughout the country.<sup>45</sup>

#### CASE STUDY – NOVA SCOTIA, CANADA

The Nova Scotia Restorative Justice Program’s (NSRJP) road to success not only demonstrates the importance of support from victims and the community for a successful restorative justice program, but also how fostering that support takes time. Originally launched in 1999, “The central objective was to have the restorative justice approach operationalized in different strategic ways, phased in by offender status and region, and applicable to all offences and all offenders throughout the province.”<sup>46</sup> The program was coordinated and funded by the Nova Scotia office of the Canadian Department of Justice, and actually authorized by the Attorney General of Nova Scotia.<sup>47</sup> Despite this critical support, Don Clairmont points out, in his piece about the initial im-

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 160.

<sup>42</sup> RESTORATIVE JUSTICE: 2017 BEST PRACTICE FRAMEWORK, N.Z. Ministry of Just., (Aug. 2017), <https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-best-practice-framework-2017.pdf> (last visited July 31, 2019).

<sup>43</sup> *Id.*

<sup>44</sup> Shriver, *supra* note 26, at 149.

<sup>45</sup> *Id.*; N.Z. MINISTRY OF JUST., *supra* note 21.

<sup>46</sup> Clairmont, *supra* note 14, at 245.

<sup>47</sup> *Id.* at 246; N.S. ATTY. GEN., THE NOVA SCOTIA RESTORATIVE JUSTICE PROGRAM PROTOCOLS 2018, 3, <https://novascotia.ca/restorative-justice-protocols/docs/Restorative-Justice-Program-Protocols.pdf> (last visited Oct. 5, 2019).

plementation of the NSRJP, that there was another hurdle that the initiative had to overcome.<sup>48</sup> Specifically, the uncertain support from “post-charge, post-police, criminal justice system role-players,” as well as victims and community leaders.<sup>49</sup>

Beginning in 1999, the NSRJP started as a pilot program dealing only with juvenile cases and then, over the course of 16 years, expanded to full service of adults.<sup>50</sup> The first juvenile pilot program was implemented in four regions of Nova Scotia and, once it was deemed successful, expanded to a full-fledged RJ program for juveniles across Nova Scotia in 2001.<sup>51</sup> Following a decade of successful implementation in the juvenile context, a pilot expansion to adult cases began in two regions and through an initiative at a Dalhousie University in 2011.<sup>52</sup> Finally, the NSRJP expanded its eligibility to include all adult cases across Nova Scotia in 2016, “replacing Nova Scotia’s existing adult diversion programs.”<sup>53</sup>

The NSRJP is a comprehensive RJ program. It has protocols for the application of RJ procedures at numerous stages of the traditional criminal justice process, including pre-charge, pre-plea, and post-conviction.<sup>54</sup> Cases can be referred into the RJ process by police, crown-attorneys, judges, and even correctional facilities.<sup>55</sup> The pre-plea components of the program are ultimately authorized by the Attorney General of Nova Scotia through the office’s power vested by §717 of the Criminal Code, RSC 1985, c C-46 (for adults) and §10 of the Youth Criminal Justice Act, SC 2002, c 1 and §10 of the Youth Justice Act, SNS 2001, c 38 (for juveniles).<sup>56</sup> As such, the NSRJP Protocols promulgated by that office constitute the governing regulation for the pre-plea referral process to the RJ program by police and crown-attorneys.<sup>57</sup> These protocols were drafted and produced in consultation with “non-profit agencies. . . and leaders at all levels of the [Nova Scotia] justice system”, and are regularly updated by the Attorney General’s Office.<sup>58</sup>

<sup>48</sup> Clairmont, *supra* note 14.

<sup>49</sup> *Id.*

<sup>50</sup> PROVINCE OF N.S., NOVA SCOTIA RESTORATIVE JUSTICE PROGRAM, 1 (2018), available at <https://novascotia.ca/just/tj/Restorative-Justice-Program.pdf> (last visited Oct. 5, 2019).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> N.S. ATT’Y GEN., *supra* note 50, at 3.

<sup>55</sup> *Id.* at 3, 9, 13, 17, and 22.

<sup>56</sup> *Id.* at 3.

<sup>57</sup> *Id.*

<sup>58</sup> Clairmont, *supra* note 14, at 245; N.S. ATT’Y GEN., *supra* note 50, at 3.

The protocols also contain a section for the courts but note that they are not authorized by the Attorney General's Office, but rather by the courts' own power over criminal proceedings and sentencing contained in the Criminal Code, the Youth Criminal Justice Act, and the Youth Justice Act.<sup>59</sup> The dimensions for eligibility for the NSRJP are, compared to many other RJ programs, very broad. The Attorney General's protocol mandates that, "*All matters are eligible for referral* by the police, crown, courts, correction and victim serving agencies. Police, crown and corrections *shall* consider all matters for referral except where a provincial hold or moratorium is in place; or referral is otherwise barred by law."<sup>60</sup> At this point, the only moratorium that is still in place is in cases involving domestic or sexual violence.<sup>61</sup>

While the NSRJP had the support of almost all of the system actors within its jurisdiction, it still took some time for support from victims and victim advocates to occur. For several years after its initial implementation, victim advocacy groups "such as seniors, women's organizations and business leaders" were reluctant to see RJ extend beyond cases involving "minor property crime and young offenders."<sup>62</sup> This was despite the fact that the NSRJP consistently demonstrated better outcomes than the traditional criminal justice system in terms of recidivism, participant involvement and satisfaction, and provincial coordination.<sup>63</sup> Nevertheless, because of the relatively low case load handled by the program in its early years, the 'value-added' by the program to these measures across all cases in Nova Scotia was fairly modest.<sup>64</sup> Over time, the RJ program became more acceptable with all of the stake-holders and system actors in the process including victim's groups.<sup>65</sup> By 2010, it was largely the consensus of the system actors, non-profit agencies, and community groups that the RJ program added a valuable dimension to the criminal justice system and was ready to be rolled out to adult cases.<sup>66</sup> Since the expansion into adult casework, in 2011, the program has continued to reach its objectives and experience success.<sup>67</sup>

<sup>59</sup> N.S. ATT'Y GEN., *supra* note 50, at 17.

<sup>60</sup> *Id.* at 19.

<sup>61</sup> The Canadian Press, *N.S. to divert more criminal cases away from courts to restorative justice system*, CBC (July 16, 2019), <https://www.cbc.ca/news/canada/nova-scotia/restorative-justice-system-criminal-cases-youth-1.5213583>.

<sup>62</sup> Clairmont, *supra* note 14, at 250.

<sup>63</sup> *Id.* at 251.

<sup>64</sup> *Id.*

<sup>65</sup> Clairmont, *supra* note 14, at 19.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 64.

*Unique Challenges Faced in Chicago*

Criminal legal procedure and sentencing law in Illinois along with the prevalence of false convictions in Cook County present unique challenges to the implementation of RJ in the violent felony context in Chicago. The Restorative Justice Community Court (RJCC) is located in the North Lawndale neighborhood and is currently the only restorative justice program in the city.<sup>68</sup> Its creation and protocol also demonstrates how unique problems in Chicago require RJ advocates to use unique solutions to maintain the integrity of the restorative justice process. The program is currently limited to taking cases involving defendants between the ages of 18 and 26 having been charged with a non-violent or misdemeanor.<sup>69</sup> The program also requires that the defendant live in North Lawndale and have a non-violent criminal history to be eligible for the program.<sup>70</sup> Founded in 2017, the program was envisioned to be a truly community based process, operating outside of a court setting and in the Lawndale neighborhood it serves.<sup>71</sup> The RJCC itself facilitates and enforces the work of multiple restorative justice ‘circles’ which are kept and operated by professional restorative justice practitioners trained by Illinois Balanced and Restorative Justice and the Community Justice for Youth Institute.<sup>72</sup>

To get a better idea of how an RJ program like this is implemented, I spoke with Sarah Staudt, formerly a staff attorney at Lawndale Christian Legal Center (LCLC).<sup>73</sup> Ms. Staudt participated in the planning and implementation RJCC with Cook County’s Chief Judge’s office, the State’s Attorney’s Office, as well as numerous restorative justice practitioners and community leaders from Lawndale.<sup>74</sup> The planning of the RJCC began in 2015 when LCLC and the Cook County Circuit Court Chief Judge’s office received a grant from the Center for Court Innovation, “a public-private partnership between New York state’s court system and a community-development charity.”<sup>75</sup> Once this grant was secured, it took about two years of careful

<sup>68</sup> CIR. CT. OF COOK COUNTY, *supra* note 24.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Interview with Sarah Staudt, Staff Attorney and Senior Policy Analyst, Chicago Appleseed Fund for Justice (Oct. 30, 2019).

<sup>73</sup> *Id.*

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

<sup>75</sup> Yana Kunichoff, *Should Communities Have a Say in How Residents Are Punished for Crime?*, THE ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/chicago-restorative-justice-court/524238/>.

negotiation and planning to come up with policies and a program structure that addressed all of the stakeholders' needs and concerns.<sup>76</sup>

Two of these needs, as stated by community leaders and restorative justice practitioners involved in the process, were protections against systematic coercion to participate in the program and protections of participant confidentiality.<sup>77</sup> Since restorative justice requires that offenders accept responsibility for their offenses and participate of their own free will, the RJ practitioners involved in planning RJCC wanted to make sure that defendants charged were not compelled to participate in the program because of the only alternative at the post-conviction stage: harsh statutory sentencing minimums requiring years of incarceration.<sup>78</sup> Illinois criminal sentencing law remains some of the most severe in the country to this day.<sup>79</sup> To mitigate the likelihood of its effect on defendant's decision to participate, the program was designed to receive most of its referrals directly from bond hearings, while the cases were still in a pre-trial posture.<sup>80</sup> A defendant whose case has been referred to the program will, upon being released on bond, receive their next court date at the RJCC in Lawndale instead of being instructed to return to an ordinary criminal court.<sup>81</sup> At that court date, they are told what the program is and how it would work in their case and then asked if they would like to participate in the RJ process.<sup>82</sup>

By taking cases before undergoing any trial, RJCC also needed to guarantee some form of confidentiality to participant defendants in order to prevent the prosecution or the court from using their admissions of guilt from the RJ process in order to incriminate and convict them later if the process fell through.<sup>83</sup> So during the construction of the program, stakeholders established a form confidentiality agreement that would be used between each individual participant and the State's Attorney's Office which gave defendants a sort of

<sup>76</sup> Interview with Sarah Staudt, *supra* note 72.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; In the words of Professor Russell D. Covey, "When the deal is good enough, it is rational to refuse to roll the dice [on trial], regardless of whether one believes the evidence establishes guilty beyond a reasonable doubt, and regardless of whether one is factually innocent." Russell D. Covey, *Logitudinal Guilty: Repeat Offedners, Pla Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 450 (2011).

<sup>79</sup> Ben Ruddell, *Illinois Needs Strong Leadership on Sentencing Reform*, ACLU OF ILLINOIS (July 30, 2019), <https://www.aclu-il.org/en/news/illinois-needs-strong-leadership-sentencing-reform>.

<sup>80</sup> Interview with Sarah Staudt, *supra* note 72.

<sup>81</sup> *Id.*

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

<sup>83</sup> *Id.*

limited immunity for statements made in the restorative justice circle which could incriminate them for the crime they were charged.<sup>84</sup>

However, even after two years of diligent planning by system actors, community members, and defense advocates, the RJCC has still faced Chicago's innocence problem and some system side takeover. Illinois has the distinction of being the jurisdiction with the third most uncovered false convictions in the country.<sup>85</sup> The National Registry of Exonerations totals 2,515 exonerations across the country, 240 of which occurred in Cook County, IL.<sup>86</sup> That makes Cook County responsible for about 9.5% of the discovered false convictions nationally. Comparatively, the population of Cook County accounts for about 1.5% of the total population of the country.<sup>87</sup> In the face of this reality, the founders of the RJCC in Chicago discussed the innocence problem in their planning of the program, but they were unable to build a fool-proof safeguard into the program to make sure that innocent defendants don't agree to participate in the program for fear of being convicted and sentenced at a traditional trial.<sup>88</sup>

Furthermore, the independence of the restorative justice circles in the program, as envisioned by the community leaders and RJ advocates, has softened over time and become more subject to oversight and regulation by system actors.<sup>89</sup> Originally the circles were supposed to have the power to create a 'repair of harm' agreement and then have it enforced by the court without further modification by the state's attorney or the judge.<sup>90</sup> However, a few months

<sup>84</sup> *Id.*; There was some haggling over the extent of the immunity which would be granted during the planning of the program. It was eventually decided that partial immunity would be granted for only the crime charged in regards to the statements made in the circle, but also that there would be no police nor prosecutors present in the circles either.

<sup>85</sup> Bashirah Mack, *Why Illinois Has So Many Wrongful Convictions – and How to Fight Them*, CITY BUREAU (Oct. 3, 2018), <https://www.citybureau.org/stories/2018/12/14/why-illinois-has-so-many-wrongful-convictionsand-how-to-fight-them>.

<sup>86</sup> THE NAT'L REGISTRY OF EXONERATIONS, *Browse Cases: Detailed View*, U. OF MICHIGAN L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx#> (last visited Nov. 12, 2019).

<sup>87</sup> Calculated off of Cook County's estimated population of 5,180,493 on July 1, 2018 and the United States' estimated population of 327,167,434 on July 1, 2018. See *Illinois County Population Estimate Totals*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Nov. 12, 2019); *National Population Totals and Components of Change: 2010-2018*, U.S. CENSUS BUREAU, [https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html#par\\_textimage\\_2011805803](https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html#par_textimage_2011805803) (last visited Nov. 12, 2019).

<sup>88</sup> Interview with Sarah Staudt, *supra* note 72.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

into the implementation of the program, the court began mandating further services and extending periods of oversight dictated by the circles' agreements.<sup>91</sup> This would commonly occur when participating offenders completed the terms of the agreements, which they had come to with the victims and community leaders in a circle under the supervision of a restorative justice practitioner, before a period of six months had passed since the beginning of the process.<sup>92</sup> The court would then extend the supervision of the court over the offender for the remaining few months.<sup>93</sup> This was problematic since the circles were supposed to have complete control over the formulation of the repair of harm agreements, which were to be in turn enforced by the court.<sup>94</sup> Restorative justice is centered on the stakeholders of the crime for the repair and reparation of the victim and the shared social fabric.<sup>95</sup> It's not the traditional and arbitrary levy of penance on an individual for their offense against the state.

The planning and creation of the RJCC in Chicago demonstrates how the implementation of a systematized RJ process that takes violent felony cases in Cook County would have to be adapted for the unique realities in the jurisdiction.

### CONCLUSION

Restorative justice is a legitimate alternative to traditional criminal justice systems that has been shown to reduce recidivism and is likely to result in lower rates of incarceration. However, most restorative justice programs in the United States have been limited to dealing with juvenile cases and low-level adult offenses. The only current restorative justice process taking adult cases in Cook County is currently the Restorative Justice Community Court (RJCC) in Lawndale, and it caps the age of eligible defendants at 26. The creation and implementation of new restorative justice programs that take adult cases, involving serious felonies, could have profound public benefits in Chicago.

RJ advocates and policy makers would be well advised to take into consideration lessons from successful systematized RJ programs around the world. The adoption and systemization of restorative justice in New Zealand demonstrates how critical it is to have sufficient support from system actors and pol-

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> London, *supra* note 6, at 19.

icy makers in order to have a meaningful effect on the existing criminal justice system. The creation and expansion of the Nova Scotia Restorative Justice Program (NSRJP) shows both the importance of confidence in RJ amongst victims and community members and how that confidence requires time to foster. Finally, the example of the Restorative Justice Community Court (RJCC) in the Lawndale neighborhood of Chicago demonstrates that, even with careful and attentive planning, implementing a restorative justice program in Chicago can meet significant hurdles as the result of unique challenges posed by the existing criminal justice system.