

2024

Restorative Justice as a Democratic Practice

Daniel S. McConkie Jr.
Northern Illinois University College of Law

Follow this and additional works at: <https://lawcommons.luc.edu/lucj>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Law Commons](#), [Law and Society Commons](#), [Law Enforcement and Corrections Commons](#), [Public Law and Legal Theory Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Daniel S. McConkie Jr., *Restorative Justice as a Democratic Practice*, 55 Loy. U. Chi. L. J. 667 (2024).
Available at: <https://lawcommons.luc.edu/lucj/vol55/iss3/5>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

Restorative Justice as a Democratic Practice

Daniel S. McConkie, Jr.*

Our criminal justice system, to be truly democratic, should be more responsive to those most affected by it, and this calls for significant participation from citizens. Unfortunately, the state-centered, professionalized criminal justice system marginalizes citizens at every stage, depriving them of a voice and power. Instead, the system should embody and encourage criminal justice citizenship, which refers to the rights and privileges of ordinary people to participate directly in certain aspects of the criminal justice system and to deliberate in some of its workings. Such citizenship is indispensable to democracy, or rule by the people.

Restorative justice, especially where it is centered in community courts, is an ideal reform to strengthen criminal justice citizenship and, therefore, democracy itself. Restorative justice seeks to address and repair crime's harm through a deliberative process that fosters mutual understanding and acceptance of responsibility and involves the stakeholders of crime directly in the process. Restorative justice strengthens democracy by fostering the following three key aspects of criminal justice citizenship. First, restorative justice can provide many opportunities for lay participation and collective civic action to address individual crimes and broader issues in a community. Second, restorative justice processes foster deliberation. These processes give voice to the key stakeholders and encourage dialogue, understanding, collaboration, and creativity in repairing harm. Third, restorative justice strengthens membership, which refers to citizens belonging to a community as civic equals. It does so by inviting key stakeholders, broadly defined, to play a role in seeking to repair the harms of crime—promoting a shared commitment to the social order and accountability to others. To realize the benefits of restorative justice as a democratic practice, reformers should continue to promote grassroots community court experiments that involve as many stakeholders as possible. These experiments can help to reduce the size of the carceral state.

* Associate Professor, Northern Illinois University College of Law. J.D., Stanford Law School, 2004. Former Assistant United States Attorney (2008–2013). Special thanks to Evan Bernick, John Braithwaite, Albert Dzur, Greg Elinson, Heidi Frostestad, K. Hope Harriman, Adriaan Lanni, Jim Lindgren, Andrew Mamo, Laurel Rigertas, Michael Seng, and the participants of the 2022 CrimFest, especially Avlana Eisenberg and Evelyn Malavé.

INTRODUCTION	669
I. RESTORATIVE JUSTICE IN AMERICA	673
<i>A. General Description</i>	674
<i>B. Does Restorative Justice Work?</i>	683
1. Evidence that Restorative Justice Works.....	683
2. Why Restorative Justice Has not Seriously Challenged the Carceral State	685
3. Criticisms of Restored Justice as Coercive and Ineffective in Serious Cases	690
<i>C. Brooklyn's Red Hook Community Justice Center</i>	693
<i>D. Chicago's North Lawndale Restorative Justice Community Court</i>	699
II. HOW RESTORATIVE JUSTICE STRENGTHENS CITIZENSHIP	703
<i>A. Democracy and Citizenship</i>	703
<i>B. Participation: Actively Engaging Stakeholders in Restorative Justice Processes</i>	707
<i>C. Deliberation: Arriving at Joint Decisions to Address Crime Restoratively</i>	715
<i>D. Membership: Addressing Crime in a Way That Strengthens and Repairs Social Bonds</i>	721
1. Accountability.....	721
2. Solidarity.....	724
3. Belonging.....	726
4. Legitimacy	727
5. Equality	728
III. POLICY PROPOSALS	730
<i>A. More Investment in Restorative Justice to Shrink Our Carceral State</i>	730
<i>B. More Restorative Justice Programs That Involve Community Stakeholders</i>	732
<i>C. More Research on How Restorative Justice Revitalizes Democracy</i>	733
CONCLUSION	734

INTRODUCTION

North Lawndale is a predominantly Black neighborhood in Chicago with a “long history of marginalization.”¹ The neighborhood has struggled against poverty, economic decline, and crime since the 1950s.² Mass incarceration has hit North Lawndale particularly hard, and residents have little trust in the criminal justice system. In 2015, a group of local citizens decided to try something different.³ Instead of criminal justice administered by the state of Illinois, they strived to create a way to address crime administered by local stakeholders who, themselves, were most affected by crime—without lawyers and judges.⁴ The North Lawndale Restorative Justice Community Court (NLRJCC) was the result.

The NLRJCC handles nonviolent crimes (mostly drug cases) committed by North Lawndale residents between the ages of eighteen and twenty-six.⁵ The NLRJCC convenes “peace circles,” which allow offenders, victims, and others (usually specially selected relatives and friends) to participate in conversations about the harm caused by crime and what those in the circles can do to repair it. Trained mediators conduct the circles, and no state employees are present.⁶ Where offenders accept responsibility, the group arrives at a shared “Repair of Harm Agreement,” a legally binding document with a plan for repairing the harm done by the crime without fines or incarceration.⁷

1. See Kelsie Hope Harriman, *Restoring Justice: An Analysis of the North Lawndale Restorative Justice Community Court*, at 20–25 (Apr. 17, 2018) (B.A. Thesis, University of Chicago) [hereinafter *Harriman, Restoring Justice*], <https://knowledge.uchicago.edu/record/2525?ln=en> [https://perma.cc/4NLJ-K5HY] (describing North Lawndale’s history).

2. See Amanda Seligman, *North Lawndale*, ENCYC. CHICAGO, <http://www.encyclopedia.chicagohistory.org/pages/901.html> [https://perma.cc/N6C7-F4GX] (last visited Mar. 22, 2024) (describing North Lawndale’s transformation from a nearly all-white neighborhood in 1930 to nearly all-Black by 2000, its population drop from 112,261 to 41,768 over the same time period, and its racial tensions and economic decline); *Id.* (“Residents fled its increasing poverty, unemployment, crime, and physical deterioration, but hints of revitalization in the late 1990s suggested to some observers that the area was beginning to prosper.”); ROBERT G. SPINNEY, *CITY OF BIG SHOULDERS: A HISTORY OF CHICAGO 187–91* (2d ed. 2020) (describing the emergence of the “Black Ghetto”).

3. The group of citizens included local leaders, court reform experts, restorative justice practitioners, and court representatives. *Harriman, Restoring Justice*, *supra* note 1, at 33–40.

4. See *id.* (describing effort to build a community based restorative justice program).

5. On the need to expand restorative justice efforts to include violent and other serious crimes, see *infra* notes 139–43, 376–82, 424. See also Michelle Alexander, *Opinion, Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> [https://perma.cc/PGF6-CE7C] (“A growing body of research strongly supports the anecdotal evidence that restorative justice programs increase the odds of safety, reduce recidivism and alleviate trauma.”).

6. *Harriman, Restoring Justice*, *supra* note 1, at 86.

7. *Id.* at 87.

Although the NLRJCC accepts relatively few cases, it has succeeded so far in reducing recidivism and cutting costs.⁸ But the benefits go far beyond that. As one North Lawndale resident remarked, the NLRJCC “is a massive shift in power” from the Cook County courts to the North Lawndale community:

[T]hat’s the revolutionary part that I still can’t quite believe is happening . . . No court employee . . . nobody from Circuit Court of Cook County sits in these circles so it is literally trusting community members . . . to come together, sit in circle and come to a Repair of Harm Agreement . . . [The NLRJCC] is really just supervising that which the community says needs to happen.⁹

The NLRJCC gives North Lawndale residents more power over their own lives and facilitates cooperation for the common good. It exemplifies restorative justice as a democratic practice.

Our criminal justice system handles some of our most difficult and sensitive social problems. It should be highly responsive to those most affected by it, which calls for significant participation from citizens. Unfortunately, our current system sidelines citizens at every stage, failing to give them a voice and power. Our state-centered, professionalized justice system gives short shrift to “criminal justice citizenship.”¹⁰ Criminal justice citizenship refers to “the rights and privileges of [ordinary people] to participate directly in some aspects of the criminal justice system and to deliberate in some of its workings.”¹¹ In prior work, I have described this idea and its three key principles: participation, deliberation, and membership.¹² Participation is direct public involvement in democratic processes. Deliberation refers to structured dialogues among laypersons and experts to influence or determine official decisions. “Membership

8. See Editorial, *Reducing Crime in Chicago: Instead of Jail and a Record, a Second Chance*, CHI. TRIB. (Nov. 13, 2020, 6:25 PM), <https://www.chicagotribune.com/opinion/editorials/ct-editorial-restorative-justice-court-north-lawndale-second-chance-20201113-r74ushfv6re6rfgo2oklbslvai-story.html> [https://perma.cc/E25Q-32V2] (“So far, none of the 63 individuals who have completed the program have committed another crime When you consider that jailing someone for a year in an Illinois prison carries a \$38,000 price tag, the case for restorative justice community court expansion builds.”).

9. Harriman, *Restorative Justice*, *supra* note 1, at 52 (quoting Interview by Kelsie Hope Harriman with Stakeholder 4, RJCC Stakeholder, in Chicago, Ill. (Dec. 21, 2017)).

10. See generally Daniel S. McConkie Jr., *Criminal Justice Citizenship*, 72 FLA. L. REV. 1023 (2020) [hereinafter McConkie, *Citizenship*] (discussing the concept and applying it to jury trials); Daniel S. McConkie Jr., *Plea Bargaining for the People*, 104 MARQ. L. REV. 1031 (2021) [hereinafter McConkie, *Plea Bargaining*] (applying same concept to plea bargaining reform). “Citizen” as used here does not reference immigration law.

11. McConkie, *Citizenship*, *supra* note 10, at 1025.

12. See *infra* Part II (discussing how restorative justice strengthens citizenship).

refers to who can participate and whether they can participate on an equal basis.”¹³

The carceral state works against criminal justice citizenship. It denies laypeople, such as jurors, the opportunity to participate in the process and decide its outcomes. It marginalizes and stigmatizes poor people and people of color. It lacks legitimacy. Its carceral logic and procedures give short shrift to such values as personal responsibility, reparation of harm, strengthening of civic bonds, and reconciliation.¹⁴

In recent decades, some jurisdictions have begun experimenting with restorative justice as an alternative to the conventional American approach.¹⁵ Restorative justice seeks to address and repair crime’s harms through a deliberative process that fosters mutual understanding, acceptance of responsibility, and sometimes, reconciliation between offenders, victims, and communities; it involves the stakeholders of crime directly in the process; it posits a smaller role for the state; and it promotes the rehabilitation and reintegration of wrongdoers into civil society.¹⁶ This approach has been commonsensical in many societies throughout history;¹⁷ however, in modern-day America, restorative justice radically reconceptualizes the purposes of criminal law, the procedures by which criminal justice is administered, and the role of a criminal justice system in a democracy.

Restorative justice could be an effective—if only partial—antidote to the cruelty and waste of the carceral state. One way that restorative justice promises to help shrink the carceral state is by strengthening criminal justice citizenship. Most importantly, virtually every case resolved through restorative justice—especially the serious ones—keeps someone from being incarcerated and suffering the attendant collateral consequences. But restorative justice goes beyond avoiding the harms of the carceral state; it strengthens civic bonds and repairs crime’s damage to our social fabric. It can strengthen our democracy by enhancing its legitimacy and helping “to ensure that the system . . . does not become untethered from the people it is supposed to serve.”¹⁸ It can also provide

13. McConkie, *Citizenship*, *supra* note 10, at 1026.

14. *See id.* at 1028–30 (describing the downsides of a jury trial).

15. Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020).

16. For a discussion of the four core ideas of restorative justice philosophies and practices in the United States, *see infra* notes 45–55 and accompanying text.

17. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999) [hereinafter Braithwaite, *Restorative Justice*] (“Restorative justice has been the dominant model of criminal justice throughout most of human history for all the world’s people.”).

18. McConkie, *Plea Bargaining*, *supra* note 10, at 1031.

meaningful opportunities for civic service that strengthen communities, counteract the effects of crime, and reduce recidivism. In short, restorative justice, especially when implemented through community courts, can strengthen our democracy by encouraging grassroots citizen participation in deliberative criminal justice processes that seek to repair the harms of crime and strengthen social ties.

Many communities that have been hardest hit by mass incarceration, including North Lawndale, have been the most willing to give restorative justice a try. The Red Hook Community Justice Center (RHCJC) in Brooklyn is another example. The RHCJC is a community court founded through a local initiative to address crime in a way that benefits the neighborhood, including through restorative justice methods. In low-level cases, the RHCJC provides opportunities for offenders and victims to listen to each other, for offenders to take responsibility for how their actions impacted victims and the entire community, to do what they can to provide restitution and reparations, and to strengthen that community. Community members play key roles in this process. The RHCJC has succeeded in many measures, including reducing recidivism and improving victim satisfaction with the justice system, but it has also revitalized local democracy by engaging the community in a common cause. Other small-scale restorative justice experiments like RHCJC's have seen good measures of success across America—yet these successes encompass a tiny fraction of the cases that are otherwise fed into our vast carceral state.

This Article proceeds in three parts. Part I describes the current state of restorative justice in America. In doing so, Part I provides a general description of what restorative justice is, how it is practiced in different jurisdictions, and an evaluation of its effectiveness. Part I then describes two successful restorative justice programs in the Red Hook and North Lawndale neighborhoods.

Next, Part II discusses the relationship between democracy and citizenship and explains how restorative justice strengthens democracy by fostering each of the three key aspects of democratic citizenship. Lay participation is an essential feature of government by “the People,” and criminal justice requires a greater measure of it than merely electing officials like prosecutors, judges, and police chiefs.¹⁹ Section II.A then

19. U.S. CONST. pmbl.; see Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1483 (2017) [hereinafter Kleinfeld, *Three Principles*] (“The ‘We the People’ principle of criminal procedure holds that the administration and enforcement of criminal law should be *by* and *of* the people—that is, solidaristic, public, embedded in local communities, primarily value rational rather than instrumentally or formally rational, primarily under lay rather than official control, open to particularized and equitable acts of moral judgment, and seen by a democratic polity as procedurally legitimate.” (footnote omitted)).

discusses how restorative justice, when properly designed, can provide impactful opportunities for lay participation. This gives citizens a feeling of connection to their community and confidence to participate in other democratic processes. Restorative justice harnesses citizens' abilities to listen, problem-solve, and apply common-sense moral reasoning to deal with the consequences of crime constructively—something that the criminal justice bureaucracy fails to do. Finally, restorative justice becomes a form of collective civic action, a catalyst for addressing individual crimes and broader issues in a community.

Deliberation, which refers to the process of citizens speaking and listening to each other and learning from each other, is necessary for participatory democracy to work. As described in Section II.B, restorative justice processes foster deliberation—giving a voice to the key stakeholders and encouraging dialogue, understanding, collaboration, and creativity to repair harm. Many benefits flow from restorative deliberations, including (1) reaching collaborative, constructive solutions, (2) empowering the marginalized by listening to them, and (3) improving citizens' ability and inclination to deliberate in other contexts. Restorative justice allows citizens to effectively deliberate together about issues of common concern.

Membership, discussed in Section II.C, has to do with citizens' belonging to a community as civic equals. That common interest of belonging as civic equals can foster a shared commitment to the social order and accountability to others. It also requires trust in the government that regulates the social order. Restorative justice is conducive to all of this by inviting all stakeholders to play a role in seeking to repair the harms of crime.

Finally, Part III offers several policy proposals. Our society should make greater investments in restorative justice programs to shrink the size of the carceral state. These programs should be community-based, involving many stakeholders (as opposed to uniform, top-down state institutions), and they must deal with violent and serious crimes, not just misdemeanors. Furthermore, restorative justice research should not only investigate effects on recidivism and victim satisfaction but also consider how well restorative justice engages the public in criminal processes, restores public confidence in those processes, reduces criminal justice costs, and shrinks the carceral state.

I. RESTORATIVE JUSTICE IN AMERICA

This Part discusses the need for restorative justice and how it works in the United States today, emphasizing community courts that invite grassroots, local participation in their restorative processes. Section I.A describes America's oversized carceral state and how that carceral state,

in particular, is bad for democracy. Restorative justice is an ancient practice, but it was not seen as a potential reform or alternative to America's large, conventional justice systems until the 1970s when many small restorative justice experiments began to bloom.²⁰ They come in many varieties but share a common conceptual core. Section I.B argues that the weight of the evidence shows that restorative justice works as measured by reduced recidivism, victim satisfaction, and cost savings. Even still, restorative justice is nowhere near to displacing America's vast carceral state. Sections I.C and I.D describe community courts in Brooklyn's Red Hook and Chicago's North Lawndale neighborhoods. In both neighborhoods, the carceral state and other factors have weakened community engagement. Moreover, in both neighborhoods, restorative justice is not just a reform but also a democratic practice, empowering participants and community members to work together to repair the damage done by crime.

A. General Description

America's carceral state is gigantic. As of 2023, about "1.9 million people" are behind bars "in the United States on any given day."²¹ Although these numbers have gone down since peak incarceration in 2008 at 2.3 million persons, the current incarceration rate is still nearly triple what it was in 1980.²² By way of reference, other democracies have found ways to address crime without incarcerating anywhere near as many of their citizens.²³ The social costs of mass incarceration have been enormous. Staggering amounts of money have been spent; countless

20. Carolyn Boyes-Watson, *Looking at the Past of Restorative Justice: Normative Reflections on its Future*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF RESTORATIVE JUSTICE 7–9 (Theo Gavrielides ed., 2019); *Id.* at 7 ("Restorative justice is a *contested* concept with a contested history precisely because it has served as an aspirational paradigm for a variety of different activist movements." (citation omitted)).

21. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html> [<https://perma.cc/VG6Q-B3J6>]; see also *Growth in Mass Incarceration*, SENT'G PROJECT (2022), <https://www.sentencingproject.org/research/> [<https://perma.cc/K9LH-DM2H>] (showing "a 500% increase over the last 40 years" in rates of incarceration in the United States).

22. See, e.g., John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> [<https://perma.cc/HA46-KZHB>] (showing data on incarceration rates). In 1980, the U.S. incarceration rate was 310 per 100,000 adults; that rate peaked at 1,000 in 2008 and has gone down to 810 in 2019. *Id.*

23. See *id.* ("The U.S. [incarceration] rate is also far higher than the rates of other heavily populated nations, including Brazil (357 per 100,000) and Turkey (335 inmates per 100,000 people). Incarceration rates in Western Europe are less than a quarter of the U.S. rate: In England and Wales, there are 131 inmates for every 100,000 people, while France and Germany incarcerate 93 and 69 people, respectively, for every 100,000 residents.").

crime victims have never been made whole; many communities have been weakened; and thousands of offenders have had their lives ruined.²⁴

The carceral state is also bad for democracy and citizenship. It defeats direct citizen participation in many ways, such as sidelining juries in favor of plea bargaining,²⁵ disenfranchising felons,²⁶ and prison gerrymandering. These deficits weaken the essential link between the criminal justice system and the people that the system is designed to serve.

The carceral state diminishes democratic deliberation, denying the people a meaningful opportunity in most cases to chart the system's course. Criminal justice professionals—rather than citizens—make all the decisions about guilt and sentencing.²⁷ Yet those professionals are no better than laypersons at considering questions of right and wrong, or in helping to respond to crime constructively and creatively at the local level.²⁸ A citizenry disconnected from its criminal justice system will lack the strong “habits of freedom” necessary for a healthy democratic society.²⁹

The carceral state is also disastrous for citizens' membership as social equals by disproportionately punishing people of color.³⁰ This denial of full social membership has, in turn, led many communities to a crisis of confidence in the criminal justice system itself.³¹ Furthermore, cities and

24. See generally Nicole P. Dyszlewski, Lucinda Harrison-Cox & Raquel Ortiz, *Mass Incarceration: An Annotated Bibliography*, 21 ROGER WILLIAMS U. L. REV. 471 (2016) (compiling sources); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

25. See McConkie, *Plea Bargaining*, *supra* note 10, at 1051–64 (discussing several downsides of plea bargaining in the criminal justice system).

26. See Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 324 (2018) (“Mass incarceration not only disenfranchises millions of Americans, disproportionately people of color, it also increases the voting power of predominantly white rural areas where prisons are located. People in prison are counted towards representation while being excluded from the franchise.”).

27. See McConkie, *Citizenship*, *supra* note 10, at 1028–33 (discussing the dangers of leaving the democratic nature of the criminal justice system unchecked).

28. See *id.* at 1072–75 (explaining that reasoned jury deliberations have a very low error rate).

29. *Id.* at 1036 (“[T]hat a citizenry that does not participate in the criminal justice system will have strong ‘habits of freedom,’ such as participation in politics, deliberation, and the desire to seek the common good, necessary to a healthy democratic society.” (quoting Yuval Levin, *Taking the Long Way: Disciplines of the Soul Are the Basis of a Liberal Society*, FIRST THINGS, Oct. 2014, at 25, 30)).

30. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2010) (“Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.”).

31. See, e.g., John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, PEW RSCH. CTR. (May 21, 2019), <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely->

neighborhoods ravaged by mass incarceration become less able to organize politically and socially to address their problems collectively.³²

Shrinking the carceral state requires other ways to deal with crime that do not entail excessive punishments. One school of reformist thought—the democratization of criminal justice—employs a different logic from that of the carceral state. Democratization holds that criminal justice should be administered locally according to local values rather than solely by bureaucracies and professionals employing carceral logic.³³ It also holds that more lay participation (justice “by the people”) will temper the current excesses of the conventional justice system.³⁴ Punishment should be “for the people”—that is, pro-social.³⁵

“Restorative justice has been the dominant model of criminal justice throughout most of human history for all the world’s peoples”³⁶ and is currently practiced to varying extents, with great local variation, throughout the world.³⁷ In the United States, Native American tribes have practiced it since time immemorial, and their use of it has, in part, occasioned an efflorescence of the practice in the conventional criminal justice

in-their-views-of-criminal-justice-system/ [https://perma.cc/DC2D-93VE] (“[A]round nine-in-ten black adults (87%) said blacks are generally treated less fairly by the criminal justice system than whites, a view shared by a much smaller majority of white adults (61%).”).

32. See Ariel R. White, *Political Participation Amid Mass Incarceration*, 25 ANN. REV. POL. SCI. 111, 112 (2022) (“[A] series of stylized facts that we have learned from the last decade of scholarship [are] . . . 1. Descriptively, carceral contact is associated with less voting. 2. Short periods in jail have a causal effect on voting. 3. There is less clear evidence that long prison terms themselves reduce voting. 4. There is mixed evidence of household or community spillover effects. 5. Scholars know less about nonvoting participation than about voting behavior.”).

33. Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1694 (2017) [hereinafter Kleinfeld et al., *White Paper*].

34. *Id.*; see Kleinfeld, *Three Principles*, *supra* note 19, at 1483 (describing criminal justice administration that is by the people and of the people).

35. See Kleinfeld, *Three Principles*, *supra* note 19, at 1479 (“The principle of prosocial punishment holds that criminal punishment should aim . . . to protect, repair, and reconstruct the normative order violated by a crime while at the same time minimizing the damage to the normative order caused by punishment itself.”).

36. Braithwaite, *Restorative Justice*, *supra* note 17, at 2. Restorative justice can also apply to civil cases. See Annalise Buth & Lynn Cohn, *Looking at Justice Through a Lens of Healing and Reconnection*, 13 NW. J.L. & SOC. POL’Y 1, 14 (2017).

37. See, e.g., Sean Hux, *International Lessons in the Systematic Adoption of Felony Restorative Justice in Chicago*, 25 PUB. INT. L. REP. 31, 34 (2019) (“New Zealand and Nova Scotia have each instituted sweeping restorative justice programs which have become an important part of their respective criminal justice systems.”). Kenya still uses a robust form of restorative justice for many crimes. See generally Daniel S. McConkie Jr., *Promoting and Reforming Kenya’s Traditional Justice Systems in Criminal Cases*, 38 EMORY INT’L L. REV. (forthcoming 2024) [hereinafter McConkie, *Promoting and Reforming*].

system since the 1970s.³⁸ Schools and juvenile court systems are most likely to employ it.³⁹ Forty-five states and the District of Columbia now have at least some restorative justice laws.⁴⁰ “[T]he most commonly codified forms of restorative justice are victim-offender conferencing, mediation, and dialogue, followed by impact panels and family group conferencing.”⁴¹ But most jurisdictions employ restorative justice in only a tiny percentage of criminal cases.⁴² Vermont and Colorado stand out as exceptions. Colorado has the most restorative justice laws of any state,⁴³

38. Robert V. Wolf, *Peacemaking Today: Highlights of a Roundtable Discussion Among Tribal and State Practitioners*, CTR. FOR CT. INNOVATION 1–7 (2012), https://www.innovatingjustice.org/sites/default/files/documents/Peacemaking_Today.pdf [<https://perma.cc/HF76-LEW4>] (describing the peacemaking roundtable discussion); see also Albert W. Dzur, *Civic Implications of Restorative Justice Theory: Citizen Participation and Criminal Justice Policy*, 36 POL’Y SCI. 279, 280 (Dec. 2003) [hereinafter Dzur, *Civic Implications*] (discussing various victim-offender mediation projects). Although restorative justice originated in small societies, it can work better, in some ways, in cities because there are more resources and serious offenders can reintegrate at a slower pace, instead of immediately trying to fit in on a small Reservation. Wolf, *supra*, at 15.

39. Public schools are increasingly using restorative justice to resolve behavioral problems. Susan Abraham, *Through the Lens of Restorative Justice: A Re-Humanizing*, 64 N.Y.L. SCH. L. REV. 11, 26 (2019). For more on restorative justice and juveniles, see Kristen M. Blankley & Alisha Caldwell Jimenez, *Restorative Justice and Youth Offenders in Nebraska*, 98 NEB. L. REV. 1, 4–5 (2019); Jessica Ashley et al., *Implementing Balanced and Restorative Justice: The Illinois Experience*, 24 CHILD. LEGAL RTS. J. 23 (2004); Joseph Pesa, *Out with the Old and in with the New: The Need for Restorative Justice in the Illinois Juvenile Criminal Court System*, 53 UIC L. REV. 373 (2020); Sascha Brodsky, *Is Discipline Reform Really Helping Decrease School Violence?*, ATLANTIC (June 28, 2016), <https://www.theatlantic.com/education/archive/2016/06/school-violence-restorative-justice/488945/> [<https://perma.cc/E8XU-RZPB>].

40. González, *supra* note 15, at 1152. Curiously, though, most state law’s do not define the term “restorative justice.” *Id.* at 1161.

41. *Id.* at 1161 (“Disaggregated data indicates that the most commonly codified forms of restorative justice are victim-offender conferencing, mediation, and dialogue, followed by impact panels and family group conferencing.” (citations omitted)). See also Kimberly S. Burke, ILL. CRIM. JUST. INFO. AUTH., AN INVENTORY AND EXAMINATION OF RESTORATIVE JUSTICE PRACTICES FOR YOUTH IN ILLINOIS 9 tbl.3 (Apr. 2013), https://archive.icjia-api.cloud/files/icjia/pdf/ResearchReports/InventoryandExaminationofRestorativeJusticePracticesforYouthIllinois_042013.pdf [<https://perma.cc/AUF5-J4GJ>] (“Victim impact panels allow victims of similar crimes to share their experiences with offenders of similar crimes. Victims do not confront their specific offender but rather address offenders of similar crimes. By hearing the impact that their crimes have on other people, offenders are able to understand the harm they have caused to their victims and the community, even though they are not interacting with their specific victim.”).

42. Because there are varying definitions of restorative justice and no centralized way to track the many local restorative justice programs, estimating the number of restorative justice cases is very difficult. See Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287, 2296–2310 (2020) (exploring why prosecutors are reluctant to employ restorative justice).

43. González, *supra* note 15, at 1158 (“The Colorado restorative justice scheme contains a diverse set of laws ranging from aspirational and ideological statements to laws that describe criminal law processes and procedures like diversion programs and probation alternatives, and finally, to criminal law adjacent settings (e.g., the composition of a local juvenile services planning committee).”).

and Vermont has “adopt[ed] restorative justice as a system level approach” to criminal justice.⁴⁴

There are many varieties of restorative justice philosophies and practices in the United States, but they generally share four core ideas. First, crime does not literally harm the state (as the traditional dichotomy of “People v. [Defendant]” assumes),⁴⁵ but rather real people and relationships.⁴⁶ Second, criminal justice processes should focus on repairing harm.⁴⁷ Third, the victims and local communities primarily affected by crime⁴⁸ should be active participants in responding to it.⁴⁹ “There is . . . a democratic logic involved in [the restorative justice] process, one that disperses rather than centralizes authority, responsibility, and accountability for decisions.”⁵⁰ This democratic logic competes with “the default

44. *Id.* at 1160; *see id.* (“[S]tate policy is ‘that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses’” (quoting VT. STAT. ANN. tit. 28, § 2a (2020))). Vermont is the only state in which every county has a program. Jordyn Haime, *Part 3: In Vermont, Restorative Justice Under Statute May Not Lead to Equitable Services*, GSNC (Apr. 20, 2021), <https://www.collaborativenh.org/race-and-equity-project-stories/2021/4/20/restorative-justice-part-3-in-vermont-restorative-justice-under-statute-may-not-lead-to-equitable-services> [<https://perma.cc/V4LL-8J8Q>]. But there are enormous racial disparities in Vermont’s restorative justice programs, perhaps because Blacks are less likely to be referred. *Id.* Vermont, “[w]hen compared to other jurisdictions, . . . [is] unique as [it is] the only state to codify the use of ‘restorative justice panels’ as formal decision-making bodies.” González, *supra* note 15, at 1160 (quoting VT. STAT. ANN. tit. 33, § 5262(b)(2) (2020); VT. STAT. ANN. tit. 24, § 1964 (2020)). Professor Thalia González notes some key national trends: (1) there is no widely agreed-upon set of restorative justice procedures; (2) most restorative justice procedures lack confidentiality protections for participants; (3) victims may elect whether to participate, although offenders are sometimes required to participate; and (4) certain crimes are typically excluded (i.e., sex offenses, domestic violence, “offenses resulting in great bodily injury or death”). González, *supra* note 15, at 1162–64.

45. *See* Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 253–55 (2019) (criticizing the “people/defendant dichotomy” as a representation and neutrality problem).

46. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 35–38 (rev. & updated ed. 2015) (“For restorative justice, the key questions are: 1) who in the community cares about these people or about this offense, and 2) how can we involve them in the process?”).

47. *See* Randy E. Barnett, *Restitution: A New Paradigm for Criminal Justice*, 87 ETHICS 279, 301 (1977) (“The experimentation with restitutionary justice will, however, differ from the trial and error of the recent past since we will be guided by the principle that the purpose of our legal system is not to harm the guilty but to help the innocent—a principle which will above all restore our belief that our overriding commitment is to do justice.”).

48. Although restorative justice is typically employed locally, it can also be scaled up to address state-level crimes. *See* Lindsay Harroff, *Lessons from Truth and Reconciliation Commissions in South Africa, Kenya, and the United States for Transitional and Restorative Justice*, 28 KAN. J.L. & PUB. POL’Y 527, 534–41 (2019) (describing the history of “truth commissions”).

49. ZEHR, *supra* note 46, at 36–37 (describing the benefits of a meeting during which particular stakeholders can participate).

50. Albert W. Dzur, *Restorative Justice and Democracy: Fostering Public Accountability for Criminal Justice*, 14 CONTEMP. JUST. REV. 367, 369 (2011) [hereinafter Dzur, *Restorative Justice and Democracy*] (emphasis omitted).

logic” of justice system professionals’ “more technocratic perspective.”⁵¹ Fourth, because “[t]he broad aims of restorative justice are victim recovery, offender rehabilitation, and the restoration of relationships (i.e., community connectiveness),”⁵² the criminal justice system should consider and balance the needs of all stakeholders instead of focusing most of its energy on identifying and punishing the guilty.⁵³ Crime victims have varying needs and desires from the justice system, not all of which involve incarceration. In fact, many victims do not want offenders to be incarcerated; victims instead may want to understand offenders’ motivations, or they may want a greater sense of personal safety.⁵⁴ Beyond crime victims, other stakeholders include the offender and the family and friends of the offender and victim.⁵⁵

Even more broadly, other community members and representatives are stakeholders. In this context, “community” means “the people with common interests living in a particular area.”⁵⁶ The community can include clergy and other trusted leaders, experts who provide social services for offenders, victims, and others, and even lawyers, victims’ advocates, and other criminal justice professionals.⁵⁷

Because restorative justice, by its nature, is decentralized, its basic principles have given rise to a wide variety of modern procedures in America. Each procedure implements these principles to varying degrees

51. *Id.*

52. Kyle Ernest, *Is Restorative Justice Effective in the U.S.? Evaluating Program Methods and Findings Using Meta-analysis*, at 13 (Aug. 2019) (Ph.D. dissertation, Arizona State University), <https://keep.lib.asu.edu/items/157635> [<https://perma.cc/Z6VV-W2TF>].

53. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 30 (2002) (“There may be larger obligations beyond those of offenders; for example, the social injustices and other conditions that cause crime or create unsafe conditions. Many times, others in addition to the offenders have responsibilities as well: families, the larger community, society as a whole.”); KERRY CLAMP, *RESTORATIVE JUSTICE IN TRANSITION* 4 (2014) (“[T]he primary stakeholders in any conflict are perceived to be the victim, the offender and the community (which may include the family/supporters of the victim and offender), rather than the state and its practitioners.”).

54. Alexander, *Reckoning with Violence*, *supra* note 5 (“Sixty-nine percent [of people who participated in the 2016 Alliance for Safety and Justice national poll] preferred holding people accountable through options beyond prison, such as mental health treatment, substance abuse treatment, rehabilitation, community supervision and public service.”).

55. Families have key roles in many restorative justice procedures, see, for example, Michael P. Seng, *Segregation, Violence, and Restorative Justice: Restoring our Communities*, 50 J. MARSHALL L. REV. 487, 505–06 (2017), which describes how in Hawai‘i, the whole family comes to the circle to support the offender and help ensure that she or he follows through on the agreement.

56. *Community*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/community> [<https://perma.cc/SGCZ-2MEG>] (last visited Mar. 23, 2024) (definition 1(a)). *Merriam-Webster*’s also defines community in other ways relevant: “a social state or condition” (i.e., “The school encourages a sense of *community* in its students.”); “joint ownership or participation” (i.e., “*community* of goods”); “common character,” or likeness (i.e., “*community* of interests”); “social activity,” or fellowship. *Id.*

57. Ernest, *supra* note 52, at 14–23.

of fidelity and with many other approaches with which restorative justice shares ideological valence, like therapeutic and community courts.⁵⁸ Some of the principal procedures include circle sentencing, victim-offender mediation, and community boards.⁵⁹

Generally, these procedures have a few things in common. First, participation is, at least ideally, voluntary.⁶⁰ Where victims choose not to participate, a surrogate might instead stand in.⁶¹ Offenders can also choose not to participate—in which case the conventional criminal justice system handles their case. However, the fear of a harsh sentence⁶² or social pressures might encourage less-than-willing offenders to participate in restorative justice.⁶³ Second, all restorative justice procedures involve a great deal of speaking and listening so that all participants have a greater understanding of the crime and how it affected others, enabling them to create and agree upon a course of action going forward.⁶⁴ One common procedure is called a restorative justice “circle” because participants sit in a circle, and all in the circle have an opportunity to speak. The circle promotes healing, although forgiveness and reconciliation are not essential outcomes.⁶⁵ Third, the procedures are varied and flexible according to the needs of any particular situation, although formalized

58. Restorative justice laws are on the books in forty-five states and the District of Columbia. González, *supra* note 15, at 1152; *see also* Tali Gal & Hadar Dancig-Rosenberg, “I Am Starting to Believe in the Word ‘Justice’”: Lessons from an Ethnographic Study on Community Courts, 68 AM. J. COMP. L. 376, 376–77 (2020) (“Israeli community courts [which employ many restorative sanctions] implement a range of evidence-based, democracy-oriented approaches to crime control, such as procedural justice, therapeutic jurisprudence, and community justice, in the context of community courts.”).

59. Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 368. Community boards are a restorative justice process where “a small group of citizens meet with victims and offenders.” *Id.*

60. ZEHR, *supra* note 46, at 57.

61. *Id.* at 56.

62. Or in traditional societies, the fear of social ostracism or private justice. *See, e.g.*, Mumbi S. Mwihurih, *Analysing the Effectiveness of Informal Access to Justice in Kajiado North and Kajiado West Constituencies*, at 42 (Nov. 2015) (LL.M. thesis, University of Nairobi), [http://erepository.uonbi.ac.ke/bitstream/handle/11295/94792/Mwihurih_Analyzing the Effectiveness of Informal Access to Justice in Kajiado North and Kajiado West Constituencies.pdf?sequence=3](http://erepository.uonbi.ac.ke/bitstream/handle/11295/94792/Mwihurih_Analyzing%20the%20Effectiveness%20of%20Informal%20Access%20to%20Justice%20in%20Kajiado%20North%20and%20Kajiado%20West%20Constituencies.pdf?sequence=3) [<https://perma.cc/3G9F-LMY4>] (“In most cases enforcement of a decision by an IJS consists of social sanctions, for example, shunning, ostracism and in some cases banishment from the community.”); McConkie, *Promoting and Reforming*, *supra* note 37 (manuscript at 9–10) (explaining the African customary justice system and how punishment could include ostracism).

63. Wolf, *supra* note 38, at 6 (“[F]orcing ‘people to do things is what the traditional [Anglo-western] system is trying to do, so I don’t think that peacemaking can align that way.” (second alteration in original) (quoting Julie Marthaler, former circle coordinator, Sw. Health & Hum. Servs., Minnesota)).

64. ZEHR, *supra* note 46, at 56–57 (noting that while different models are distinct, they all involve a facilitated encounter or dialogue led by trained facilitators).

65. *Id.* at 64–66 (describing the circle process in detail).

restorative justice programs are often more rigid.⁶⁶ Fourth, because the procedure is non-adversarial and collaborative, lawyers are generally absent—instead, professionally-trained facilitators facilitate the process, which keeps costs down and focuses the participants on restoring and repairing rather than on technicalities and individual rights.⁶⁷ Fifth, the procedures offer varying levels of confidentiality that balance offenders’ and victims’ interests in privacy with the larger needs of community members to participate and the public to know what happens.⁶⁸ Finally, the participants agree on the outcome and reduce it to writing, rather than the judge imposing the outcome on the participants.⁶⁹ Informal social obligations created and reinforced by circle participants are important in enforcing the agreements.⁷⁰

The most common contemporary restorative justice process is victim-offender mediation. This mediation process employs a trained mediator to facilitate a dialogue between the victim and the offender that can result in an explanation of why the offender did what they did, how it impacted the victim, and what the offender might do to make things right insofar as that is possible.⁷¹

“Community conferences”—“circle sentencing” or “circle processes”—are similar to victim-offender mediation but consider a broader range of stakeholder interests. These conferences “include the participa-

66. *Id.* at 60–69 (detailing how models differ in who participates, how the practice is facilitated, what defines their goals).

67. Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 60–65 (2003); ZEHR, *supra* note 46, at 57 (“[E]ncounters are led by training facilitators who guide the process, balancing concern for all the parties involved.”).

68. *See* González, *supra* note 15, at 1162–64 (noting that many states lack confidentiality protections for restorative justice processes). However, Illinois has established an evidentiary privilege for parties to a restorative justice practice. 735 ILL. COMP. STAT. 5/804.5(a) (2021).

69. ZEHR, *supra* note 46, at 62, 75, 87, 89 (differentiating restorative justice from retributive justice due to the fair mutual consent between victim and offender).

70. *See, e.g.*, John Braithwaite, *Street-Level Meta-Strategies: Evidence on Restorative Justice and Responsive Regulation*, 17 ANN. REV. L. & SOC. SCI. 205, 210–11 (2021) (noting that offenders are more likely to follow up on voluntary agreements to rehabilitation than judge-ordered rehabilitation).

71. K. Hope Harriman, Comment, *Regulating Restorative Justice: What Arbitration Teaches Us About Regulating the Restorative Process in Criminal Courts*, 34 GEO. J. LEGAL ETHICS 1005, 1006 (2021) [hereinafter Harriman, *Regulating Restorative Justice*]. For example, Vermont essentially has a victim-offender mediation program. Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 371. Offenders plead guilty and are sentenced to reparative probation with a program to complete which can include community service and victim reparation, including apologies. *Id.* (“The 72 boards and community justice centers operating throughout the state include over 500 volunteers and handle around 1400 cases a year. Reparative Boards meet in public places like libraries, town halls and police stations.” (citation omitted)). Their proceedings are open to the public, but members of the public do not usually come. *Id.*

tion of community representatives in each process, stressing the social context of crime and reflecting a perception of the community as a primary stakeholder in the aftermath of the crime.”⁷² Any affected community member can participate in a community conference.⁷³

Community justice programs are not necessarily a form of restorative justice but rather a court reform movement consistent with restorative justice. These programs generally espouse the following principles. First, the program should co-create justice with the community, with broad participation.⁷⁴ Co-creation might include community advisory boards and operations which are easily accessible to the public.⁷⁵ Second, the program should advance equity and equality.⁷⁶ Third, the program should put people first, “humaniz[ing] the justice system by centering the needs of the individuals and the communities they serve.”⁷⁷ Fourth, the program should “emphasize community solutions over traditional responses, like incarceration, probation, and fines.”⁷⁸ Fifth, the program should foster accountability for crime using non-punitive and restorative justice practices.⁷⁹ Such practices include “ongoing judicial monitoring to track participants’ engagement in court-mandated services and community restitution.”⁸⁰ Moreover, the program should provide “high-quality services, including drug treatment, mental health services, job training, [and] housing assistance.”⁸¹ The program should operate transparently and invite community feedback.⁸² To repair harms, the program should invite community investment, police-community dialogues, and even truth and reconciliation processes to address long-term systemic harms.⁸³ Sixth, the program should model innovation.⁸⁴

72. Tali Gal et al., *Measuring the Restorativeness of Restorative Justice: The Case of the Mo-saica Jerusalem Programme*, 1 INT’L J. RESTORATIVE JUST. 252, 254 (2018).

73. Harriman, *Regulating Restorative Justice*, *supra* note 71, at 1006 (“[A]ny community member who was affected by the crime is encouraged to participate in the conflict-resolution process and keep the offender accountable for repairing the harm that they caused.”).

74. CTR. FOR CT. INNOVATION, BUREAU OF JUST. ASSISTANCE, U.S. DEP’T JUST., NCJ NO. 305536, *COMMUNITY JUSTICE TODAY: VALUES, GUIDING PRINCIPLES, AND MODELS* 3–4 (2022) [hereinafter *COMMUNITY JUSTICE TODAY*].

75. *Id.*

76. *Id.* at 4.

77. *Id.* at 6 (including “[l]inking people with services and supports”).

78. *Id.* at 7.

79. *Id.* at 10.

80. *Id.* at 11.

81. *Id.*

82. *Id.*

83. *Id.* at 11–12.

84. *Id.* (introducing innovative community justice models through “[i]mplementing new approaches,” “[e]valuating new approaches,” and “[d]isseminating lessons learned”); *see* K. Sabeel

Community courts built on the community justice model have several ways of inviting local participation outside the restorative justice processes. For example, two Israeli community courts in Tel Aviv—modeled after the Red Hook Community Justice Center⁸⁵—made use of “local steering committees” and volunteers to assist “throughout the process,” “approached and encouraged” businesses “to employ participants,” held social events and holiday activities for participants, including a community garden and “a ‘good deeds day.’”⁸⁶ These community courts also provide community service opportunities for all participants and mentoring projects, one for participants’ children and another for program graduates.⁸⁷ Although these forms of participation are tangential to restorative justice processes, they support those processes by strengthening the community and providing social support for those affected by crime.⁸⁸

B. Does Restorative Justice Work?

1. Evidence that Restorative Justice Works

There is good, though limited, evidence that restorative justice works.⁸⁹ Restorative justice decreases recidivism relative to conventional criminal justice, saving the costs of future crimes and prosecutions, and it increases victim satisfaction with the justice process. Professors Bruce Green and Lara Bazelon recently reviewed the evidence and concluded:

Although there is program-specific data indicating that restorative justice processes are generally more effective than the traditional adjudicative process in reducing recidivism and promoting victim satisfaction, the sample sizes are often small, the comparison groups are not uniform, and, because many of these programs are relatively new, longitudinal data is hard to come by.⁹⁰

Restorative justice also better repairs crimes’ harms and reintegrates offenders into society.

Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CAL. L. REV. 679 (2020) (discussing criteria for institutional design of community courts).

85. Gal & Dancig-Rosenberg, *supra* note 58, at 376, 388.

86. *Id.* at 400–01.

87. *Id.*

88. *Id.* at 410 (“In contrast to the mainstream criminal process, which considers a given offense through the lens of a predetermined set of possible sentences, the community court model involves a holistic and comprehensive set of rehabilitative, restitutive, and accountability elements. Together, they are designed to transform participants’ lives and help them desist from crime.”).

89. See Braithwaite, *supra* note 70, at 208–11 (providing a recent and optimistic review of the evidence).

90. Green & Bazelon, *supra* note 42, at 2297–98.

One meta-analysis of 121 studies evaluating restorative justice programs concluded that restorative justice studies usually focus on recidivism, reports of satisfaction, and restitution compliance.⁹¹ Kyle Ernest found that restorative justice had “reduce[d] the likelihood of recidivism when compared to the outcomes of non-restorative control groups by as much as 30%” and “[e]xposure to restorative justice reduced the odds of subsequent arrest by 41.5% compared to control offenders.”⁹² Moreover, “[v]ictims were 86.7% more likely to report satisfaction with restorative justice programs compared to their control counterparts.”⁹³ “Offenders were 58.9 % more likely to fulfill their restitution agreements when they participated in restorative justice programs compared to offenders processed through the criminal justice system.”⁹⁴ Relatedly, restorative justice is cheaper than conventional criminal processes. Restorative justice is simpler, more streamlined, involves fewer lawyers, results in little to no incarceration, and reduces recidivism.⁹⁵

Because offenders opt into restorative justice programs,⁹⁶ these studies are hard to compare to studies of the conventional justice system. An offender who chooses to participate in a restorative justice program might have a greater proclivity to apologize, make amends, and accept treatment.⁹⁷ However, even if self-selection is skewing the results, the results of these restorative justice programs are still significant because, in many

91. Ernest, *supra* note 52, at 96; *see also* LAWRENCE W. SHERMAN & HEATHER STRANG, SMITH INST., *RESTORATIVE JUSTICE: THE EVIDENCE* 12 (2007), https://www.iirp.edu/pdf/RJ_full_report.pdf [<https://perma.cc/P4D7-Z6EZ>] (reviewing evidence on the effectiveness of restorative justice in the United Kingdom); Braithwaite, *Restorative Justice*, *supra* note 17, at 104–07 (analyzing an “Optimistic Account” and a “Pessimistic Account” of restorative justice).

92. Ernest, *supra* note 52, at 100–01.

93. *Id.* at 101; *see also* John Braithwaite, *Criminal Justice That Revives Republican Democracy*, 111 NW. U. L. REV. 1507, 1519–20 (2017) (“[T]he majority of citizens—almost always more than 80% of them—are satisfied with restorative justice that they have experienced.”) [hereinafter Braithwaite, *Republican Democracy*].

94. Ernest, *supra* note 52, at 101.

95. *See, e.g.*, CYNTHIA G. LEE ET AL., NAT’L CTR. FOR STATE CTS., *A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER* 10 (2013), https://www.ncsc.org/_data/assets/pdf_file/0015/19113/11012013-red-hook-exeuctive-summary.pdf [<https://perma.cc/2977-R2J6>] (“For each of the 3,210 adult misdemeanor defendants arraigned a [sic] the Justice Center in 2008, taxpayers realized an estimated savings of almost \$4,800 per defendant in avoided victimization costs relative to similar cases processed in a traditional misdemeanor court”); Heather Strang et al., *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*, 9 CAMPBELL SYSTEMATIC REV. 1, 2 (2013) (“A cost-effectiveness estimate for the seven United Kingdom [] experiments found a ratio of 8 times more benefit in costs of crimes prevented than the cost of delivering RJs.”).

96. ZEHR, *supra* note 46, at 60.

97. *See* Strang et al., *supra* note 95, at 13 (“Non-random comparison groups are abundant in restorative justice evaluations, but are arguably plagued by biased selection of cases that were deemed more ‘appropriate’ for RJs than cases to which they were compared.” (citations omitted)).

cases, offenders are successfully diverted from the conventional process, leading to a cascade of social benefits.

Furthermore, despite restorative justice's general success, there are plenty of individual cases in which restorative processes do not work well or are even counterproductive. For example, although there is evidence that victims as a group experience less anger following a restorative process, that is not true of all individual cases; "[W]e do commonly see individual cases where the way the offender or the police behave in a conference leaves them much angrier than they would have been had a restorative conference never occurred."⁹⁸ Likewise, in the rare case where community members excoriate offenders instead of working toward a constructive resolution, those offenders may become even more likely to re-offend.⁹⁹

2. Why Restorative Justice Has not Seriously Challenged the Carceral State

Restorative justice seemingly has good potential for gaining widespread acceptance. This is because restorative justice is working, albeit on a small scale.¹⁰⁰ Moreover, as more Americans learn about restorative justice, they may be willing to try it, whether in their own lives¹⁰¹ or at the ballot box.¹⁰² True, most Americans have come to expect that crime will be dealt with through punishment, even harsh punishment, but they have not always felt this way, and they may change their minds.¹⁰³ Restorative justice resonates with several diverse criminal justice and political perspectives. Its focus on restoring and repairing is intuitive to many—including indigenous peoples, people of diverse faith traditions,

98. Braithwaite, *Republican Democracy*, *supra* note 93, at 1520.

99. See SHERMAN & STRANG, *supra* note 91, at 74 (describing an increase in total arrests of offenders who had participated in restorative justice with community representatives, who were "often highly critical" of the offenders, compared to a decrease of total arrests for offenders who had participated in the process without community representatives).

100. For a discussion of small-scale restorative justice working, see *supra* Section I.B.1.

101. As evidenced by community-based restorative justice programs like the ones in North Lawndale and in Red Hook that employ community volunteers and require the consent of both victims and offenders to participate in the process. See *infra* Sections I.C, I.D.

102. As evidenced by the proliferation of restorative justice legislation in recent decades. See González, *supra* note 15, at 1156 ("As of July 2020, 46 jurisdictions have codified 'restorative justice' into their juvenile and/or adult criminal justice systems." (footnotes omitted)).

103. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 1–27 (2012) (discussing changing ideas about criminal justice and punishment throughout American history, from Colonial justice, which was often based on a small town morality and focused on reintegrative punishment, to modern ideas of harsh punishment meted out by experts and professionals).

and humanists.¹⁰⁴ It can be politically attractive to liberals and progressives for its “humanistic, non-punitive elements” that are consistent with a larger vision of a society characterized by civil rights and equality.¹⁰⁵ Conservatives and libertarians may find restorative justice appealing because it emphasizes personal accountability, victims’ rights, and reducing costs.¹⁰⁶

Notwithstanding all this, restorative justice has struggled to gain a foothold in America. Outside a few contexts, local experiments predominate but have not taken a real bite out of the carceral state.¹⁰⁷ Two fundamental reasons for this are that the carceral state is so entrenched in our society that the restorative justice movement has had little opportunity to grow, and that existing restorative justice programs have failed to engage the public to change their minds about criminal justice. The story of a failed restorative justice program in Kings County, New York, illustrates both reasons and offers a cautionary tale about the difficulties of challenging the carceral state. The King County program allowed for mediation between the offender and victim, community sentencing conferences, judicial diversion, jail alternatives, better compliance monitoring, and a wide variety of community service options for offenders.¹⁰⁸ Dennis Whittman led the program for a quarter century, and it prospered under his talented, tireless, and even visionary leadership.¹⁰⁹ Whittman’s program saved King County millions of dollars, kept many low-level offenders out of jail, provided healing for victims, and reduced recidivism.¹¹⁰ But when Whittman eventually retired, there was no one like

104. See Wolf, *supra* note 38, at 1–7 (discussing Native American perspective on restorative justice); HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 126 (1990) (describing the biblical perspective).

105. Dzur, *Civic Implications*, *supra* note 38, at 280.

106. *Id.*

107. Mark Obbie, “*They Knew It Was the Right Thing to Do*”: *The Unlikely Rise of Restorative Justice in a Conservative Upstate New York County*, SLATE (Dec. 29, 2015, 8:15 AM), <https://slate.com/news-and-politics/2015/12/restorative-justice-its-rise-and-fall-in-rural-upstate-new-york-county.html> [<https://perma.cc/GKG6-UW2T>] (“Although restorative programs exist in nearly every state and the roster of laws allowing for them is extensive, nowhere has the ultimate goal of wholesale shifts to restorative practices been attempted, much less realized.”). “Halfway” restorative justice measures are destined to fail. *See id.* (“[T]here are three stages to social intervention. The first one is they ignore you. The second is they oppose you. And the third is they co-opt you. And we’re in the combination of two and three. I mean there’s an awful lot of co-optation going on where people are claiming to do restorative justice or they try some half-baked idea that they call restorative justice and then they claim it doesn’t work.” (quoting interview with Howard Zehr)).

108. *Id.*

109. *See id.* (noting that restorative-justice expert Mark Umbreit, who calls Whittman “ahead of his time”).

110. *Id.*

him to replace him, and many parts of the chronically underfunded program did not survive.¹¹¹

The failure of Kings County's program due to lack of expertise and funding shows how hard it is to institutionalize restorative justice. Fledgling programs compete against the much larger, well-entrenched, and lavishly funded carceral system. For example, Vermont has more thoroughly institutionalized restorative justice than any other non-Native-American jurisdiction in the United States, but its programs are still persistently underfunded.¹¹² In America, criminal justice reforms of any kind never seem to replace that system; instead, they are layered on top of or even co-opted by the system (much like victim-rights offices, which are often simply part of the prosecutor's office and have not transformed the nature or purposes of the system). Restorative justice reforms likewise carry the risk of bearing the restorative justice label without the accompanying deep changes in ideology and approach.¹¹³ "Although restorative programs exist in nearly every state and the roster of laws allowing for them is extensive, nowhere has the ultimate goal of wholesale shifts to restorative practices been attempted, much less realized."¹¹⁴ Voters are habituated into paying vast sums of money to build and maintain prisons, leaving little of the criminal justice budget for other programs.¹¹⁵

Similarly, most of today's criminal justice professionals would not easily fit into a restorative justice system. Gaining their support would require time, effort, and education.¹¹⁶ If restorative justice is drastically expanded, as indeed it must be to present a viable alternative in most

111. *See id.* ("[T]he most exceptional parts of the Wittman legacy . . . all lie essentially dormant."); *see also* Gina Barton & Mary Zahn, *Another Road to Justice*, MILWAUKEE J. SENTINEL (Nov. 29, 2004), <https://archive.jsonline.com/news/crime/another-road-to-justice-266879651.html> [<https://perma.cc/GN6G-77NJ>] (discussing funding problems for restorative justice programs in Wisconsin and Oregon). Localities have incentives to incarcerate simply because the state often funds prisons but not necessary restorative justice programs. *See id.* ("[T]hey pick up the tab for you," says Dennis Maloney, "who spearheaded the Deschutes County restorative justice program").

112. Haime, *supra* note 44; González, *supra* note 15, at 1159–60 (stating Vermont's restorative justice laws address establish restorative justice community centers and that it is unique compared to other jurisdictions because it is the only state to codify use of restorative justice panels).

113. YVON DANDURAND & ANNETTE VOGT, U.N. OFF. ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES, at 95–96, U.N. SALES NO. 96 (2d ed. 2020) [hereinafter RESTORATIVE JUSTICE HANDBOOK]; *see generally* U.N. OFF. OF DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES, U.N. SALES NO. E.06.V.15 (2006).

114. Obbie, *supra* note 107.

115. *See id.* (referencing Howard Zehr's belief that restorative justice has failed to live up to its promise because it lacks a "central organization of practitioners and advocates to coalesce around a clear strategy" and because it is opposed by the prison-industrial complex).

116. *See* RESTORATIVE JUSTICE HANDBOOK, *supra* note 113, at 95–96 (describing likely difficulties of adopting practices which challenge the status quo).

cases to the conventional courts, it will require many professionals—including specially trained facilitators, judges, treatment providers, probation officers, and other court personnel. Yet only a handful of law schools currently offer restorative justice programs or certificates.¹¹⁷ Still, many of today's criminal justice professionals, trained in and steeped in the old ways, could perform key roles in a restorative justice-oriented system. For example, on the one hand, some judges might be able to be retrained as restorative justice facilitators—but, on the other hand, former judges pose the risk of being too jaded from spending many years in an adversarial, retributive criminal justice system to learn the skill set of collaborative and caring problem-solving needed in the role. Probation officers could likely succeed in a more restorative role with additional training in helping offenders keep the commitments made in restorative justice processes toward restitution and rehabilitation. Furthermore, because restorative work is more hands-on, more probation officers will be needed. The role of traditionally trained lawyers and correctional officers would correspondingly be diminished.¹¹⁸ With different training, all these

117. For law schools currently offering restorative justice programs or certificates, see *National Center on Restorative Justice (NCORJ)*, VT. L. & GRADUATE SCH., <https://www.vermontlaw.edu/academics/centers-and-programs/national-center-on-restorative-justice> [https://perma.cc/9ULE-YNH8] (last visited Apr. 6, 2024) (hosting the NCORJ; offering Master's, J.D. specialization, and "Professional Certificate in Restorative Justice"); *Restorative Justice Facilitation and Leadership Certificate*, UNIV. OF SAN DIEGO, <https://pce.sandiego.edu/certificates/restorative-justice-facilitation-and-leadership-certificate/> [https://perma.cc/58NM-8FNK] (last visited Apr. 6, 2024) (offering a "Professional Certificate" in restorative justice "Facilitation and Leadership"); *Restorative Justice Project*, UNIV. OF ILL. CHI. L. SCH., <https://law.uic.edu/experiential-education/restorative-justice/> [https://perma.cc/Q62A-UHFL] (last visited Apr. 6, 2024) (providing an overview of the restorative justice project); *Restorative Justice Project*, UNIV. OF WIS.-MADISON L. SCH., <https://law.wisc.edu/fjr/rjp> [https://perma.cc/M8YU-3527] (last visited Apr. 6, 2024) (same); *Initiative on Restorative Justice and Healing*, UNIV. OF ST. THOMAS SCH. OF L., <https://law.stthomas.edu/about/centers-institutes/restorative-justice-healing/index.html> [https://perma.cc/MWK9-J5BQ] (last visited Apr. 6, 2024) (describing the "Initiative on Restorative Justice and Healing"); *Restorative Justice Project*, N.Y. L. SCH., <https://www.nyls.edu/academics/specialty-areas/centers-and-institutes/impact-center-for-public-interest-law/restorative-justice-project> [https://perma.cc/54SD-ZGYR] (last visited Apr. 6, 2024) (describing the "Restorative Justice Project").

Several other institutions of higher education outside of law schools offer specialized restorative justice training. See, e.g., *Trainings & Professional Development*, SUFFOLK UNIV., <https://www.suffolk.edu/cas/centers-institutes/center-for-restorative-justice/what-we-do> [https://perma.cc/QZ6Z-WNAR] (last visited Apr. 6, 2024) (providing an overview of "Professional Certificate in Restorative Justice Practices"); *Graduate Certificate in Restorative Justice*, GOVERNORS ST. UNIV., <https://www.govst.edu/resj/> [https://perma.cc/NW94-C62A] (last visited Apr. 6, 2024) (same).

118. See RESTORATIVE JUSTICE HANDBOOK, *supra* note 113, at 96 (recognizing possible reservations of probation supervision personnel and criminal justice professionals and recommending methods of education to overcome these reservations). Police officers, too, would benefit from more and better peacemaking and mediation training. See Christopher Cooper, *Police Mediators—Rethinking the Role of Law Enforcement in the New Millennium*, 7 DISP. RESOL. MAG. 17, 17 (2000) (arguing that "mediation of interpersonal disputes by patrol police officers" would transfer

criminal justice professionals could use their skills to facilitate restorative justice instead of further entrenching our carceral state.

Some criminal justice professionals have begun to embrace restorative justice.¹¹⁹ Many of them acknowledge that the current system is overly harsh and ineffective and are willing to try new approaches.¹²⁰ Some justice professionals are even embarrassed at the system's terrible results and feel a sense of accountability.¹²¹ There is more political traction than ever for these programs, although it has been ebbing lately.¹²²

Prosecutors have many reasons to be cautious about adopting restorative justice reforms. "Mainstream prosecutors tend to be traditionalists rather than innovators"—they have been trained in and acculturated into conventional criminal justice thinking and methods.¹²³ Prosecutors are philosophically committed to conventional justice, the hallmarks of which are public condemnation of crime, deterrence through shame and incarceration, and retributive punishment.¹²⁴ They are also reluctant to try a somewhat unproven method of addressing crime, and even if they did, there would be no guarantee of sufficient funding for the program. A whole bureaucracy is already in place to employ conventional methods and reward those who effectively do so; that bureaucracy will be very difficult to displace. Prosecutors are the most powerful players in the system,¹²⁵ and some of them may fear that restorative justice will take discretion and power away from them and give it to others, like victims and offenders, along with their families and friends, care providers, and

"problem-solving power from officer to citizen," "reduce[] citizen calls for police intervention," and "improv[e] police-community relations").

119. See Dzur, *Civic Implications*, *supra* note 38, at 280 (providing that professionals across the political spectrum find value in restorative justice); see also Green & Bazelon, *supra* note 42, at 2290 (providing that restorative justice principles have been employed in schools and juvenile justice proceedings).

120. See Dzur, *Civil Implications*, *supra* note 38, at 280 ("These reform-minded professionals seek innovation for various reasons, but a strong motivation is a desire to share responsibility for the costs and other social consequences of criminal justice institutions.").

121. Albert W. Dzur, *Public Restorative Justice: The Participatory Democratic Dimensions of Institutional Reform*, 59 *RAISONS POLITIQUES* 51, 69–70 (2015) [hereinafter Dzur, *Public Restorative Justice*].

122. Restorative Justice is on the Brennan Center's list of progressive prosecutorial principles. See FAIR AND JUST PROSECUTION ET AL., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 12–13 (2018), https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf [<https://perma.cc/R626-D4WC>]. But see Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies: Then Violent Crime Surged*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html> [<https://perma.cc/Q5DX-JN29>] (discussing rising and falling public opinion relating to progressive prosecutors).

123. Green & Bazelon, *supra* note 42, at 2303.

124. *Id.* at 2299–2300.

125. See generally Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. REV. 1429 (2017).

other community stakeholders.¹²⁶ Obviously, prosecutors in most jurisdictions do not expect to win elections based on restorative platforms; retributive justice is currently much more popular.¹²⁷

Aside from the difficulties of displacing the carceral state, the second reason for the failure of restorative justice to change the public's view of criminal justice much is that restorative justice programs are still primarily small-scale, focused on victim-offender mediation, and do not deeply engage the public. In fact, most people still know little about restorative justice.¹²⁸ This is not necessarily surprising for any criminal justice reform, given that "the background institutional environment" of criminal justice generally "is largely non-transparent, hierarchical, and nonparticipatory."¹²⁹ Gratefully, there has been a large uptick in media coverage of restorative justice since 2011.¹³⁰ Still, hearing about restorative justice will not likely be enough to change our politics around criminal justice. Widespread participation "is required for contemporary publics to soberly acknowledge and assume responsibility for criminal justice institutions."¹³¹ This participation is most widespread already in schools, where restorative justice is more common.¹³² As restorative justice becomes more popular with greater citizen participation, it may gain more political saliency. But until then, it will struggle to challenge the reigning carceral paradigm.

3. Criticisms of Restored Justice as Coercive and Ineffective in Serious Cases

Two criticisms of restored justice should be addressed: first, that it is often coercive, and second, that it does not work in serious cases.

First, restorative justice processes are not coercive. They are designed to be voluntary.¹³³ The paradigm case is when participants approach a

126. Green & Bazelon, *supra* note 42, at 2304–05.

127. *Id.* at 2308–10. In some jurisdictions, progressive prosecutors have bucked this trend; nevertheless, they remain an aberration. See Herndon, *supra* note 122 (identifying elections of Kim Foxx in Chicago and Larry Krasner in Philadelphia as evidence of support for progressive ideas).

128. Dzur, *Public Restorative Justice*, *supra* note 121, at 51.

129. *Id.* at 52.

130. David R. Karp & Olivia Frank, *Anxiously Awaiting the Future of Restorative Justice in the United States*, 11 VICTIMS & OFFENDERS 50, 51–52 fig.2 (2016).

131. Dzur, *Public Restorative Justice*, *supra* note 121, at 68.

132. See *id.* at 64 (explaining that various schools utilize restorative justice or "participatory innovation" for conflict resolution, because "the negative consequences of tough-minded 'zero tolerance' policies" exacerbated "disengagement" and "the 'school to prison' pipeline").

133. See, e.g., Gerry Johnstone, *Voluntariness, Coercion and Restorative Justice: Questioning the Orthodoxy*, 3 INT'L J. RESTORATIVE JUST. 157, 157 (2020) ("[R]estorative orthodoxy holds that nobody should be coerced into participating in a restorative meeting—particularly the victim, but

facilitator without involving state actors at all. As a practical matter, most restorative justice cases in the United States are referrals from the conventional justice system, and wrongdoers know that—if the matter is not resolved consensually—they are likely to be dealt with more harshly in the conventional courts.¹³⁴ To the extent that they participate against their will, some of restorative justice’s aims, like personal reform and reconciliation, may not be achieved. However, this is no reason to reject restorative justice altogether. Restorative justice will almost always be, if not fully voluntary, at least less coercive than the conventional courts. Even mandated participation in restorative justice reduces the odds of later arrest.¹³⁵ Furthermore, to reduce any coercion arising through the referral process, offenders can be afforded the opportunity to counsel with an attorney about whether to participate.¹³⁶ Further legal assistance in the restorative justice process itself, however, would likely work against its informal, collaborative, and non-adversarial nature.¹³⁷

Restorative justice can still help when alleged offenders opt out of the process altogether, such as when they are innocent or unwilling to accept responsibility for their acts. As one experienced tribal restorative justice practitioner remarked:

After years of searching for a case that wasn’t appropriate, I haven’t found one yet. I think even in the most heinous of crimes, there is some element of peacemaking that is beneficial to the victims, the families, the offender’s family, maybe even the community, especially in a tribal community.¹³⁸

Restorative processes provide benefits to all those affected by crime, even when offenders choose not to participate.

Second, skeptics argue, with good reason, that restorative justice can be problematic in certain kinds of cases—like violent crimes and sexual

also the offender.” (quoting Carolyn Hoyle, *The Case for Restorative Justice*, in *DEBATING RESTORATIVE JUSTICE* 57 (Chris Cunneen & Carolyn Hoyle eds., 2010)); M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 132 (2016) (providing examples that concern the problem that coercion plays in diversionary programs).

134. See Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 649 (2021) (“Most restorative justice programs are fairly small and operate through discretionary referrals from police, prosecutors, or judges.”).

135. See Ernest, *supra* note 52, at 102 (explaining that mandated participation in restorative justice resulted in treatment offenders to be “68.9% less likely” to be recidivate than control offenders).

136. John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 563, 566 (2002) [hereinafter Braithwaite, *Standards*].

137. See *id.* at 566–67 (explaining the complications of legal assistance in the restorative justice process).

138. Wolf, *supra* note 38, at 7 (quoting Interview with David D. Raasch, Assoc. Judge, Stockbridge-Munsee Tribal Court, in Scottsdale Ariz. (Dec. 6, 2011)).

assault.¹³⁹ It is true that, if done incorrectly, the process might give wrongdoers the opportunity to excuse their own conduct and to pressure victims into accepting apologies. In such cases, the restorative justice process would have to be modified considering these power dynamics and other sensitivities.¹⁴⁰ But the benefits of a properly modified process could be great. For example, in some domestic violence cases, skillfully executed restorative justice might be a good option for victims who do not trust the criminal justice system. If done correctly, restorative justice has the potential to get at the causes of why abusers commit violent acts; it can rehabilitate the abusers by helping them empathize with those whom they abuse; it also gives victims an alternative to leaving their partner, who is often a co-parent.¹⁴¹ In short, restorative justice can work in nearly any kind of case, felonies and misdemeanors alike, from petty thefts to violent crime and sex offenses.¹⁴² Of course, whether it succeeds in a particular case depends on the participants and the dynamics among them. Some offenders are not interested in taking responsibility for their actions; some victims prefer retribution to restoration.¹⁴³

139. See, e.g., Hanan, *supra* note 133, at 125 (“[D]espite the widespread acceptance of restorative justice as an alternative in criminal cases, it often fails to offer an actual substitute for the criminal court system. Instead, restorative justice often functions as a therapeutic adjunct to prosecution that seeks to promote offender ‘accountability’ and victim healing. This focus pre-determines the outcome of any dispute resolution encounter, an anathema to mediation practice, which permits the parties to determine the outcome. The therapeutic focus of restorative justice makes it inapplicable in any instance in which the accused’s culpability is uncertain or deserving of more nuanced interpretation. Finally, the rhetoric of restorative justice masks the influence that the criminal justice system has on out-of-court dialogue, including the potentially coercive effects of the threat of prosecution.” (footnotes omitted)).

140. See Robert Weisberg, *Restorative Justice and the Danger of Community*, 2003 UTAH L. REV. 343, 370–71 (2003) (discussing how sentencing circles in domestic violence cases may wrongly emphasize “community” needs over the needs of actual victims); see also Ernest, *supra* note 52, at 28 (explaining that dialogue-based restorative justice should be based on the following principles: “(1) participation must be voluntary, (2) held in a safe location, (3) facilitated by an objective party, (4) respectful dialogue, and (5) equal prioritization of stakeholder needs.”).

141. See Leah Sottile, *Abuser and Survivor, Face to Face*, ATLANTIC (Oct. 5, 2015), <https://www.theatlantic.com/health/archive/2015/10/domestic-violence-restorative-justice/408820> [https://perma.cc/GVH3-L3VB] (discussing the potential rehabilitative benefits of restorative justice for abusers, and the ability of restorative justice processes to offer a non-policing option for abuse victims).

142. See, e.g., Alexander, *Reckoning with Violence*, *supra* note 5 (providing that some restorative justice programs are created for victims of felonies such as shootings, stabbings, and robberies to participate in a “survivor-centered accountability process”); Wolf, *supra* note 38, at 7 (explaining restorative justice can be used “to handle a wide range of cases”). See generally JUDAH OUDSHOORN ET AL., *THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR SEXUAL ABUSE: HOPE THROUGH TRAUMA* (2015).

143. See Alexa Sardina & Alissa R. Ackerman, *Restorative Justice in Cases of Sexual Harm*, 25 CUNY L. REV. 1, 54 & n.296 (2022) (opining that not all individuals are ready for restorative justice processes based on the authors’ experiences).

In summary, restorative justice can be an effective alternative to conventional prosecutions, even in difficult cases. Sections I.C and I.D examine a few successful community restorative justice programs that effectively mobilize public participation to address crime constructively.

C. Brooklyn's Red Hook Community Justice Center

Located in southwest Brooklyn, the Red Hook Community Justice Center (RHCJC) is a community court that employs a restorative justice approach to crime.¹⁴⁴ A close look at this case study will serve to illustrate the principles of democratic restorative justice in practice.

Red Hook has long suffered from economic woes, very high crime, and a strained relationship with the police and courts.¹⁴⁵ In December 1992, Patrick Daly, the beloved principal of a local high school, was killed in the cross fire of a gang fight.¹⁴⁶ A community coalition to address crime was soon formed, led by the Kings County District Attorney Charles J. Hynes, and included many community groups, clergy, and school leaders.¹⁴⁷ The New York State Unified Court System and the Mayor's Office of Criminal Justice supported this effort.¹⁴⁸ Listening sessions were held to understand the community and its needs. These sessions "incorporate[d] a wide range of perspectives, including those of stakeholders not active in community organizations whose voices would ordinarily go unheard."¹⁴⁹ In addition, the representatives of the local community board were consulted.¹⁵⁰ "[R]epresentatives from the Legal Aid Society, the court system, Victim Services, and other service providers" were also consulted.¹⁵¹

These talks resulted in the establishment of the RHCJC. The RHCJC handles misdemeanors, some felonies, juvenile cases, and even family and civil matters.¹⁵² The RHCJC seeks holistic solutions to common legal problems instead of resolving each legal problem without regard to

144. The Red Hook Community Justice Center was established in the mid-1990s with help from a local "non-profit public-private partnership," the Center for Court Innovation. LEE ET AL., *supra* note 95, at 30–31.

145. *See id.* at 27 (explaining there was a "deep-seated distrust of the police," and community members did not trust courts any more than police).

146. *Id.* at 23.

147. *See id.* at 24–25 (discussing how support for "problem-solving courts was building among policymakers," including Charles J. Hynes).

148. *Id.* at 26.

149. *Id.*

150. *Id.* at 31. That Board consisted of fifty representatives appointed by the Borough president and represented much of the Justice Center's catchment area. *Id.*

151. *Id.*

152. *See generally id.*

the other legal problems.¹⁵³ Judge Alex Calabrese, a remarkably personable jurist, has been the one seeking these holistic solutions. Judge Calabrese “has served as the public face and the sole judge of this groundbreaking justice center since it opened 17 years ago. His bench sits at eye level with the defendants, rather than looking down on them from above, to better facilitate a dialogue.”¹⁵⁴ The building is welcoming, well-lit, decorated with photos of the neighborhood, and the cells have thick glass instead of bars.¹⁵⁵ “More than anything else, what sets [the RHCJC] apart is a fundamental idea of respect. Treat defendants with respect, and they’ll respect you—and the law—in the future.”¹⁵⁶ Judge Calabrese frequently calls the RHCJC “[t]he court of second chances.”¹⁵⁷ He knows the community well and is well-respected there.¹⁵⁸ Other court officers also have strong ties to the neighborhood.¹⁵⁹ On-site, there are prosecutors, defense attorneys, pretrial services officers, probation officers, and police officers.¹⁶⁰

The RHCJC has a wide variety of programs using restorative justice methods to resolve cases locally, repairing the harms of and deterring future crime, all without excessively enmeshing wrongdoers in the criminal justice system. Diversion from prosecution is a key strategy—where that fails, any resulting jail sentence tends to be shorter than defendants would otherwise expect.¹⁶¹ These restorative justice methods involve extensive community input and participation. Five such programs are described as follows:

1. Youth Court. — The RHCJC’s Youth Court has a strong restorative justice component. The idea of the Youth Court is to intervene in the lives of youth (ages ten-to-eighteen) committing minor offenses so they

153. See LEE ET AL., *supra* note 95, at 106 (explaining that to avoid families being “whipsawed back and forth between criminal, family and housing courts,” a single judge who becomes familiar with them and all their legal problems can adjudicate the cases).

154. Daniel C. Vock, *In Unconventional Courtroom, a Little Respect Goes a Long Way*, GOVERNING (Feb. 17, 2017), <https://www.governing.com/archive/gov-red-hook-brooklyn-justice-center.html> [https://perma.cc/XBP9-6E68].

155. *Id.*

156. *Id.*

157. *Id.*

158. See LEE ET AL., *supra* note 95, at 36 (noting that Judge Calabrese has spent more than a decade working with the community through attending “council and tenants’ association meetings, youth basketball games and other community events” and making personal housing inspections).

159. See *id.* at 38 (“Those officers who are assigned to the Justice Center tend to develop strong ties to the community.”).

160. *Id.* at 44–46.

161. See Vock, *supra* note 154 (explaining jail-diversion programs such as cleaning graffiti or drug treatment programs “reduce the amount of time defendants spend in jail”). Where that fails, any resulting jail sentence tends to be shorter than defendants would otherwise expect. *Id.*

will not later become involved in more serious offenses.¹⁶² The Youth Court is for minor offenses, like truancy, trespassing, assault, and possession of alcohol or marijuana.¹⁶³ Youth who participate accept responsibility for their actions.¹⁶⁴ The Youth Court's members are other youth—they serve as judges, advocates, and juries that sit in restorative circles for six months, working five hours per week while getting paid \$100 monthly.¹⁶⁵ The Youth Court can apply a range of sanctions, including “community service, essays, letters of apology to the victim or the youth's own parents, and attendance at RHCJC workshops on topics such as life skills and conflict resolution.”¹⁶⁶ The authority of the Youth Court to enforce is based on peer pressure rather than legal authority.¹⁶⁷

2. *Native American Model.* — The RHCJC houses a Peacemaking Program that follows a Native American model.¹⁶⁸ Volunteers from the community are trained to facilitate disputes, including crimes, between community members, and the program “empowers community members to resolve their own conflicts without intervention from police or courts.”¹⁶⁹

3. *Low-level Offenses.* — The RHCJC has a way to divert very low-level offenses (like drinking in public, remaining in a park after hours, and failing to leash dogs) using restorative justice methods.¹⁷⁰ The cases are generally resolved without arrests or court appearances if participants choose to attend a thirty-minute group discussion that teaches them about what public behaviors are illegal and “aims to impress upon participants the idea that their actions have negative consequences for others, securing a normative commitment to obey the law in the future.”¹⁷¹

162. LEE ET AL., *supra* note 95, at 60.

163. *Id.* at 59.

164. *See id.* (“[T]he [defendant] is required to admit responsibility for the offense . . .”).

165. *See id.* (stating that returning “senior members” serve three hours per week, and receive \$120 per month).

166. *Id.*

167. *See id.* at 60 (“Youth Court therefore relies primarily on peer pressure rather than legal authority to encourage participants to complete their sanctions.”).

168. *See Peacemaking Program*, CTR. FOR JUST. INNOVATION, <https://www.courtinnovation.org/programs/peacemaking-program> [<https://perma.cc/MP3Q-GX9L>] (last visited Mar. 24, 2024) (describing the peacemaking program on the Red Hook court's website); *see also* Editorial, *The Courtroom of the Future Looks a Lot Like This Navajo Tradition*, NATIONSWELL, <https://nationswell.com/restorative-justice-navajo-tradition-peacemaking/> [<https://perma.cc/G8EB-QUFV>] (last visited Mar. 24, 2024) (explaining the peacemaking program with roots in Native American tradition).

169. *Peacemaking Program*, *supra* note 168.

170. LEE ET AL., *supra* note 95, at 85.

171. *Id.* at 86.

4. *Traffic Crimes*. — In the RHCJC's Circles for Safe Streets Program, offenders who have violated criminal traffic laws can participate in restorative justice circles to discuss the consequences of their actions, get the help they need, and make restitution to victims.¹⁷² This process can replace criminal prosecutions or mitigate the sentencing of a prosecution.¹⁷³

5. *Driving Misdemeanors*. — Similarly, the RHCJC's Driver Accountability Program facilitates restorative justice circles for driving misdemeanors with no identifiable victim, and this program "may be used as an alternative to incarceration or for sentence mitigation."¹⁷⁴ Follow-up surveys indicate that most participants drive more carefully after participating in this program.¹⁷⁵ One successful participant in the program said, "Taking the time to sit down and listen to stories of other people . . . makes you reflect and think that you have to be a bit more careful, that there are people on the street, and that they have nothing to do with your time."¹⁷⁶

The RHCJC provides a multitude of social services accessible to all community members, regardless of whether they are involved in a case. Community members can receive services from the on-site clinic that provides mental health treatment, drug treatment, and social services.¹⁷⁷ A resource coordinator works closely with other staff to get people into drug treatment programs.¹⁷⁸ The RHCJC's Alternative Sanctions Office helps offenders comply with court-ordered sanctions like community service, anger management classes, educational programs, and individual treatment sessions.¹⁷⁹ The building houses a GED program, social workers, a housing resource center,¹⁸⁰ drug treatment, and many other

172. *Fact Sheet: Driver Accountability Through Restorative Justice*, CTR. FOR JUST. INNOVATION (Sept. 2023), https://www.innovatingjustice.org/sites/default/files/media/document/2023/CJI_Factsheet_CirclesforSafeStreets_09072023.pdf [<https://perma.cc/3PEC-HDGU>].

173. *Id.*

174. *Id.*

175. See *Fact Sheet: Driver Accountability Program*, CTR. FOR JUST. INNOVATION (Mar. 31, 2022), https://www.innovatingjustice.org/sites/default/files/media/document/2022/CCI_FactSheet_DAP_03312022.pdf [<https://perma.cc/5MJQ-2GG6>] ("Based on feedback from those who completed the follow-up survey, 91 percent reported that their driving behavior had changed, and 78% of respondent attributed this change directly to the Driver Accountability Program.").

176. *Id.*

177. LEE ET AL., *supra* note 95, at 92.

178. *Id.* at 37 (explaining how the resource coordinator and clinic staff are all employees of the Center for Court Innovation and therefore part of the same organizational structure). The RHCJC's long-term drug treatment program (30+ days) which is monitored by the court's on-site clinic under the supervision of the judge, is "designed to use the coercive power of the court to motivate lasting behavioral change." *Id.* at 90.

179. *Id.* at 79.

180. *Id.* at 42 (housing resource center helps people to find housing and to mediate disputes).

services.¹⁸¹ The Community and Youth Programs Center provides programming for the whole community, not just for court-involved persons.¹⁸² Red Hook CARES (Counseling and Restorative Services) is a program that provides a wide range of services to survivors to help them “achieve stability, safety, and healing in their lives.”¹⁸³

The RHCJC is committed to the restorative sanction of community service and has the resources to support it. About a third of offenders receive this sanction.¹⁸⁴ The RHCJC’s sanctions are intended to be visible in the community, including graffiti clean-up and “beautifying local parks.”¹⁸⁵ The RHCJC works with community organizations, local government, and churches to arrange these community service opportunities.¹⁸⁶ There are several community service sites, including the courthouse itself, and most of the sites are in the Red Hook neighborhood.¹⁸⁷ The RHCJC also helps arrange childcare for program participants.¹⁸⁸ “The overall compliance rate for community service is 80 percent; for social service sanctions, the rate is 69 percent.”¹⁸⁹

The Community Advisory Board contributes to the ongoing leadership of the RHCJC. It is composed of more than three dozen members and meets quarterly “to give community members a voice in court planning, improving perceptions of procedural justice and making the court more responsive to the perceived needs of the community.”¹⁹⁰ In practice, however, the Board has had little influence over the RHCJC’s policy decisions and has instead been more involved in community programming.¹⁹¹

The RHCJC has strong restorative elements but also borrows heavily from two other modern court reform movements: therapeutic courts and

181. See *id.* at 79 (explaining the resources provided by the Justice Center).

182. *Id.* at 43.

183. *Red Hook CARES: Counseling and Restorative Services*, CTR. FOR JUST. INNOVATION, <https://www.innovatingjustice.org/red-hook-cares> [<https://perma.cc/6YUJ-TPXT>] (last visited Apr. 6, 2024).

184. See LEE ET AL., *supra* note 95, at 80 (“Overall, 35 percent of defendants were mandated to community service . . .”).

185. *Red Hook Community Justice Center*, CTR. FOR JUST. INNOVATION, <https://www.innovatingjustice.org/programs/red-hook-community-justice-center/more-info> [<https://perma.cc/TR38-YWNQ>] (last visited Mar. 24, 2024).

186. LEE ET AL., *supra* note 95, at 42.

187. *Id.* at 80.

188. See *id.* (explaining that the RHCJC staff help mitigate issues for defendants with childcare responsibilities).

189. *Id.* at 81. Curiously, Cynthia Lee notes that “[c]ompliance rates for both types of sanctions have been declining since 2005.” *Id.*

190. *Id.* at 47.

191. *Id.*

problem-solving courts.¹⁹² The RHCJC itself is, in many ways, a therapeutic court. It typically handles misdemeanor cases and tries to get defendants into treatment pursuant to its social service mandate; it has a friendly and sympathetic judge and uses a wide range of non-penal sanctions, but it is still entirely within the criminal justice system.¹⁹³ “The vast majority of criminal cases at Red Hook are resolved through the traditional court process without judicially supervised treatment for drug addiction.”¹⁹⁴ The RHCJC is also a problem-solving court.¹⁹⁵ Problem-solving courts do not limit themselves to punishing criminals but “seek to prevent crime by directly addressing its underlying causes.”¹⁹⁶ For example, the RHCJC established a problem-solving juvenile court in response to community demand.¹⁹⁷

The results that the RHCJC has achieved are impressive. The RHCJC carefully gathers data to analyze its effectiveness and “to help guide policy decisions.”¹⁹⁸ The RHCJC’s data shows that, relative to the conventional justice system in downtown Brooklyn, it has successfully resolved many more cases using non-carceral alternatives.¹⁹⁹ Defendants are much more likely to receive sentences requiring community service, receiving social services, or both.²⁰⁰ Compliance rates with these dispositions are very high.²⁰¹ “This is in marked contrast to the pattern in the

192. Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 95 (2006) (“Therapeutic jurisprudence sees law ‘as a kind of therapist or therapeutic agent.’ Legal rules and procedures and the roles of legal actors ‘constitute social forces that, whether intended or not, . . . often produce therapeutic or antitherapeutic consequences.’ . . . An important goal of therapeutic justice is to maximize the positive effects of legal interventions on the social, emotional, and psychological functioning of individuals and families.” (quoting Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 185 (1997))).

193. LEE ET AL., *supra* note 95, at 79.

194. *Id.* at 76.

195. *Id.* at 2.

196. *Id.*

197. *See id.* at 105–14 (explaining the founding of the problem-solving juvenile court).

198. *Id.* at 32.

199. LEE ET AL., *supra* note 95, at 83. According to 2008 data, defendants at Red Hook, compared to the Brooklyn criminal justice system, were much less likely to get jail sentences (11% in contrast to 17%); more than three times as likely (62% v. 20%) to receive a conditional discharge with alternative sanctions (like community service, social services, or both); six times less likely to receive time-served sentences (5% as opposed to 32%); more likely to get adjournment in contemplation of dismissal (32% versus 27%), less likely to have case dismissed (20% versus 22%). Interestingly, if the defendants do receive a jail sentence, they serve 81 days on average, compared to the forty or so days that might serve downtown. *Id.*

200. *See id.* at 87 (“At the Justice Center, 78 percent of conditional discharges [] and 69 percent of adjournments in contemplation of dismissal [] entered at initial disposition carry a requirement that the defendant complete community service, a short-term social service intervention, or both.”).

201. *Id.*

downtown Brooklyn criminal court, where the majority of defendants receive a ‘walk,’ or a case disposition that imposes no obligation on the part of the offender.”²⁰² Compliance rates with these restorative sanctions are high.²⁰³ Finally, recidivism for graduates has improved, possibly due mainly to their perception that the system treated them fairly.²⁰⁴

Because of the RHCJC’s effectiveness and long-standing presence in Red Hook, it is well known in the community: in 2009, 87 percent of community residents reported to know about the RHCJC.²⁰⁵ The vast majority of residents who had a case at the RHCJC—or had a family member or friend with a case at the RHCJC—said that the case had been handled fairly.²⁰⁶

The Red Hook Community Justice Center is not the only court that has successfully combined community justice and restorative justice. A court in Chicago provides another great example.

D. Chicago’s North Lawndale Restorative Justice Community Court

North Lawndale is a predominantly Black neighborhood in Chicago that has been devastated by the effects of long-standing racism, economic problems, crime, and the carceral state.²⁰⁷ Unsurprisingly, there is little trust in the criminal justice system there.²⁰⁸ In 2015, a group of residents who lived, worked, or worshipped in North Lawndale hatched a plan to form a restorative justice court there.²⁰⁹ They secured a grant from the Center for Court Innovation and spent two years making plans to address the needs and concerns of all stakeholders.²¹⁰ In 2017, this coalition of local leaders, court reform experts, restorative justice practitioners, and

202. *Id.*

203. *Id.*

204. *Id.* at 139–40.

205. *Id.* at 182.

206. LEE ET AL., *supra* note 95, app. E at 35. By way of comparison, it is common that residents of neighborhoods where other community courts are located do not know about such community courts. *Id.* at 11.

207. Harriman, *Restoring Justice*, *supra* note 1, at 23. In 2016, “40% of community respondents rated the overall quality of life in North Lawndale as ‘ok;’ 30% percent as ‘poor’ or ‘very poor;’ and 24% as ‘good’ or ‘very good.’” *Id.* at 24. The top-five most cited problems included violent crime, drug use, drug sales, presence of abandoned properties, and lack of employment. *Id.*

208. *See id.* at 24 (“The community has many reasons not to trust the system as it stands, given the long history discriminatory housing practices, predatory lending, police abuse, and mass incarceration that it has experienced.”).

209. *See id.* at 33–40 (explaining the founding of the restorative justice court in North Lawndale).

210. *See Hux*, *supra* note 37, at 40 (“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.”).

court representatives formed the North Lawndale Restorative Justice Community Court (NLRJCC).²¹¹

Most NLRJCC cases originate in the Cook County Bond Court. Participants must be residents of North Lawndale between the ages of eighteen and twenty-six who committed the crime—which must be nonviolent and committed in North Lawndale.²¹² Offenders in that age bracket lack the legal protections afforded to juveniles, but their minds are not fully developed relative to mature adults.²¹³ If offenders do not opt in, their case is handled through the conventional criminal justice system. Prosecutors screen the cases and must also agree to the case transfer.²¹⁴ Three-fourths of the cases the court handles are drug offenses.²¹⁵ If there is an identifiable victim, that victim must also be willing to participate in this process; if the victim is not willing, a surrogate victim will take their place.²¹⁶ Each participant has a community case manager who meets with them throughout the typically six-month process and, after the process, perhaps an additional six months.²¹⁷

The NLRJCC convenes a series of “peace circles,” which allow offenders, victims, and others (usually specially selected relatives and friends) to participate in “a guided conversation about the harm that occurred and how to repair it.”²¹⁸ North Lawndale residents receive restorative justice training to facilitate these conversations.²¹⁹ The circles are confidential, no state employees participate, and statements made in

211. Harriman, *Restoring Justice*, *supra* note 1, at 33–40. Chicago is a fertile ground for restorative justice innovation. *See, e.g.*, CMTY. RESTORATIVE JUST. HUBS, <https://rjhubs.org/about> [<https://perma.cc/GJ3B-EKPK>] (last visited Mar. 24, 2024) (explaining a local restorative justice hub in Chicago); CMTY. JUST. FOR YOUTH INST., <http://cjyi.org> [<https://perma.cc/7QKQ-7UHU>] (last visited Mar. 24, 2024) (same); *see also* PROJECT NIA, <http://www.project-nia.org> [<https://perma.cc/MD94-44YU>] (last visited Mar. 24, 2024) (focusing on restorative justice for youth in Chicago). For a promising Chicago experiment, see Yana Kunichoff, *Should Communities Have a Say in How Residents Are Punished for Crime?*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/chicago-restorative-justice-court/524238> [<https://perma.cc/3QE9-CUYF>].

212. Harriman, *Restoring Justice*, *supra* note 1, app. G at 84. The Center for Court Innovation requires that participants not be accused of violent offenses. Otherwise, they might otherwise not be able to make bail. *Id.* Furthermore, participants must be out of custody to be able to participate in multiple circle sessions with several other participants. *Id.*

213. *See id.* (explaining the age brackets for a restorative justice hub); *see also* Hon. Leanna Weissmann, *Redefining Justice for Emerging Adults: Emerging Adult Courts Promise a Cost-Effective Means to Rehabilitate Offenders Who Commit Crimes Prior to Their 25th Birthdays*, 55 IND. L. REV. 53, 55 (2022) (challenging the notion that emerging adults should be treated as adults in the criminal justice system).

214. Harriman, *Restoring Justice*, *supra* note 1, app. G at 84–85.

215. *Id.* at 85.

216. *Id.*

217. *Id.* at 86.

218. *Id.*

219. *Id.*

the circle may not generally be used in a criminal case.²²⁰ In a peace circle, all participants have an equal voice, they agree on shared values as to what will make for a safe discussion, and they enhance group connectedness by performing simple rituals and telling and listening to stories.²²¹ These circles usually last two to four hours and can be held once or as many times as necessary on different days until an agreement is reached, typically following one to three sessions.²²² The group ultimately arrives at a shared “Repair of Harm Agreement,” a legally-binding document with a plan for repairing the harm done by the crime.²²³ If the offender breaches the agreement, the case can be referred back for traditional prosecution, although this is not automatic.²²⁴ If the offender successfully complies with the agreement, the case is dismissed.²²⁵ However, the offender may continue to access services even after the case’s dismissal.²²⁶

The NLRJCC leadership structure combines professionals and community members to harness the unique competencies of each. “The Executive Coordination Team is the NLRJCC’s ‘[d]ecision-making body[,] . . . composed of the assigned court judge, a [North Lawndale] leader, and the most senior project coordinator on staff.’”²²⁷ The Steering Committee “was designed to authentically and equitably engage both the Circuit Court of Cook County and the community of North Lawndale.”²²⁸ It is composed of seven members from the Cook County courts (generally white) and seven from the North Lawndale community (generally Black).²²⁹ Both sets of stakeholders have created a strong partnership, although there have been inevitable differences of opinion and even some conflict: “This collaboration signifies . . . an attempt to unify two historically opposed interests in pursuit of the common goal of improving the

220. *Id.*; see 735 ILL. COMP. STAT. 5/804.5(a) (2021) (granting evidentiary privilege for statements made “during . . . in anticipation of or as a follow-up to” a restorative justice practice).

221. Harriman, *Restoring Justice*, *supra* note 1, app. G at 86–87.

222. *Id.* at 87.

223. *Id.*

224. *Id.* at 87 (explaining that “the NLRJCC team” has discretion to decide whether the case should be returned to the courts; in making that decision, that team “will seek to understand and ameliorate the root causes of the defendant’s non-compliance”).

225. *Id.* at 88.

226. Harriman, *Restoring Justice*, *supra* note 1, app. G at 88; see also Sophia H. Hall, *The Reality of Restorative Justice: The Community Restorative Justice Court*, CHI. BAR ASS’N REC., Jan. 2017, at 32, 33–35 (Justice Hall discussing Chicago’s North Lawndale court).

227. Harriman, *Restoring Justice*, *supra* note 1, at 38.

228. *Id.* at 39.

229. *Id.*

delivery of justice for residents of North Lawndale.”²³⁰ Even still, the Circuit Court of Cook County subsequently chose to exercise more supervision over the process than was originally intended.²³¹

The NLRJCC is small but has seemingly succeeded so far in terms of recidivism and costs. As of November 2020:

129 people have been assigned to the court—63 have graduated and had their offenses expunged, 13 either didn’t comply with the program or opted out, one was killed in gang gunfire while going through the court process, and another 52 are in the program. . . . [N]one of the 63 individuals who have completed the program have committed another crime²³²

The estimated cost of running that entire program in 2021 was only about \$593,000.²³³

In short, the NLRJCC has found a way to address crime—one that involves less incarceration and repairs crime’s harms—by helping victims, offenders, and other community stakeholders to work together for the common good. Similar programs are expanding throughout Chicago.²³⁴

230. *Id.* at 42–43. *See also id.* at 40 (“The partnership, although perhaps one of the court’s primary challenges, is also one of its greatest strengths. In fact, . . . the system-community partnership at the NLRJCC is one of the primary ways through which the NLRJCC is challenging the moral hierarchy that pervades our traditional criminal justice system.”); *id.* at 41–42 (“North Lawndale residents invited Cook County employees into a working partnership despite a long history of institutional abuse in order to make the NLRJCC a reality. In turn, Cook County employees accepted North Lawndale residents as moral and intellectual equals, and gave them the decision-making power to prove it. The mere existence of this partnership challenges the inequitable social hierarchies that define both our justice system and our society.”). One community stakeholder put it like this:

I think the (NLRJCC) is going well—it is an unusual collaboration from community and system. The system is used to doing their programs the way they always do, but we on the community side, we believe there is a better way. The system is releasing the control that they have had for a long time and listening to the community about how to restore.

Id. at 43–44 (quoting Interview by Kelsie Hope Harriman with Stakeholder 7, RJCC Stakeholder, in Chicago, Ill. (Jan. 12, 2018)).

231. Hux, *supra* note 37, at 41–42 (“[T]he 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. 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. However, a few months into the implementation of the program, the court began mandating further services and extending periods of oversight dictated by the circles’ agreements.” (footnotes omitted)).

232. Editorial, *supra* note 8.

233. By way of comparison, the price of incarcerating a single prisoner for one year in Illinois was \$38,000. *Id.*

234. As of June 2021, there were 188 participants in Cook County’s Restorative Justice Community Courts in North Lawndale, Avondale, and Englewood; ninety-five more had already successfully graduated. *See* Press Release, Timothy C. Evans, C.J., Cir. Ct. Cook Cnty., Illinois, Evans Praises L. Supporting Restorative Just. Pracs. in Illinois Cts., Signed by Gov. Pritzker (July 15,

Next, Part II will theorize why the North Lawndale and Red Hook programs improve the quality of justice by adhering to the principles of citizenship.

II. HOW RESTORATIVE JUSTICE STRENGTHENS CITIZENSHIP

The North Lawndale and Red Hook community courts highlight a key, underexamined aspect of the restorative justice movement: its promise to revitalize local civic action. This Part discusses that idea, beginning with the relationship between democracy and citizenship.²³⁵ Democracy generally means self-rule, and citizenship refers to essential conditions that must be satisfied for self-rule to be effective and fair. Restorative justice strengthens democracy by fostering each of the three key aspects of democratic citizenship: participation, deliberation, and membership.²³⁶ Restorative justice provides many opportunities for effective lay participation, providing a way for people to work together to repair the harms caused by crime.²³⁷ Restorative justice also fosters deliberation, giving stakeholders a voice, encouraging a respectful and fruitful exchange of ideas, and fostering collaboration.²³⁸ Finally, restorative justice treats community members as civic equals, fostering accountability to others and solidarity.²³⁹

A. Democracy and Citizenship

Democracy and citizenship are intertwined. “Democracy,” simply defined, is rule by the people.²⁴⁰ “Citizenship” refers to people’s role in democracy, or how they fulfill democracy’s demands.²⁴¹ A similar perspective offered by Sociologist Charles Tilley argues that, in a

2021), <https://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2845/Chief-Judge-Evans-praises-law-supporting-restorative-justice-practices-in-Illinois-courts-signed-by-Gov-Pritzker-today> [<https://perma.cc/U7G3-WTHL>]; Press Release, Cook County Circuit Court, Illinois, Restorative Just. Cmty. Ct. Launched in Avondale—The First on the Nw. Side, (Aug. 5, 2020), <http://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2781/Restorative-Justice-Community-Court-launched-in-Avondale-the-first-on-the-Northwest-Side> [<https://perma.cc/TED4-PPNN>]; see also Albert W. Dzur & John McKnight, *Refunctioning the Police in Longmont*, 110 NAT’L CIVIC REV. 6, 14 (2022) (describing a successful, community-based restorative justice effort in Longmont, Colorado).

235. See *infra* Section II.A.

236. See McConkie, *Citizenship*, *supra* note 10, at 1023 (discussing these three pillars of citizenship at length).

237. See *infra* Section II.B.

238. See *infra* Section II.C.

239. See *infra* Section II.D.

240. McConkie, *Plea Bargaining*, *supra* note 10, at 1038–40; see also Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, *supra* note 19, at 1383–85 (discussing participatory democracy as government “by the People”).

241. McConkie, *Plea Bargaining*, *supra* note 10, at 1038.

democracy, citizens and the state had a relationship “characterized by ‘broad, equal, protected and mutually binding consultation.’”²⁴²

Similarly, Xavier de Souza Briggs argues that democracy can also be understood as a particular approach to problem-solving, and this lens is particularly useful in understanding the power and potential of restorative justice.²⁴³ Democracy has the potential “to be the fulfillment of ‘community life’ itself, which necessarily includes [making] progress on important community problems.”²⁴⁴ Philosopher and educator John Dewey discusses about how this problem-solving is accomplished:

[D]emocracy is belief in the ability of human experience to generate the aims and methods by which further experience will grow in ordered richness. . . . [T]he task of democracy is forever that of creation of a freer and more humane experience in which all share and to which all contribute.²⁴⁵

Crime is one such “community problem” identified by Briggs that any effective democracy must address. There are many causes of crime, but surely, among them is wrongdoers’ lack of consideration for the rights of others. If wrongdoers—and people generally, for that matter—felt a greater affiliation with and attachment to the people around them, crime would generally decrease.²⁴⁶ Likewise, crime itself inherently tends to further weaken social ties by damaging relationships. The criminal justice system’s response to crime has only compounded this problem, separating people from social support networks and failing to restore what crime takes away from victims and communities.²⁴⁷

242. K. Sabeel Rahman, *(Re)constructing Democracy in Crisis*, 65 UCLA L. REV. 1552, 1558 (2018) (quoting CHARLES TILLEY, *DEMOCRACY* 13–14 (2007)).

243. XAVIER DE SOUZA BRIGGS, *DEMOCRACY AS PROBLEM SOLVING: CIVIC CAPACITY IN COMMUNITIES ACROSS THE GLOBE* 7 (2008) (arguing that democracy can also be understood as a contest among interest groups and an instrument of deliberation).

244. *Id.* at 7–8 (discussing JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* (1927)).

245. 14 JOHN DEWEY, *THE LATER WORKS OF JOHN DEWEY, 1925–1953: 1939–1941, ESSAYS, REVIEWS AND MISCELLANY* 229–30 (Jo Ann Boydston ed., 1988).

246. See, e.g., Brian A. Stuart & Evan J. Taylor, *The Effect of Social Connectedness on Crime: Evidence from the Great Migration*, 103 REV. ECON. & STATS. 18, 31 (2021) (“We find that social connectedness also leads to sizable and statistically significant reductions in rapes, robberies, assaults, and burglaries.”).

247. See, e.g., *id.* (“Our results suggest that social connectedness, and the related concept of social capital, could help address market failures and generate desirable outcomes that are difficult to accomplish with government policies. The results also suggest that policies which disrupt social networks and communities, such as mass incarceration or the construction of interstate highways in the United States, could have negative consequences that are more severe than previously thought.”); see Roberts, *supra* note 24, 1304 (“For the past thirty years, the growth of the prison population has generally been accepted as a conventional law enforcement response to crime. . . . Empirical research on the social consequences of incarceration in these communities and the

Our justice system cannot effectively address crime “without significant democratic features” that allow citizenship to flourish.²⁴⁸ A simple but time-tested alternative to retributive justice is to view crime as a breakdown of relationships and the response to crime as an opportunity to repair those relationships to the extent possible. In an age of inequality, mass incarceration, and eroded trust in institutions, the United States needs new democratic approaches—what Briggs calls “new types of civic action”²⁴⁹—to address crime. Criminal law ideally addresses social needs beyond convicting and punishing the guilty. It should be concerned with processes that involve laypeople who are the most affected by crime and, in many ways, best able to determine the most productive way forward. Such processes should make use of expert knowledge without abandoning popular participation.²⁵⁰ Restorative justice practice represents a promising avenue for our justice system to embody rule by the people. To paraphrase Dewey, restorative justice is a method of justice rooted in human experience that seeks to repair harms and allow relationships to grow “in ordered richness.”²⁵¹ “All share” and “all contribute” to this “freer and more humane experience.”²⁵²

Any conception of democracy that glosses over the role of citizenship would be impoverished because citizens make democracy work. In fact, “the promotion of responsible citizenship is an urgent aim of public

resulting disenfranchisement of their citizens makes the moral question of mass imprisonment inescapable.”).

248. McConkie, *Plea Bargaining*, *supra* note 10, at 1034; *see also* BIBAS, *supra* note 103, at 129–66 (arguing for a return of power to the public in the criminal justice system).

249. *Cf.* Albert W. Dzur, *Four Theses on Participatory Democracy: Toward the Rational Disorganization of Government Institutions*, 19 *CONSTELLATIONS* 305, 305–06 (2012) [hereinafter Dzur, *Four Theses on Participatory Democracy*] (describing John Dewey’s “attention to the importance of public spheres of collective activity that could give meaning and purpose to the modern formal institutions that inadequately represented them”); *ORG. FOR ECON. CO-OPERATION DEV. (OECD), INNOVATIVE CITIZEN PARTICIPATION AND NEW DEMOCRATIC INSTITUTIONS: CATCHING THE DELIBERATIVE WAVE 3* (2020) (“Growing efforts to embed public deliberation into public decision making could be seen as the start of a period of transformation to adapt the architecture of representative democracy. Democratic institutions across the world are beginning to transform in ways that give citizens a more direct role in setting agendas and shaping the public decisions that affect them.”).

250. McConkie, *Plea Bargaining*, *supra* note 10, at 1034 (“The criminal law’s purposes are ultimately social; they have to do with declaring and reinforcing what conduct is unacceptable and reprehensible, how to determine whether someone is guilty of a crime, including providing for convicts a path back to full membership in society. Professionals have an important role to play here, but not more important than the people. . . . Society’s interest in the outcome of criminal cases is too great, and the balancing of interests too fine, for the people not to have a significant role.”).

251. DEWEY, *supra* note 245, at 229.

252. *Id.* at 230.

policy.”²⁵³ In the criminal justice context, citizenship should encompass the people’s right “to participate directly in some aspects of the criminal justice system and to deliberate in some of its workings.”²⁵⁴ Unfortunately, our modern adversarial bureaucratic criminal justice system generally does not rest on the three pillars of democratic citizenship: membership, participation, and deliberation.²⁵⁵ Today’s justice system disregards equal membership by sidelining victims and stigmatizing offenders. It leaves little room for public participation, as by trading jury trials for plea bargains, and thus, deprives all of us of the social benefits of public deliberation. In contrast, restorative justice can rely on each of these pillars:

1. *Participation*. — The first pillar of citizenship “refers to public participation in democratic processes.”²⁵⁶ “‘Institutions and procedures must be designed to give the people an important role in government, but the nature and extent of that role are limited by other considerations,’ such as procedural accuracy, over-severity, and racial justice.”²⁵⁷ Restorative justice, especially as practiced in the Red Hook and North Lawndale courts, provides many opportunities for such participation.

2. *Deliberation*. — The second pillar of citizenship refers to structured deliberation among laypersons and experts to influence or determine official decisions.²⁵⁸ Restorative justice processes encourage deliberation, although they must be carefully designed to foster healthy and effective deliberation. Furthermore, because those processes allow citizens to witness firsthand the possibilities of restorative justice to promote human flourishing, they might, given sufficient time and public participation, reshape public attitudes toward criminal justice.

3. *Membership*. — The third pillar of citizenship “refers to who can participate and whether they can participate on an equal basis.”²⁵⁹ It enforces reciprocal social obligations by holding wrongdoers accountable. It empowers persons and communities who are affected by crime and provides them with a means to work together toward shared goals, promoting equality, solidarity, and belonging. And, to the extent possible,

253. Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, in *THEORIZING CITIZENSHIP* 283, 300 (Ronald Beiner ed., 1995). Citizenship is not merely derivative of democracy but instead must play “an independent normative role in any plausible political theory.” *Id.*

254. McConkie, *Citizenship*, *supra* note 10, at 1025.

255. McConkie, *Plea Bargaining*, *supra* note 10, at 1041.

256. McConkie, *Citizenship*, *supra* note 10, at 1026.

257. *Id.* (quoting McConkie, *Plea Bargaining*, *supra* note 10, at 1026).

258. McConkie, *Plea Bargaining*, *supra* note 10, at 1045–46.

259. McConkie, *Citizenship*, *supra* note 10, at 1027.

it seeks to reintegrate convicted persons into society as fully participating and equal citizens.

B. Participation: Actively Engaging Stakeholders in Restorative Justice Processes

Citizen participation in criminal justice should involve laypersons in the resolution of individual cases.²⁶⁰ Conventional criminal justice systems, however, “repel public involvement” by “treat[ing] criminal justice as a professional and technical matter,” by excluding non-experts from participating, and by operating primarily in non-public places.²⁶¹ For example, these repelling features characterize our ubiquitous system of plea bargaining well.²⁶² “The lack of public participation inherent in professionalization results in stereotypical views of offenders and defensive fears about crime.”²⁶³ It essentially promotes the “othering” of wrongdoers. In contrast, “[r]estorative justice turns those traditional observers of the criminal justice system—victims, offenders, and their families and friends—into participants.”²⁶⁴ There is a national trend toward addressing social problems generally through innovative, local-led initiatives with high citizen participation.²⁶⁵ The American restorative justice movement exemplifies this trend.

Restorative justice programs can be designed with varying levels of citizen participation, but some experiments give local citizens a great deal of power. At the NLRJCC, for example, one participant noted:

[A] massive shift in power from system to community No court employee . . . sits in these circles, so it is literally trusting community members . . . to come together, sit in circle and come to a Repair of Harm Agreement The NLRJCC is really just supervising that which the community says needs to happen.²⁶⁶

260. *Id.* at 1077–80 (discussing importance of juries).

261. Dzur, *Public Restorative Justice*, *supra* note 121, at 3 & n.2.

262. *Cf.* *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (“[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.” (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992))).

263. Dzur, *Civic Implications*, *supra* note 38, at 287.

264. Hux, *supra* note 37, at 31 (quoting DECLAN ROCHE, *ACCOUNTABILITY IN RESTORATIVE JUSTICE* 9 (2003)).

265. *See* BRIGGS, *supra* note 243, at 10 (“Business and nongovernmental organizations, informal citizen-led initiatives, ‘community-driven development’ and ‘community building,’ and cross-sector partnerships are taking on much of the innovative work on urgent problems.” (quoting *Community Building*, in *ENCYCLOPEDIA OF COMMUNITY: FROM THE VILLAGE TO THE VIRTUAL WORLD* (Karen Christensen & David Levinson ed., 2003))). Restorative justice works especially well on the local level, especially for crimes that have an identifiable local impact. *See* Alexander, *supra* note 5 (discussing specific examples).

266. Harriman, *Restoring Justice*, *supra* note 1, at 52 (quoting Interview by Kelsie Hope Harriman with Stakeholder 4, RJCC Stakeholder, in Chicago, Ill. (Dec. 21, 2017)).

Even in programs that have a greater level of state involvement and oversight, restorative justice can be part of a “virtuous circle[] of democratic responsibility,” using citizens’ voices to check judges and prosecutors.²⁶⁷

Restorative justice courts allow for civic participation beyond that of the circles where individual cases are decided. The courts are often created at the grassroots level (as in North Lawndale), involving many citizens and community organizations.²⁶⁸ The board overseeing the court will often have a mix of community representatives and other professionals, such as judges and specially-trained restorative justice practitioners.²⁶⁹ Furthermore, the courts often serve other functions that strengthen the community and discourage crime. They might serve as clearing-houses for social services, meeting places for public dialogue about any issue, and as a hub for local activism and community service.²⁷⁰

For example, the Near Westside Peacemaking Project in Syracuse, New York, played an active role in revitalizing that neighborhood, carrying out twenty-two community benefit projects from 2013 to 2017, including community dialogues with the police, beautifying community gardens, and movie nights at public parks.²⁷¹ The Peacemaking Project brought together participants in the restorative justice process, neighbors, and agency partners.²⁷² Many community members felt that these programs were one of the Peacemaking Project’s greatest strengths.²⁷³ Similarly, the RHCJC used its community advisory board to accomplish these purposes.²⁷⁴

Participatory restorative justice yields several benefits. First, participants feel connected to others and gain confidence to participate in other democratic processes.²⁷⁵ Participating in restorative justice can help citizens to “see how constitutional ideals and the promise of criminal

267. Braithwaite, *Republican Democracy*, *supra* note 93, at 1524.

268. *See supra* Sections I.C, I.D (describing the processes used by Brooklyn’s Red Hook Community Justice Center and Chicago’s North Lawndale Restorative Justice Community Court).

269. *Id.*

270. *See, e.g.*, COMMUNITY JUSTICE TODAY, *supra* note 74, at 7 (describing Syracuse Peacemaking Project).

271. *See* AMANDA B. CISSNER, CTR. FOR CT. INNOVATION, MAKING PEACE IN SYRACUSE, NEW YORK: A PROCESS EVALUATION OF THE NEAR WESTSIDE PEACEMAKING PROJECT, at ix (2019) (describing efforts enhancing existing neighborhood revitalization efforts through resident-driven community benefits projects).

272. *Id.*

273. *Id.*

274. *See* LEE ET AL., *supra* note 95, at 47–48 (describing the role of the RHCJC community advisory board).

275. *See* Laura Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1419 (2017) (“Greater local participation in criminal justice has the advantage of helping community members feel connected to both the inner workings of the criminal justice system and the larger civic structure.”).

justice are made real.”²⁷⁶ Second, restorative justice uses community members’ unique abilities to accomplish what conventional courts cannot.²⁷⁷ Laypersons with a good understanding of community conditions can be very good, in consultation and deliberation with others, at coming up with constructive approaches to moving forward after a crime has been committed. “Participatory democracy is at home in rationally disorganized institutions that mobilize, engage, and focus the capabilities of lay citizens.”²⁷⁸ Professor Albert W. Dzur defines “rational disorganization” as “the realization that including informal and nonroutine elements into a formal system enables it to function better.”²⁷⁹ He argues that citizen participation tends to de-routinize the criminal justice processes, leading to more deliberation of each case, more (and different) perspectives, and dispersed responsibility for decision-making.²⁸⁰ Restorative justice of the kind offered in the Red Hook and North Lawndale courts offers the benefits of rational disorganization by focusing on each case’s unique human elements and relationships and involving many stakeholders. Our expert-driven criminal justice system ignores the relational aspect of crime and the relational opportunities of addressing crime through restorative justice. The decline of public involvement in criminal justice correlates with the decline in American social capital generally. In his book *Bowling Alone: The Collapse and Revival of American Community*, Professor Robert Putnam famously documents this decline.²⁸¹ It can be measured in many ways, including fewer social connections in

276. *Id.*

277. See Wolf, *supra* note 38, at 9 (“Abramson said it was important not to underestimate the capacity of community members to tackle difficult problems. ‘I think we also have to really appreciate the power and wisdom in the community. I don’t think that we are ever going to have enough mental health services to deal with the depth of what is going on with our young people. And to build a system based around mental health professionals is not viable and probably not what we need,’ she said. She has found that in Baltimore, community conferencing fosters access to ‘a whole lot of resources that we usually don’t get to tap into.’” (quoting Interview with Lauren B. Abramson, Executive Director, Community Conferencing Center, in Scottsdale Ariz. (Dec. 6, 2011))).

278. Dzur, *Four Theses on Participatory Democracy*, *supra* note 249, at 317.

279. Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 374.

280. See *id.* (discussing the impact of citizen participation on the criminal justice process, emphasizing its role in fostering deliberation, incorporating lay perspectives, promoting self-reflection among court professionals, and distributing decision-making responsibilities); see also Dzur, *Four Theses on Participatory Democracy*, *supra* note 249, at 315–16 (addressing the organizational characteristics of participatory democratic government, highlighting its decreased bureaucratic efficiency due to lay citizens assuming tasks typically performed by trained specialists, and its reduced formal rationality characterized by greater procedural variations stemming from lay citizens’ potential misunderstandings of institutional rules and their inclination towards deliberate rule rejection).

281. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

families, neighborhoods, and social, religious, and civic organizations.²⁸² Restorative justice practice through community courts can create and strengthen social connections by mobilizing entire neighborhoods to address crime in a better way.

The third benefit of participatory restorative justice is that it is not limited to dealing with social issues one crime at a time. Restorative justice, especially when situated in a community court, can provide a forum for addressing large and complex community problems. It may begin with a simple crime, but the restorative justice deliberations may shed light on solutions to systemic issues relating to crime. “Restorative justice thus may lead to truly effective ways to confront neighborhood problems.”²⁸³ For example, “local residents [might] band together to sue a property owner who is allowing [a] vacant property to be used for illegal purposes.”²⁸⁴ Alternatively, residents may decide to bring issues that began in restorative justice circles to the attention of the city council or other government bodies.²⁸⁵ In this way, restorative justice becomes a “springboard for [local collective] action.”²⁸⁶

Nevertheless, involving laypersons in the criminal justice process raises special issues and has occasioned criticisms that must be dealt with. These criticisms relate to the role of experts, the definition and voice of “the community,” and the amount of time required of citizens to participate.

The first criticism is that restorative justice dispenses needed experts. There is no question that experts have an important contribution to make, and that there is a practical necessity for state involvement in American criminal justice.²⁸⁷ While restorative justice should foreground stakeholders and maximize popular participation, professional expertise will still be needed—including trained mediators,²⁸⁸ treatment providers,²⁸⁹

282. See *id.*; *What We Do Together: Hearing on The State of Social Capital in America Today Before the J. Econ. Comm.*, 115th Cong., 1st Sess. 36, 90 (May 17, 2017) (statement of Sen. Mike Lee, Vice Chairman, J. Econ. Committee).

283. Seng, *supra* note 55, at 506.

284. *Id.*

285. See *id.* (“Restorative justice thus may lead to truly effective ways to confront neighborhood problems, especially if the demands are taken to city hall or to the local school board . . .”).

286. *Id.*

287. See Olson & Dzur, *supra* note 67, at 169–71 (arguing paid professionals are needed to receive specialized training and to devote sufficient time to restorative justice practice).

288. See Dzur, *Civic Implications*, *supra* note 38, at 292 (discussing semi-professional mediators who are not professionals but do receive training).

289. For noteworthy critiques of the democratization movement, see, for example, John Rapaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711 (2020), which warns against succumbing to the movement’s rhetorical charm; and RACHEL ELISE

and government officials.²⁹⁰ It may also be helpful, sometimes, for lawyers to be present. They can be properly trained in restorative justice settings to ensure that individual rights are protected, although there should be little need for them where offenders have given consent to participate and a trained mediator is present.²⁹¹ Furthermore, some court-adjacent restorative justice programs put prosecutors in the circle to discuss potential outcomes.²⁹² Lay citizens and experts have to work closely together in restorative justice processes, respecting the essential contributions that each can make. Some tensions will inevitably arise, but the blended system ultimately harnesses the strengths and mitigates the weaknesses of both groups.²⁹³ An analogy can be found in continental jury systems wherein laypersons and trained judges deliberate together.²⁹⁴

The second principal criticism is that the notion of “community” is too vague, and that the so-called “voice of the community” is only a few loud or powerful voices.²⁹⁵ True, the fact that people live together in the same

BARKOW, PRISONERS OF POLITICS 164 (2019), which condemns criminal justice policy based on the “whims of the electorate.”

290. See *supra* Sections I.C, I.D (detailing role of public officials in RHCJC and NLRJCC).

291. Olson & Dzur, *supra* note 67, at 172 (“As democratic *professionals*, those involved in restorative justice are responsible for ensuring that the core legal value of fairness to offenders is not sacrificed. As *democratic* professionals, they are responsible for nurturing citizen participation in the process.”).

292. See, e.g., LEE ET AL., *supra* note 95, at 44–45 (describing prosecutors’ role at Red Hook).

293. For a discussion of Vermont’s community boards that administer restorative justice—which handles only minor offenses, leaving the more serious offenses to the professionals in the conventional justice system, see Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 373. There is pressure to partially professionalize these community boards by giving members strict guidelines, providing more training, and paying them more. *Id.* But too much of this renders them bureaucratic and not locally controlled. *Id.* Professor Dzur describes “tensions between formal organizational imperatives and professional roles and the informal dimensions of the democratic logic of restorative justice.” *Id.* at 371. For a discussion of the benefits and drawbacks of Vermont’s statutorily mandated restorative justice efforts, see Haime, *supra* note 44.

294. Toby S. Goldbach & Valerie P. Hans, *Juries, Lay Judges, and Trials*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIM. JUST.* 2723 (Gerben Bruinsma & David Weisburd eds., 2014) (arguing that the system works best when professional judges help to encourage and facilitate lay participation); see also Valerie P. Hans & Claire M. Germain, *The French Jury at a Crossroads*, 86 *CHI.-KENT L. REV.* 737, 745–46 (2011) (discussing the French experience with mixed lay/professional juries).

295. See Rappaport, *supra* note 289, at 739, 757–58 (2020) (discussing the definition of “community” and the problem of displacement, i.e., communities wanting to send crime and criminals elsewhere). For a comprehensive discussion and critique of the idea of community, see Weisberg, *supra* note 140, at 343–74. Professor Weisberg argues that calling a geographic area like a neighborhood “the community” “often exploits the normative halo associated with any version of the word ‘community,’ suggesting that there are strong social bonds or moral authority that necessarily underlie any grouping that can be so designated.” *Id.* at 347. Professor Weisberg further argues that the notion of community is highly complex and imbued with idealism and may cloud our view of its potential ambiguities and even sinister dimensions. *Id.* at 373–74.

zip code does not mean that they have everything in common, and their interests in crime and ideas about how to address crime may be sharply divergent. Even assuming the “community” does have a view, determining it is notoriously difficult.²⁹⁶ Voting on every issue is impractical, and even if it were not, close majorities cannot necessarily be said to represent the entire community’s view. Choosing community representatives who can faithfully represent a community’s diverse voices is likewise difficult. “Community input” inevitably means input from some voices and not others.²⁹⁷ This critique has been extended to restorative justice in particular: “[R]estorative justice theorists assume that throughout the restorative justice process, participants from a given ‘community’ recognize their common identity as community members, feel responsibility toward that community, and consent to moral and behavioral standards necessary for maintaining community spirit and social order.”²⁹⁸ Of course, those assumptions do not always hold true. How the “community” is defined for purposes of restorative justice, and who the stakeholders are, will vary from case to case. The definition depends on who the crime victims and their support groups are, who the offenders and their support groups are, and who are the others indirectly affected by the crime.²⁹⁹ The narrowest restorative justice approach might be a two-party victim-offender mediation; the broadest approach might involve a series of meetings at which hundreds participate, such as South Africa’s truth and reconciliation proceedings.³⁰⁰ Whether local leaders choose a broad or narrow approach depends, in turn, on whether they choose to see crime as a discrete event resulting in direct harm or as part of broader conditions requiring societal-level solutions; whether they have the capacity to facilitate broader restorative justice approaches; and whether local communities desire to participate in such approaches.³⁰¹ Regardless of whether a broad or narrow definition of community is employed, “in many contexts, the question of ‘who and what’ is the community is

296. Weisberg, *supra* note 140, at 347.

297. See Rappaport, *supra* note 289, at 739, 757–58 (critiquing the notion that local communities can independently shape crime policies without considering broader structural influences).

298. Won Kyung Chang, *When My Community Met the Other: Competing Concepts of “Community” in Restorative Justice*, 32 CAN. J.L. & SOC. 371, 374 (2017).

299. Depending on the definition of “community” employed, victims and offenders do not necessarily belong to the same community. *Id.* at 378.

300. See, e.g., Harroff, *supra* note 48, at 551–56 (analyzing how “truth commissions” in South Africa and Kenya contributed to the formation of new national communities).

301. See RESTORATIVE JUSTICE HANDBOOK, *supra* note 113, at 64, 98 (asserting how a restorative justice program defines “community” as a critical factor in determining the nature and extent of participation in its process and identifying the individuals affected by the crime).

not an issue, as individuals clearly understand what comprises their community.”³⁰²

A third criticism has to do with whether the community, even if it could be defined, should be meting out justice.³⁰³ “The idealization of community in the context of serious crime can be of concern. Where violence occurs within the family or other intimate relationships, one may wonder how to define the role and relevance of the community within the restorative justice process.”³⁰⁴ Communities may reject and ostracize those who report a crime; they may hold problematic views about certain crimes; they may not treat all community members fairly; and they may provide insufficient support for offenders and victims alike.³⁰⁵ Simply put, “[n]ot all communities are well placed and ready to participate in . . . restorative justice, and one must guard against unreasonable assumptions about ‘community.’”³⁰⁶

These concerns are valid, but they should be kept in perspective. Problems of fairness and representation are inherent to any democracy, but at least local democracy can make them easier to manage. In theory, the smaller the scale of a democratic unit, the more likely it is that minority voices can have access to public processes and be heard—unless, of course, there are systemic inequalities that need to be dealt with by state or national authorities.³⁰⁷ Restorative justice systems like those in Red Hook and North Lawndale take extraordinary steps to foster broad, democratic citizenship in these unique, localized communities, and they have perhaps done so better than any county or state-level body could have done. On the other hand, perhaps a democratic unit of any size could implement restorative justice programs if they were well-organized, inclusive, and participatory.³⁰⁸

302. *Id.* at 97.

303. *See id.* at 73 (“Not all communities are well placed and ready to participate in these forms of restorative justice, and one must guard against unreasonable assumptions about ‘community.’”).

304. *Id.*

305. *See id.* (describing the idealization of community in the context of a serious crime).

306. *Id.*

307. *See, e.g.,* CIVIL RIGHTS DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015) (“[F]erguson’s police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes. Ferguson’s own data establish clear racial disparities that adversely impact African Americans. The evidence shows that discriminatory intent is part of the reason for these disparities. Over time, Ferguson’s police and municipal court practices have sown deep mistrust between parts of the community and the police department, undermining law enforcement legitimacy among African Americans in particular.”).

308. E-mail from Albert W. Dzur, Distinguished Professor, Bowling Green State Univ., to Daniel S. McConkie, Jr., Assoc. Professor of L., N. Ill. Univ. Coll. of L. (June 9, 2023, 3:38 CST) (on file with author).

Applying these community-oriented critiques to conventional courtrooms is especially instructive. In restorative justice circles, many community members are involved, including those directly affected by the crime. Those in the circle are not likely to see incarceration as the only possible answer. In contrast, criminal justice professionals in the courtroom represent the community even less. Although the judge and the prosecutor may be selected somewhat democratically, they themselves may not live in or even understand well the affected community; they are likely chosen from a larger jurisdiction that does not represent the specific community affected by the crime; or they were elected by voters who have little awareness of non-carceral alternatives.³⁰⁹

A fourth criticism is that citizens do not typically have the time or inclination to volunteer for criminal justice causes.³¹⁰ This is particularly salient for the kind of community-wide, highly participative restorative justice that has proven so effective.³¹¹ Laypersons may be asked to participate in deliberative circles or community boards. Business owners might be asked to provide additional training to help former offenders succeed at their jobs. Many people are happy to help, but there are limits to what they are able or willing to give. Relatedly, those who volunteer might more typically be retired or not represent a fair cross-section of the community. Jury service provides a good example and a cautionary tale of the difficulties of securing citizen involvement and the excessive sacrifice some people make to serve as jurors.³¹²

For restorative justice to work on a much larger scale, the United States will need “an eager, participatory community base” to participate in the

309. See, e.g., *Massive Database Shows State Judges Are Not Representative of the People They Serve*, VAND. UNIV. RSCH. NEWS (June 22, 2016, 10:26 AM), <https://news.vanderbilt.edu/2016/06/22/massive-database-shows-state-judges-are-not-representative-of-the-people-they-serve/> [<https://perma.cc/V3H2-LXK7>] (“A first-of-its-kind database of more than 10,000 current state judges shows when it comes to race, gender and ethnicity, these [judged] are not representative of the people they serve.”); Laurie L. Levenson, *Do Prosecutors Really Represent the People? A New Proposal for Civilian Oversight of Prosecutors*, 58 DUQ. L. REV. 279, 281 (2020) (“Once appointed or elected, many prosecutors have little contact with actual community members other than an occasional town hall meeting. . . . There is little day-to-day input by the community into the functioning of the prosecutor’s office.”).

310. See McConkie, *Citizenship*, *supra* note 10, at 1078 (“Other reforms are necessary to allow more people to participate in jury service.”); see also Nancy S. Marder, *Expanding the Jury: A Provocative Proposal*, 35 CRIM. JUST. ETHICS 68, 74–75 (2016) (“[The] call for juries to make decisions pertaining to bail, plea agreements, and ancillary sentencing is likely to make jurors feel that their time is being wasted.”).

311. See *supra* Sections I.C, I.D (describing community courts in Brooklyn’s Red Hook and Chicago’s North Lawndale neighborhoods).

312. See McConkie, *Plea Bargaining*, *supra* note 10, at 1078 (explaining the social benefits of jury service).

effort.³¹³ Because that base is currently lacking, the government will have to make great efforts to educate and capacitate the citizenry for the task and make such participation as easy and convenient as possible. Such efforts will help citizens see the value in this work. Public schools can effectively teach young people how to participate in restorative justice processes.³¹⁴ Outside of the education context, adult citizens who participate in restorative justice should be fairly compensated for their time.³¹⁵ Fair compensation will also help ensure broad and equal participation in the process.

C. Deliberation: Arriving at Joint Decisions to Address Crime Restoratively

Deliberation describes an iterative process of becoming informed about the issues, listening to others with an open mind, carefully considering their ideas, and speaking one's mind.³¹⁶ Appropriately designed deliberative processes are necessary for a well-functioning democracy. People subjected to collective decisions must have the ability or opportunity to deliberate about them effectively.³¹⁷ These deliberations should at least influence, if not control, the ultimate decision. Deliberative democracy fosters "a collective search for better answers above and beyond self-interested bargaining, a 'school' for developing citizenship, and a mechanism for expanding the public's faith in politics and thereby invigorating civic life."³¹⁸

Restorative justice processes are designed to foster healthy deliberation.³¹⁹ They give voice to those most affected by crime; they leave space for lay and expert input; they are designed to provide opportunities for

313. Dzur, *Civic Implications*, *supra* note 38, at 297.

314. See ALBERT W. DZUR, *DEMOCRACY INSIDE: PARTICIPATORY INNOVATION IN UNLIKELY PLACES* 43–66 (2019) (discussing democratic innovation in K–12 education).

315. See McConkie, *Citizenship*, *supra* note 10, at 1078 ("[I]n light of the benefits of jury service, one author has called for one week of paid, mandatory jury duty per citizen per year, with government-provided childcare."); McConkie, *Plea Bargaining*, *supra* note 10, at 1071–72 ("If not, poor people may effectively be excluded from this important public service."); Dzur, *Four Theses on Participatory Democracy*, *supra* note 249, at 311–13 (refuting the idea that citizens do not like or want more participatory democracy).

316. See generally McConkie, *Citizenship*, *supra* note 10, at 1054–65.

317. See JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS 1* (Oxford Univ. Press ed., 2002) (discussing the "deliberative turn in democratic theory").

318. BRIGGS, *supra* note 243, at 7.

319. See *supra* Section I.A (describing America's oversized carceral state and how that carceral state is bad for democracy).

understanding, foster collaboration instead of adversarialism, and seek reparation of harm.³²⁰

The process of setting up a restorative justice program itself requires public deliberations. Stakeholders must reflect together on a starting set of values because local conceptions of restorative justice will differ in many particulars.³²¹ Ultimately, they must “[s]ecure through this local democratic deliberation a set of local commitments to standards that are widely shared.”³²² This process was followed in creating the Red Hook Community Justice Center and the North Lawndale Restorative Justice Community Court.³²³ Thus, both of these courts represent, in some sense, the views of the communities they serve, reflect an insider’s understanding of those communities’ needs and involve those communities in responding to those needs.

Each restorative justice circle is an ad hoc deliberative body. Circles provide stakeholders, including victims and others affected by the crime, the ability and opportunity to effectively deliberate about the appropriate response.³²⁴ Wrongdoers, too, have an opportunity to express themselves constructively—rather than through criminal behavior, which may be considered an “expressive, a[nd] clumsy attempt to say something.”³²⁵ Nils Christie argues that crime should “become a starting point for a real dialogue, and not for an equally clumsy answer in the form of a spoonful of pain.”³²⁶ Restorative justice deliberations need not be limited to the case at hand but can also include discussions of the larger social context of crime, especially as it relates to what the community can do about it.³²⁷

Many benefits flow from restorative deliberations, including (1) creating collaborative, constructive solutions, (2) empowering the marginalized by listening to them, and (3) improving citizens’ ability and inclination to deliberate in other contexts. First, restorative justice deliberations, simply put, provide opportunities for mutual understanding and creative

320. *Id.*

321. See Braithwaite, *Standards*, *supra* note 136, at 574–75 (suggesting examples for what to do before setting up a new restorative justice program).

322. *Id.* at 575.

323. See LEE ET AL., *supra* note 95, at 24–28 (Red Hook); Harriman, *Restoring Justice*, *supra* note 1, at 33–37 (North Lawndale).

324. See DRYZEK, *supra* note 317, at 172–74 (explaining deliberation and effective problem-solving); see also Dzur, *Civic Implications*, *supra* note 38, at 293–94 (“Conferences, according to Braithwaite, can be like micro-institutions of deliberative democracy that allow citizens to discuss the consequences of criminal acts, who is responsible, who should put them right and how.” (internal quotation marks and citations omitted)).

325. NILS CHRISTIE, *LIMITS TO PAIN* 11 (1981).

326. *Id.*

327. See Dzur, *Civic Implications*, *supra* note 38, at 293–94 (describing how family group conferences are broad in the sense of connecting participants to larger social issues related to crime).

solutions that improve the lives of victims, wrongdoers, and other stakeholders.³²⁸ Everyone in the circle may have something to contribute to the outcome.³²⁹ Furthermore, this “re-stitching” of “torn social fabric” makes a degree of reconciliation possible.³³⁰

Second, by listening to those who have committed crimes and those who are affected by them, the state cedes power to the marginalized. “[W]e can tell how much power a person has by how many people listen to their stories. When the prime minister speaks from his podium many listen; when the pauper on a street corner mutters his stories we walk past.”³³¹ By listening to disempowered groups, restorative justice circles center their lives and needs rather than serving an impersonal state by incarcerating the guilty.

Third, generally, those who deliberate as part of the process may also become better deliberators, both personally and politically. “These same people who personally participate in criminal justice and are energized by the experience may choose to exercise their citizenship in other ways, such as by voting or becoming involved in other civic activities.”³³² Barbara A. Smith, a justice on the Supreme Court of the Chickasaw Nation in Oklahoma, said that those who participate in peacemaking processes can later use what they learned as a “life tool,” which its “users can rely on down the road to improve communication and promote harmony.”³³³

Relatedly, Albert Dzur points out that restorative justice’s goal to decrease punitiveness boils down to three democratic principles: (1) the rationality threshold, (2) the responsibility threshold, and (3) the punitiveness threshold.³³⁴ He argues that restorative justice deliberations should shape citizens’ views of criminal justice relating to these thresholds in particular ways. First, the rationality threshold means that those participating in restorative justice processes will have their “views of punishment, sentencing, and criminal justice process [] tested against others’ views, challenged, pressed for grounding in principles, reasons, and facts.”³³⁵ Although Americans currently put great faith in incarceration

328. See generally Wojciech Zalewski, *Restorative Justice—A Form of Deliberative Democracy?*, 21 BIAŁOSTOCKIE STUDIA PRAWNICZE 23, 23–31 (2016).

329. *Id.*

330. Kleinfeld, *Three Principles*, *supra* note 19, at 1457–58.

331. Braithwaite, *Standards*, *supra* note 136, at 564.

332. McConkie, *Citizenship*, *supra* note 10, at 1049 (citing ANDREW GUTHRIE FERGUSON, *WHY JURY DUTY MATTERS* 75–76 (2013)).

333. Wolf, *supra* note 38, at 1, 3; Appleman, *supra* note 275, at 1418.

334. See Dzur, *Civic Implications*, *supra* note 38, at 295–97 (asserting that “the ‘decline in punitiveness’ goal” points to these principles).

335. *Id.* at 295.

to address crime, that has not always been the case, and there are some signs that incarceration is becoming less popular.³³⁶ “If dialogue oriented restorative justice forums were widespread, citizens would come in contact with real cases, real victims, and real offenders, rather than the abstractions popularized in campaigns and in media treatments.”³³⁷ This experience might mitigate any reflexive desire to punish.³³⁸

Second, participants will hopefully learn that what the criminal process does to offenders and victims is “ultimately the democratic responsibility of all citizens.”³³⁹ Dzur calls this the “responsibility threshold.”³⁴⁰ He points out that, while Americans have come to think that criminal justice is the province of experts, greater participation will show citizens another way of doing justice: The rules and processes of criminal procedure can be flexible according to the needs of each case. Those rules and processes are politically constructed. Accordingly, through restorative justice, the people can and should take responsibility “to make sure criminal justice expresses the values under which they truly wish to live.”³⁴¹

Finally, Dzur posits that restorative justice participants may “come to realize that punishment is less rational or less morally desirable than other forms of resolving harms to victims and communities caused by offenders.”³⁴² This assertion is possibly speculative—the fact that citizens may eventually come around to this point of view is appealing but not a necessary consequence of deliberation.

Deliberation theory has been roundly criticized in many quarters, and there is no question that perfect deliberation is rarely if ever, achieved.³⁴³ People do not always bother to become informed about issues, and they may not really listen to or consider what others have to say. Furthermore, “deliberative mechanisms tend to amplify predictably dominant voices while muffling others. In other words, the ‘community values’ that appear to emerge from community meetings and the like disproportionately

336. See Jeffrey Bellin, *Understanding Mass Incarceration in the US is the First Step to Reducing a Swollen Prison Population*, CONVERSATION (Mar. 2, 2023), <https://theconversation.com/understanding-mass-incarceration-in-the-us-is-the-first-step-to-reducing-a-swollen-prison-population-200041> [<https://perma.cc/YP2W-YBTG>]; see also BIBAS, *supra* note 103, at 1–27 (discussing Americans’ changing attitudes toward punishment).

337. Dzur, *Civic Implications*, *supra* note 38, at 296.

338. *Id.*

339. *Id.* at 295.

340. *Id.* at 297.

341. *Id.*

342. *Id.* at 295. Dzur admits that this is not likely to become popular, but it is still at the core of what restorative justice is. *Id.* at 296–97.

343. See Rappaport, *supra* note 289, at 748–49 (explaining that deliberation theory “is entirely idealized”).

reflect relatively powerful factions of the community.”³⁴⁴ These are real concerns that need to be considered in designing any form of public deliberation. But if the alternative is no public deliberation at all, the shortcomings of these arguments are laid bare. Democracy is impossible without some deliberation, and there is solid research into effective methods of incorporating citizen deliberation into democratic processes.³⁴⁵ Specifically, restorative justice is a method of democratic deliberation with a long track record in human societies worldwide of harnessing wisdom and participation of a broad array of crime’s stakeholders.³⁴⁶

To summarize, restorative justice is a form of democratic problem-solving that institutionalizes key tenets of citizenship—including lay participation and deliberation. Any good democracy must provide means for its citizens to band together to seek solutions for shared problems, and their ability to do so well is called “collective efficacy” or “civic capacity.”³⁴⁷ This idea is old: Alexis de Tocqueville famously observed that “in democratic societies, the art of combining is the mother of all other human arts.”³⁴⁸ Civic capacity rests on overlapping clusters of small organizations, especially between neighbors who trust each other and are willing to work together as needed.³⁴⁹ “The core structures for creating and deploying civic capacity are stable coalitions that authorize things and implementation-focused alliances that get things done.”³⁵⁰ For restorative justice, a stable political coalition must authorize and support a restorative justice program such as a community court.³⁵¹ Although addressing crime is inherently contentious, restorative justice courts grounded in authentic, non-partisan community support can produce real results and achieve durable support.³⁵² A restorative justice program or

344. *Id.* at 749.

345. *See, e.g.*, OECD, 249, at 19.

346. *See* John Braithwaite, *Restorative Justice*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 323, 323 (Michael H. Tonry ed., 2000) (“Restorative justice has been the dominant model of criminal justice throughout most of human history for all the world’s peoples.”).

347. BRIGGS, *supra* note 243, at 9. This goes beyond social capital, which measures only connections—that’s an important ingredient of civic capacity but not its only measure. *Id.* at 8–9.

348. *Id.* at 8.

349. *See id.* at 9 (“[C]ollective efficacy also captures the core concept of democracy as a recipe for collective (or ‘community’) problem solving.”).

350. *Id.* at 12.

351. *See id.* at 11 (“[I]t is possible to construct effective forms of civic capacity, under particular conditions and often against long odds”); *id.* at 12 (“The core structures for creating and deploying civic capacity are stable coalitions that authorize things [such as issue-specific Left-Right coalitions] and implementation-focused alliances that get things done.”). In America, the major political parties have generally failed to endorse restorative justice, although local politicians in some jurisdictions have championed it. *Id.*

352. *See id.* at 14 (“Communities need civic pillars that withstand the contentiousness that tackling major public issues invariably triggers.”).

court, once it has popular support, depends on small- and large-scale “implementation-focused alliances.”³⁵³ On a smaller scale, each restorative circle or case requires collaboration among all of its varied participants. On a larger scale, the program itself, as in Red Hook and North Lawndale, often has a board of directors representing various interests.³⁵⁴

By some measures, Americans do not create local associations as well or as often as they used to.³⁵⁵ When they do, they do so in different ways from the past. Briggs points to a massive loss of trust in public institutions and experts, “a massive decentralization of decision making ‘downward’ to local governments and ‘outward’ to private and nonprofit contractors,” “the diffusion of ‘empowerment’ as an antihierarchical organizing principle for society,” and other factors.³⁵⁶ All this may imply a greater need for government to facilitate local democratic practices.³⁵⁷

Because restorative justice programs reflect local ideals, programs will naturally differ from each other. The civic capacity to address a particular problem will be limited to a specific locality; that approach will be inherently unique and not necessarily transferable to another locality; it will require a stable institution, a “pillar of civic capacity,” to “withstand the contentiousness that tackling major public issues invariably triggers.”³⁵⁸ John Braithwaite argues that we should value this diversity of approaches and allow “a thousand flowers to bloom.”³⁵⁹ Embracing diversity will foster innovation and help make restorative justice authentically democratic. Furthermore, it will prevent over-regulation and dry legalism from desiccating the creative, humanistic aspects of restorative justice. Still, as states gain more experience with restorative justice, they may ultimately set some standards that come to be widely accepted.³⁶⁰

353. *Id.* at 12.

354. *See supra* Sections I.C, I.D.

355. *See* Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 374–75 (discussing the decline of civic involvement and public engagement since the 1960s).

356. BRIGGS, *supra* note 243, at 10.

357. *See* Dzur, *Restorative Justice and Democracy*, *supra* note 50 at 374–75. Dzur points to Portland, which had a mayor’s office that facilitated local activism, and even the Environmental Protection Agency, which has fostered local action, as examples. *Id.* The same can be done with restorative justice.

358. BRIGGS, *supra* note 243, at 14.

359. Braithwaite, *Standards*, *supra* note 136, at 575.

360. *See id.* at 570 (discussing how maximizing standards will serve as “useful yardsticks for evaluating restorative justice programmes”); *see also* González, *supra* note 15, at 1150–51 (cataloging restorative justice laws in all states, and noting some trends).

D. Membership: Addressing Crime in a Way That Strengthens and Repairs Social Bonds

Membership refers generally “to one’s belonging to the political community as an equal and having a sense of that belonging.”³⁶¹ This belonging relates to “who can participate [in government processes] and whether they can participate on an equal basis.”³⁶² It implies a larger social order to which there is a shared commitment, often referred to as solidarity; accountability to others as a member of that order, including a duty to respect their rights and interests; and trust in the government that regulates that order.³⁶³

The carceral state is detrimental to the membership aspect of citizenship. It famously and notoriously exacerbates inequality and marginalizes the voices of offenders and victims alike.³⁶⁴ It controls criminal justice decisions based on a carceral logic that is foreign to and harmful to many communities. It does little to nothing to address the root causes of crime or to attempt to repair the relationships in which crime ruptures. It incarcerates excessively, removing too many people from the community and permanently branding them as criminals.³⁶⁵

Restorative justice can counteract many of these consequences by repairing harms, reintegrating offenders, and inviting local democratic participation in a common cause.³⁶⁶ It promotes various facets of the membership pillar of citizenship, especially (1) accountability to others, (2) solidarity (a “shared commitment to social order”), (3) “a sense of belonging,” (4) legitimacy (“acceptance of state authority”), and (5) civic equality, in terms of both rights and duties.³⁶⁷

1. Accountability

Our “adversarial and non-participatory” system “does little to challenge any stereotypes or rationalizations offenders have built up about

361. McConkie, *Citizenship*, *supra* note 10, at 1036.

362. *Id.* at 1026.

363. *Id.* at 1035.

364. See ALEXANDER, *supra* note 30, at 17 (analogizing the current criminal justice system to a caste system that promotes stigmatization, discrimination, marginalization, and demonization of racial minorities).

365. See *id.* at 140–220 (providing a detailed analysis of the determinantal consequences of the carceral state).

366. See Dzur, *Civic Implications*, *supra* note 38, at 281 (discussing how these factors serve as “primary indicators of [restorative justice’s] success”).

367. See McConkie, *Citizenship*, *supra* note 10, at 1035 (defining “democratic citizenship” and its relation to and influence on the criminal justice system); RICHARD BELLAMY, *CITIZENSHIP* 12 (2008); Russell J. Dalton, *Citizenship Norms and the Expansion of Political Participation*, 56 *POL. STUD.* 76, 78–79 (2008).

their victims and about society in response to their crimes.”³⁶⁸ Instead, the system equates individual accountability with accepting punishment (incarceration) for crime—which encourages offenders to deny wrongdoing and evade punishment.³⁶⁹ Even offenders who might be inclined to accept personal responsibility for their actions typically avoid punishments that are, at best, indirectly related to any harm they may have caused.³⁷⁰ Furthermore, the system denies offenders any obligation or opportunity to “answer the victims’ questions, listen to them, honor their pain, express genuine remorse, or do what they can to repair the harm they’ve done.”³⁷¹ In contrast, restorative justice situates accountability in our relationships with others.³⁷² It helps wrongdoers consider the harm they have caused, helps them repair that harm as much as possible, and helps them consider their ongoing social obligations.

Restorative justice also, through popular participation, encourages the community to better understand and take responsibility for its role in crime.³⁷³ Through an emphasis on listening, restorative justice helps a community “take a good hard look at itself” to consider other factors contributing to crime beyond a wrongdoer’s bad choices.³⁷⁴ None of this necessarily takes away from the individual responsibility of wrongdoers, but it helps communities keep “in perspective” the fact that crimes do not occur in vacuums.³⁷⁵ Community conditions, including the economy, public health and education systems, and cultural attitudes, can influence others’ decisions about whether to obey the law.

368. Dzur, *Civic Implications*, *supra* note 38, at 286–87; *Id.* (“At minimum, because the criminal process is so complex and so offender-oriented, they are caught up entirely in their own legal situations. Consequently, offenders rarely are encouraged or allowed to see the real human costs of what they have done.” (quoting HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 41 (1990))).

369. *Id.*

370. *Id.*

371. Alexander, *supra* note 5 (“[Defendants are] not required to take steps to heal themselves or address their own trauma, so they’re less likely to harm others in the future.”).

372. See Jerusalem Demsas, *Derek Chauvin’s Conviction Shouldn’t Obscure How Broken Our Criminal Justice System Is*, VOX NEWS (Apr. 21, 2021), <https://www.vox.com/2021/4/21/22395068/derek-chauvin-george-floyd-verdict-protests-change> [<https://perma.cc/2SEB-KEZD>] (detailing a conversation with Professor John Pfaff).

373. See Goldbach & Hans, *supra* note 294, at 10–11 (providing examples of the positive impact of community involvement in various stages of criminal proceedings).

374. Wolf, *supra* note 38, at 7; see Ernest, *supra* note 52, at 14 (summarizing the benefits of community involvement in an offender’s societal rehabilitation); see also Gordon Bazemore, *Restorative Justice, Earned Redemption and A Communitarian Response to Crime* 47–51 (May 1999) (Communitarian Network & Geo. Wash. Inst. For Communitarian Pol’y Stud. Position Paper) (discussing role of community in providing support to offenders to prevent crime).

375. Seng, *supra* note 55, at 509.

For example, considering factors extrinsic to wrongdoers is critical to effectively addressing violent crime. Our current strategy is long prison sentences, but those sentences themselves are criminogenic.³⁷⁶ Danielle Sered insightfully writes, “[T]he core national violence prevention strategy relies on a tool [mass incarceration] that has as its basis the central drivers of violence.”³⁷⁷ Incarceration is not the most effective way to change violent people or protect others from violence.³⁷⁸ Violence does not arise *ex nihilo* from the minds of dangerous individuals; it has a social context and a history.³⁷⁹ The system’s overuse of violence to address violence is incongruent with other purposes of sentencing and evinces a profound moral crisis that goes beyond individual wrongdoing at the center of our society’s response to violence crime.³⁸⁰ Conventional criminal procedure often narrows the time frame down to the incident in question, ignoring the complicated history that victims have been offenders and vice versa.³⁸¹

Even in homicides—where the state will likely prosecute regardless of any available restorative justice processes—the victims’ families and the larger community can benefit from restorative justice. Peacemaking allows the community to “take a good hard look at itself,” encouraging participants to ask, “What role, what responsibility do we have as a community?”³⁸²

376. See Damon M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 CRIME & JUST. 353, 353 (2021) (“Based on a much larger meta-analysis of 116 studies, the current analysis shows that custodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions such as probation.”); see also ASHLEY NELLIS, SENT’G PROJECT, STILL LIFE: AMERICA’S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 6 (2017) (“[T]he impulse to engage in crime, including violent crime, is highly correlated with age, and by one’s early 40s even those identified as the most chronic ‘career criminals’ have tapered off considerably. Lifelong imprisonment with limited or no chance for review only serves a retributive purpose and is often counterproductive for purposes of crime control.” (footnotes omitted)).

377. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 2 (2019).

378. See *id.* at 2 (explaining how incarceration intensifies violence by contributing to a series of disruptive factors).

379. *Id.* at 3 (“Nearly everyone who commits violence has also survived it, and few have gotten formal support to heal.”).

380. *Id.* at 33–35. See also *id.* at 35 (“[I]n the richest nation in the world with arguably the largest and most expensive criminal justice system in human history, the majority of people who survive violence prefer *nothing* to everything we have to offer.”).

381. I owe this insight to Eve Hanan, Assoc. Dean for Fac. Dev. & Rsch., U. Nev. L.V., William S. Boyd Sch. of L., Remarks at Conference (on file with author).

382. Wolf, *supra* note 38, at 7; see also Jennifer J. Llewellyn & Brenda Morrison, *Deepening the Relational Ecology of Restorative Justice*, 1 INT’L J. RESTORATIVE JUST. 343, 343–45 (2018) (documenting how a university’s use of restorative justice in a sexual harassment case helped to expose and address a broader culture that fostered the sexual harassment).

2. Solidarity

Solidarity describes “social interdependence”³⁸³ and a “sense of a shared civic project.”³⁸⁴ A degree of solidarity is required for people in a locality to work together to address common problems. It depends in part on the quality of interpersonal relationships, institutions, and civic equality that help people to work together.

Restorative justice fosters a sense of solidarity because it represents a local effort to repair crime’s harms and address its root causes.³⁸⁵ Restorative justice assumes that the offender is part of the community and that, fundamentally, they are on the same side, even though crime may have created a breach in that relationship that needs to be healed.³⁸⁶ “Procedural justice studies report the critical value of respectful and inclusive dialogue that takes participants’ views seriously and allows them to learn more about offenders. This helps people see beyond offenders as others and mentally reintegrate them into the human family.”³⁸⁷

In this way, restorative justice can bolster social solidarity by simultaneously holding offenders accountable for their actions and reintegrating them into the community. Whereas American criminal justice traditionally punishes whole communities through harsh collateral consequences, restorative justice promises to strengthen communities. Currently, those who are convicted of serious crimes can suffer a wide range of collateral consequences, including disenfranchisement, loss of housing, welfare benefits, jobs, and parental rights, barriers to higher education, and increased chances of deportation.³⁸⁸ These consequences weaken entire communities.³⁸⁹ In contrast, restorative justice attempts to facilitate

383. McConkie, *Plea Bargaining*, *supra* note 10, at 1043.

384. McConkie, *Citizenship*, *supra* note 10, at 1039.

385. See Robert Yazzie, “Hozho Nahasdlíi”—*We are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 122 (1996) (“[The Navajo concept of] *K’è* describes many emotions: respect, good relationships, love, and group solidarity. It is feelings, it is good relationships. *K’è* promotes and prompts trust.”).

386. Restorative justice among Bantu speakers in Africa have a philosophy called *Ubuntu*, a Zulu word meaning “a person can only be a person through other people.” McConkie, *Promoting and Reforming*, *supra* note 37 (manuscript at 7); see also DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 31–32, 54–55 (1999) (defining and explaining that *Ubuntu*’s “central concern is the healing of breaches, the redressing of imbalances” through restorative principles).

387. Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 377 (emphasis omitted); see also Albert W. Dzur, *The Myth of Penal Populism: Democracy, Citizen Participation, and American Hyperincarceration*, 24 J. SPECULATIVE PHIL. 354, 372–73 (2010) (elaborating on the positive impacts of public participation in restorative justice to humanize offenders, resulting in more empathetic outcomes).

388. SERED, *supra* note 377, at 172.

389. See, e.g., Ta-Nahisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age->

reconciliation between offenders and victims and whole communities.³⁹⁰ Where possible, instead of removing offenders from their communities, it seeks to reintegrate offenders into the community as equal and fully participating members without unduly restricting their future opportunities. This may reduce recidivism and enhance public safety better than our current system.³⁹¹ But even where offenders are incarcerated, restorative reintegration practices can be employed to “build social capital and make the community more receptive and engaged in supporting the offender’s reintegration.”³⁹²

Restorative justice is a radical reconceptualization of our criminal process, which erroneously “presuppose[s] a clean separation between the interests of the public and the interests of the defendant”³⁹³ Likewise, restorative justice is a radical reconceptualization of “punishment” toward strengthening civic bonds.³⁹⁴ Our dominant theories of punish-

of-mass-incarceration/403246/ [https://perma.cc/6RCE-UCVE] (emphasizing the deleterious consequences of incarceration and discussing how the criminal justice system “has, in effect, become a credentialing institution as significant as the military, public schools, or universities—but the credentialing that prison or jail offers is negative”); Roberts, *supra* note 24, at 1277 (“[I]ncarceration has become a systemic aspect of community members’ family affairs, economic prospects, political engagement, social norms, and childhood expectations for the future. . . . Investigating the community-level impact of incarceration helps to reframe the issues raised by the stark racial disproportionality in the nation’s prisons and the criminal justice system generally.” (footnote omitted)).

390. For an innovative approach to reconciliation using restorative justice within prisons, see Gerry Johnstone, Eur. Comm. on Crime Problems, *Restorative Justice in Prisons: Methods, Approaches and Effectiveness* 6–9 (Sept. 29, 2014), <https://rm.coe.int/16806f9905> [https://perma.cc/VZ7J-QZYN]. Prison Fellowship International’s Sycamore Tree Program brings crime victims and volunteers into prisons to have structured classes and conversations with inmates about the effects of crime and discuss how to make amends. *Id.* The crime victims, however, are not victims of these particular inmates’ crimes. This program benefits not only inmates but also volunteers and crime victims. *Id.*

391. See *supra* Section I.B.1 (discussing evidence that restorative justice reduces recidivism).

392. U.N. OFF. ON DRUGS AND CRIME, *INTRODUCTORY HANDBOOK ON THE PREVENTION OF RECIDIVISM AND THE SOCIAL REINTEGRATION OF OFFENDERS* 84 (2012).

393. Simonson, *supra* note 45, at 271.

394. See Ekow Yankah, *Crime, Freedom and Civic Bonds: Arthur Ripstein’s Force and Freedom: Kant’s Legal and Political Philosophy*, 6 CRIM. LAW & PHIL. 255, 269 (2012) (“[A] republican theory reminds us that law and punishment is ultimately about upholding civic equality, illustrating civic concern and preserving civic bonds. Thus, a republican view naturally reminds us that while punishing criminal actors is critical to upholding civic equality, our responsibilities to the victims of crime may not end with punishing the offender.”). There are some interesting restorative justice-adjacent projects that help criminals to continue to be a part of their community, such as a program at a Green Bay prison where inmates who are visited by families of murder victims from the community (unrelated to the crime they committed) to help them find understanding and healing. Barton & Zahn, *supra* note 111.

ment do not adequately consider the importance of community; they are individualist.³⁹⁵

3. Belonging

The democratic deliberation and participation that restorative justice fosters can result in an improved sense of belonging for members of a community, offenders, and victims alike. Restorative justice helps citizens see each other as peers, not enemies. “Procedural justice studies report the critical value of respectful and inclusive dialog that takes participants’ views seriously and allows them to learn more about offenders. This helps people see beyond offenders as *others* and mentally reintegrate them into the human family.”³⁹⁶ That has been the case with the North Lawndale Community Justice Center.³⁹⁷ Furthermore, community members who participate in restorative justice processes may “feel connected to both the inner workings of the criminal justice system and the larger civic structure.”³⁹⁸

Sometimes, people want harsh sentences for those who are different, while at the same time, they want thoughtful and even merciful sentences for their own family and friends. Any criminal justice system must answer the questions, “Who is worthy of respect?” and “How will that respect be shown?” One RHCJC judge states that the RHCJC’s success:

rests on that central idea that *everyone deserves respect*. “It all starts from understanding that everybody who comes through your doors, whether they walk in through the front door or they’re brought in through the back door by the police, *they’re a member of your*

395. See, e.g., Ekow N. Yankah, *The Right to Reintegration*, 23 NEW CRIM. L. REV. 74, 75 (2020) (“[Under] [a] republican political theory, centered on our shared civic bonds, . . . punishment is justified where a citizen attacks another in ways that deny their civic equality and undermine our ability to maintain a common civic life. It is the seriousness of this threat that requires forceful common repudiation. But the same justification, requiring we protect civic equality through punishment, compels the state to reintegrate offenders after punishment; the right to punish and the obligation to reintegrate are complimentary political duties.”).

396. Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 376–77; see also Dzur, *The Myth of Penal Populism*, *supra* note 387, at 354–79.

397. Press Release, Cook County Circuit Court, Illinois, Restorative Just. Cmty. Ct. Arrives in North Lawndale (July 20, 2017), <http://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2564/Restorative-Justice-Community-Court-arrives-in-North-Lawndale> [https://perma.cc/DH9F-HMEQ] (“Every human being in every community wants safety and a sense of belonging. This court helps provide structure and support so that the community of North Lawndale can bring that healing home.” (quoting Judge Colleen F. Sheehan)); *Id.* (“[T]he NLRJCC helps reintegrate offenders back into the community by connecting them with services including mental health counseling, substance abuse treatment, education, job training, and parenting classes.”).

398. Appleman, *supra* note 275, at 1418.

community. They are a member of your community before they had a case, while the case is pending and after the case is over with.”³⁹⁹

In viewing crime through a larger perspective of a person’s whole life and its community context, restorative justice bucks the modern trend of defining someone solely by the worst thing they have ever done.⁴⁰⁰

Beyond respect, an even more difficult question is, “Who deserves mercy, and under what circumstances?”⁴⁰¹ The conventional justice system is not known for mercy. It may carve out somewhat more lenient treatment for juveniles, some drug users, and some first-time offenders, but the bulk of the adult population, however, receives little lenience.⁴⁰² In contrast, restorative justice seeks to unlock the potential in offenders and whole communities by expanding the circle of mercy under the right circumstances.⁴⁰³

4. Legitimacy

Membership includes citizens’ acceptance of the government’s power and of the political system. “Citizens are more likely to view [the] law as legitimate if it reflects the will of the people in some meaningful way, and if its burdens and benefits are equitably distributed.”⁴⁰⁴ These citizens should be more willing to actively participate in public processes.⁴⁰⁵

Restorative justice is, by its nature, grassroots and, therefore, helps restore the system’s legitimacy. This is especially important in communities that lack trust in the criminal justice system. In the NLRJCC, “You [the offender or community member] aren’t trusting the judge or the prosecutor—you’re trusting your neighbor who is sitting in the circle next to you.”⁴⁰⁶ Restorative justice courts like those in Red Hook and North

399. Vock, *supra* note 154 (emphasis added) (quoting Judge Alex Calabrese).

400. See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17–18 (2014) (“Each of us is more than the worst thing we’ve ever done.”); see also LEE ET AL., *supra* note 95, at 28 (“You can’t divide a person up. . . . You have to have a comprehensive look at the whole person. . . . The community court can look at social issues. It has great potential for eliminating social problems.”).

401. See STEVENSON, *supra* note 400, at 311–14 (noting that all people are deserving of mercy).

402. See *supra* Section I.A (describing America’s vast carceral state).

403. See STEVENSON, *supra* note 400, at 311–14 (explaining the need for just mercy in the criminal justice system).

404. McConkie, *Citizenship*, *supra* note 10, at 1041; see also Gal & Dancig-Rosenberg, *supra* note 58, at 400 (discussing community courts in Israel based on the Red Hook model and seeks “to enhance public trust in the authorities and build institutional legitimacy by strengthening community ties”).

405. See McConkie, *Citizenship*, *supra* note 10, at 1041–42 (“Citizens who are the law’s ‘agents, not merely its obedient subjects,’ will respect the law and be willing to play an active role in the civic enterprise.” (quoting R.A. Duff & S.E. Marshall, *Civic Punishment*, in *DEMOCRATIC THEORY AND MASS INCARCERATION* 36 (Albert W. Dzur et al. eds., 2016))).

406. Kunichoff, *supra* note 211.

Lawndale seek to provide not just substantive justice (meaning a just resolution of the issues at hand) but also procedural justice (meaning participants' and community perceptions of the fairness of the process).⁴⁰⁷ Participants in both the RHCJC and NLRJCC are generally satisfied with the process.⁴⁰⁸ The benefits of this are clear: offenders are more likely to rehabilitate, and community members are more likely to cooperate with and participate in the system.⁴⁰⁹

5. Equality

Finally, restorative justice is strongly associated with providing equal protection of the laws to those involved in criminal justice matters. Whereas the carceral state notoriously does the most harm in minority communities, restorative justice promises hope of better outcomes and less inequality in those communities.⁴¹⁰ Furthermore, if we view crime as offenders dominating victims (as political philosopher Philip Pettit does), the carceral state may exacerbate that dynamic by attempting to use state domination to counteract offenders' domination. This increases domination overall.⁴¹¹ "When properly implemented, restorative justice practices empower marginalized voices and promote non-domination,

407. See Abraham, *supra* note 39, at 25 ("These courts [including in Red Hook] have incorporated a number of restorative practices, and has emphasized the importance of procedural justice, into their adjudication of criminal charges.").

408. See LEE ET AL., *supra* note 95, at 86, 88 (providing ethnographic evidence, such as participants' perceptions that the Judge respected them); see also Harriman, Restoring Justice, *supra* note 1, at 48–52, 61 (explaining that NLRJCC provides dignity to participants and transfers power from the Cook County courts to North Lawndale residents; virtually all offenders who are offered the opportunity to participate in the program choose to do so). High participant satisfaction gives hope to the idea that the surrounding communities have heard positive reports about these courts. Any successful restorative justice program must effectively communicate what it's doing to the affected community, by word of mouth and mass media. RESTORATIVE JUSTICE HANDBOOK, *supra* note 113, at 99. This establishes and maintains trust. *Id.*

409. See Dzur, *Public Restorative Justice*, *supra* note 121, at 57–61 (discussing the significance of community participation); see also Green & Bazelon, *supra* note 42, at 2297–98 (noting the impact of reduced recidivism).

410. See, e.g., Shannon M. Sliva et al., *Fulfilling the Aspirations of Restorative Justice in the Criminal System? The Case of Colorado*, 28 KAN. J.L. & PUB. POL'Y 456, 477 n.134 (2019) ("[D]isparities [in criminal justice] undermine the legitimacy of the law and legal authorities in black neighborhoods and diminish the capacity of residents to engage in collective problem-solving." (quoting Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 487 (2009))).

411. See Dzur, *Civic Implications*, *supra* note 38, at 288; JOHN BRAITHWAITE & PHILLIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 117–18 (1990) ("While the criminal justice system is uniquely concerned with the protection of dominion, it does not have a monopoly on this mission. In fact, most protection of dominion is secured by informal social control in the community, a type of social control the criminal justice system should seek to foster rather than supplant.").

facilitating social justice aims.”⁴¹² Restorative justice processes put offenders, victims, and other parties directly affected by crime at the center of the process, allowing them to come up with local solutions that are less affected by state politics and less likely to harm minority communities disproportionately.

There are concerns that restorative justice’s decentralized and flexible nature will result in sentencing inequality across jurisdictions.⁴¹³ While inequality always merits a close look, Professor Richard A. Bierschbach points out that the critical question is whether restorative justice (or any alternative to our current justice system) “is less unequal—or unequal in more palatable ways—than what we have now.”⁴¹⁴ We can apply Bierschbach’s reasoning to racial inequality. Given the rampant racial inequalities of the current system, the inequalities that might result from decentralized restorative justice—administered locally by the communities most harmed by the carceral state—seem to pale in comparison.

There are also concerns that restorative justice could actually widen the justice system’s net by picking up criminal matters that would have otherwise been too low-level for the conventional justice system to bother with.⁴¹⁵ Although this is a valid concern, restorative justice’s emphasis on voluntary participation (especially in cases where there is no threat of prosecution), facilitates dialogue, and access to social services likely constituting a benefit to offenders, thereby outweighing any net-widening concerns.⁴¹⁶

In summary, restorative justice administered through community courts is not only good for offenders and victims, but it can strengthen the conditions of citizenship and thereby revitalize democracy. As seen

412. Sliva, *supra* note 410, at 476. “Non-domination” is of particular importance to civic republicans. Braithwaite, *Standards*, *supra* note 136, at 565.

413. See Michael M. O’Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89 MARQ. L. REV. 305, 309–12 (2005) (discussing different mechanisms for combining static views of uniformity); see also Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 373 (discussing reasons for nonuniform results from Vermont community boards).

414. Richard A. Bierschbach, *Equality in Multi-Door Criminal Justice*, 23 NEW CRIM. L. REV. 60, 61 (2020).

415. See Harriman, *Restoring Justice*, *supra* note 1, at 62–64 (“When executed poorly, restorative justice programs simply pile on additional sanctions that are difficult for defendants to meet. This makes defendants susceptible to failure, because if they cannot meet the additional requirements, they will be transferred back to a traditional courtroom to be prosecuted. . . . [this] may actually ‘widen the net’ and *increase* the criminal justice system’s level of social control.”).

416. See *id.* at 62–63 (“[I]f net widening funnels individuals into a system that confers a net benefit instead of a net harm, it may be a very good thing—especially if the system can function in a way that does not deny participants of their agency.”); see also Kent Roach, *Conditional Sentences, Restorative Justice, Net-widening and Aboriginal Offenders*, in THE CHANGING FACE OF CONDITIONAL SENTENCING: SYMPOSIUM PROCEEDINGS, RSCH. & STAT. DIV., CANADA DEP’T OF JUST., at 29–35 (2001) (explaining how RJ can mitigate the concerns of net-widening).

in the restorative justice courts in Red Hook and North Lawndale, restorative justice strengthens the key pillars of criminal justice citizenship—participation, deliberation, and membership—and, in so doing, strengthens democracy. Restorative justice provides many opportunities for lay participation and collective civic action to address individual crimes and systemic issues that contribute to crime. Additionally, restorative justice processes require deliberation that brings key stakeholders to the table for dialogue and collaboration in repairing harms. Finally, restorative justice strengthens membership and civic equality by gathering key stakeholders to work together to repair the harms of crime. This promotes a shared commitment to the social order and accountability to others.

III. POLICY PROPOSALS

Restorative justice is an engine of democratic revival and social change that has been successful in the United States, but only on a small scale. This Part proposes three actions to build on that success: (1) more investment in restorative justice to significantly shrink our carceral state; (2) more restorative justice programs that involve many community stakeholders; and (3) more research on whether and how restorative justice revitalizes local democracy.

A. More Investment in Restorative Justice to Shrink Our Carceral State

The American carceral state is vast, representing an annual cost of at least \$80 billion to taxpayers.⁴¹⁷ Most states now have restorative justice programs, but they still handle only a tiny fraction of criminal cases.⁴¹⁸ Instituting more restorative justice programs would naturally shrink that carceral state because it results in little to no incarceration and collateral consequences,⁴¹⁹ and it leaves families and communities intact.⁴²⁰

417. See Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [<https://perma.cc/6YRJ-BUBG>] (“Many experts say that [\$80 billion] figure is a gross underestimate, though, because it leaves out myriad hidden costs that are often borne by prisoners and their loved ones, with women overwhelmingly shouldering the financial burden.”).

418. González, *supra* note 40, at 1156 (noting that as of July 2020, forty-six U.S. jurisdictions had codified some form of restorative justice).

419. See Lanni, *Taking Restorative Justice Seriously*, *supra* note 134, at 681 (“Expanding restorative justice is a tantalizing option because it offers a way to bypass this flawed [carceral] system altogether, and to use a process that has a little something for everyone—more mercy for offenders, but also more empowerment for crime victims.”).

420. In Bangladesh, the government was able to significantly reduce incarceration rates using restorative justice. John Braithwaite, *Paralegals Changing Lenses*, 3 RESTORATIVE JUST. 311, 312 (2015). China has seen some success in using restorative justice methods, albeit with somewhat shallow civil society roots, to reduce incarceration. Yan Zhang & Yiwei Xia, *Can Restorative Justice Reduce Incarceration? A Story from China*, 38 JUST. Q. 1471, 1485–87 (2021).

The research suggests that restorative justice programs are highly cost-effective and reduce recidivism.⁴²¹ The cost of these programs would be more than offset by the savings from shrinking our disastrously expensive and wrongheaded reliance on the carceral state.⁴²² Furthermore, and just as important, these programs harness the power of citizens to work together as equals to repair the harm done by crime and foster social conditions under which crime is less likely. These programs instantiate democratic action that is vibrant, local, and conducive to human flourishing.

Governments at all levels need to make expanded investments in restorative justice. This must include not only funding for centers like the ones in Red Hook and North Lawndale but also training for a future generation of professional restorative justice practitioners.

In considering the allocation of funds, we should also focus on implementing restorative justice in schools and juvenile justice programs to become “engines of democracy-building that help our children to learn to be democratic.”⁴²³ Nor is it too late to teach adults the same thing; they can reap the benefits of participating in restorative justice programs as quickly as such programs are established in more communities.

Furthermore, there is no need to limit the application of restorative justice to low-level crimes. There is evidence that restorative justice interventions can be even more effective in cases of violent crime.⁴²⁴ Unfortunately, many restorative justice practitioners have not yet embraced this idea or learned how to put it into practice.⁴²⁵ The whole justice system would benefit from the gradual introduction of restorative elements into the process, and the hope is that a complete transformation could eventually occur.

At the same time, government and community leaders will have to provide education to the public about the potential benefits of restorative

421. See *supra* Section I.B.1 (providing evidence of the success of restorative justice programs).

422. See *id.* (explaining the cost-effective qualities of restorative justice programs).

423. Braithwaite, *Republican Democracy*, *supra* note 94, at 1523; see also *id.* at 1521 (“It is best for this learning [of democratic problem-solving] to occur during childhood”); see also *id.* at 1523 (“Our justice institutions can be crafted as engines of democracy-building that help our children to learn to be democratic There is an important role here for restorative justice that injects a deliberative democracy that can work better in the micro judicial deliberations of the polity than in legislatures.”).

424. See Alexander, *Reckoning with Violence*, *supra* note 5 (discussing a survivor-center restorative justice program that gives victims an opportunity to shape what repair looks like, and often carry out repairs instead of sending people to prison).

425. See Samantha Jeffries, William R. Wood, & Tristan Russell, *Adult Restorative Justice and Gendered Violence: Practitioner and Service Provider Viewpoints from Queensland, Australia* 10 LAWS 13 (2021) (“[T]here are concerns that RJ may be construed as too lenient and send the wrong message to offenders, potential offenders, victims, and communities that IPDFV/SV is not responded to or dealt with on the same level as other serious violent crimes.”).

justice, especially where the retributive mindset is entrenched.⁴²⁶ This will require governments to cede more direction and management of criminal justice to the citizenry.⁴²⁷ In summary, there are many promising ways to invest in restorative justice, and doing so can divert cases from the carceral state.

B. More Restorative Justice Programs That Involve Community Stakeholders

The potential of restorative justice deliberations to improve citizens' capacity to deliberate with each other and to take responsibility for finding constructive solutions to crime is a good reason to broaden participation in restorative justice. Currently, the most common form of restorative justice program is victim-offender mediation, which is, to some, a far cry from restorative justice. These programs deliver some great results but often fail to get other key stakeholders to the table. That failure inhibits the release of the participatory democratic potential of restorative justice.⁴²⁸ "[R]estorative justice programmes must be concerned with the needs and with the empowerment not only of offenders, but also of victims and affected communities."⁴²⁹ Restorative justice programs must involve more stakeholders in their creation, administration, and circles. These programs need to also serve as community hubs that provide services and serve as gathering places for dialogue, outreach, and action. Promoting such widespread participation requires political will and know-how, and adequate funding. Community justice programs, like Red Hook's and North Lawndale's, provide institutional support to

426. RESTORATIVE JUSTICE HANDBOOK, *supra* note 113, at 65 ("Some members of the community may at first view a restorative justice process as more lenient and less effective at preventing crime than the traditional criminal justice system and its reliance on punishment. A restorative justice programme may be perceived to allow the offender to get off 'lightly,' particularly when a more serious offence is involved. It is therefore always important to develop materials and design initiatives to educate the community about the principles and practices of restorative justice and the potential role that community members can play. For a longer-term impact, restorative justice can be included in school and university curricula.")

427. See Harriman, *Restoring Justice*, *supra* note 1, at 34–40 (providing an example of a partnership between a community organization and court system that promulgated restorative justice around Chicago).

428. See Dzur, *Public Restorative Justice*, *supra* note 121, at 55–57 (describing examples of successful citizen participation in formative justice programs); see also Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 375 (noting that victim offender mediation is most common RJ but least democratic); see also Kleinfeld et al., *White Paper*, *supra* note 33, at 1703 ("These restorative justice institutions and proceedings should embrace [1] the participation of immediate stakeholders, [2] local communities more broadly, and [3] networks of care and support for both offenders and victims.").

429. Braithwaite, *Standards*, *supra* note 136, at 567; see also Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. REV. 323, 347 (2017) (discussing community-based restorative justice).

restorative justice and help it to interface with the community and its various stakeholders, with the proper facility, and with social services. These programs may be key to scaling up restorative justice efforts.⁴³⁰

Another good reason to expand the reach of restorative justice programs into the community beyond what simple victim-offender mediation can accomplish is the potential to change public attitudes about criminal justice. As more people learn firsthand about restorative justice through direct participation in community courts and restorative justice processes, it will hopefully have a “humanizing impact” on how they think about punishment.⁴³¹

One challenge to expanding these programs into communities that need it most is that sometimes “the communities most in need of healing are also those least able to successfully mobilize themselves and to participate fully in community-based restorative processes.”⁴³² However, successful programs in many communities throughout the United States, like North Lawndale, show that these challenges can be overcome.⁴³³ Restorative justice programs generally must involve more community stakeholders to realize the benefits of criminal justice citizenship.

C. More Research on How Restorative Justice Revitalizes Democracy

Currently, restorative justice research tends to focus on recidivism and victim satisfaction.⁴³⁴ As important as these are, they fail to measure broader social and democratic impacts. “Less than 5% of the studies measured success related to stakeholder relations/socialization, emotions,

430. See Lanni, *supra* note 134, at 639 (“Ensuring equal access to restorative justice may require large-scale implementation of restorative justice programs that may compromise quality and attention to local community concerns.”); see also *id.* at 641 (“[A] relatively broad and flexible conception of restorative justice would be necessary if these programs are to be scaled up to have a meaningful impact on incarceration.”).

431. *Contra* Dzur, *Public Restorative Justice*, *supra* note 121, at 51 (“This type of program has not had a significant humanizing impact on how most Americans think about punishment practices.”).

432. RESTORATIVE JUSTICE HANDBOOK, *supra* note 113, at 97.

433. *But see id.* at 98 (“[I]t cannot always be assumed that restorative justice practices will necessarily have a healing and transformative effect, irrespective of the situation in which a community finds itself. In some instances, existing social tensions, inequities and inequalities, power differentials, and various forms of exclusion, discrimination or ostracism may be exacerbated rather than alleviated by introducing a participatory justice programme.”).

434. See Ernest, *supra* note 52, at 98 (“From examining the outcome measures of 121 studies, it is clear that the victims and community members who participate in the restorative process are generally not prioritized ahead of offenders. Aside from minimal experiential outcome measures such as support stakeholder and community stakeholder satisfaction (n=13), support stakeholders (i.e., parents, peers, citizens) were excluded from the evaluation process entirely. By comparison about three-quarters of studies examined at least one outcome focused exclusively on victims or offenders (n=89, 73.6%).”).

and perceptions, not including victim satisfaction.”⁴³⁵ These measurements are too narrow considering the broader function that restorative justice must serve in our society. Researchers should also measure how restorative justice programs affect public attitudes toward criminal justice (e.g., punitiveness) in localities. Some researchers examine the effects of restorative justice on the whole community,⁴³⁶ but this form of research is rare.⁴³⁷ The United Nations Handbook on Restorative Justice Programmes suggests that program evaluations of restorative justice include: (1) “The number of volunteers and volunteer hours contributed to restorative processes” (a good measure of public participation), (2) “The attributes (e.g., age, gender, ethnicity) of crime victims, offenders, community members who participate in restorative processes, and facilitators,” and (3) “The perceptions of participants [not limited to victims and offenders] and their satisfaction with their experience of the process and its outcomes.”⁴³⁸ It would also be helpful for future studies to consider broader factors in communities served by restorative justice programs, like “changes in public opinion” and “a decline in prison populations.”⁴³⁹ Few researchers have investigated the democratic benefits of restorative justice. As they begin to do so, we will be better able to harness those benefits.

CONCLUSION

Restorative justice is more than an effective alternative method to deal with crime. Unlike our current bureaucratized criminal justice system, restorative justice promises to strengthen our democracy. Happily, restorative justice and my framework for analyzing its democratic dimensions have appealing elements for both the political Left and Right, making this a plausible route for reform in our polarized times.

As the courts in Red Hook and North Lawndale have demonstrated, restorative justice can allow citizens to participate and deliberate about criminal justice in a way that helps victims, holds offenders accountable without treating them as less than fully equal to other citizens, and harnesses the power of communities to act together and flourish. These courts exemplify restorative justice as a democratic practice, a kind of social order “wherein a criminal charge does not permanently regulate a

435. *Id.* at 97.

436. *See* LEE ET AL., *supra* note 95, at 9–13 (examining an example of community courts in the criminal justice landscape).

437. *See* Harriman, *Restoring Justice*, *supra* note 1, at 15 (“Most community court evaluations have focused on individual participants, and not the community at large.”).

438. RESTORATIVE JUSTICE HANDBOOK, *supra* note 113, at 105.

439. Dzur, *Restorative Justice and Democracy*, *supra* note 50, at 377.

person to the bottom of our society's social caste, and wherein even the most marginalized individuals are empowered to find their own solutions to crime and conflict."⁴⁴⁰ The time is now for communities throughout the country to act together to shrink the carceral state by embracing participatory restorative justice.

440. Harriman, *Restoring Justice*, *supra* note 1, at 69.



SCHOOL *of* LAW