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THE CO-OPTATION OF RESTORATIVE JUSTICE AND ITS CONSEQUENCES FOR AN ABOLITIONIST FUTURE

ALICIA VIRANI*

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INTRODUCTION

In 2012, I started a Restorative Community Conferencing (RCC) Program in Long Beach, California.¹ This was a restorative justice (RJ) program modeled after a program in Alameda County, California, run by a non-profit organization, Community Works, which defines RCC as a process for resolving harm through “an organized,

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1. California Conference for Equality and Justice, *Healing Harms*, CAL. CONF. EQUAL. & JUST., <https://www.cacej.org/healing-harms> [<https://perma.cc/52E4-E453>] (last visited Dec. 4, 2023).

facilitated dialogue in which young people, with the support of family and community members, meet with their crime victims to create a plan to repair the harm caused by their offense.”²

The program accepted referrals from law enforcement and district attorneys of young people under the age of eighteen who would have been prosecuted but for being diverted away from arrest or official charges and into our program.³ The following is a story of an RJ process I facilitated that highlights the power of restorative justice (RJ) to exist as an alternative to the criminal punishment system.

A sixteen-year-old girl, I’ll call her Noemi, was referred to the RCC program for a felony battery. I first met Noemi and her mother at their small apartment in the Pico-Union neighborhood of Los Angeles. I was offered a seat next to Noemi’s twin bed, where her eight-month-old son was laying on his back, blowing spit bubbles.

I described the RCC process to Noemi and she immediately agreed to participate. We talked about what she had done and why she thought she had done it. Her mom came into the room and together we talked about what Noemi had been going through at the time of the incident. At the time of this incident, Noemi was in an abusive relationship where she was coerced into doing drugs with her boyfriend. One day, he forced her to break into an apartment building to hangout on the balcony and do drugs. The apartment manager of this building, I’ll call her Sandra, found them and asked them to leave. The three of them started arguing and Noemi punched Sandra in the face, multiple times, leaving Sandra with bruises for weeks. Since this incident, Noemi had ended her relationship with her boyfriend and expressed wanting to make sure that she was in healthy relationships and not using drugs so that she could be the best mom to her son. I could also see that she felt a deep sense of remorse for her behavior and for hurting Sandra.

After meeting Noemi, I then went to talk with Sandra, a middle-aged apartment manager with two young children. She talked about how she was harmed, the multiple bruises on her face, the intrusion of strangers onto the property she manages, and how her children were scared after seeing her injuries. I then explained the RCC process to her, letting her know it could give her the opportunity to meet with Noemi and tell her about how she was harmed, and to have a voice in what Noemi should do to make things right. I also

2. SUJATHA BALIGA, SIA HENRY & GEORGIA VALENTINE, RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST’S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY 1 (2017), https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf [<https://perma.cc/8FBS-KYBJ>].

3. *Id.*

explained that this would be in lieu of court processing of the case. Sandra readily agreed to participate.

I met with Noemi a few more times before the face-to-face meeting to help her work on an apology letter, and each time I did, her clarity around what happened, empathy for Sandra, and ability to take accountability grew.

On the day of the meeting, we all sat in a circle: Noemi, her mom and her son, Sandra and her two kids, and myself and my co-facilitator. Sandra spoke about the harm caused to her, but specifically focused on how her two young children felt in the aftermath of the incident, seeing their mom with bruises. She told everyone that her children were fearful for weeks after this happened, worrying constantly that something else might happen to their mom or to them. Noemi then read her apology letter to Sandra. Noemi was able to explain about her abusive boyfriend who was controlling her life at the time and express her sincere remorse and commitment to refrain from violence in the future. Noemi's mom was also able to express how this incident affected her. In being given an opportunity to discuss their feelings openly, all three women shared many commonalities with each other about being mothers and their desires for their children.

We then moved on to collectively create an accountability plan so Noemi could make things right. Sandra had the opportunity to tell Noemi what she would like Noemi to do. Sandra did not want anything from Noemi for herself, but she asked Noemi if she would write apology cards to her children because Sandra felt this was the biggest harm that had occurred. Noemi immediately agreed to this suggestion and asked Sandra what her children's favorite cartoon characters were. Noemi, who is an artist, committed to drawing and writing apology cards to Sandra's children. Sandra expressed a lot of care and concern for Noemi's situation with her ex-boyfriend. She wanted Noemi to be connected to some form of counseling to help her heal from the impact of her ex-boyfriend. Noemi agreed to this. Noemi and her mother also made suggestions for the accountability plan including finding Noemi a job and getting her GED. I continued to meet with Noemi after this circle, helping her find connections to a young women's counseling group, a part-time job at a non-profit, and hand-delivered the apology cards to Sandra's children.

What occurred in this RCC process likely sounds foreign to anyone who has intimate knowledge of the juvenile and criminal punishment systems. Being a part of this process allowed every participant to define harm, healing and accountability for themselves. Had this case gone through the criminal punishment system, Sandra's children, and the harm they experienced from this, would

have gone unheard and unaddressed, as they would not have been identified as victims in that system. Noemi likely would never have had to go through the process of writing an apology letter. Instead, she would have had to make multiple court appearances, at best be placed on probation without a period of incarceration and have to fulfill requirements of probation on which she would have no input. Moreover, Sandra and Noemi would never have been able to talk to each other directly; eliminating any potential for them to see their commonalities as mothers and to engage in healing dialogue.

The power of the RCC process as compared to the juvenile punishment system should be clear from this example. However, there were still elements of the juvenile punishment system that crept into our process. By virtue of how the program was structured, at the end of this process, I still had to report back to the District Attorney's Office that Noemi had completed her accountability plan (although the plan itself and everything during the RCC process was kept confidential). Throughout the process, Noemi had the threat of having a juvenile petition filed against her hanging over her head if she did not complete the RCC program. There remained much entanglement for Noemi with the punishment system.

The question I had then and now, was *why*? Two experienced facilitators safely guided this process and engaged in long-term follow-up. Sandra was able to voice what her needs were and have them met. Also, Noemi took accountability and had her needs met. Why was the looming threat of punishment so important to the state in this process? Why was a rubber stamp needed from the District Attorney's Office once this process was over? Could this truly be considered an RJ process given its entanglements with law enforcement and prosecutors? And what legitimacy was I affording the punitive system by allowing it to maintain the power to decide who was eligible to participate in RJ?

These are the questions that this Article seeks to flesh out; but does not claim to answer. RJ processes have the ability to supplant the criminal and juvenile punishment systems as we know it. As I argue in this Article, the core principles of RJ are very much aligned with an abolitionist vision. For advocates of penal and prison abolition, seeking to both dismantle our current system and create a new set of approaches to harm and violence, RJ can provide a north star, offering a nonpunitive, community-centered path forward.

And yet, rather than RJ being used solely outside of the system, what has occurred over the past few decades is the co-optation of RJ by system actors who have sought to embed it within the punitive system in big and small ways. This co-optation has served to obscure the reality that RJ's core principles and those of the criminal

punishment system are fundamentally incompatible. There has also been a lack of critical thought from many advocating for RJ about whether the core principles of RJ can be upheld once RJ is entangled with systems actors.

As argued in this Article, the core principles of RJ are completely in opposition to the way the criminal punishment system operates.⁴ And yet, RJ has still been subsumed and claimed by those who continue to believe in and uphold the existence of the criminal punishment system.

This Article explores the ways in which RJ has been co-opted, argues that RJ's core principles can never coexist with the criminal punishment system, and analyzes how RJ co-optation is a barrier to abolitionist goals. It proceeds in three parts. In Part I, I present the fundamental principles upon which RJ processes should be based. While many scholars and practitioners have identified the lack of a consistent RJ definition⁵ by which to guide the work, I propose that there are fundamental principles that serve to guide RJ, and these are in stark contrast with the principles and realities of the criminal punishment system. Part II describes how RJ has been co-opted by law enforcement, prosecutors, courts, and state law. I provide examples of how co-optation occurs via these state actors and how this co-optation results in a distortion and often a complete obfuscation of RJ's fundamental principles. Finally, Part III discusses how the co-optation of RJ lends legitimacy to the criminal punishment system and expands the web of punitive actors in a way that detracts from abolitionist goals. It also contemplates whether all hope is lost with RJ or whether it can be utilized as an incremental step towards abolition.

I. THE FUNDAMENTAL PRINCIPLES OF RESTORATIVE JUSTICE

Restorative justice (RJ) is a theory and approach to respond to harm and violence that has its roots in indigenous cultures around the world.⁶ Chief Justice Emeritus of the Navajo Nation, Robert Yazzie, defines the Navajo system of “horizontal” justice as:

4. See Teiahsha Bankhead & Rachel V. Brown, *The Restorative Justice Path to Healing Our Communities*, PEACE IN PROGRESS (May 2023), 58, 65–66, <https://www.icip.cat/perlapau/en/article/the-restorative-justice-path-to-healing-our-communities> [<https://perma.cc/QQ6Z-2DCP>].

5. See, e.g., Joseph Robinson & Jennifer Hudson, *Restorative Justice: A Typology and Critical Appraisal*, 23 WILLIAMETTE J. INT'L L. & DISP. RESOL. 335, 336 (2016).

6. See FANIA DAVIS, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND US SOCIAL TRANSFORMATION* 19–20 (Barbara Toews ed., 2019).

A system in which no authority figure has to determine what is “true.” Think of a system with an end goal of restorative justice which uses equality and the full participation of disputants in a final decision. If we say of law that “life comes from it,” then where there is hurt, there must be healing.⁷

The focus of RJ is to collectively identify the harms, needs, and obligations that arise out of a particular incident “in order to heal and put things as right as possible.”⁸

In addition to RJ being a way of responding to harm and violence, it also presents a theory of social relationships.⁹ This theory of social relationships describes for us a *way of being* and relating to one another that creates communities of care and interdependence, intended to prevent violence and encourage accountability to each other.¹⁰ Put simply, the idea is that if I am in relationship with my neighbor, I am less likely to harm them. And if I do harm them, I am more likely to be motivated to take accountability for my actions. Focusing on building healthy social networks is the proactive practice that RJ has to offer and is fundamental to creating the shift in relationships needed to prevent a great deal of harm and violence from occurring in the first place. These proactive practices range from teaching people skills of nonviolent communication, active listening, cultivating communities of support, and a particular tool of RJ: the circle.¹¹

This Article focuses primarily on the aspect of RJ that provides the set of tools and practices that people utilize to respond after harm and violence occur. Restorative justice processes that are activated after harm and violence occur happen in a plethora of ways. Primarily, they are centered around an accountability process for the person who caused harm (PWCH) and a healing process for the person who was harmed (PH).¹² Sometimes, these processes can happen via a collective meeting where the PWCH and PH work towards

7. Robert Yazzie, “Life Comes from It”: Navajo Justice Concepts, 24 N.M. L. REV. 175, 180 (1994).

8. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE: REVISED AND UPDATED 48 (2015).

9. *Id.* at 28–29.

10. *Id.* at 29–30.

11. Restorative justice is typically practiced while sitting in a circle where participants “discuss how they have been affected and reach agreement about what should be done to repair the harm caused.” By sitting in a circle, everyone occupies an equal space on a level playing field and is able to see and hear each other fully. Circles have proven to be an effective space for discussions integral to the healing process. Bankhead & Brown, *supra* note 4, at 59 (citation omitted).

12. See ZEHR, *supra* note 8, at 48–49.

accountability and healing together with their respective communities, in the same room, guided by an RJ facilitator.¹³ These processes have a variety of different names, such as restorative community conferencing, family group conferencing, and victim-offender mediation.¹⁴

RJ as a response to harm and violence is thought to have first taken place in North America in 1974 and proliferated in such a way that “[b]y the end of the 1990’s, 1,500 programs claiming to offer restorative justice practices had been established throughout North America.”¹⁵ As of this writing, thirty-nine states have RJ codified in some form in their state laws.¹⁶ State laws have increased dramatically since the mid-2000s.¹⁷ This may be due to and/or contributing to an even greater explosion of RJ programs in the last two decades.¹⁸

Studies of RJ processes show that they have long-term, positive impacts on all participants, and have much better outcomes than the punitive system along several axes.¹⁹ RJ processes are shown to reduce feelings of fear, anger, post-traumatic stress symptoms, and depression for the PH.²⁰ People harmed are more likely to be pleased with the way their case was dealt with if the PWCH engages in RJ than if prosecution proceeded; this is often labeled as “satisfaction.”²¹ Numerous RJ studies show that satisfaction for all participants is much higher in an RJ process than in the punitive system.²²

13. BALIGA ET AL., *supra* note 2, at 3.

14. *See, e.g.*, ZEHR, *supra* note 8, at 36; *see also* BALIGA ET AL., *supra* note 2, at 3–4.

15. M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 139 (2016).

16. Alicia Virani, Leah Zelder-Ordaz, Emma Engler, Eushrah Hossain, Brisely Martinez & Isaiah Zeavin-Moss, *The Promise and Perils of Restorative Justice Legislation in California*, UCLA SCH. L. CRIM. JUST. PROGRAM 8 (2023), https://law.ucla.edu/sites/default/files/PDFs/Criminal_Justice_Program/The_Promise_and_Perils_of_RJ_Legislation_in_California.pdf [<https://perma.cc/PJD7-LWUFU>].

17. Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1149 (2020).

18. *See* Virani et al., *supra* note 16, at 3.

19. Lawrence W. Sherman, Heather Strang, Geoffrey Barnes, Daniel J. Woods, Sarah Bennett, Nova Inkpen, Dorothy Newbury-Birch, Meredith Rossner, Caroline Angel, Malcolm Mearns & Molly Slothower, *Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences*, 11 J. EXPERIMENTAL CRIMINOLOGY 501, 502–03 (2015); “[Restorative justice conferencing] in general proved more effective than [conventional justice] in preventing recidivism. . . .” *Id.* at 523.

20. *Id.* at 502.

21. *See id.* at 525.

22. *See* BALIGA ET AL., *supra* note 2, at 9 (finding that 91 percent of persons harmed surveyed who participated in Alameda County’s restorative justice program said they would participate in another conference and refer the process to a friend). *See also* Joanna Shapland, Anne Atkinson, Helen Atkinson, Becca Chapman, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson & Angela Sorsby, *Restorative Justice: The Views of Victims and Offenders*, MINISTRY JUST. RSCH. SERIES 1, 26 (June 2007).

In terms of its impact on future risks of violence, RJ has been shown to correlate to a lower likelihood of rearrest, both in the short and long term. Youth who participated in an Alameda County RJ program were forty-four percent less likely to recidivate than youth who were processed through the juvenile legal system.²³ More than recidivism rates, RJ processes have an impact on the PWCH's perspective, including increased empathy for people harmed and an increase in their deliberative and self-reflective processes.²⁴

These outcomes reflect the power RJ can have, which derives from its unique set of principles and values that differ from our current punitive system. While the definition and classification of RJ processes is sometimes up for debate, when one looks at the core values and principles, several emerge across the writings that help to guide RJ practitioners and are foundational to the RJ approach. These fundamental principles can be grouped under these three categories: (1) who is involved in RJ processes; (2) how these individuals engage in the process; and (3) intended outcomes.

A. The "Who" of Restorative Justice

Restorative Justice (RJ) prioritizes the involvement of three main participants: (1) the person harmed (PH) by a particular incident, (2) the person who caused harm (PWCH) in a particular incident, and (3) the community.²⁵

One of the guiding principles of RJ is that the PH is at the center of the process.²⁶ As Howard Zehr states, "[s]ince justice should seek to put right, and since victims have been harmed, *restorative justice must start with those who have been victimized* and their needs."²⁷ This is different from the criminal punishment system where prosecutors represent the state and victims' voices and requests are often unheard.²⁸ The PWCH must also be involved and

("Both victims and offenders were highly satisfied in general, with 85 per cent of victims and 80 per cent of offenders sa[id] they were very or quite satisfied.").

23. BALIGA ET AL., *supra* note 2, at 7.

24. Yotam Shem-Tov, Steven Raphael & Alissa Skog, *Can Restorative Justice Conferencing Reduce Recidivism? Evidence from the Make-It-Right Program*, NAT'L BUREAU ECON. RSCH. WORKING PAPER SERIES 1, 25 (2022).

25. ZEHR, *supra* note 8, at 37.

26. *See id.* at 32.

27. *Id.* at 42.

28. *E.g., id.* at 21; DAVIS, *supra* note 6, at 27 ("Restorative justice elevates the voices of survivors, families, communities, and responsible parties in ways that rarely occur in the adversarial context . . ."); *see also* ZEHR, *supra* note 8, at 32 ("Concerned primarily with making sure those who offend get what they deserve, the legal system usually considers those victimized as, at best, a secondary concern of justice.").

given voice in the process to understand why they caused harm, what they need to ensure that they refrain from causing harm again, and what they can do to be accountable to the PH.²⁹ This again differs from the criminal punishment system. In my experience as a public defender, accused people rarely if ever speak in court, are not asked about what they need to prevent future similar behavior, or what they think they should do to make things right.

RJ processes also allow for the involvement of community in the process in several ways. First, RJ processes emphasize the need for the PH and PWCH to have support throughout the process.³⁰ They are encouraged to identify and involve people in their community (however they individually define their community) who can support their healing and accountability both during and after the RJ process itself.³¹ Second, community is also included in the form of individuals that may have been impacted by a particular act(s) of harm other than the direct PH.³² The idea is that those who witnessed the harm or its aftermath, like Sandra's children in the introduction, as well as those who may be related to or in the same community as the PWCH and the PH may feel the impacts of the incident and may also require healing.³³ For example, if the PH's home was burglarized, their next-door neighbor, upon knowing this, may feel scared to be in their home, and may even take steps to protect themselves such as getting a security system or a gun. RJ acknowledges the ripple effect of harm and thinks of the people harmed as a broad category.³⁴ The PWCH is also encouraged to think about these ancillary effects of their actions and part of their accountability plan can often be a commitment to make things right by the larger community, in a realistic and achievable manner.³⁵

The criminal punishment system does not consider these broader webs of harm and certainly has no mechanism to address these needs. It also does not typically provide formal opportunities for the people going through the process to receive support.³⁶ In fact, quite to the contrary, there are often so many admonitions for a person charged with a crime to not talk about anything related to it, as well as barriers to receiving support from community, like during

29. ZEHR, *supra* note 8, at 25.

30. *Id.* at 39–40.

31. *Id.* at 37–40.

32. *Id.* at 37.

33. *See id.* at 37.

34. *Id.* at 33.

35. ZEHR, *supra* note 8, at 38–39, 68–69.

36. *Id.* at 22–23.

incarceration.³⁷ This often serves to isolate people from their community rather than build strong communities of support.

B. The “How” of Restorative Justice

Restorative Justice (RJ) processes are intended to be flexible, with room for creativity, such that they are responsive to the needs and harms that arise out of a given incident.³⁸ However, there are still some core principles to the approach that run across all processes. RJ processes must be voluntary, non-adversarial, should work to eliminate hierarchies, and operate in a nonpunitive manner.

Participation in an RJ process must be voluntary for everyone involved.³⁹ The PH should not in any way be coerced into participating in a process where they may have to engage with the PWCH. This is so because such a process could further victimize or traumatize someone who is not ready or willing to participate.⁴⁰ It is important that every RJ process centers the needs of those harmed so that what they need to heal and feel safe again is the focus.⁴¹ Thus, the PH has to be given the opportunity to participate in various ways that do not necessarily require them to meet with the PWCH directly. Many RJ programs offer the PH the ability to write a letter that expresses their harm that is then read to the PWCH by a facilitator or by someone in the PH’s family or community.⁴² The PH can also choose to engage in their own healing circle with the support of their community without ever wanting or needing to hear from the PWCH. The PWCH should also not be coerced into participating. An expression of remorse or apology from the PWCH may come across as insincere or cause the PH more distress if the PH knows that the PWCH is facing the threat of prosecution if they do not participate in an RJ process.⁴³

37. *Id.* at 24.

38. TANYA RUGGE & TERRI-LYNNE SCOTT, RESTORATIVE JUSTICE’S IMPACT ON PARTICIPANTS’ PSYCHOLOGICAL AND PHYSICAL HEALTH 1 (2009); *see also* ZEHR, *supra* note 8, at 34 (describing different methods of RJ engagement).

39. ZEHR, *supra* note 8, at 57–58.

40. Jerusalem Demsas, *The Promise—and Problem—of Restorative Justice*, VOX (Mar. 23, 2022, 5:00 AM), <https://www.vox.com/22979070/restorative-justice-forgiveness-limits-promise> [<https://perma.cc/ZYY5-R3D2>].

41. *See* Shannon M. Sliva, Elizabeth H. Porter-Merrill & Pete Lee, *Fulfilling the Aspirations of Restorative Justice in the Criminal System? The Case of Colorado*, 28 KAN. J.L. & PUB. POL’Y 456, 470 (2019).

42. *Information for Victims*, RESTORATIVE JUST. VICTORIA, <https://www.rjvictoria.com/rj-for-victims> [<https://perma.cc/6ZXW-WLQT>] (last visited Dec. 4, 2023).

43. Alfred Allan, Justine de Mott, Isolde M. Larkins, Laura Turnbull, Tracey

By contrast, the criminal punishment system often relies on coercion to force the PH to testify against the PWCH.⁴⁴ Much has been written about how the PWCH is coerced into waiving their rights,⁴⁵ accepting a plea deal,⁴⁶ and abiding by probation conditions.⁴⁷

RJ processes must also be non-adversarial and non-hierarchical.⁴⁸ They do not center around fact-finding nor advocating for any given individual's rights.⁴⁹ Instead, RJ processes are focused on active and equal participation as well as collaboration and consensus-building between all participants.⁵⁰ RJ processes actively seek to combat unequal power dynamics and ensure that everyone has a voice in the process.⁵¹ As Thalia González puts it, RJ creates an opportunity in which "all of the dimensions of power can be discerned, acknowledged, and challenged."⁵² This is why so many RJ processes emphasize the use of the circle. The circle "is perfect, unbroken, and a simile of unity and oneness. It conveys the image of people gathering together for discussion," it is a practice that attempts to disrupt hierarchies and the notion that there is one person or group wielding power over another.⁵³ Instead of a judge, who may not live in the community and does not know the people involved in the incident, it should be people most intimately familiar with the incident—the

Warwick, Lacey Willett & Maria M. Allan, *The Impact of Voluntariness of Apologies on Victims' Responses in Restorative Justice: Findings of a Quantitative Study*, 29 PSYCHIATRY, PSYCH. & L. 593, 603 (2022) (finding that apologies given voluntarily by PWCH had a significantly more positive impact as related to PH's acceptance of the apologies and perceptions of sincerity as opposed to apologies that were mandated by law).

44. See Rachel J. Wechsler, *Victims as Instruments*, 97 WASH. L. REV. 507, 510–12 (2022) (discussing the variety of tools used by prosecutors to coerce testimony from witnesses including material witness warrants, the threat of criminal charges, and offers of assistance that are dependent on the witness providing testimony).

45. See generally Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment, and Alienation*, 68 FORDHAM L. REV. 2011, 2011, 2023–32 (2000) (detailing some of the many constitutional rights defendants waive in plea bargaining and its coercive nature).

46. See Clark Neily, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal.*, CATO INST. (Aug. 8, 2019), <https://www.cato.org/commentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-totally-legal> [<https://perma.cc/7F4Y-EPBA>].

47. See Michelle S. Phelps & Ebony L. Ruhland, *Governing Marginality: Coercion and Care in Probation*, 69 SOC. PROBS. 799, 801, 809 (2022) (examining community supervision and probation conditions as both care and coercion).

48. See ZEHR, *supra* note 8, at 77–78.

49. See Demsas, *supra* note 40.

50. ZEHR, *supra* note 8, at 35–36.

51. *Id.* at 36.

52. Thalia González, *Reorienting Restorative Justice: Initiating a New Dialogue of Rights Consciousness, Community Empowerment and Politicization*, 16 CARDOZO J. CONFLICT RESOL. 457, 462 (2014).

53. Yazzie, *supra* note 7, at 180.

PWCH and the PH—and their communities who decide how to proceed.⁵⁴

RJ must also be nonpunitive. As Fania Davis puts it, “Restorative justice views a vengeful and punitive response to harm unacceptable . . . [p]unishment, the equivalent of officially sanctioned vengeance, is a mere variant of the original harm, replicating and reproducing it, resulting in the destruction of community safety nets and social breakdown.”⁵⁵ RJ practitioners take great care to ensure that their approach and programmatic structure is nonpunitive. The aim is to create equal relationships that feel safe so that truth-telling can occur.⁵⁶ Another way of understanding the distinction is that punishment is done *to* people, whereas RJ is done *with* them.⁵⁷ Punishment operates via fear and control, RJ operates from a collective place of caring for all who are involved.

This is evidently in stark contrast to our current systems, that are designed as adversarial and hierarchical models, with the prosecution and defense as opponents and the judge as the ultimate arbiter. It is rare that a PH is able to speak in court, unless under oath while giving testimony, and even more rare for a PWCH to speak in court.⁵⁸ Their voices are not meaningfully considered in the process. This structure has been defined as one that steals conflicts from communities and gives them to the state.⁵⁹ Even in diversionary programs or alternative courts (e.g., drug courts), that purport to be less retributive and more rehabilitative,⁶⁰ I observed in my role as a public defender that the PH will still rarely have a say in what the PWCH should do to make things right, and the plan of action for the PWCH is rarely individually tailored.

The current system is remarkably punitive. Excessive charging, prolonged sentences, and horrific carceral conditions, are fixtures of the system, and all inflict immense amounts of harm on those caught

54. Howard Zehr states that RJ programs should aim to “put key decisions into the hands of those most affected by crime.” ZEHR, *supra* note 8, at 48.

55. DAVIS, *supra* note 6, at 28.

56. *Id.* at 28–29.

57. If punitive, one would respond by doing things *TO* the offender, admonishing and punishing, but asking little thoughtful or active involvement of the offender. If restorative, one engages *WITH* the offender and others, encouraging active and thoughtful involvement from the offender and inviting all others affected by the offense to participate directly in the process of healing and accountability.

PAUL MCCOLD & TED WACHTEL, IN PURSUIT OF PARADIGM: A THEORY OF RESTORATIVE JUSTICE, INT’L INST. RESTORATIVE PRACS.: RESTORATIVE PRACTICES EFORUM 2 (2003).

58. Joanna Shapland, *Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?*, 5 OXFORD J.L. & RELIGION 94, 98 (2016); ZEHR, *supra* note 8, at 35.

59. See Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 3 (1977).

60. *What Are Drug Courts?*, NAT’L DRUG CT. RES. CTR., <https://ndcrc.org/what-are-drug-courts> [<https://perma.cc/5X7A-RWKA>] (last visited Dec. 4, 2023).

up in it, particularly communities of color.⁶¹ These are all aspects of a system centered around punishment. RJ seeks a different way forward.

C. The Outcomes of Restorative Justice

Restorative justice (RJ) processes have varied, creative, and impactful outcomes. While some of the studied outcomes of RJ were laid out at the beginning of Part I, this subsection intends to focus on what RJ's core principles say about what outcomes should be (as opposed to how academics define the parameter of researchable outcomes). Central to these processes are the outcomes of healing and genuine accountability.

Beginning the journey of healing for all participants is a fundamental outcome of RJ processes. RJ processes are guided by asking about and identifying all of the ways in which participants felt harmed, the needs that surfaced from the harm, and what can be done to address those needs.⁶² The notion is that by meeting people's needs, a process of healing is occurring.⁶³ This healing is important because unaddressed needs can lead to future harm to self or others.⁶⁴ Studies of RJ programs have documented the healing effects of RJ processes including reduced post-traumatic stress symptoms,⁶⁵ reduced fear of a repeat attack,⁶⁶ and reduced feelings of fear, anger, depression and thoughts of suicide for the person harmed (PH).⁶⁷

Another outcome is genuine accountability from the person who caused harm (PWCH). Mia Mingus outlines accountability as having four parts: (1) self-reflection, (2) apology, (3) repair, and (4) behavior change.⁶⁸ All RJ processes in response to harm and violence should support the PWCH to engage in this process of accountability that results in an action plan that is created by and agreed upon by

61. See Jeremy Travis & Bruce Western, *The Era of Punitive Excess*, BRENNAN CTR. JUST. (Apr. 13, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/era-punitive-excess> [https://perma.cc/4WSU-2MWL].

62. *Id.* at 42–43.

63. *Id.* at 32–33.

64. *Id.* at 42.

65. Heather Strang, Lawrence W. Sherman, Evan Mayo-Wilson, Daniel Woods & Barak Ariel, *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, 43–44 (2013).

66. Sherman et al., *supra* note 19, at 525.

67. See RUGGE & SCOTT, *supra* note 38, at 13–15.

68. Mia Mingus, *The Four Parts of Accountability & How to Give a Genuine Apology*, LEAVING EVIDENCE (Dec. 18, 2019, 7:48 AM), <https://leavingevidence.wordpress.com/2019/12/18/how-to-give-a-good-apology-part-1-the-four-parts-of-accountability> [https://perma.cc/L7P4-8VFP].

everyone who is a part of the process.⁶⁹ The plan details how the PWCH will make things as right as possible and who will support them in doing so; the repair and behavior change part of accountability.⁷⁰ Each plan is uniquely tailored to the particular harm experienced by the participants in the process. The participatory nature of coming up with this plan that includes the PWCH ensures that it is far more likely to be completed and to create meaningful change for them.⁷¹ It also means that the outcome should be tailored, realistic and achievable for the PWCH.⁷² These elements are what I assert must be present for accountability to be genuine.

Contrast these outcomes to the current punitive system. While many prosecuting offices have “victim services” units, many people harmed by crime are not offered the services they need to help them heal, and often when they are it is tied to their cooperation with the system either by filing a police report or testifying in court.⁷³ Many PH feel re-traumatized by having to engage with the system in this way, a far cry from the healing that most people need.⁷⁴

In California, a study found that while one in three people in California identified as having been a victim of crime, less than one in five of those victims reported receiving financial assistance or services to assist their healing and address the trauma.⁷⁵ Additionally, *only fourteen percent* of victims felt “very supported” by the criminal punishment system.⁷⁶

Outcomes for the PWCH in the criminal punishment system are typically not focused on genuine accountability as defined above, but rather on standardized forms of punishment, with sentences that are not individually tailored.⁷⁷ Accountability in the criminal punishment system is usually considered the acceptance of a plea deal or sentence—an expression of guilt, and perhaps a display of remorse.⁷⁸

69. BALIGA ET AL., *supra* note 2, at 3.

70. *Id.* at 2.

71. *Cf.* Sliva et al., *supra* note 41, at 470 (stating that subjugating the PWCH’s agency “can provoke resentment, which lessens the offender’s bonds with the community and respect for the law, reducing the likelihood of successful reintegration and criminal desistance.”).

72. *Restorative Justice Outcome Agreements*, RESTORATIVE SOLS., <https://www.restorativesolutions.org.uk/news/restorative-justice-outcome-agreements> [<https://perma.cc/52CJ-FGF9>] (last visited Dec. 4, 2023).

73. ALLIANCE FOR SAFETY AND JUST., CALIFORNIA CRIME SURVIVORS SPEAK: A STATE-WIDE SURVEY OF CALIFORNIA VICTIMS’ VIEWS ON SAFETY AND JUSTICE 4 (2019), <https://allianceforsafetyandjustice.org/wp-content/uploads/2019/04/201904-CSJ-CA-Crime-Survivors-Speak.pdf> [<https://perma.cc/XDW8-279P>].

74. *See id.* at 5.

75. *Id.* at 2.

76. *Id.*

77. *See id.* at 7.

78. *See, e.g.*, U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 2021). The

It rarely, if ever, leads to a direct apology or redress from the PWCH to the PH.⁷⁹ Outcomes rarely address the underlying root causes of the incident.⁸⁰ Instead, the criminal punishment system and its constitutive parts inflict further harm and have been described as “death-making institutions.”⁸¹ An overwhelming amount of research shows the harmful and long-lasting consequences of policing, prosecution, and incarceration on people’s health,⁸² mental health,⁸³ financial status,⁸⁴ and how these consequences affect not just those who are directly targeted, but also those in their communities.⁸⁵ These devastating consequences are primarily meted out on Black and Latine individuals across the country.⁸⁶

II. PUNISHMENT BY ANOTHER NAME

As delineated above, there are clear core principles of restorative justice (RJ) that are foundational and essential to any RJ program; RJ processes must: (1) center the PH and provide opportunities for

fifteen instances in which the word accountability appears in the Sentencing Guidelines indicates a definition of accountability as having in fact committed the act (criminal liability). *See id.* Further, in Part E—Acceptance of Responsibility, the commentary provides that such acceptance is “truthfully admitting the conduct comprising the offense of conviction . . .” *Id.* § 3E1.1 cmt. n.3.

79. *See* LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 63 (2007) (finding that people who experienced harm who went through restorative justice processes received more apologies from the people who harmed them than those who did not).

80. Keeanga-Yamahatta Taylor, *The Emerging Movement for Police and Prison Abolition*, *THE NEW YORKER* (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [<https://perma.cc/KX7H-HGJG>].

81. *Id.*

82. Nia Heard-Garris, Tiffani J. Johnson & Rachel Hardeman, *The Harmful Effects of Policing—From the Neighborhood to the Hospital*, 176 *JAMA PEDIATRICS* 23, 24 (2022).

83. Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, *PRISON POL’Y INITIATIVE* (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts> [<https://perma.cc/3ANK-BB8P>].

84. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, *PRISON POL’Y INITIATIVE* (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/LJ8E-JWAE>]; Michael Mc Laughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the United States* 7 (July 2016), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/Publications/Economic_Burden_of_Incarceration.pdf [<https://perma.cc/4KVS-J327>].

85. *See, e.g.*, Isaac Bryan, Terry Allen, Kelly Lytle Hernández & Margaret Dooley-Sammuli, *The Price of Freedom: Bail in the City of Los Angeles*, *MILLION DOLLAR HOODS*, https://milliondollarhoods.org/wp-content/uploads/2017/10/MDH_Bail-Report_Dec-4-2017.pdf [<https://perma.cc/P7SX-B2RN>] (last visited Dec. 4, 2023) (exposing the financial impact of cash bail on neighborhoods in Los Angeles).

86. *See, e.g.*, ASHLEY NELLIS, *THE SENT’G PROJECT*, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 5 (2021) (finding that Black people are incarcerated in state prisons at nearly five times the rate of white people).

engaging the PWCH and community in a process; (2) operate in a voluntary, non-adversarial, non-hierarchical, and nonpunitive manner; and (3) focus on genuine accountability and healing as the outcomes.⁸⁷ Yet, as RJ programs proliferate, so many of them fail to adhere to these core principles.⁸⁸ Many RJ diversion programs have developed as partnerships with entities like law enforcement, prosecutors' offices, and the courts.⁸⁹ Many of these same state actors have created their own RJ programs embedded within their systems.⁹⁰ Further, state laws have created RJ schemes that encourage state control of RJ.⁹¹

Below, I lay out myriad ways that RJ has been co-opted by the criminal and juvenile legal systems along the continuum of state actors, from law enforcement to legislators. Co-optation as discussed in this Article is when system actors like courts, law enforcement, and prosecutors adopt the language, and sometimes the practices, of restorative justice to create a perception of reform and responsiveness to community demands while failing to adhere to RJ's core principles and continuing to rely on punitive logics.⁹² This co-optation can lead people to believe that RJ and the criminal punishment system can coexist instead of as fundamentally incompatible, as I argue.⁹³

A. Co-optation and Law Enforcement

For some time now, there has been a strong and concerning integration of restorative justice (RJ) with policing. In 2016, Restorative Justice International released a white paper, explaining what they term restorative policing and calling for its adoption as a new

87. See discussion *supra* Section I.A.

88. See discussion *supra* Section I.C.

89. SHERMAN & STRANG, *supra* note 79, at 34.

90. Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 JUST. POL'Y J. 1, 2 (2016), https://www.cjcj.org/media/import/documents/jpj_restorative_justice_in_the_states.pdf [<https://perma.cc/BE8F-4CDZ>].

91. *Id.* at 7–8.

92. There is also the tendency for many community-based groups to label their work as restorative justice even when they are not engaging at all in preventing or responding to harm and violence. This tends to broaden the definition or the umbrella of RJ, which could be seen as a form of co-optation, or at least causes confusion when people try to understand what RJ is and is not. While these efforts exist, they do not fall within the type of co-optation as I am defining it, and thus will not be a focus of this Article. For a discussion of the fundamental incompatibility of RJ principles and punitive logics, see *supra* Part I.

93. Howard Zehr espouses the former belief, that RJ and the criminal punishment system can coexist. Zehr states that, “[r]estorative justice is neither a panacea nor necessarily a replacement for the legal system.” ZEHR, *supra* note 8, at 19. Even in an ideal world, it is not clear whether restorative justice should replace the legal system. ZEHR, *supra* note 8, at 19.

paradigm in policing.⁹⁴ The white paper encourages police departments to adopt restorative justice approaches in their policing, calling for police to act as “peacemakers and master facilitators”.⁹⁵

There are several programs in the United States that have attempted to integrate RJ with the functions of the police. For example, The Justice Project of South Florida describes their diversion program as one where youth who are diverted “engage with police officers in monthly ‘police youth dialogues’ where they can ask questions and build relationships with officers.”⁹⁶

Another example is Communities for Restorative Justice in Massachusetts.⁹⁷ This organization states that police officers are one of their sources for referrals.⁹⁸ “Police officers participate in Opening and Closing circles, which take place at the referring department, unless the victim prefers another venue.”⁹⁹ It also describes one of its desired outcomes for participating police departments as “strengthening police relationships within their communities.”¹⁰⁰

Many things about these programs stand out as conflicting with RJ principles. First, the approach remains punitive by having standardized requirements.¹⁰¹ If everyone who is diverted and engaging in RJ is required to do the same thing, like engage in dialogue with police officers, the process is not collaborative, individually tailored or voluntary. This is the doing *to* someone referenced above which is a core operating function of punitive systems, not restorative processes. Further, it might be possible that the person who caused harm (PWCH) was traumatized, mistreated, or even brutalized by law enforcement.¹⁰² RJ’s goals are for healing and accountability,

94. RESTORATIVE JUST. INT’L, WHITE PAPER ON RESTORATIVE POLICING 1 (Paul McCold ed. 2016), <https://www.restorativejusticeinternational.com/assets/RJI-White-Paper-on-Restorative-Policing-01-JUL-16pdf.pdf> [<https://perma.cc/6W98-YDGE>]. “Approaching restorative justice from a crime fighting orientation leads to viewing restorative justice as an alternative punishment rather than an alternative *to* punishment.” *Id.* at 5 (emphasis added).

95. *Id.* at 1.

96. NAT’L CTR. ON RESTORATIVE JUST., RESTORATIVE APPROACHES TO POLICING: PROGRAM DESCRIPTIONS 3 (2021), <https://ncorj.org/wp-content/uploads/2022/06/restorative-approaches-to-policing-program-descriptions.pdf> [<https://perma.cc/EY7M-UUHM>].

97. *Id.* at 10; CMTYS. FOR RESTORATIVE JUST., <https://www.c4rj.org> [<https://perma.cc/2DTT-JYGA>] (last visited Dec. 4, 2023).

98. *Our Partnerships*, CMTYS. FOR RESTORATIVE JUST., <https://www.c4rj.org/about-us/communities-served> [<https://perma.cc/S57X-PPPC>] (last visited Dec. 4, 2023).

99. *Id.*

100. *Id.*

101. See NAT’L CTR. ON RESTORATIVE JUST., *supra* note 96, at 3, 10 (describing the uniformed, structured model applied to each case that enters that program).

102. See ZEHR, *supra* note 8, at 41 (“Studies show that many of those who offend have indeed been victimized or traumatized in significant ways. . . . These harms and perceptions of harms may be an important contributing cause of crime.”); see generally

not to give police officers a chance to humanize themselves to community members.

Second, it is also punitive because it does not attend to structural power dynamics between law enforcement and communities. Even if the officer is a part of the community, it may be near impossible to dismantle the power dynamics. Police officers' stated role is one of enforcement.¹⁰³ It is a top-down approach that positions officers with the power-à-vis residents.¹⁰⁴ Even if the officer shows up in plain clothes and has been trained in RJ, this does not align well with the participatory and community-based nature of RJ. Additionally, it is hard to imagine that a PWCH would feel willing to be open and honest as is required by RJ if the process is taking place in the very station where the PWCH may have been held after arrest.

Finally, there is no mention of the person harmed (PH) and their participation, when PH must be centered in RJ processes.¹⁰⁵ Instead, the focus seems to be on law enforcement's involvement in the process. Typically, law enforcement is not a part of the community that is directly impacted by a particular act of harm.¹⁰⁶ While some may argue that this would be the very reason to include them, to begin to build community, that should not be the goal or outcome of RJ after harm has occurred.

This integration of RJ with policing is a deeply concerning form of co-optation. If we conceive of policing as "advanc[ing] inequality through their distribution of violence and surveillance, death, and debt" then there can be no compatibility between the role of law enforcement and RJ's core principles.¹⁰⁷ And yet, many law enforcement agencies, sometimes with the support of community groups, are naming what they do RJ.¹⁰⁸ In doing so, they get to present a façade of caring about or responding to community demands for fairness or less violence, while proceeding with business as usual.

Addressing Law Enforcement Violence as a Public Health Issue, AM. PUB. HEALTH ASS'N (Nov. 13, 2018), <https://www.apha.org/policies-and-advocacy/public-health-policy-state-ments/policy-database/2019/01/29/law-enforcement-violence> [https://perma.cc/YDZ5-KAGW].

103. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1786 (2020).

104. *Id.*

105. "For restorative justice, then, justice begins with a concern for victims and their needs. It seeks to repair the harm as much as possible, both concretely and symbolically." ZEHR, *supra* note 8, at 32 (describing RJ as a "victim-oriented approach").

106. Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 149 (2012) ("[L]egitimate police service requires a degree of *separation* from the public . . .").

107. Akbar, *supra* note 103, at 1786.

108. See discussion *supra* Section II.A.

B. Co-optation and Prosecutors

Many prosecutors' offices across the country engage in restorative justice (RJ) through different methods. For some, this has meant making a commitment that their office will refer cases to community-based RJ organizations instead of filing charges.¹⁰⁹ For others, this has meant the development of RJ programs *within* the prosecutors' offices.¹¹⁰

For example, I was allowed to observe a Los Angeles City Attorney's Neighborhood Justice Program (NJP) panel, which took place over Zoom during the pandemic.¹¹¹ What I observed highlighted a few major concerns when RJ programs operate within prosecutors' offices, including the coercive nature of the program, the threat of punishment hanging over someone's head, and the use of community members as de facto judges rather than supportive participants.

NJP describes itself as a "neighborhood-focused restorative justice program."¹¹² The process consists of the person who caused harm (PWCH), a volunteer facilitator, an NJP staff member, and volunteer community panelists who do not know the PWCH.¹¹³ The community panelists "directly engage with the individual to discuss the crime, the reasons it was committed and the harm it caused. Working together with the individual, they discuss what obligations [consequences] are appropriate given the crime and the harm caused."¹¹⁴ This language reflects RJ principles—however the following experience I was witness to did not adhere to these principles at all.

The panel I witnessed consisted of three volunteer panelists and was for a case involving a petty theft from a major retail chain. Prior to the process beginning, the volunteer panelists were allowed to read the police report, which stated that the PWCH was seen walking out of the store without paying and that they had been seen taking merchandise from this same store on two other occasions.

109. See, e.g., Press Release, Los Angeles Cnty. Dist. Att'y's Off., District Attorney Gascón Announces the Launch of Pre-Filing Diversion Program for Youth (Nov. 17, 2021), <https://da.lacounty.gov/media/news/district-attorney-gascon-announces-launch-pre-filing-diversion-program-for-youth> [<https://perma.cc/5M83-AMFJ>] (announcing Los Angeles District Attorney George Gascón's development of a pre-filing restorative justice program for youth under eighteen).

110. See Natalie Delgadillo, *Restorative Justice Has The D.C. Attorney General's Office Looking At Prosecutions In A New Light*, DCIST (May 8, 2020, 1:33 PM), <https://dcist.com/story/20/05/08/restorative-justice-has-the-d-c-attorney-generals-office-looking-at-prosecutions-in-a-new-light> [<https://perma.cc/NW3Z-RYE9>].

111. *Neighborhood Justice Program*, L.A. CITY ATT'Y, <https://cityattorney.lacity.gov/neighborhood-justice-program-njp> [<https://perma.cc/VV5S-8ZTY>] (last visited Dec. 4, 2023).

112. *Id.*

113. *Id.*

114. *Id.*

The panel began with an overview of the process, an explanation that the process was confidential, and that the PWCH could leave at any time, but that if they did their case would be returned to court. Then, the facilitator asked the PWCH to tell the panel a little bit about them.

The panelists were then allowed to ask questions. When they asked the PWCH about the most recent alleged theft, the PWCH stated that on that day they were absent minded and accidentally left the store without paying for the merchandise. When the PWCH was asked about the allegation of prior thefts from that store, the PWCH said they had no memory of that. The panel then asked the PWCH to talk about the effects of their actions. The PWCH became very emotional while talking about the potential impact and waste of time to the store. During this portion, one of the panelists told the PWCH that this program was a one-time shot for them and asked if the PWCH realized the potential consequences to their immigration status in the United States if their case had not been diverted to this program.

After this cursory discussion of the incident and its impacts, the panelists began discussing the “repair” part of the process with the PWCH present. The panelists decided that there was a need for the PWCH to understand the potential immigration consequences of the criminal charge, had it been filed (because the PWCH had said they were a recent immigrant). Thus, they decided that the PWCH should write a three-page letter/paper, discussing the consequences that their actions could have had on their immigration status, as well as acknowledging what they had done. The panelists never once asked the PWCH for their input as to what they should do to make things right, nor did they engage in a conversation about whether in fact the PWCH had intended to steal.

After the PWCH agreed to write this letter, the process was over, and the panelists stayed on with the facilitator to debrief. One panelist stated that if they had scared the PWCH enough to never do it again, then their goal was accomplished, falling back on the deterrence model that the criminal punishment system hangs its hat on; but fear is not a motivating force used by RJ processes.¹¹⁵ Additionally, one of the panelists stated that maybe this was a “cultural thing” and that the PWCH did not understand the implications because of where they were from. Another panelist interjected—unrelated to anything—that there was a lot of masculine control in “these households,” presumably referring to the PWCH’s ethnicity.

115. SHERMAN & STRANG, *supra* note 79, at 12.

The panelists did not seem to be of the same racial or ethnic background as the PWCH.

This process surfaces issues that can develop when RJ is embedded within prosecutors' offices—although not exclusive to this forum. There were little to no elements of restorative justice present in this particular session I viewed. Particularly egregious was the involvement of individuals who have little training or understanding of RJ, but who are defined as “community” for the purposes of fulfilling an RJ requirement. The community members, in this model, were given the power to make decisions, rather than to be a part of a collaborative process; and there was no attempt to establish any kind of community kinship between the PWCH and these panelists.

Typically, RJ programs that intentionally involve community will do so with the participants' permission and most often the participants will identify which community members they want present. Community members are typically present in RJ processes to play a supportive role, not to ask questions or mete out punishment.¹¹⁶ It is rare that an individual will feel comfortable admitting to complete strangers, at the first encounter, that they did something wrong.¹¹⁷ The way NJP was set up was almost like a tribunal, with three community panelists allowed to ask whatever questions they wanted, and none of those questions were asked in a restorative way.¹¹⁸ Further, these panelists imposed the consequence of letter writing on the PWCH. This did not seem individually tailored but was more aligned with their perceptions of who this person was and what they should care about. As can be seen in their debrief comments, the panelists engaged in an “othering” of the PWCH by falling back on some stereotypes about their racial, ethnic, and religious identity. This again is reinscribing power dynamics and empowering panelists to feel like they know better than the PWCH what they need to do to make things right.¹¹⁹

116. ZEHR, *supra* note 8, at 57 (“[T]rained facilitators . . . guide the process, balancing concern for all the parties involved. Unlike arbitrators, conference or circle facilitators do not impose settlements.”).

117. *Id.* at 58 (“In interviews, those who have offended often suggest that it is difficult and frightening to face the ones they have harmed. Indeed, most of us would try to avoid such obligations if we could.”).

118. The International Institute for Restorative Practices defines restorative questions as a “tool used to process an incident of wrongdoing or conflict.” Some examples of these questions are “What happened?”; “What were you thinking at the time of the incident?”; “Who was impacted by your actions, and how?”; and “How will you repair the harm?” See Samantha White, *Time to Think: Using Restorative Questions*, INT’L INST. RESTORATIVE PRACS. (Jan. 9, 2012), <https://www.iirp.edu/news/time-to-think-using-restorative-questions> [https://perma.cc/D7H7-TMTJ].

119. See generally Mikhail Lyubansky & Elaine Shpunin, *Challenging Power Dynamics in Restorative Justice*, in *THE PSYCHOLOGY OF RESTORATIVE JUSTICE: MANAGING*

The process ended without anyone having a good grasp on whether the PWCH was accountable. In fact, when the panelists were debriefing, they said that they were not convinced that the PWCH would not shoplift again. One panelist even indicated that this would not be the first time they left a process not believing the person.

The individual is also told up front that they must comply, or their case will be sent back to the court. This completely negates any sense of voluntariness as anyone familiar with the criminal punishment system would understand that anything is preferable to going through the court process.¹²⁰ Any RJ program operating through a prosecutors' office will likely have this similar mandate in direct contradiction to RJ's core principle of voluntariness.

C. Co-optation and the Courts

Jurisdictions across the country are claiming to incorporate restorative justice (RJ) throughout the traditional court process, with the court acting as the ultimate arbiter and law enforcement continuing to play a surveillance role.¹²¹

For example, Washington County in Minnesota has a program called Washington County Community Circles.¹²² The program works with individuals accused in cases of property damage, domestic violence, theft of services or fraud of social services, and driving offenses that cause harm.¹²³ Once an individual is referred by the court to the program they are involved in "pre-sentence" circles and ultimately a "sentencing circle" that creates sentencing recommendations for the judge.¹²⁴ Once an individual is sentenced, they are "'on probation' [with] the circle" and meet once a month with the circle after sentencing.¹²⁵ Sample letters to the court provided by the program indicate that some people can be "on probation with the

THE POWER WITHIN 183, 189 (Theo Gavrielides ed., 2015) (explaining that facilitators during the RJ process hold power which can be used in ways that "may mirror or exacerbate existing power dynamics, or create new ones.").

120. See ZEHR, *supra* note 8, at 58 ("Efforts are made to maximize the offending person's voluntary participation as well. . . . In reality, however, there is often some pressure on the offending person to choose between lesser evils.").

121. See *infra* notes 132–41 and accompanying text.

122. *Circles Process Protocol Manual*, WASH. CNTY. CMTY. CIRCLES, INC. (revised 2022), <https://static1.squarespace.com/static/5735eea4ab48de2f729ce64d/t/58f7bf5a4402430f962aae24/1492631389155/WCCC+Protocol+Manual+08+2013.pdf> [<https://perma.cc/88G5-MJGM>].

123. *Id.* at 4.

124. *Id.* at 9.

125. *Id.* at 10.

circle” for eighteen months, thus required to engage in eighteen post-sentence circles.¹²⁶ Further, sample letters indicate that circles report back to the court when someone has failed a drug test or is not adhering to their sentencing agreements.¹²⁷ It is unclear what actions the court takes if such a report is received, but this protocol makes it clear that the court remains in control.¹²⁸

Cook County, Illinois, has developed Restorative Justice Community Courts (RJCC) in three different neighborhoods.¹²⁹ The courts are not in traditional courthouses and the “courtroom” is typically tables placed in a circle where the judge sits at the same level as the person who caused harm (PWCH).¹³⁰ A defense attorney and prosecuting attorney are present.¹³¹ Judges in these courts have the opportunity to “make decisions on community-based sentences, treatment for the defendants, and other programs.”¹³² The court collaborates with the Social Service Department of Chicago, which is described as a “community corrections agency” that reports to the judge and assesses risk.¹³³ If an individual agrees to participate in RJCC, then a series of peace circles is held, led by community members via which they create a “[r]epair of [h]arm [a]greement.”¹³⁴ Ultimately the judge must approve of this agreement.¹³⁵

There is not much about either of these programs that track RJ principles other than the fact that they call their processes “circles.” In RJ, the obligations that a PWCH has to meet are created and agreed to by everyone who is a part of the circle, meaning those most directly impacted by the incident that the circle is addressing.¹³⁶ In

126. *Id.* at 21.

127. *Id.* at 23.

128. See *Circles Process Protocol Manual*, *supra* note 122, at 23.

129. Press Release, State of Ill. Cir. Ct. of Cook Cnty., *Restorative Justice Community Court Arrives in North Lawndale* (July 20, 2017) [hereinafter Cook County Press Release], <https://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2564/Restorative-Justice-Community-Court-arrives-in-North-Lawndale> [https://perma.cc/AJF6-TAQX].

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*; see also Margaret Kulujian, *A Not So New Approach . . .*, THE TALKING PIECE: THE AVONDALE RESTORATIVE JUST. CMTY. CT. NEWSLETTER (2021), <https://www.cookcountycourt.org/Portals/0/Chief%20Judge/RJCC/RJCC%20THE%20TALKING%20PIECE-3.pdf?ver=RbsI8TAmsgYQWvxHvwW-8g%3D%3D> [https://perma.cc/P2F4-KPFD].

134. STATE OF ILL. CIR. CT. OF COOK CNTY., RESTORATIVE JUSTICE COMMUNITY COURT: A RESTORATIVE APPROACH TO CRIME AND CONFLICT, https://www.cookcountycourt.org/Portals/0/Chief%20Judge/RJCC/RJCC%20Brochure%20.pdf?ver=wcoeht7T8nkvZxs749_1Q%3d%3d [https://perma.cc/9M26-XYVT].

135. *Restorative Justice Community Courts*, STATE OF ILL. CIR. CT. OF COOK CNTY., <https://www.cookcountycourt.org/ABOUT-THE-COURT/Restorative-Justice-Community-Courts> [https://perma.cc/J8UB-AVYK] (last visited Dec. 4, 2023).

136. BALIGA ET AL., *supra* note 2, at 2.

these models in Washington and Cook counties, agreements that are created in circle must be approved of by the judge who is not a part of the circle itself.¹³⁷ Allowing judges who are not part of the person harmed (PH) or PWCH's community to have a meaningful and often overriding say in the outcome means that the community that came together in circle really did not have the power to decide collectively on how healing and accountability should be achieved. The RJ principle of ensuring that everyone is heard, and that the needs of the PH are addressed could be completely upended if a judge does not approve of the plan or alters it.

Further, one might anticipate the external pressure that community organizations may feel when creating their agreements or sentencing recommendations to conform to the requirements of a given judge rather than to rely on the wisdom and individual concerns of the parties to the circle. If agreements have been rejected in the past by judges and sent back to the circle, this may create a feedback loop by which circle processes are influenced by the judge's requirements from the outset. This type of pressure will always be present if the setup is that an outside authority figure has the ultimate say in what the outcome is of the RJ process.

Courts that use RJ as a way to achieve a sentence that will then be monitored by the court and probation fail to understand that the RJ process of getting to accountability and healing itself is an incredibly difficult and intensive process for those involved.¹³⁸ Typically, people going through RJ processes have several meetings in advance of bringing together everyone in circle.¹³⁹ There is a lot of emotional labor and time involved in helping people prepare to meet one another.¹⁴⁰ Ordering people to commit to that long process after they have already been through the criminal court system seems overburdensome and perhaps setting people up to fail.¹⁴¹ Once a judge orders RJ, if the PWCH loses interest or ability to participate

137. STATE OF ILL. CIR. CT. OF COOK CNTY., RESTORATIVE JUSTICE COMMUNITY COURT: A RESTORATIVE APPROACH TO CRIME AND CONFLICT (2020), <https://www.cookcountycourt.org/Portals/0/Chief%20Judge/RJCC/Restorative%20Justice%20Booklet.pdf?ver=01M69g8Ey-5QMLMcE6UVEQ%3d%3d> [<https://perma.cc/TVK2-XURD>]; Robert B. Coates, Mark S. Umbreit & Betty Vos, *Restorative Justice Systemic Change: The Washington County Experience*, 68 FED. PROBATION 1, 8 (2004).

138. Alexis Gutierrez, *Addressing Common Concerns with Restorative Justice*, RESTORATIVE JUST. CTR. U.C. BERKELEY, <https://rjcenterberkeley.org/blog/addressing-common-concerns-with-restorative-justice-> [<https://perma.cc/EE7D-NT87>] (last visited Dec. 4, 2023).

139. STATE OF ILL. CIR. CT. OF COOK CNTY., *supra* note 134.

140. Gutierrez, *supra* note 138.

141. This phenomenon has been termed "net-deepening" or "net-strengthening" to refer to conditions imposed upon people through diversion programs that may be more onerous than probation conditions. See Hanan, *supra* note 15, at 133.

in the process, this could then be a violation of their probation conditions, resulting in further punishment.¹⁴²

Although both the Washington County and Cook County models claim to draw from RJ theory and practices to operate, they seem to be unwilling to stray far from the structure of the punitive system. Certainly, changing the physical location and structure of these courts could create a less hostile or intimidating environment, but it does not necessarily change the power dynamics or create a process where true healing and accountability are reached.¹⁴³ Additionally, many individuals going through this process are still subject to surveillance such as probation and the possibility of violations that have legal ramifications.¹⁴⁴ Constant surveillance or reporting “violations” does not breed an empowering environment for the PWCH to feel in control of making things right.¹⁴⁵ Instead, these are punitive tools being used to keep people in line, rather than to empower people to have a say in creating their own path to accountability.

As Allegra McLeod argues with respect to another alternative model, the judicial monitoring model of alternative courts creates “risks of judicial overreaching, expanded surveillance, and increased incarceration for technical violations.”¹⁴⁶ These very same risks are present when RJ is embedded in systems in the ways described above. In addition to these very serious risks, RJ is meant to be a participatory process through which those with the greatest stake in the harm decide together on the outcome. The outcome is focused on accountability and healing. Much care is taken in these processes to address and dismantle hierarchies and to ensure that the process is nonpunitive.¹⁴⁷ Allowing judges to have the final say in an RJ process or to use RJ as a sentence in criminal or juvenile court recreates the top-down, paternalistic way in which the criminal punishment system currently operates. It is simply punishment by a different name.

D. Co-optation Through State Law

As mentioned, the proliferation of restorative justice (RJ) in legislation over the past two decades has been remarkable.¹⁴⁸ Legislation

142. John A. Humphrey, Gale Burford & Meredith P. Huey, *Reparative versus Standard Probation: Community Justice Outcomes*, 1, 9, <https://www.montpelier-vt.org/DocumentCenter/View/1134/Reparative-Versus-Standard-Probation-Community-Justice-Outcomes-PDF?bidId=> [<https://perma.cc/L3A7-9R24>] (last visited Dec. 4, 2023).

143. Lyubansky & Shpungin, *supra* note 119, at 7–8.

144. Humphrey et al., *supra* note 142.

145. *Id.*

146. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1621 (2012).

147. DAVIS, *supra* note 6, at 28.

148. González, *supra* note 17, at 1149.

serves the co-optative function in numerous ways. I will focus on three ways here. First is the way state law creates eligibility criteria that function to exclude certain people from accessing restorative justice.¹⁴⁹ Second are state laws that exert coercive pressure to engage in RJ.¹⁵⁰ The third is legislation that enables systems to monopolize control of RJ programs.¹⁵¹ It is important to note that these three outcomes of co-optation are not unique to legislation itself. As the previous sections show, other state actors co-opting RJ have also created policies and practices that are coercive and serve to exclude participants and community. However, it remains necessary to track RJ legislation closely to determine how it is being used to co-opt RJ in ways that may outlast any particular RJ program.

1. Eligibility Criteria

Numerous states across the country that legislate around restorative justice (RJ) have parameters as to who can participate. Typically, this legislation mandates what type of offenses are eligible for RJ and/or what type of conviction history disqualifies someone from participation.

In Florida, there is a law that allows state attorneys to establish a Neighborhood Restorative Justice Center only for “first-time nonviolent juvenile offenders.”¹⁵² In Wisconsin, state law enables the department of justice to make grants to establish “programs based on principles of restorative justice, that provide alternatives to prosecution and incarceration for criminal offenders who abuse alcohol or other drugs.”¹⁵³ However, the law states that “violent offenders” are not eligible to participate in the program.¹⁵⁴ As a further example, Massachusetts state law excludes from eligibility in community-based RJ programs people charged with certain sexual offenses, an offense against a family or household member, or an offense resulting in serious bodily injury or death.¹⁵⁵

It is likely that legislators will always feel the need to, or face pressure to, put parameters around who is eligible to be diverted, given the political currency of being tough on crime. However, this

149. See FLA. STAT. § 985.155(2)(a) (2014); MASS. GEN. LAWS ch. 276B, § 3 (2018); WIS. STAT. § 165.95 (2019); COLO. REV. STAT. § 18-1.3-101, *amended by* S.B. 23-164 (2023).

150. FLA. STAT. § 985.155(2)(a) (2014); COLO. REV. STAT. § 18-1.3-101, *amended by* S.B. 23-164 (2023).

151. FLA. STAT. § 985.155(2)(a) (2014); COLO. REV. STAT. § 18-1.3-101, *amended by* S.B. 23-164 (2023).

152. FLA. STAT. § 985.155(2)(a) (2014).

153. WIS. STAT. § 165.95 (2019).

154. *Id.*

155. MASS. GEN. LAWS ch. 276B, § 3 (2018).

type of eligibility criteria conflicts with RJ principles and is a way for the state to control who can access RJ. Since RJ centers the person who was harmed, the idea is if the person harmed (PH) wants an RJ process, no matter for what offense, it should be allowed to happen. Conditioning access to RJ based on the type of crime charged silences the needs of the PH and is antithetical to RJ's core principle of providing healing for those directly impacted by harm.

Additionally, RJ believes that everyone has the potential to be accountable for their actions and committing to repair, no matter what the level of harm.¹⁵⁶ It is true that more serious instances of violence may require a longer or more intensive process, but it does not mean that RJ is not well suited for more violent incidents. To the contrary, there is evidence indicating that RJ processes in cases of violence are actually quite effective.¹⁵⁷ For example, one study indicated that "Only the violent offenders said the [RJ] experience was a turning point in their lives," suggesting that an RJ process has the ability to prevent people engaged in violent behavior from repeating the harm.¹⁵⁸ Studies of RJ programs across the globe bear this out.¹⁵⁹ In Alameda County, a restorative community conferencing program for youth found that youth charged with more serious "person" offenses (robbery, battery, etc.) had a "significantly lower recidivism rate than the 'property' cases."¹⁶⁰ A study that reviewed multiple RJ programs in various countries found that RJ may work better with more serious crimes rather than with less serious crimes.¹⁶¹

Finally, eligibility parameters based on type of current charge and prior record of convictions or arrests can have racially biased outcomes. This is because race has been found to influence who is arrested,¹⁶² the seriousness of the charges brought,¹⁶³ as well as the likelihood of conviction.¹⁶⁴ Thus, because people of color, particularly Black people, are targeted by every aspect of the criminal punishment

156. See ZEHR, *supra* note 8, at 16–18; SHERMAN & STRANG, *supra* note 79, at 16, 68.

157. Sherman et al., *supra* note 19, at 522.

158. *Id.*

159. See *id.* at 517–18.

160. BALIGA ET AL., *supra* note 2, at 18.

161. SHERMAN & STRANG, *supra* note 79, at 68.

162. THE SENTENCING PROJECT & AMERICAN CIVIL LIBERTIES UNION, RACIAL DISPARITIES IN SENTENCING IN THE UNITED STATES (July 14, 2022), https://www.sentencingproject.org/app/uploads/2022/10/07-14-2022_CERD-Shadow-Report-Draft_with-endnotes.pdf [<https://perma.cc/5LSL-GPRV>].

163. *Id.* at 5 (reporting Prosecutors are more likely to charge people of color with crimes that carry heavier sentences than whites. Federal prosecutors, for example, are twice as likely to charge Black people with offenses that carry a mandatory minimum sentence than similarly situated whites. State prosecutors are also more likely to charge Black people under habitual offender laws when compared to similarly situated white people).

164. *Id.* at 1, 5.

system, they are more likely to have records of arrest, charge, and conviction, that would render them ineligible for many RJ programs.¹⁶⁵

A 2016 report evaluating Colorado's RJ legislation indicated drastic differences in the percentage of white and Black youth who participated in the RJ programs.¹⁶⁶ Just over forty-four percent of RJ participants were white, whereas only *one percent* were Black.¹⁶⁷ When looking at the arrest rates across the state of youth, one can see the disparities in who is accessing RJ programs: in 2018, seventeen percent of all youth arrests were of Black youth and fifty percent were of white youth.¹⁶⁸

RJ is committed to erasing hierarchies and challenging power dynamics. Eligibility criteria, whether created by individual program rules, or laid out in state law, structure RJ programs to serve an exclusionary role, deeming some people deserving and others as undeserving. Through an RJ lens, everyone is deserving of healing, and everyone should be given the opportunity to be genuinely accountable. States cannot claim to embrace RJ while excluding the vast majority of individuals from participation.

2. Coercion

As mentioned, restorative justice (RJ) processes must be voluntary.¹⁶⁹ If any individual is coerced into participating, the process may very well fall apart. In Section II.C, I discussed the ways in which RJ is mandated via sentencing or probation, which is a quite obvious form of coercion. However, even in earlier stages of a criminal/juvenile case, the choice to participate in RJ can be a result of coercive pressures.

The way RJ has developed in many jurisdictions is that it is offered as a form of diversion to the person who caused harm (PWCH).¹⁷⁰ This can mean either there is an arrest, but no charges will be filed if RJ is completed, or charges are filed and will be dismissed if RJ is completed.¹⁷¹ Typically, if completion does not occur, charges will

165. *Id.* at 5–6.

166. DIVISION OF CRIMINAL JUSTICE & COLORADO RESTORATIVE JUSTICE COORDINATING COUNCIL, ANNUAL REPORT ON IMPLEMENTATION OF HB 2013-1254 9 (2016), https://cdpsdocs.state.co.us/oajja/Restorative_Justice/2016_Annual_Report_HB13-1254.pdf [<https://perma.cc/FQ6X-MLSD>].

167. *Id.*

168. COLORADO DEPT. OF PUBLIC SAFETY, CRIME & JUSTICE IN COLORADO: 2009–2019, 73 (2020), https://cdpsdocs.state.co.us/ors/Docs/Reports/2020_CJ09-19.pdf [<https://perma.cc/PQ6Y-46QY>].

169. *See generally* ZEHR, *supra* note 8, at 13–20.

170. *See, e.g.*, COLO. REV. STAT. § 18-1.3-101 (amended 2023).

171. *See id.*

be filed, or proceedings will be reinstated.¹⁷² RJ is offered as a way out of a system that most people want nothing to do with. Either one takes their chances in the punitive system, going to court frequently, and risking a possible conviction and even custodial time, or one takes the diversion route via RJ. Most people when faced with that decision will choose to engage in an RJ process, whether they actually feel ready to take accountability or not, and sometimes even when they are not responsible for the harm.

In Colorado, this coercive pressure is built into the statutory scheme for diversion.¹⁷³ State law requires that an individual seeking to participate in RJ as diversion enter into a written agreement and that “if the defendant fulfills the obligations described therein, the court shall order all criminal charges filed against the defendant dismissed with prejudice.”¹⁷⁴ Getting one’s charges dismissed is a huge incentive that many people would seize whether or not they actually understand what the RJ process entails and whether or not they are “guilty.”¹⁷⁵ As one RJ practitioner said about Cook County, Illinois’s RJCC model discussed above, “[w]ith this court, he feels the peace circles become ‘mandatory,’ since defendants will choose it as an alternative to incarceration, regardless of whether they want to repair the harm they’ve caused.”¹⁷⁶

This element of coerciveness, where a “benefit” (avoidance of a charge or conviction) is conferred upon the PWCH, may also be viewed by the person harmed (PH) as harmful to them and their process of healing. If they cannot trust that the PWCH is genuinely accountable, rather than just trying to avoid the punitive system, it is not a true RJ process. This very fact is a critique made of many RJ programs.¹⁷⁷ RJ is meant to be centered around the PH, yet many people have seized upon it as a way to protect PWCH from the worst outcomes of the punitive system. While this is not a misplaced motivation, it does not exactly proceed by centering what the PH needs, which is crucial to the RJ process.

Further, when RJ programs are beholden to referrals from law enforcement, prosecutors, or courts, it means there is the constant specter of a charge looming over an individual’s head as they participate in the RJ process. This is so as most diversion programs are

172. *See id.*

173. § 18-1.3-101.

174. *Id.*

175. Jenny Simeone-Casas, Sarah Conway & Resita Cox, *Justice, Restored? New North Lawndale Court Aims to Change Punitive System*, CITY BUREAU (Aug. 22, 2017), <https://www.citybureau.org/stories/2017/12/10/justice-restored-new-north-lawndale-court-aims-to-change-punitive-system> [<https://perma.cc/5HYV-NKUJ>].

176. *Id.*

177. ZEHR, *supra* note 8, at 57–58.

required to send someone's case back to the system if they do not participate in or complete the RJ process.¹⁷⁸ Such a scheme places RJ facilitators in an uncomfortable position of asking for trust from the PWCH to be vulnerable and share the multitude of emotions that come with admitting they caused harm, while also having to tell them that they do have to report them to law enforcement/prosecution if they do not follow through with the program. While many RJ programs do everything within their power to support individuals struggling to complete the RJ process, rather than sending their case back to the system, at the end of the day they are still a conduit to system actors, almost playing a dual role of healing and surveilling.

3. *Enabling Systems' Control of Restorative Justice*

In Oklahoma in 2021, the state legislature authorized the District Attorneys Council to develop and administer a five-year restorative justice pilot program.¹⁷⁹ It also mandated the type of process that would be used, "citizen-led mediation panels."¹⁸⁰ Similarly, in Alabama, the legislature granted power to the district attorney to "establish a restorative justice initiative program" with the guidelines and mechanisms to be "promulgated by the Alabama Office of Prosecution Services."¹⁸¹ This statute also allows the district attorney to set any fees to be paid by the person who caused harm (PWCH) for participation in the restorative justice program.¹⁸²

State laws such as these serve to co-opt restorative justice (RJ) by enabling state actors to be at the helm of establishing RJ programs. Even if there is cooperation with community-based organizations, as indicated in the two previous sections, guidelines and procedures for these programs can be exclusive and antithetical to RJ when promulgated by state actors.¹⁸³

Vermont, which has one of the most comprehensive RJ regimes set out in state law, has a particularly invidious grouping of legislation which seems to constrain and redefine much of what RJ is.¹⁸⁴

178. See, e.g., IMPACT JUSTICE, GENERIC RJD DA MOU (July 14, 2020), <https://rjdtoolkit.impactjustice.org/wp-content/uploads/2019/04> [<https://perma.cc/8PEH-YZPU>] (follow "Template_-Generic-RJD-DA-MOU.docx" hyperlink) (providing a template memorandum of understanding between community-based organizations and prosecutors' offices about the returning of cases that are incomplete and preserving the office's right to prosecute the individual).

179. OKLA. STAT. tit. 22, § 305.7 (2023).

180. *Id.*

181. ALA. CODE § 45-28-82.25(c) (2023).

182. *Id.*

183. *Id.*

184. VT. STAT. ANN. tit. 28, § 2a (2023).

First, Vermont law states that RJ should be “included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses”¹⁸⁵ The statute then goes on to delineate a list of requirements for any RJ diversion program that is developed, including that the “offender” is *required* to do certain things such as apologizing to victims and completing community service.¹⁸⁶ There is no issue with these outcomes writ large, but when they are a requirement, mandated by law, this is where the coercive and punitive system has begun to infiltrate an RJ process.¹⁸⁷

What is most damaging about Vermont’s law is the adult and juvenile diversion provisions that state that any diversion program, including RJ diversion programs, that are established through the Attorney General, “shall only accept persons against whom charges have been filed and the court has found probable cause, but are not yet adjudicated.”¹⁸⁸ On the one hand, this allows for preconviction RJ programs to operate.¹⁸⁹ On the other hand, this limits these particular community-based organizations from taking referrals from the community.¹⁹⁰

There are examples where states have legislated in a way that seems to address some of the concerns of state control.¹⁹¹ Several states with grant programs established by the legislature provide that funding for RJ programs can only go to community-based organizations or non-profits.¹⁹² For example, Delaware’s legislation says that in order to be eligible for state funds, an RJ program must be a 501(c)(3).¹⁹³ An even stronger example is legislation in Illinois establishing grants for RJ programs in schools; this legislation explicitly states that “Grant funds may not be used to increase the use of

185. *Id.*

186. *Id.*

187. *Id.* Interestingly, the law also mandates that the program “help in identifying the causes of crime” *Id.* In some ways this language mirrors that of transformative justice, which seeks to understand and eradicate the root causes of crime. However, most transformative justice practitioners would identify the state and its many machinations as the root cause of crime. Thus, how can the incipient of harm effectively ever mandate the rooting out of said harm?

188. VT. STAT. ANN. tit. 3, §§ 163–64 (2023).

189. *Id.*

190. *Id.*

191. DEL. CODE ANN. tit. 11, § 9502 (2023); *see also* MINN. STAT. § 611A.77 (2023) (granting money only to non-profit organizations); MONT. CODE ANN. § 44-7-303 (2023) (stating that grant funds for RJ programs can only be provided to community-based, including faith-based, organizations); NEB. REV. STAT. § 25-2909 (2023) (indicating an RJ program can only apply for funding if it has a 501(c)(3) designation); TENN. CODE ANN. § 16-20-102 (2023) (stating that programs applying for funding must have proof that they are a 501(c)(3)).

192. *See supra* note 192 and accompanying text.

193. DEL. CODE ANN. tit. 11, § 9502 (2023).

school-based law enforcement or security personnel.”¹⁹⁴ However, many have cautioned, and in some instances explicitly rejected, the incorporation of RJ into law, citing concerns of unintended consequences of such legislation such as “the creep of new language that implies or explicitly states increased powers of the criminal legal system . . . the requirements for grantees to work with prosecutor offices . . . the implementation of regulations that concretize carcerality into the bland language of internal memos”¹⁹⁵

III. RESTORATIVE JUSTICE CO-OPTATION AS WORKING AGAINST ABOLITIONIST GOALS

I have outlined above the plethora of ways the state and state actors are co-opting restorative justice (RJ). In this section, I turn to how this co-optation can pose a particular obstacle to abolition.

When I speak about abolition in this Article, I refer to carceral abolition. As Nicole Smith Futrell puts it, this broad idea of what must be abolished “encompasses the criminal legal system from beginning to end: from policing through the court process to sentencing and reentry.”¹⁹⁶ Many abolitionists think even more expansively about the problem, looking to “the social, political, and economic processes that defined the context within which imprisonment came to be viewed as the legitimate hand of justice.”¹⁹⁷ Abolitionists’ goal is to eradicate these systems with a strong commitment to building the world that they wish to see instead.¹⁹⁸ As foundational abolitionist Ruth Wilson Gilmore puts it, “Abolition is about presence, not absence. It’s about building life-affirming institutions.”¹⁹⁹

Part of this creative process includes a commitment to transformative justice (TJ).²⁰⁰

Transformative Justice is “a political framework and approach for responding to violence, harm and abuse. At its most basic, it seeks to respond to violence without creating more violence and/or

194. 105 ILL. COMP. STAT. 5/2-3.181 (2023).

195. Mimi E. Kim & V. Kalei Kanuha, *Restorative Justice and the Dance with the Devil*, 37 FEMINIST INQUIRY SOC. WORK 189, 191 (2022) (discussing abolitionist feminists’ opposing the incorporation of restorative practices into the reauthorization of the Violence Against Women Act).

196. Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 170 (2021).

197. ANGELA Y. DAVIS, GINA DENT, ERICA R. MEINERS & BETH E. RICHIE, ABOLITION. FEMINISM. NOW. 50 (2022).

198. *Id.*

199. Ruth Wilson Gilmore, Making and Unmaking Mass Incarceration Conference, Univ. of Miss., December 2019.

200. DAVIS ET AL., *supra* note 198, at 5–6.

engaging in harm reduction to lessen the violence.”²⁰¹ TJ draws from many of the same principles and practices as RJ, including: using circle as a way of helping people work through incidents of conflict and violence, centering the PH in the process, involving the broader community in any process, and supporting the PWCH in a process of accountability, among others.²⁰² However, TJ as a counterpart to abolition has an explicit political framework that positions itself as operating wholly outside of state systems of control.²⁰³ While some RJ programs and theorists also see this as necessary to the operation of RJ,²⁰⁴ the overwhelming majority of programs claiming the RJ name (as laid out above) do not.²⁰⁵

Abolitionists have a very purposeful approach to analyzing reforms and how to determine what incremental steps to take to get to abolition. Most use the framework of reformist reforms versus non-reformist reforms.²⁰⁶ Essentially, any reform that serves to strengthen or bolster the power and force of the carceral system and its logics—either through law, funding, or public opinion, among other methods—is a reformist reform and ultimately contrary to abolitionists goals.²⁰⁷ As abolitionist Rachel Herzing states, the end goal of abolition is “mak[ing] it so the system cannot continue—so it ceases to exist—rather than improving its efficiency.”²⁰⁸

201. Mia Mingus, *Transformative Justice: A Brief Description*, LEAVING EVIDENCE (Jan. 9, 2019, 6:13 PM), <https://leavingevidence.wordpress.com/2019/01/09/transformative-justice-a-brief-description> [https://perma.cc/RUA3-YLR4].

202. *Compare* BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT 11 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020) (ebook) [hereinafter BEYOND SURVIVAL], with Virani et al., *supra* note 16, at 2–3.

203. See, e.g., BEYOND SURVIVAL, *supra* note 202, at 11.

204. See, e.g., M. Kay Harris, *Transformative Justice: The Transformation of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 555, 556 (Dennis Sullivan & Larry Tifft eds., 2006) (ebook) (discussing four different ways to conceptualize restorative and transformative justice, one of which is to see them as fully aligned, while another is to see them as strictly distinct); see also Jennifer J. Llewellyn, *Transforming Restorative Justice*, 4 INT’L J. RESTORATIVE JUST. 374, 386 (2021) (advocating for RJ to take on both micro-level, interpersonal harms as well as macro-level harms brought on by structural and systemic issues); DAVIS, *supra* note 6, at 35 (advocating for an abolitionist approach using RJ, and stating that “[h]ealing interpersonal harm requires a commitment to transforming the context in which the injury occurs: the socio-historical conditions and institutions that are structured precisely to perpetuate harm.”).

205. See *supra* note 204 and accompanying text.

206. See, e.g., *Reformist Reforms v. Abolitionist Steps in Policing*, CRITICAL RESISTANCE (May 14, 2020), <https://criticalresistance.org/resources/reformist-reforms-vs-abolitionist-steps-in-policing> [https://perma.cc/Y6TK-3GT5].

207. *Id.*

208. *Black Liberation and the Abolition of the Prison Industrial Complex: An Interview with Rachel Herzing*, 1 PROPTER NOS 62, 65 (2016), reprinted in THE BLACK SCHOLAR (Sept. 6, 2016), <https://www.theblackscholar.org/black-liberation-abolition-prison-industrial-complex-interview-rachel-herzing> [https://perma.cc/6R6H-PU2R].

Many of RJ's core principles align with the way in which abolitionists view the world they wish to create. For example, the non-hierarchical approach of RJ when taken to its logical end means that no one can have power over anyone else. Abolitionists would agree that all systems of power should be dismantled.²⁰⁹ RJ's focus on involving the community is again in alignment with how abolitionists envision a future of thriving, interdependent communities that can rely on each other when harm occurs rather than relying on any state apparatus.²¹⁰

Despite these points of alignment, many RJ advocates continue to encourage the adoption of RJ into the existing system, rather than as its own, independent method. Howard Zehr states that it is not clear that restorative justice should "replace the legal system, even in an ideal world."²¹¹ Law journal articles consistently extol RJ and its potential to provide a different approach to harm and violence, and yet then recommend it be embedded in police departments,²¹² community corrections,²¹³ and prosecutors' offices.²¹⁴

Others practicing RJ do understand their work to be a step toward abolition and think critically about their role in expanding RJ while protecting it from state co-optation. Common Justice, a non-profit organization in New York City, operates a diversion program "based in restorative justice principles," while also explicitly stating that "[we must] take collective accountability for the conditions that give rise to violence in the first place," a sentiment that is more aligned with an abolitionist or transformative justice approach.²¹⁵ A California statewide RJ policy coalition, comprised of over twenty RJ organizations across the state, has identified as one of their primary concerns the co-optation of RJ by state actors.²¹⁶

209. Derecka Purnell, *Reforms are the Master's Tools*, in ABOLITION FOR THE PEOPLE, THE MOVEMENT FOR A FUTURE WITHOUT POLICING & PRISONS 144, 148 (Colin Kaepernick, ed. 2021); see Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 169 (2022); Interview by Jeremy Scahill with Mariame Kaba, *Hope Is a Discipline: Mariame Kaba on Dismantling the Carceral State*, INTERCEPTED (Mar. 17, 2021, 6:01 AM), <https://theintercept.com/2021/03/17/intercepted-mariame-kaba-abolitionist-organizing> [<https://perma.cc/66VR-L73X>]; see also Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L. J. 778, 786 (2021).

210. Compare Virani et al., *supra* note 16, at 2–3, with Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1164 (2015).

211. See, e.g., ZEHR, *supra* note 8, at 19–20.

212. See Annalise Buth & Lynn Cohn, *Looking at Justice Through a Lens of Healing and Reconnection*, 13 NW. J. L. & SOC. POL'Y 1, 13 (2017).

213. Sliva et al., *supra* note 41, at 473.

214. Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2289 (2020).

215. See, e.g., *The Common Justice Model*, COMMON JUST., https://www.commonjustice.org/the_common_justice_model [<https://perma.cc/9EGG-K5E6>] (last visited Dec. 4, 2023).

216. Virani et al., *supra* note 16, at 8.

It is evident that tensions exist within the RJ community about how and who can practice it and what its relationship should be to the existing criminal punishment system.²¹⁷ Those advocating for RJ in collaboration with the criminal punishment system seem to believe that RJ can transform that system to mitigate or maybe even eradicate many of the harms it inflicts.²¹⁸ However, I see RJ's core principles as fundamentally incompatible with the criminal punishment system and that the co-optation of RJ obscures these core principles and actively works against abolitionist goals. As outlined below, the way many RJ programs function serves to enhance the legitimacy of the criminal punishment system and expand, rather than diminish, carceral logics in ways that are counter to the abolitionist movement.²¹⁹

A. RJ as Lending Legitimacy to the Criminal Punishment System

One of the most troubling things about restorative justice (RJ) becoming co-opted by the current criminal punishment system is that it may serve to lend legitimacy to these systems, ensuring that they will continue to operate for time immemorial. By adopting the language (e.g., “restorative policing”) and incorporating some of the practices into existing systems (e.g., “restorative courts”), the criminal punishment system is using RJ to communicate that it can reconstitute itself by adapting to present-day demands for fairness and alternatives to incarceration, while continuing to monopolize the response to harm and violence.

Indigenous scholars have written about this issue in relation to indigenous models of justice being co-opted or stolen by settlers' systems.²²⁰ They argue that the co-optation of indigenous models of justice has allowed settler systems to claim that they are being responsive to demands for culturally relevant processes, while simultaneously using these indigenous practices to engage in social control.²²¹ As Paul Havemann puts it, “[d]espite its appearance as more benign than the model of pure imposition, the integrated or indigenized model is one in which the colonizer preserves aspects of the Indigenous social control system, primarily in order to utilize its authority to support the new pattern of domination.”²²²

217. Llewellyn, *supra* note 204, at 386.

218. E.g., Sliva et al., *supra* note 41, at 477.

219. See discussion *infra* Section III.A.

220. Paul Havemann, *The Indigenization of Social Control in Canada*, in *INDIGENOUS LAW AND THE STATE* 71, 83 (Bradford W. Morse & Gordon R. Woodman, eds. 1987).

221. See, e.g., *id.*

222. *Id.* at 83.

This is what I argue is occurring in the United States with RJ. System actors often express that by engaging with RJ they are fundamentally changing the system and its outcomes, and yet their power to control and punish communities remains virtually untouched.²²³ A press release from the Circuit Court of Cook County lauding the establishment of the RJCCs discussed above quotes the Chief Judge Evans as saying that this court “can truly save the lives of the young people who will be coming before us.”²²⁴ This is an audacious claim. As penal abolitionists would argue, courts typically function to destroy lives, not to save them.²²⁵

Judge Colleen Sheehan, another RJCC judge, states that the people participating in RJCC “should be offered more flexible *punishment* when they commit a crime than the adult system provides”²²⁶ This characterization of the program surfaces the inability of these court actors to let go of punishment as the frame, method, and outcome. These systems actors are fine with making their system a bit more “flexible” through the use of RJ, but they are unwilling to give up their power and their ability to punish. RJ then serves to give systems cover to operate within the same philosophical approach as they always have. Such programs function to “obscure [the criminal legal system’s] violence more efficiently.”²²⁷

Other RJ programs express misunderstandings of RJ that also lend credence to the theory that in adopting RJ, state actors enhance their legitimacy rather than transform current structures. In Yolo County, California, the District Attorney’s Office has established a Neighborhood Court, purportedly based on the principles of RJ as outlined in Howard Zehr’s philosophical work.²²⁸ A report describing the Neighborhood Court reflects a fundamental misunderstanding of RJ and how systems are co-opting community members through RJ to serve as their mouthpieces of legitimacy.²²⁹ The report states, “[r]estorative justice recognizes members of the community as

223. See Purnell, *supra* note 209, at 146.

224. Cook County Press Release, *supra* note 129.

225. See, e.g., Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CAL. L. REV. 1, 6 (2022).

226. 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/H2ZY-FD3H>] (emphasis added).

227. Purnell, *supra* note 209, at 146.

228. See Jeff Reissig, Jake Whitaker & Nicole Kirkaldy, *Neighborhood Court: Restorative Justice for a Better Community*, 34 A.B.A. CRIM. JUST. 35, 36 (2019), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cj-34-1-spring-2019.pdf [<https://perma.cc/G34V-TU6H>].

229. See *id.* at 39.

stakeholders in law enforcement and the criminal justice system.”²³⁰ Instead of turning power over to the community to operate outside of the constraints of the criminal punishment system, this program perceives of itself as absorbing community members to perform their mission.

The report goes on to explicitly state how they perceive of RJ as enhancing the legitimacy of the criminal punishment system:

The restorative justice system coexists with the traditional justice system, relying on the authority of the courts to incentivize participation in Neighborhood Court. Similarly, the restorative justice system also frees up time and energy previously spent on prosecuting these offenses to focus on more serious crimes and improve outcomes. These two systems, ideally, not only can co-exist but *have the potential to strengthen one another*.²³¹

Many programs, such as this one, do not even attempt to hide how they are using RJ to further their primary retributive goal. Further, in saying the authority of the court is needed to incentivize participation, they are securing the existence of the court’s coercive nature as a necessary piece of RJ. The statements of the officials running these programs indicate that they are fine with tinkering around the edges of the criminal punishment system by using RJ, but never will they cede their power as judges or prosecutors to be the ultimate decision makers.

Eligibility criteria, as discussed in Section II.D.1, that exclude certain people from accessing RJ also serve to justify the punitive function of the criminal system.²³² As Erin Collins in her article about status courts puts it, when people are sorted by who is deserving or sympathetic for specialized courts or programs, it serves to “entrench the system’s dysfunctional treatment of offenders who are not chosen for specialized treatment.”²³³ These divisions entrench the idea that punishment is still okay and, in fact, necessary for some (read: most) while only a small subset of individuals could benefit from an alternative, nonpunitive path.

When programs like these absorb RJ into existing systems, or limit their applicability, they are squeezing any abolitionist potential out of RJ. They have now taken RJ and made it their own, diluting its power to radically transform how we view harm and violence and our approaches to it. As can be seen in these examples, they use it

230. *Id.* at 36.

231. *Id.* at 38 (emphasis added).

232. See discussion *supra* Section II.D.1.

233. Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1485 (2017).

to indicate their responsiveness to change, while at the same time operating with business as usual.²³⁴ These state actors have not given any power away, as abolitionists would demand, but instead have placed themselves in the position to maintain control over the way RJ can be utilized.

B. RJ as Expanding Carceral Logics

The tentacles of the punitive system often reach into the community-based organizations that provide restorative justice (RJ) services, deputizing these organizations to serve a punitive and carceral role. As Derecka Purnell describes one diversion program, “[t]he power of the probation office was extended to the organization . . . [h]e was diverted from jail, but still under carceral control.”²³⁵

As described in Part II, there are many mechanisms, whether through programmatic policy or state law, that link RJ community organizations to state institutions. In some instances, the deputizing of community and service providers to serve in a more punitive role is subtle: for example, requiring report backs on the status of a participants’ RJ process.²³⁶ Other programs have slightly greater reporting requirements, like that of the Washington County Community Circles model, which indicates they report back to the court if a person misses circle or has tested positive for drugs.²³⁷ And, as mentioned above, this program explicitly labels an individual’s involvement in RJ as “being on probation with the circle.”²³⁸

This is not to say that the individuals within these programs are necessarily engaging in a punitive way when they practice RJ. However, when RJ functions within or is connected to systems, it seems that punitive logics and ideas tend to infiltrate the RJ programs, rather than restorative principles remaining paramount. Thus, not only does RJ when co-opted legitimize the criminal punishment system, it also in many ways, can expand it.

234. For example, the same Yolo County District Attorney, Jeff Reisig, who created the Neighborhood Court program also is backing a prospective ballot initiative that would create a new offense called a “treatment-mandated felony,” which would mandate drug treatment for someone arrested for a third time for drug possession and elevate this charge to a felony (currently this would be a misdemeanor under California law) and if the individual refused, they could face eighteen months of incarceration. Ashley Sharp, *Yolo County DA Says California’s Homeless Crisis Can be Solved in 1 Year by Cracking Down on Drugs*, CBS NEWS (June 1, 2023), <https://www.cbsnews.com/sacramento/news/yolo-county-da-says-californias-homeless-crisis-can-be-solved-in-1-year-by-cracking-down-on-drugs> [<https://perma.cc/C9X9-SDXZ>].

235. Purnell, *supra* note 209, at 145–46.

236. See, e.g., BALIGA ET AL., *supra* note 2, at 3.

237. *Circles Process Protocol Manual*, *supra* note 122, at 23.

238. *Id.*

C. Can Restorative Justice Be a Stepping Stone on the Pathway to Abolition?

The plethora of state actors engaging in restorative justice (RJ) has led some in the abolitionist movement to give short shrift to RJ, moving towards a more transformative justice (TJ) approach.²³⁹ Some believe that RJ is inherently or necessarily entangled with the state.²⁴⁰ Others have stated that it does not matter what it is called as long as it is a practice clear in its values that operates wholly outside of the state.²⁴¹

I intervene here to say that it is important not to throw out the baby with the bath water. In fact, much of TJ's approach to addressing interpersonal harm and violence is derived from the foundational practices of RJ.²⁴² And there are RJ programs (if only a few) that exist and operate without any state involvement.²⁴³ Others, as mentioned (including the program that I started), accept referrals from state actors like police departments or prosecutors' offices.²⁴⁴ Such arrangements often necessitate information-sharing agreements (though typically minimally) and do function with some level of coercion—meaning that if a person does not complete their RJ process, there is often the threat of prosecution hanging over their head.²⁴⁵

Programs like these, not operated by the state, but in some ways constricted by it, beg the question of whether they too are serving the function of legitimizing the current criminal punishment system and impeding abolitionist goals. Indeed, as Mimi Kim and V. Kalei Kanuha have noted, RJ when implemented in schools, which they define as institutions of “hierarchical systems of control and an unrelenting punitive logic,” can result in RJ “processes used to shame or even to mete out punishments in the form of a false egalitarian structure of circles.”²⁴⁶ At the same time, Dorothy Roberts has

239. Llewellyn, *supra* note 204, at 386.

240. *See id.*

241. *Id.*; *see* Mingus, *supra* note 201.

242. *See* Harris, *supra* note 204, at 558–60.

243. *See Mission and Values*, CHAT PROJECT, <https://chatproject.org/mission-and-values> [<https://perma.cc/U7CK-KP3J>] (last visited Dec. 4, 2023) (“The mission of The Collective Healing And Transformation (CHAT) Project is to expand community capacity to respond to and transform interpersonal conflict, harm, and violence *without the use of state intervention and the criminal legal system.*” (emphasis added)).

244. California Conference for Equality and Justice, *supra* note 1.

245. *Cf.* Green & Bazelon, *supra* note 214, at 2302 (arguing that the possibility of prosecution if one fails to satisfactorily participate in a restorative justice program may positively motivate offenders).

246. Kim & Kanuha, *supra* note 195, at 190.

asserted that abolitionist organizers also recognize that this is a “long-term project” that will sometimes entail working with and through state actors, albeit always keeping an eye on the end goal.²⁴⁷

There is not a clear answer to this. This narrow subset of programs all have some element of coercion from state actors, which would be seen as antithetical to abolitionist goals.²⁴⁸ However, many RJ programs recognize that while they may currently have to work with system actors to receive referrals, their ultimate goal is to replace the criminal punishment system and its ideology wholesale.²⁴⁹ One could see how programs like this may be grappling with current realities while fixing abolition on their horizon. Such programs could work towards abolitionist goals by also operating to take referrals from community members who have not involved the state in their conflict. There is evidence that many communities do not wish to involve the state when an act of harm or violence occurs.²⁵⁰ RJ programs that accept referrals from state actors could also reach out to communities with a distrust of the system to offer a different path forward. This could lead to a greater understanding and belief in RJ processes, which could then in turn reduce reliance on or the perceived need for state intervention. If conceived of in this way, with the ultimate goal as to not need referrals from or agreements with the state, perhaps some RJ program could be considered as working towards and not against abolitionist goals.

CONCLUSION

As I have laid out, the fundamental principles of restorative justice (RJ) could not be clearer. They lay out a road map for how to approach harm and violence in a fundamentally different and nonpunitive manner. What is most important is that RJ, as many say, is a way of *being* or an ethos.²⁵¹ That way of being is constructed around the core principles. Thus, one cannot engage in a job that both prosecutes (using the full power of the state to enforce laws and

247. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 108 (2019).

248. See McLeod, *supra* note 146, at 1621.

249. See COMMON JUST., *supra* note 215; see also *Our Principles*, RESTORATIVE CMTY. PATHWAYS, <https://www.restorativecommunitypathways.org/about> [<https://perma.cc/N9EL-3RM2>] (last visited Dec. 4, 2023) (identifying their core principles, including “removing power from the state and returning that power to communities[,]” and working to “actively dismantle white supremacy, settler-colonialism, patriarchy, and other forms of oppression that the criminal system perpetuates.”).

250. *US: Immigrants ‘Afraid to Call 911’: States Should Reject Corrosive ‘Secure Communities’ Program*, HUM. RTS. WATCH (May 14, 2014, 11:55 PM), <https://www.hrw.org/news/2014/05/14/us-immigrants-afraid-call-911> [<https://perma.cc/LJ9Y-3P36>].

251. Bankhead & Brown, *supra* note 4, at 2.

punishment) and engages in RJ. To integrate this way of being, the core principles must be adopted in full. This is why it will not work for state actors, with all of the power and violence that comes with their functions, to engage in RJ. When they do so, they will necessarily distort RJ because of the power they hold and the punitive system in which they operate.

Although many RJ advocates and practitioners have used RJ in tandem with the state, there is no requirement that it must be this way. In fact, those who are using or advocating for RJ to be embedded with the state would do well, as Howard Zehr does point out, to return to core principles.²⁵² We should not be so hungry for scraps that we compromise the promise of this approach to fit the narrow perspective that makes up a reformist model. Instead, the entire RJ community should take a stronger stand when state actors swoop in to remove RJ from their grasp. When legal scholars and other academics contemplate alternatives to the criminal punishment system, RJ should not be listed as one of many policy solutions without contemplation of how it should be implemented and by whom. Instead, there should be resounding cries of “not in our name” and a collective push back against state actors seeking to claim RJ as their own to gain political purchase. It is imperative that people advocating for the broader use of RJ are clear-eyed about the many harms that occur when RJ is intertwined with the state—such that their advocacy includes a clear vision for community-based RJ that remains outside of the state and its carceral functions.

252. See ZEHR, *supra* note 8, at 7, 72–73.