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BEYOND DUE PROCESS: AN EXAMINATION OF THE RESTORATIVE JUSTICE COMMUNITY COURTS OF CHICAGO

Jackie O'Brien*

As American society has reckoned with the harmful effects of mass incarceration, there has been a push to consider alternative forms of achieving justice. Restorative justice is one such method. A transformative approach to conflict resolution inspired by the traditions and practices of indigenous peoples, restorative justice offers a comprehensive means of addressing harm, emphasizing the community, rather than the single act that caused harm. Many jurisdictions and communities have turned to restorative justice to divert cases from the punitive criminal legal system. While there are variations in programs and approaches, many communities integrate restorative justice practices as a means of addressing harm caused by young people. Applying a restorative approach, these initiatives seek to undermine the harmful, life-long effects that interaction with the criminal legal system imposes upon young people.

These restorative alternatives operate against the backdrop of the punitive system, leading scholars, practitioners, and community members to raise concerns about the lack of procedural protections in place for individuals proceeding through these diversionary programs. Because the proceedings are less adversarial in nature, the legal community has sounded the alarm about the potential for self-incrimination, coercion, and less zealous advocacy by counsel. This unease is further compounded by the fact that failure to complete the requirements of these programs can lead to a referral back to the traditional criminal legal system.

* Thank you to Professor Tom Geraghty for your guidance, support, and thoughtful suggestions, to all those at the RJCC who provided the insight, knowledge, and experience that made this project possible, to the *Journal of Criminal Law & Criminology* team who dedicated their time and effort to this piece, and to my friends and family for their love and support.

The Restorative Justice Community Court of Chicago (RJCC) is one such alternative. Created in 2017, there are now three RJCCs operating in the North Lawndale, Englewood, and Avondale communities. This Comment seeks to analyze the due process concerns raised by members of the legal and restorative justice communities through the lens of the North Lawndale RJCC. Drawing on knowledge gained through my personal observations and interviews, it is clear that due process violations do not present a substantial threat to the success of the RJCC. Programs like the RJCC operate in a gray zone between the legal rigidity of the criminal legal system and the community-oriented approach adopted by the restorative justice community. This framework urges us to evaluate these programs through an alternative lens so that we can better understand their contributions to furthering justice while remaining aware of their shortcomings to create fully restorative spaces.

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INTRODUCTION

America is a carceral state. The population of incarcerated individuals in America increased by 500% in the past 40 years.¹ And this increase is not correlated with an increase in crime, but instead a drastic shift in criminal legal policy, including the proliferation of mandatory minimum sentences and harsh sentencing schemes for drug-related offenses and habitual offenders.² Imposing prison time as the default response to criminalized behavior, coupled with the over-policing of minority communities, especially Black Americans, has led to the “New Jim Crow,” to use a phrase coined by Michelle Alexander.³

This proliferation of mass incarceration was also accompanied by the vast expansion of criminal records, generating a series of closed doors for individuals touched by the criminal legal system and perpetuating a cycle of recriminalization.⁴ Upon realization of the destructive effects of excessive policing and punishment, a movement developed advocating for reform in sentencing schemes and record expungement.⁵ Beginning with the juvenile justice movement, some jurisdictions began to implement restorative justice practices to avoid incarceration as the default solution for addressing harmful individual behavior.

¹ *Growth in Mass Incarceration*, SENT’G PROJECT (2022), <https://www.sentencingproject.org/research> [<https://perma.cc/BX77-3Y5R>].

² *Id.*; *The History, Causes, and Facts on Mass Incarceration*, FAIR FIGHT INITIATIVE, <https://www.fairfightinitiative.org/the-history-causes-and-facts-on-mass-incarceration/#:~:text=In%20recent%20history%2C%20the%20rapid,with%20Clinton’s%201994%20crime%20bill> [<https://perma.cc/D6DY-7MJM>] (last visited Feb. 3, 2023).

³ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 14 (2010).

⁴ See James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 388–89 (2006) (identifying the harmful effects of a criminal record: increased police contact, decreased leniency in the criminal legal system, and collateral consequences, including denial of access to certain governmental programs and employment opportunities).

⁵ This is demonstrated, in part, by the bipartisan passage of the 2018 First Step Act, which took a small step towards the elimination of discriminatory sentencing regimes. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018); Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html>.

The increasing popularity of the restorative justice movement caused some legal scholars to question how these alternative approaches to justice and accountability can meet the demands of procedural due process.⁶ Others argued that these critiques are misplaced, given the dissimilar practices and goals of restorative as compared to retributive justice.⁷ However, the increasing utilization of restorative practices by many jurisdictions requires an examination of these concerns.

Observation of the Restorative Justice Community Court (RJCC) in Chicago makes clear that there are methods by which restorative justice programs can ensure the protection of participant rights traditionally guaranteed in the criminal legal system. Programs like the RJCC do more than respond to these due process critiques: they serve to challenge our conception of what rights an individual in the criminal legal system is due. Programs like the RJCC force us to consider the entire person, not just the bad act that led to entanglement with the State in the first instance.

In considering the future of programs like the RJCC, it is important to reconceptualize the framework by which we evaluate their success. We should rely not only on the markers of success in the traditional system, like due process protections, but consider how restorative practices can become more cohesively integrated in a state-run system while maintaining a holistic and community-integrated approach.

This Comment proceeds in four Parts. Part I examines the origins of restorative justice and its current application in the American context as an alternative method of addressing harm in the criminal system. Part II examines the scholarship surrounding the utilization of restorative justice practices in the American criminal context, outlining critiques and criticisms from the legal community. Scholars have raised a considerable alarm about the potential for restorative justice programs to erode the due process rights of participants, presenting a serious risk to the legitimacy of the criminal law system. Part III responds to these critiques through an analysis of the RJCC of Chicago. This analysis draws on my experience observing the RJCC of

⁶ Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 32–33 (2004).

⁷ Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2339–40 (2013) (“[A] broadened understanding enables a synergy between the restorative and retributive philosophies and thus extends the achievable goals beyond their traditional scope to include socially beneficial outcomes such as victim healing and community empowerment.”); Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307, 312–16 (2006) (providing empirical evidence suggesting that integrating procedural and restorative justice models is successful in restoring individuals and communities that have experienced harm by encouraging responsibility).

North Lawndale, a community in Chicago, Illinois, where I attended proceedings and spoke with practitioners. Part IV will take a step outside of these critiques and summarize a broader array of rights beyond those traditionally guaranteed by the Due Process Clause and how restorative justice practices can provide more protection than the due process rights guaranteed in the punitive system. Finally, the conclusion will consider the possibilities for expanding these programs and methods, beyond the current eligibility requirements, to include a broader range of harms and individuals.

I. BACKGROUND

A. WHAT IS RESTORATIVE JUSTICE?

Restorative justice has many definitions. One of the most widely used comes from Howard Zehr's *Little Book of Restorative Justice*, defining restorative justice as "a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."⁸ This definition emphasizes a key point of departure from the traditional criminal legal system, where the community is abstractly represented by "the State." In restorative justice, community involvement is not abstract. Instead, there is a concrete effort to administer justice among relevant stakeholders: the individual who committed the harm, individuals affected by the harm, and the larger community.⁹

Morrison and Vaandering provide an enlightening definition of restorative justice, which emphasizes the interrelational and reciprocal nature of justice in addressing the causes and effects of harmful individual behavior.¹⁰ Defining restorative justice with respect to their work on school communities as "a distinct praxis for sustaining safe and just school communities, grounded in the premise that human beings are relational and thrive in contexts of social engagement over control."¹¹ Instead of harnessing the punitive power to punish, restorative justice relies on the "'soft' power of relational ecologies," or the force of personal relationships rather than the hard power of institutions, to influence individual behavior.¹²

⁸ HOWARD ZEHR, *LITTLE BOOK OF RESTORATIVE JUSTICE* 37 (2002).

⁹ See Andrew Ashworth, *Is Restorative Justice the Way Forward for Criminal Justice?*, 54 *CURRENT LEGAL PROBS.* 347, 347 (2001) (explaining that for the purpose of community justice, the stakeholders are the victim, the offender, and the community at large).

¹⁰ Brenda E. Morrison & Dorothy Vaandering, *Restorative Justice: Pedagogy, Praxis, and Discipline*, 11 *J. SCH. VIOLENCE* 138, 139 (2012).

¹¹ *Id.*

¹² *Id.* at 140.

Restorative justice recognizes that when an individual commits an act that harms the community, they also experience harm themselves. Thus, in seeking to repair the harm, it is vital to rely on preexisting relationships and administer justice in relation to one another, generating new bonds and healing relationships that were strained by the breach of trust.

B. WHAT CAN RESTORATIVE JUSTICE LOOK LIKE?

The title of this Section is important: “what *can* restorative justice look like?,” rather than “what *does* restorative justice look like?” because the practice takes many forms. Although core philosophies unite the practice, restorative justice operates on a continuum.¹³ Many scholars have rejected efforts to confine restorative justice to a precise definition or set of practices, seeking instead to increase its reach and effect on individual lives by adopting a maximalist definition.¹⁴

Originally, restorative justice efforts often took the form of a “victim-offender mediation” or VOM, a practice that developed from the victims’ rights movement of the late twentieth century.¹⁵ The goal of a VOM is to bring victims and offenders together in a space where they both feel that the mediation is fair, providing an opportunity for resolution and addressing personal pain.¹⁶ The process is formalistic. The case is often referred to the VOM program after the offender admits guilt.¹⁷ Both parties must voluntarily consent to the mediation and prepare for the meeting.¹⁸ During the actual mediation, the victim is given the opportunity to share their feelings and discuss what occurred, with some mediations resulting in a formal restitution agreement.¹⁹ The goal is to provide a space for the victim to share their experiences and for the offender to take accountability for the harm they caused.²⁰

¹³ Susan Sharpe, *How Large Should the Restorative Justice ‘Tent’ Be?* in CRITICAL ISSUES IN RESTORATIVE JUSTICE 17, 19 (Howard Zehr & Barb Toews eds., 2004).

¹⁴ *Id.* at 20.

¹⁵ Marilyn Armour, *Restorative Justice: Some Facts and History*, 27 TIKKUN 25, 26 (2012).

¹⁶ Mark S. Umbreit, *Mediation of Victim Offender Conflict*, 1988 J. DISP. RESOL. 85, 87 (1988). It is important to note that many in the restorative justice community have moved away from the language of “victim” and “offender,” because it serves to define a person by reference to one action they took or one experience they had in their life. However, I will use these terms in this Section to stay consistent with the practice of VOM.

¹⁷ *Id.* at 88.

¹⁸ *Id.*

¹⁹ *Id.* at 90–91.

²⁰ *Id.* at 90.

Today, one of the most common restorative justice techniques is the practice of peacemaking circles. Several elements define the practice of circles, both internal philosophies and external ones. Well-known practitioners of restorative justice, Kay Pranis, Barry Stuart, and Mark Wedge describe the four fundamental shifts that a circle process seeks to create, “from coercion to healing; from solely individual to individual *and* collective accountability; from primary dependence on the state to greater self-reliance within the community; and from justice as ‘getting even’ to justice as ‘getting well.’”²¹ A circle, unlike the traditional justice system, centers the individual—not the harm committed. By focusing on the individual, peace circles abandon retribution in favor of the restoration of each stakeholder in the circle: the individual who committed the harm, the individual who experienced the harm, and the community affected by the harm. Put simply, in its most fundamental form, peacemaking circles elevate the community’s role in responding to the conduct of its members.²²

In a peacemaking circle, the circle keeper or circle facilitator leads.²³ The keeper is not superior to other members but is trained to facilitate the practice so that the circle can run itself.²⁴ In the beginning stages of a circle, the keeper describes guidelines and values that guide the circle.²⁵ These values commonly include confidentiality, listening and speaking with respect, and honoring the talking piece.²⁶ The talking piece is a physical object with meaning for those in the circle.²⁷ The talking piece leads the dialogue within the circle, giving the individual that holds it an opportunity to speak, and those without the talking piece an opportunity to listen.²⁸ In the circle, individuals are invited to share their needs and feelings, others can respond, and the group can explore options to address the harm and reach a consensus.²⁹

There are, of course, many variations and types of circles: healing circles, talking circles, sentencing circles, reintegration circles, etc.³⁰ In

²¹ KAY PRANIS, BARRY STUART & MARK WEDGE, PEACEMAKING CIRCLES: FROM CONFLICT TO COMMUNITY 10 (2003).

²² Albert Dzur, *Conversation on Restorative Justice: A Talk with Kay Pranis*, 4 RESTORATIVE JUST. 257, 259–60 (2016).

²³ PRANIS ET AL., *supra* note 21, at 82–84.

²⁴ *Id.*

²⁵ *Id.* at 103–05.

²⁶ *Id.* at 106.

²⁷ KAY PRANIS, CIRCLE KEEPER’S HANDBOOK 7 (Edutopia, ed. 2014).

²⁸ PRANIS ET AL., *supra* note 21, at 96–99.

²⁹ *Id.* at 143–45.

³⁰ *Types of Circles*, PEACEMAKING CIRCLES, <https://www.peacemakingcircles.org/types-of-circles> [<https://perma.cc/9MSH-TMT8>] (last visited Jan. 22, 2023).

addition to circles, there are many other forms or types of restorative justice, including family mediation and other forms of group conferencing.³¹ However, this brief overview provides the grounding features of modern restorative justice methods, which, though different in form, draw upon the practices of various indigenous peoples.

C. THE ROOTS OF RESTORATIVE JUSTICE

Restorative justice has been utilized by indigenous peoples across the world for centuries as a method of effective dispute resolution.³² In North America, many tribal societies, especially the Navajo Nation, use peacemaking to resolve disputes. This process “emphasizes healing over guilt, restitution over punishment, community over the individual, the future over the past.”³³ Chief Justice Yazzie of the Navajo Nation describes the peacemaking process of the Navajo as horizontal justice, as compared to the vertical justice utilized by the punitive American system.³⁴ Horizontal justice prioritizes equality among the participants, using “solidarity to restore good relationships among people” and within one’s self.³⁵ When harm occurs, those affected by the dispute will receive notice and gather to talk, along with their relatives and clan members.³⁶ The dispute is approached as a problem to be solved, rather than an act deserving punishment. The emphasis is on healing, not determining fault.³⁷ The Navajo Nation’s practice is one example

³¹ GORDON BAZEMORE & MARK UMBREIT, U.S. DEP’T OF JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, A COMPARISON OF FOUR RESTORATIVE CONFERENCING MODELS 1, 5–6 (Feb. 2001), <https://www.ojp.gov/pdffiles1/ojjdp/184738.pdf> [<https://perma.cc/278K-R44P>].

³² See generally Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One*, INT’L INST. FOR RESTORATIVE PRAC. (Apr. 27, 2004), <https://www.iirp.edu/news/restorative-justice-practices-of-native-american-first-nation-and-other-indigenous-people-of-north-america-part-one> [<https://perma.cc/X54R-Q2EK>]; Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part Two*, INT’L INST. FOR RESTORATIVE PRAC. (May 26, 2004), <https://www.iirp.edu/news/restorative-justice-practices-of-native-american-first-nation-and-other-indigenous-people-of-north-america-part-two> [<https://perma.cc/PFL8-TSEU>].

³³ ROBERT V. WOLF, CTR. FOR CT. INNOVATION, PEACEMAKING TODAY: HIGHLIGHTS OF A ROUNDTABLE DISCUSSION AMONG TRIBAL AND STATE PRACTITIONERS 1 (2012), https://www.courtinnovation.org/sites/default/files/documents/Peacemaking_Today.pdf [<https://perma.cc/Q39Z-5K8B>].

³⁴ Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180 (1994).

³⁵ *Id.* at 181.

³⁶ *Id.* at 183.

³⁷ *Id.* at 184 (describing the resolution of a child support dispute where the father denied paternity until the father and mother of the child entered into a peacemaking dialogue with

of peacemaking and restorative justice used by a diverse array of people and communities. The practice illustrates many of the core principles of restorative justice: community, solidarity, equality, healing, and consensus.³⁸

The Māori in New Zealand is another society that uses communal healing in conflict resolution. Māori understandings of community and justice recognize the central interconnectedness of people and the natural world, and this understanding is integral to their method for addressing harm.³⁹ The Māori restorative justice process, *hui whakatika* (or *hui* for short), is described as a “process for restoring harming.”⁴⁰ In a *hui*, all parties meet in a supportive environment, where members are offered the opportunity to share their perspectives, take accountability, and offer mutual respect.⁴¹ After time for reflection, a planning meeting is held to develop a way that the members of the *hui* can move forward as a community, supporting one another.⁴²

D. THE DEVELOPMENT OF RESTORATIVE JUSTICE PRACTICES IN THE AMERICAN CONTEXT

Restorative justice in the American criminal system looks considerably different from the diverse indigenous roots of the practice. Entanglement of these practices with the power of the state necessarily alters its administration. It is no doubt important to give a name to the range of societies and people who have historically used restorative justice as a means of conflict resolution. But it is also important to distinguish these practices from the range of restorative justice programs implemented in the modern American context.⁴³

other community members, at which point the father admitted paternity and the group came to a child support agreement).

³⁸ *Id.*

³⁹ Alethia Z. Fenney, Navajo Peacemaking and Māori Restorative Justice: A Comparison of Process and Procedure 18 (Summer 2012) (Master of Criminology thesis, Regis University) (All Regis University Theses).

⁴⁰ Sonja Bateman & Mere Berryman, *He Hui Whakatika: Culturally Responsive, Self-Determining Interventions for Restoring Harmony*, 9 KAIRARANGA 6, 8 (2008).

⁴¹ *Id.* at 9.

⁴² *Id.*

⁴³ See Robert G. Yazzie, *Forward* of EDWARD C. VALANDARA & WADBLI WAPĤĀHA HOKŠĪLA, *COLORIZING RESTORATIVE JUSTICE* xi (2020) (“Indigenous people have used the peacemaking circle to work out their issues in every respect from time immemorial.”); *COLORIZING RESTORATIVE JUSTICE*, *supra*, at 1–2 (“Rather than changing the system, the [Restorative Justice] process are called on to ‘patch up’ the harms that racist and colonizing structures and institutions cause routinely.”).

A common narrative is that modern restorative justice was born through a “victim-offender resolution program” or “victim-offender mediation” (VOM) in Canada.⁴⁴ In 1974, two probation officers, both members of the Mennonite Central Community, proposed a meeting between two young men who vandalized property and the community members whose property was vandalized.⁴⁵ In the end, the two young people visited every person harmed, spoke with them, and provided monetary restitution.⁴⁶ The practice was considered a success and eventually developed into a formal program, at one point handling 163 cases in a single year.⁴⁷ This practice expanded to the United States, with a VOM program starting in Elkhart, Indiana in 1978.⁴⁸ This movement was led by several key figures from the Mennonite Committee, including Howard Zehr and Mark Umbreit.⁴⁹

But the contemporary American restorative justice movement starts much earlier and can be traced back to the juvenile justice movement, which began in the late nineteenth century.⁵⁰ The first juvenile court was established in 1899 in Cook County, Illinois.⁵¹ The court was developed in response to what was seen as an overly punitive system for young people, which resulted in long-term harm. Interventionist advocates argued that the juvenile justice court should serve as the “substitute parent” and act in the child’s best interest, or as “parents patriae.”⁵² While much of the juvenile justice system closely mirrors the adult system’s formalistic and punitive measures, it has also been an area of vast expansion for restorative justice. There are now more than 750 recorded juvenile restorative justice programs.⁵³ The restorative justice movement steadily gained traction and surprising margins

⁴⁴ John Bender, *The Birthplace of Restorative Justice*, Mennonite Cent. Comm. (Apr. 29, 2019), <https://mcc.org/stories/birthplace-restorative-justice> [https://perma.cc/46FA-3ET4] (adopting the text from an article originally published as John Bender, *Part 1: Reconciliation Begins in Canada*, 16 MCC PEACE SECTION NEWSL. 1 (1986)).

⁴⁵ DEAN E. PEACHY, *The Kitchener Experiment in Mediation and Criminal Justice* 14, 14–15 (Martin Wright & Burt Galaway eds., 1989).

⁴⁶ *Id.* at 17–18.

⁴⁷ *Id.* at 22.

⁴⁸ HOWARD ZEHR, *Changing Lenses* 160 (1990).

⁴⁹ *Id.* at 172.

⁵⁰ *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., <http://www.cjcj.org/education1/juvenile-justice-history.html> (last visited Jan. 16, 2023).

⁵¹ *Id.*

⁵² GORDON BAZEMORE & MARA SCHIFF, *Juvenile Justice Reform and Restorative Justice* 8 (2004); *In re Gault*, 387 U.S. 1, 16 (1967) (“[T]he proceedings were not adversary, but that the state was proceeding as parents patriae.”).

⁵³ John Braithwaite, *Encourage Restorative Justice*, 6 *CRIMINOLOGY & PUB. POL’Y* 689, 689 (2007).

of public support, leading to its incorporation in other areas of the criminal legal system, including with respect to emerging adults.⁵⁴

As of July 2020, forty-six jurisdictions have incorporated restorative justice practices into their criminal legal system for juveniles or adults.⁵⁵ There is no set form to guide these attempts at reconceptualizing the administration of the criminal legal system.⁵⁶ However, specific trends emerge, including: an absence of express confidentiality guarantees, a lack of procedural laws governing the process, and a requirement of voluntary participation.⁵⁷ These trends in the legalization of restorative justice implicate due process concerns, requiring that these programs be examined on the basis of the critiques of criminal legal practitioners.

E. THE NECESSITY OF DUE PROCESS: THE SUPREME COURT'S DECISION IN *GAULT*

The Supreme Court exerted its influence over the development of alternative models of justice in *In re Gault*. The Court held that minors in the juvenile justice system are entitled to certain guarantees of due process, including adequate notice of the charges or allegations, a right to counsel, the privilege against self-incrimination, and a right to confrontation and cross-examination of witnesses.⁵⁸ Analyzing the origins of juvenile justice, the Court recognized that juvenile courts were established with the goal of rehabilitation, rather than retribution as in the adult context.⁵⁹ As such, the “apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded.”⁶⁰

But the wide-ranging discretion provided to juvenile courts had harmful consequences.⁶¹ In *Gault*, a court committed Gerald Gault, a 15-year-old boy, to a state institution as a juvenile delinquent for making a prank phone call after the judge found that Gerald was “habitually involved in immoral

⁵⁴ *Id.* at 689–90 (citing the unanimous passage of a resolution encouraging the adoption of restorative practices at the U.N. Congress on the Prevention of Crime and Treatment of Offenders).

⁵⁵ Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1156 (2020).

⁵⁶ *Id.* at 1160–62 (“Restorative justice . . . exists across the country in a highly discretionary and localized manner with decision-making authority held by a diverse set of state actors.”).

⁵⁷ *Id.* at 1162–64.

⁵⁸ *In re Gault*, 387 U.S. 1, 30–31 (1967).

⁵⁹ *Id.* at 16.

⁶⁰ *Id.* at 15.

⁶¹ *Id.* at 16–17.

matters.”⁶² Gerald and his parents were not provided with notice of the charges against him or assistance of counsel when he was questioned by the judge prior to his release from the Detention Home or at the later hearing where he was deemed a juvenile delinquent.⁶³

This abuse of discretion led the Court to reject the notion that the State can disregard the guarantees of due process in juvenile proceedings because the proceedings are intended to be non-adversarial.⁶⁴ Instead, these alternative models of justice must also abide by some minimum principle of fairness and due process.⁶⁵ Even if a court is designed to function as the *parens patriae*, “the admonition to function in a “parental” relationship is not an invitation to procedural arbitrariness.”⁶⁶ The Court’s goal in *Gault* was not only to extend procedural guarantees to juveniles, but to use these procedural protections to ensure reliability and predictability in the juvenile system, limiting the discretion of individual judges.

II. POTENTIAL DUE PROCESS VIOLATIONS

Legal and restorative justice scholars alike have questioned the viability of implementing restorative justice principles in the criminal context while preserving due process rights.⁶⁷ These rights include the right to procedural due process, the privilege against self-incrimination under the Fifth Amendment, the right to counsel, and the right to a jury trial under the Sixth Amendment.⁶⁸

Some argue that the underlying philosophies of the criminal legal system and restorative justice are so antithetical that it is impossible to meaningfully incorporate restorative justice practices in the rigid criminal

⁶² *Id.* at 9.

⁶³ *Id.* at 5–8.

⁶⁴ *Id.* at 30.

⁶⁵ *Id.* at 27–29. This decision was later distinguished by *Allen v. Illinois* which held that the possibility of involuntary commitment by the State does not necessarily trigger the “entire range of criminal procedural protections.” In *Allen*, the petitioner was found to be a sexually dangerous person after the state court admitted testimony of his psychiatric examination over his protests that this violated his right against self-incrimination. The Court drew the line between proceedings aimed to punish, as was the case in *Gault*, and those designed to ensure that the State can provide care and treatment for certain individuals. *Allen v. Illinois*, 478 U.S. 364, 369–70 (1986).

⁶⁶ *In re Gault*, 387 U.S. 1, 30 (1967) (quoting *Kent v. United States*, 383 U.S. 541, 555 (1966)).

⁶⁷ Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 683 (2005); Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 *WASH. U. J. L. & POL’Y* 301, 305 (2007).

⁶⁸ *Id.* at 311–15.

system.⁶⁹ Restorative justice “employs a responsive regulatory approach that identifies social engagement as the key element,” which necessitates flexibility in the way the practice responds to individuals as it seeks to develop relationships within a complex community.⁷⁰ Conversely, traditional criminal process seeks to treat every offender with equality of treatment and fundamental fairness, and any substantial departure in procedural treatment is grounds for a potential violation.⁷¹

For some scholars, the wide gap between these two methods of justice negates any attempt to force new models to conform to our old conceptions of due process rights. Contrasting the due process model of criminal process with a model based on restorative justice, Kent Roach argues that the due process model has different priorities. He explains that focusing “on rights at the exclusion of duties, including the duty to repair harm,” alienates the defender, the victim, and the community, thereby encouraging “the offender to deny responsibility for the crime.”⁷²

Restorative justice practitioners are similarly concerned that state involvement in restorative practices will undermine one of the central goals of restorative justice: creating community autonomy.⁷³ If the State becomes involved, imposing more rigid procedures and expectations on the outcomes of restorative justice, this can frustrate the ability of community members to do what they believe is just and right.⁷⁴ Other scholars, like Kay Pranis, believe there is a positive role for the State to play in restorative justice. For example, Pranis argues that state involvement can guarantee equity and human rights for all participants, while also supporting communities in constructive ways as they build their capacity for self-regulation.⁷⁵ But Pranis also advocates for a restrained role for the state—the community must be the

⁶⁹ M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 125 (2016) (arguing that the therapeutic agenda and separate function from the criminal legal system makes restorative justice incompatible with a diversionary program, preferencing instead the utilization of neutral forms of mediation); Carolyn Boyes-Watson, *What Are the Implications of the Growing State Involvement in Restorative Justice?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE, *supra* note 13, at 216, 216–17; Andrew Ashworth, *Responsibilities, Rights and Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 578, 590–92 (2002).

⁷⁰ Morrison & Vaandering, *supra* note 10, at 139.

⁷¹ 16C C.J.S., *Constitutional Law* § 1814 (2022).

⁷² Kent Roach, *Four Models of Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 711 (1999).

⁷³ Boyes-Watson, *supra* note 69, at 215 (identifying three central constraints of state involvement with restorative practices: sovereignty, organization, and professionalism).

⁷⁴ Telephone Interview with Dave Kelly, Exec. Dir., Precious Blood Ministries of Reconciliation (Feb. 4, 2022).

⁷⁵ Dzur, *supra* note 22, at 263 (interviewing Kay Pranis).

primary actor, not the government or members of the traditional criminal legal system.⁷⁶

Regardless, there are questions raised by practitioners and scholars about the implications of state involvement in restorative justice. How can we structure state-administered restorative justice to ensure that procedural due process guarantees are not undermined? The discussion that follows highlights some of the most prominent due process concerns raised in the implementation of restorative justice programs.

A. SELF-INCRIMINATION

One of the greatest concerns posed by the impact of restorative justice on the rights traditionally reserved for criminal defendants is the risk it creates for self-incrimination.⁷⁷ By their nature, restorative justice programs require that a participant accept responsibility for the harm they caused, taking personal accountability.⁷⁸ While this admission presents a minimal risk in the restorative proceedings, there is the potential for the participant to be referred back to the traditional punitive system where admissions of guilt could be used against the participant.⁷⁹ There are also concerns that a participant could admit to their involvement in a different criminal activity during the restorative justice process, opening the door to subsequent prosecution.⁸⁰

B. RIGHT TO COUNSEL

Given the non-adversarial nature of restorative justice, the practice seems to run counter to the traditional role of defense counsel: to zealously protect their client's rights against efforts by the State to implicate them in criminal activity.⁸¹ This shift away from the traditional role of the impassioned defender can leave participants open to further violations as it may encourage "a culture of underzealous representation," where the

⁷⁶ *Id.* at 265 ("That's why I felt so strongly when I started the circle projects that they had to be community driven and had to be community organised first. They can't be completely dependent on the state.").

⁷⁷ Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J. L. & POL'Y 301, 311–12 (2007).

⁷⁸ *Restorative Justice Community Court – Cook County Circuit Court (North Lawndale)*, RESOL. SYS. INST., <https://www.aboutrsi.org/court-adr-across-illinois/programs/restorative-justice-community-court-cook-county-north-lawndale> [<https://perma.cc/448G-ZKD2>] (last visited Jan. 12, 2023).

⁷⁹ *Id.*

⁸⁰ Reimund, *supra* note 6, at 28–29.

⁸¹ Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 38 (2000).

advocate is no longer opposed to the State but vested in the success of the alternative justice program.⁸² Does this new framework, placing the court and the advocate on the same side, present a dangerous conflict of interest that can serve to jeopardize the participant's rights within the system?

On the other end of the spectrum, there are concerns that the involvement of defense counsel in restorative justice could jeopardize the process because lawyers might undermine their client's participation in order to protect their constitutional rights.⁸³ More generally, the presence of defense counsel at restorative justice proceedings may undermine the non-adversarial atmosphere that restorative justice practitioners seek to create.⁸⁴ In a restorative justice proceeding, defense counsel's goal is not a denial of their client's culpability, but supporting their client's effort to take accountability, address harm, and seek healing.⁸⁵

C. COERCION

When faced with the impending threat of criminal prosecution, there is a fear that individuals will agree to participate in diversionary programs even if they believe they are innocent or are not willing to accept responsibility for the offense.⁸⁶ Can an individual genuinely exercise their freedom of choice and agree to participate in a program that will expunge their arrest record when the alternative is to face an uncertain future in the punitive system? This critique raises significant concerns, especially for racial minorities who

⁸² Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 79 (2007) (examining the role of defense counsel in specialty problem-solving criminal courts, highlighting potential conflicts of interest, a vested interest in the court's success, and the inability to provide effective representation in a non-adversarial setting).

⁸³ Reimund, *supra* note 67, at 30–31; *see also* Robert F. Cochran, Jr., *The Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 J. L. & RELIGION 211, 213–14 (2000); Telephone Interview with Dave Kelly, *supra* note 74 (explaining that other restorative justice initiatives in Chicago have experienced substantial pushback from the public defender's office, who raise concerns about jeopardizing client rights).

⁸⁴ Reimund, *supra* note 67, at 19; Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOL. L. REV. 327, 346 (1998) (arguing that non-lawyers should be eligible to serve as mediators in disputes in order to reduce “the adversarial nature of the mediation process . . . lawyers tend to look at disputes in black and white.”).

⁸⁵ Zoom Interview with Laura Hardwicke, Att’y, Lawndale Christian Legal Ctr. (Nov. 1, 2021).

⁸⁶ Hanan, *supra* note 69, at 132 (“The accused is put in the position of capitulating with the demands of the complaining witness and, if she does not capitulate, the case will be prosecuted criminally.”).

experience trauma related to discriminatory policing and racism in the criminal legal system.⁸⁷

This potential for coercion not only implicates due process concerns, but also concerns for restorative justice practices as well, which rely primarily on the willing participation of the individual who committed the harm.⁸⁸ Even if the defendant voluntarily agrees, in the sense that they were not required to participate in a restorative process, there is a legitimate critique that the alternative (proceeding through the criminal legal system) does not offer much choice.⁸⁹ Some have even cautioned against the possibility of restorative justice alternatives creating a class of “strict liability” offenses, where defendants will admit their guilt freely in order to avoid the consequences of the criminal system, eliminating the State’s burden to establish culpability.⁹⁰

III. THE RESTORATIVE JUSTICE COMMUNITY COURT OF CHICAGO: A CASE STUDY

There are three Chicago Restorative Justice Community Courts located in the neighborhoods of North Lawndale, Avondale, and Englewood.⁹¹ The first RJCC, located in North Lawndale, opened in 2017, with the two additional branches opening in 2020.⁹² These courts are representative of many of the diversionary restorative justice programs implemented across

⁸⁷ See Shantel D. Crosby, *Trauma-Informed Approaches to Juvenile Justice: A Critical Race Perspective*, 67 JUV. & FAM. CT. J. 5, 8–9 (2016) (describing the ways in which interactions with police and the juvenile court system “perpetuated psychological trauma among adjudicated youth of color”); see also Rasheena Latham, *Who Really Murdered Trayvon? A Critical Analysis of the Relationship Between Institutional Racism in the Criminal Justice System and Trayvon Martin’s Death*, 8 S.J. POL’Y & JUST. 80, 96–97 (2014) (highlighting numerous racist aspects of the traditional criminal trial process: disparate sentencing, selective prosecution, racially biased jury selection, and prosecutorial discretion in dropping charges).

⁸⁸ See generally ZEHR, *supra* note 8, at 28 (“This implies a responsibility on the part of the offender to, as much as possible, take active steps to repair the harm to the victim and perhaps the impacted community.”); KERRY CLAMP, *RESTORATIVE JUSTICE IN TRANSITION* 34 (2014) (“In reality, current processes that serve to divert cases away from the adversarial system can never be considered completely voluntary, given that the offender has to choose between engaging with his/her victim and proceeding through the normal adversarial system (a latent form of coercion).”).

⁸⁹ PRANIS ET AL., *supra* note 21, at 57.

⁹⁰ Golan Luzon, *Challenges Shared by Restorative Justice and Strict Liability in the Absence of Mens Rea*, 19 NEW CRIM. L. REV. 577, 578 (2016).

⁹¹ *Restorative Justice Community Courts*, CIR. CT. OF COOK CNTY., <https://www.cookcountycourt.org/ABOUT-THE-COURT/Restorative-Justice-Community-Courts> [<https://perma.cc/4WL2-KJ4C>] (last visited Jan. 22, 2023).

⁹² *Id.*

the country, though procedures and practices vary.⁹³ Over a period of several months, the author attended the RJCC in North Lawndale, primarily by videoconference, to observe weekly proceedings.⁹⁴ The author interviewed practitioners of restorative justice, court personnel, RJCC judges, and individuals who were crucial in the formation of the RJCC.

After evaluating the methods and procedures used, it is clear that the RJCC does not present a serious risk to participants' due process rights. In fact, the RJCC goes further to protect rights that have previously gone unrecognized in our system. The proliferation of restorative practices as an alternative to the punitive system works to expand our understanding of what rights individuals involved in the criminal legal system are due. In turn, this may serve to compel community members and legal practitioners to reconsider the goals that our criminal legal system should seek to achieve. The RJCC and its structure also raise important questions, however, about how these state-run initiatives can better center the community and adhere to restorative principles.

A. ORIGINS AND DEVELOPMENT

Although the Restorative Justice Community Court opened in 2017, its history goes back much further.⁹⁵ The effort to develop the RJCC was led by Judge Colleen Sheehan, who first implemented restorative justice practices as a judge in the juvenile justice division, where she was assigned in 2007.⁹⁶ The first restorative justice practice utilized by her court was a one day

⁹³ See *Red Hook Community Justice Center*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/red-hook-community-justice-center> [<https://perma.cc/ER3Z-WT2V>] (last visited Jan. 12, 2023); see also CYNTHIA G. LEE, FRED L. CHEESMAN, DAVID B. ROTTMAN, RACHEL SWANER, SUVI LAMBSON, MIKE REMPEL & RIC CURTIS, NAT'L CTR. FOR STATE CTS., *A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER 3* (2013); see also *Restorative Justice*, OAKLAND UNIFIED SCH. DIST., <https://www.ousd.org/restorativejustice> [<https://perma.cc/G2D3-8MAD>] (last visited Jan. 12, 2023) (Oakland, California is well-recognized for integrating restorative justice practices comprehensively throughout its public school system. *Restorative Justice Newsroom*, OAKLAND UNIFIED SCH. DIST., <https://www.ousd.org/Page/12325> [<https://perma.cc/F4YP-WDR4>] (last visited Feb. 3, 2023) (containing links to multiple news articles reporting on Oakland's integration of restorative justice practices in its public school system)).

⁹⁴ I observed the RJCC between September 2021 and January 2022, during the Covid-19 pandemic. The RJCC eventually opened to allow for in-person hearings, though the majority of individuals still participated virtually.

⁹⁵ Telephone Interview with Judge Sheehan, Cir. Ct. of Cook Cnty. (Nov. 12, 2021).

⁹⁶ Paul Caine, *Cook County Court to Try New Approach to Justice*, WTTW (May 16, 2016), <https://news.wttw.com/2016/05/16/cook-county-court-try-new-approach-justice> [<https://perma.cc/NQ3T-NRZG>]; *id.*

peacemaking circle with young people and police officers.⁹⁷ After seeing restorative justice practices produce positive outcomes in the juvenile division, a goal was formed to translate this work to the area of emerging adults.⁹⁸

And so, the effort to create the RJCC began.⁹⁹ Judge Sheehan and other members of the court system drafted a proposal and brought it to community members to collect their input.¹⁰⁰ Over the next year, Judge Sheehan fielded concerns from community members and adjusted the framework of the proposed RJCC.¹⁰¹ This resulted in the creation of a vision and action plan advocating for the creation of a restorative justice court in the North Lawndale neighborhood.¹⁰² As described in the action plan, the RJCC would “view justice with an emphasis on repairing harm caused by conflict and crime,” refocusing on the harm done to the community and individuals rather than the State.¹⁰³ Instead of adhering to rigid adversarial hearing, “[t]he restorative processes used in the court will be collaborative and inclusive and will involve participation of victims, offenders and those community members impacted by the crime.”¹⁰⁴ Judge Sheehan’s plan sought to address harm in a way that was entirely new to Chicago’s criminal system, focusing on the long-term effects of rectifying harm done to the communities, rather than treating each harm as isolated and distinct.

In 2016, Judge Sheehan received a grant from the Department of Justice’s Court Innovation program to start the court.¹⁰⁵ There were concerns that community autonomy would be lost within the institutionalized state-run framework, a focus prevalent among restorative justice practitioners, making community buy-in and involvement imperative.¹⁰⁶ A steering committee was developed, comprised equally of systems practitioners, individuals who were

⁹⁷ Telephone Interview with Judge Sheehan, *supra* note 95.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² COLLEEN SHEEHAN, RESTORATIVE JUSTICE COMMUNITY COURT VISION & ACTION PLAN COOK COUNTY 4.

¹⁰³ *Id.* at 12.

¹⁰⁴ *Id.*

¹⁰⁵ Lauraann Wood, *Community Court Offers Hope for Healing*, CHI. DAILY L. BULL. (May 31, 2016), <https://www.chicagolawbulletin.com/archives/2016/05/31/community-court-5-31-16> [<https://perma.cc/5EYC-5MKX>].

¹⁰⁶ Carsten Erbe, *What Is the Role of Professionals in Restorative Justice*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE, *supra* note 13, at 293–94 (“The real demon in the development of the modern restorative justice movement is bureaucratic structures and the organization culture/thinking around it.”); Telephone Interview with Dave Kelly, *supra* note 74.

familiar with and practiced in the criminal legal system, and community practitioners, mainly nonprofit organizations that operated within the community of North Lawndale and were part of the Restorative Justice Hub.¹⁰⁷ This steering committee guided the development of the RJCC and its structure.¹⁰⁸

B. PROCESSES AND PROCEDURES

A participant's journey through the RJCC begins with a referral from the Circuit Court of Cook County.¹⁰⁹ This typically occurs at the bond court stage, where court personnel look for cases that fit the eligibility criteria of the RJCC: the individual must be between the ages of 18 and 26, charged with a nonviolent felony or misdemeanor, have a nonviolent criminal history, and live, work, or worship in one of the communities where an RJCC operates.¹¹⁰

Once they are referred to the RJCC, the individual must decide whether they want to participate.¹¹¹ This is a decision often informed by conversations with their counsel and review of the terms of the voluntary participation agreement that all participants are required to sign before proceeding.¹¹² A voluntary participation agreement includes thirteen terms and conditions, some of which outline the rights that the individual is waiving by proceeding with the restorative process.¹¹³ Among the rights waived are the right to a preliminary hearing, and the right to a speedy trial.¹¹⁴ Importantly, the agreement states that the “[p]articipant accepts responsibility for his or her actions related to the dispute or crime.”¹¹⁵ The rest of the provisions that apply to the participant outline their duty to attend programming, comply with the requirements of the court, and commit the time and effort necessary to engage meaningfully in the program. Failure to do so “may result in

¹⁰⁷ See *Community-Led Restorative Justice Hubs*, CMTY. RESTORATIVE JUST. HUBS, <https://rjhubs.org> [<https://perma.cc/JHJ5-H2YP>] (last visited Jan. 12, 2023).

¹⁰⁸ Telephone Interview with Judge Sheehan, *supra* note 95.

¹⁰⁹ Zoom Interview with Judge Spratt, Cir. Ct. of Cook Cnty. (Oct. 14, 2021).

¹¹⁰ *Restorative Justice Community Court – Cook County Circuit Court (North Lawndale)*, *supra* note 78.

¹¹¹ Zoom Interview with Judge Spratt, *supra* note 109.

¹¹² Zoom Interview with Laura Hardwicke, *supra* note 85.

¹¹³ Restorative Justice Community Court (RJCC) Agreement (primary source with author).

¹¹⁴ *Id.* Term 1 & Term 2 (primary source with author provided by practitioners at the North Lawndale RJCC).

¹¹⁵ *Id.* at Term 4.

disqualification from the RJCC” and the case being “transferred to the felony trial or municipal division for prosecution.”¹¹⁶

The agreement also imposes obligations on the State’s Attorney’s Office. First, the agreement requires that the State will not use any “statements made by the participant during the confidential peacemaking circle process regarding their past criminal behavior” in any future criminal proceeding.¹¹⁷ The State also agrees that completion of the conditions of the RJCC will result in the State’s Attorney’s Office dismissing the charges against the participant. These voluntary agreements are signed by the Assistant State’s Attorney, as well as the participant and their counsel.¹¹⁸

Judge Spratt presides over the North Lawndale RJCC.¹¹⁹ When a new participant joins the court, Judge Spratt ensures that the individual signed the form voluntarily before she informs the participant of the unique nature of the RJCC by highlighting several things: the process is successful only if the participant is willing to dedicate him or herself to it fully, and everyone at the RJCC is “on your side.”¹²⁰ Judge Spratt outlines the process of a participant’s journey through the RJCC.¹²¹ Typically, it follows a similar format. First, the individual meets with a member of the Social Service Department who completes an assessment and provides a recommendation.¹²² After the assessment, each member of the RJCC is assigned an individual case manager, who can assist with initiating the circles and proceeding through the repair of harm process.¹²³

Before they can sign a repair of harm agreement (ROHA), individuals participate in a peacemaking circle with two circle keepers.¹²⁴ The circles are a space for the person to consider and reflect on their past, as well as their goals for their future. It also provides an opportunity for an individual to assess where they are at that point in time, in relation to their self, family, and community. Having an opportunity to pause and reflect, with the support of the circle keepers, can be incredibly valuable. This is especially true in the context of the often high stress and policed communities in which

¹¹⁶ *Id.* at Term 7 & Term 11.

¹¹⁷ *Id.* at Term 9.

¹¹⁸ *Id.*

¹¹⁹ *Restorative Justice Community Court – Cook County Circuit Court (North Lawndale)*, *supra* note 78.

¹²⁰ Author’s personal observations of RJCC proceedings.

¹²¹ *Id.*

¹²² Zoom Interview with Judge Spratt, *supra* note 109.

¹²³ *Id.*

¹²⁴ *Id.*

participants often live.¹²⁵ Typically, an individual may complete three to five circles before creating a ROHA with the help of their circle keepers and case managers to present to the court for approval.¹²⁶

The terms of a ROHA are specific to that participant and what arose during their circle process.¹²⁷ Many agreements include individual goals for personal development such as getting a driver's license, a social security card, undertaking an education related goal, seeking counseling, and securing permanent employment.¹²⁸ The community is a centerpiece of many ROHA goals, such as engaging in mentoring, community service, paying tribute to those lost within the community, and engaging in different forms of creative expression.¹²⁹ Of course, the ROHA is the culmination of an effort to repair harm, and so there are goals that directly serve that effort, like writing a letter of apology or reflection, engaging in a circle with the person who experienced the harm, or other forms of restitution.¹³⁰ The connection with the Restorative Justice Hub and other community organizations provides a valuable resource in the fulfillment of ROHAs. Participants are often referred to other restorative practices and groups which may relate to the harms that they experienced.¹³¹

Once a member of the RJCC successfully completes the terms of their ROHA, the charges are dismissed, and the arrest record is expunged.¹³² When a participant successfully completes the program, individuals are encouraged to maintain a connection with the people they met throughout the RJCC process and, if they are willing, to guide others through the process by participating in peacemaking circles.¹³³

¹²⁵ Zoom Interview with Laura Hardwicke, Att'y, Lawndale Christian Legal Ctr. (Sept. 27, 2022).

¹²⁶ Zoom Interview with Judge Spratt, *supra* note 109.

¹²⁷ Zoom Interview with Laura Hardwicke, *supra* note 125.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ For example, the Stick-Talk group in Chicago aims to hold space for young people affected by urban gun violence and discuss harm reduction techniques. *Stick Talk*, STICK TALK (2021), <https://www.holdingspace.xyz/stick-talk> [<https://perma.cc/8VSF-ELA4>].

¹³² *Restorative Justice Community Court – Cook County Circuit Court (North Lawndale)*, *supra* note 78.

¹³³ Author's personal observations of RJCC proceedings.

Since its inception in 2017, 249 people have been referred to the RJCC.¹³⁴ Seventy of those cases are active.¹³⁵ Thirty-one were referred back to the circuit court system, either because the individual would not engage, wanted to go back to the punitive system, or were arrested on another charge while they were in the RJCC.¹³⁶ In total, 144 cases have been dismissed through successful completion of a ROHA.¹³⁷ Of those 144 individuals who have successfully completed the program, 26 were rearrested and 118 have not been rearrested.¹³⁸

C. OBSERVATIONS

The North Lawndale RJCC convenes once a week on Thursdays at the UCAN Center in North Lawndale.¹³⁹ Because of the COVID-19 pandemic, the proceedings shifted online in 2020. Now, proceedings operate in a hybrid fashion and participants are permitted to attend in person or via videoconference to ensure the safety of those who do not feel comfortable traveling to the center.¹⁴⁰ There are several key figures present when the RJCC convenes, including the judge of the court, a member of the State's Attorney's Office, a court reporter, a member from the social services department, case managers, public defenders, the RJCC court coordinator, and the participants, as well as their family members if they choose to attend.¹⁴¹

Even though figures from the traditional legal system are present, the RJCC looks and functions differently. In person hearings are conducted in a room at the UCAN Center, a North Lawndale community center which focuses on servicing local youth and families, with the tables arranged in a

¹³⁴ Statistics of the North Lawndale RJCC (June 21, 2022) (primary source with author). It is important to note that many restorative practitioners do not feel that qualitative statistics of recidivism accurately capture the success of the goals guiding a restorative justice practice, like building and deepening personal and community connections. Instead, a common method is to evaluate participant satisfaction with the restorative process, to gauge to what extent an individual felt heard and acknowledged. *See* THALIA GONZÁLEZ & REBECCA EPSTEIN, GEO. L. CTR. ON POVERTY & INEQ., BUILDING FOUNDATIONS OF HEALTH AND WELLBEING IN SCHOOL: A STUDY OF RESTORATIVE PRACTICES AND GIRLS OF COLOR 12 (2021) (utilizing focus groups to evaluate the extent to which restorative practices increased interpersonal connections, improved school climate, social and emotional skills, and empowered girls of color in schools).

¹³⁵ Statistics of the North Lawndale RJCC, *supra* note 134.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Author's personal observations of RJCC proceedings.

¹⁴⁰ Zoom Interview with Judge Spratt, *supra* note 109.

¹⁴¹ Author's personal observations of RJCC proceedings.

circle.¹⁴² The judge does not wear formal judicial robes and sits in a chair at the table, like everyone else in the circle.¹⁴³ The RJCC sounds different as well.¹⁴⁴ Time is spent checking in with participants, asking them for updates about their lives and commending any progress that has been made in the process.¹⁴⁵ Similarly, while some formal methods of the traditional process remain, such as formal introductions for the court reporter when someone new speaks at the table, practitioners are able to engage conversationally with the judge, updating her on the progress of the participant, any hurdles they face, and next steps.¹⁴⁶

It is important to recognize, however, that the RJCC still operates at a level of formality not characteristic of many restorative justice practices. There is still a judge who “presides” over the court.¹⁴⁷ The majority of practitioners wear business casual or formal clothing.¹⁴⁸ Individuals coming to the court have to go through security.¹⁴⁹ Cases are called before the court in a formalized, systemic way, typical of the traditional criminal legal system.¹⁵⁰ This formality is reflective of the “vertical justice” that the traditional American legal system prioritizes, as Chief Justice Yazzie describes, a structure that relies on “hierarchies and power.”¹⁵¹ Critically, the RJCC struggles to create the “radical hospitality” which restorative justice seeks to provide.¹⁵² This is representative of the RJCC’s position in the restorative justice and criminal legal communities; operating in a gray zone between the two.

There are instances where participants do not actively engage in the process, by missing their day to attend the RJCC, failing to show up for circles, or fulfill terms of their ROHA. In these cases, there is no one strike, and you’re out policy; there is no formal strike policy of any kind.¹⁵³ A conversation ensues instead.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 178 (1994).

¹⁵² *The Mechanics of Circle Processes*, RESTORE CIRCLES, <https://www.restorecircles.com/love/the-mechanics> [<https://perma.cc/Y3Y8-WDCS>] (last visited Jan. 22, 2023).

¹⁵³ Zoom Interview with Judge Spratt, *supra* note 109.

In one instance, a participant failed to attend multiple circles and communicate with his case manager. Judge Spratt reiterated that the process could proceed only if he is willing to participate, which includes making it to circles.¹⁵⁴ Similarly, a participant experienced difficulty in fulfilling one of the terms of her ROHA because of a logistical issue.¹⁵⁵ Instead of requiring the individual to find a way to complete that term of her agreement, her case manager suggested convening a new circle to find an alternative way that she could fulfill that goal and complete the process.¹⁵⁶ The RJCC proceeds in a manner that is noticeably flexible and encouraging, contrasted with the formal rigidity of the traditional court system that most people experience.

One notable challenge the RJCC faces is continued involvement and input from the local community. A unifying principle of a restorative justice process, community input is a vital element in determining how to rectify the harm and support the individuals involved going forward.¹⁵⁷ Currently, most circles at the RJCC occur between the individual participant and two trained circle keepers, with minimal involvement from local community members.¹⁵⁸ However, one of the more urgent goals of the North Lawndale RJCC is to reach out to community members, especially those within the senior and church communities, and encourage them to support the young people going through the circle process.¹⁵⁹

D. ADDRESSING DUE PROCESS CRITIQUES

1. *Self-Incrimination*

The RJCC does not present a serious risk to the privilege against self-incrimination that is unique to its procedures. First, the terms of the participation agreement protect statements about past criminal conduct from state use if they are made while in the circle.¹⁶⁰ Second, greater protections were provided by a recently passed Illinois law, SB 64, which created an evidentiary privilege between restorative justice practitioners and participants.¹⁶¹ SB 64 provides that anything said or done to prepare for a

¹⁵⁴ Author's personal observations of RJCC proceedings.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ ZEHR, *supra* note 8, at 25–27 (defining engagement of stakeholders, including community members, as one of the three pillars of restorative justice).

¹⁵⁸ Author's personal observations of RJCC proceedings.

¹⁵⁹ Zoom Interview with Judge Spratt, Cir. Ct. of Cook Cnty. (Jan. 25, 2022).

¹⁶⁰ Restorative Justice Community Court (RJCC) Agreement, Term 9 (primary source with author).

¹⁶¹ 735 ILL. COMP. STAT. 5 § 804.5 (2021).

peacemaking circle or as a follow-up to the circle, “or the fact that the practice has been planned or convened, is privileged and cannot be referred to, used, or admitted in any civil, criminal, juvenile, or administrative proceeding unless the privilege is waived”¹⁶² As a result of SB 64, anything said in a restorative justice practice or circle, subject to mandatory reporting requirements, cannot be utilized by the State in court.¹⁶³ Additionally, an individual can only waive the privilege with respect to him or herself, protecting the other parties in the practice.¹⁶⁴

There are two important things to note about this new law. First, it does not establish a right to confidentiality.¹⁶⁵ This means that someone could leave the circle and share what was said with others.¹⁶⁶ This information could be utilized for investigatory purposes by the State, but it could never be admitted as testimony in court.¹⁶⁷ Second, people participating in circles are still subject to mandatory reporting laws, which is an especially important concern for social workers.¹⁶⁸ To preserve the integrity of the circle, then, it would be an important practice that mandatory reporters disclose their status to participants before the circle commences. Further, the privilege is waived for all participants if disclosure is necessary to prevent great bodily harm, death, or the commission of a crime.¹⁶⁹ Despite these limitations, SB 64 is still a major step forward in affording restorative justice the *formal* protections necessary to prevent due process pitfalls and encourage confident participation in the process.

¹⁶² *Id.* § 804.5(c).

¹⁶³ *Id.* It is also important to note that the law provides a state-sanctioned definition of restorative justice, defining the practice as “a gathering, such as a conference or circle, in which parties who have caused harm or who have been harmed and community stakeholders collectively gather to identify and repair harm to the extent possible, address trauma, reduce the likelihood of further harm, and strengthen community ties by focusing on the needs and obligations of all parties involved through a participatory process.” This definition does identify several of the key values underlying restorative justice practices as outlined by scholars and practitioners, namely voluntariness, interrelationship building, and community involvement. *Id.* § 804.5(b).

¹⁶⁴ *Id.* § 804.5(c).

¹⁶⁵ Patrick Keenan-Devlin, Exec. Dir., The James B. Moran Center for Youth Advoc., Presentation at Lawndale Christian Legal Center’s Restorative Justice Community Day, Lawndale, Ill. (Nov. 19, 2021).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ 735 ILL. COMP. STAT. 5 § 804.5(f)(2) (2021).

¹⁶⁹ *Id.* § 804.5(f)(1).

2. *Right to Counsel*

All participants are represented by counsel when they appear before the RJCC, though participants may excuse their counsel from appearing in person.¹⁷⁰ But the role of counsel begins prior to referral to the RJCC. Lawyers serve as the first source of information for the defendant, both in advocating to have their case diverted and explaining what the RJCC process entails.¹⁷¹

Not all cases are automatically referred by the State at the bond court stage. There is a prominent role for counsel to play in advocating for the case to be referred to the RJCC on behalf of their client.¹⁷² This requires the lawyer to engage in advocacy with the state's attorney's office and the judge, to convince both parties that the case is appropriate for restorative resolution.¹⁷³ Even though the RJCC is widely embraced by many members of the Chicago legal community, there are still people who doubt its efficacy and are reticent to approve these requests.¹⁷⁴

Once the individual is a member of the RJCC, the role of defense counsel looks different than it would in a traditional criminal context. There is no requirement that counsel attend every RJCC proceeding alongside their client, but participants do have a right to counsel and most appear before the RJCC with counsel.¹⁷⁵ Many participants are represented by attorneys from the Lawndale Christian Legal Center, but the Cook County Public Defender's Office has an attorney who is assigned to the RJCC.¹⁷⁶ Defense counsel appears to be a primary source of information, both for the court and the participant. When the participant does not appear on the day of their status hearing before the RJCC, it is often the lawyer who communicates with the judge, providing the reason for the absence, asking for a delay in the case being called, and if necessary, communicating the requirement of attendance to the participant on behalf of the judge.¹⁷⁷

¹⁷⁰ Zoom Interview with Judge Spratt, Cir. Ct. of Cook Cnty. (Sept. 16, 2022).

¹⁷¹ Zoom Interview with Laura Hardwicke, *supra* note 85.

¹⁷² *Id.*

¹⁷³ While this approach has the positive outcome of referring more cases out of the punitive process and into the RJCC, it is important to acknowledge that it can generate concerns about equal access to these programs given documented biases of prosecutors and judges. See Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 671–72 (2021).

¹⁷⁴ Zoom Interview with Laura Hardwicke, *supra* note 85.

¹⁷⁵ Author's personal observations.

¹⁷⁶ *Id.*; Telephone Interview with Melanie Nuby, Ass't Pub. Def., Cook Cnty. Pub. Def. Off. (Mar. 7, 2022).

¹⁷⁷ Author's personal observations.

Based on my observations, it appears that the lawyers who represent the participants are familiar with restorative justice practices and do not frustrate the process through their presence.¹⁷⁸ Lawyers at the RJCC encourage the participant's active participation in the process, promoting the ultimate goals of diversionary restorative programs, while also ensuring effective channels of communication between the client and the court.¹⁷⁹

3. Coercion

There is always a risk of coercion in diversionary programs. However, these risks can be mitigated by providing information about the program to empower the individual in making their decision of whether to participate. On a few occasions, individuals who were referred by the State to the RJCC declined to participate after Judge Spratt informed them of what the process entailed, deciding instead to argue their innocence in the circuit court system.¹⁸⁰ For these individuals, the RJCC did not compel them to accept responsibility for wrongdoing they did not commit. The voluntary participation agreement also addresses some of these concerns, as it clearly outlines the expectations and process of the RJCC, allowing individuals to weigh their options accordingly.¹⁸¹ But, as long as the punitive system remains the prevailing model of the criminal legal system, there will always be a concern that diversionary programs, while voluntary, compromise the autonomy of the individual because it forces them to choose “between a rock and a hard place.”¹⁸²

Some scholars have criticized the coercion critique of diversionary restorative justice programs for its failure to recognize coercive elements of the traditional punitive system, namely plea bargaining.¹⁸³ The role of defense counsel is demonstrative of this parallel, “the role of defense counsel in advising his or her client to accept the diversion to criminal mediation

¹⁷⁸ *Contra* Paul R. Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System—An Overview and Legal Analysis*, 29 AM. U. L. REV. 17, 65–66 (1979) (arguing that the presence of counsel at dispute resolution in mediations will disrupt the process because the role of the advocate is “likely to force parties into more combative and less conciliatory positions . . . hinder[ing] the effectiveness of these programs.”).

¹⁷⁹ Zoom Interview with Laura Hardwicke, *supra* note 85 (describing a supportive role for counsel in encouraging their client's participation in the program).

¹⁸⁰ Zoom Interview with Judge Spratt, *supra* note 109.

¹⁸¹ Restorative Justice Community Court (RJCC) Agreement (primary source with author).

¹⁸² Ann Skelton & Cheryl Frank, *How Does Restorative Justice Address Human Rights and Due Process Issues?* in CRITICAL ISSUES IN RESTORATIVE JUSTICE, *supra* note 13, at 205.

¹⁸³ Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 684–85 (2005).

mirrors the role of defense counsel in advising the client whether to accept a plea offer or proceed to trial.”¹⁸⁴ This dissuades concerns for some, who view alternative forms of restorative justice as a preferred form of resolution that empowers the individual, in contrast to plea bargaining which concentrates power in the hands of the prosecutor.¹⁸⁵

IV. BEYOND DUE PROCESS: HOW RESTORATIVE MODELS PROTECT MORE THAN THE PROCEDURAL RIGHTS OF PARTICIPANTS

Diversionary restorative justice programs, if implemented correctly, do not exacerbate due process concerns. By focusing on traditional due process narrowly, those critical of restorative justice and alternative programs fail to account for the more expansive notion of rights grounded in a restorative justice practice.¹⁸⁶ While these protections may not fall within the ambit of traditional procedural rights guaranteed under the Due Process Clause, that is no reason to discount their impact or legitimacy. The protections that restorative justice programs afford may prove more effective than traditional procedural rights in furthering the goals of the criminal legal system, including taking accountability and not engaging in the same conduct in the future. Ultimately, due process may not be the proper lens by which to analyze or critique programs like the RJCC. Instead, as restorative programs and initiatives become more prevalent, it is necessary to develop alternative frameworks to evaluate these programs and their effects on the communities in which they operate.

With this conclusion in mind, it is important to highlight the additional protections provided by the RJCC that are currently lacking in the punitive system. These protections can be described in the following ways: providing flexibility and accessibility, reaffirming the dignity of the individual, and supporting the person after their formal interaction with the court system concludes. With this alternative, and more expansive, framework of procedural protections, we can engage in a fruitful analysis moving forward to evaluate the efficacy of restorative approaches in state-run systems.

A. FLEXIBILITY AND ACCESSIBILITY

Upon comparing the RJCC with proceedings of the Circuit Court of Cook County, a glaring difference emerges. At the Circuit Court, individuals are expected to conform to rigid rules, expectations, and processes which are

¹⁸⁴ Hanan, *supra* note 69, at 164.

¹⁸⁵ Skelton & Frank, *supra* note 181, at 205 (“So if the comparison is made with plea bargaining, then the risk of coercion in restorative justice processes is no greater.”).

¹⁸⁶ See CLAMP, *supra* note 88, at 88–89.

foreign to the lived experiences of most individuals who enter a courthouse.¹⁸⁷ In contrast, the RJCC seeks to break down these barriers creating a more familiar atmosphere that seeks to meet an individual where they are, rather than forcing them to conform to the expectations of an alienating state-guided process. This difference is evidenced by two values prioritized in the RJCC: flexibility and accessibility.

Because of the individualized and community-driven nature of restorative justice, flexibility is an inherent component of the RJCC process.¹⁸⁸ Developing a ROHA requires collaboration between the individual and the circle keepers as they identify ways that the individual can repair the harm done to the community and achieve their own goals. There is no strict timeline; some people may need more than five circles to identify the means of resolution, and others may need less.¹⁸⁹

Flexibility is also evidenced in the procedures utilized by the RJCC. For example, the North Lawndale RJCC intends to continue with a hybrid model for status hearings because participants have lives outside of the RJCC and may be encumbered by work or familial obligations that preclude them from attending in person.¹⁹⁰ If an individual does not appear on their day to attend the RJCC, there is an inquiry into why: did their phone die? did the court take too long that day, causing them to spend their whole break waiting until their case was called?¹⁹¹ There is no assumption that a person's absence is disrespectful to the court or the process.

The RJCC is also more accessible than the traditional criminal legal system. First, it is located within the community and does not force individuals to travel long distances for a court date.¹⁹² Second, its location within a community center creates a more welcoming and familiar atmosphere than a courthouse.¹⁹³ When individuals come to the RJCC in

¹⁸⁷ Maria Hawilo, Kat Albrecht, Meredith Martin Rountree & Thomas Geraghty, *How Culture Impacts Courtrooms: An Empirical Study of Alienation and Detachment in the Cook County Court System*, 112 J. CRIM. & CRIMINOLOGY 171, 176 (2022).

¹⁸⁸ PRANIS ET AL., *supra* note 21, at 55–56 (“Setting times that make it easy for everyone to attend, picking central meeting places, helping with transportation, baby-sitting, and expenses if necessary The judicial system, by contrast, isn’t ‘transparent’ Complex procedures discourage people from representing themselves as either victims or offenders.”).

¹⁸⁹ Author’s personal observations.

¹⁹⁰ Zoom Interview with Judge Spratt, *supra* note 109.

¹⁹¹ Author’s personal observations of RJCC proceedings.

¹⁹² Author’s personal observations attending RJCC proceedings at UCAN Center North Lawndale, 3605 W. Fillmore St., Chicago, IL 60624.

¹⁹³ It is crucial to note that many Chicago restorative justice practitioners believe that the RJCC’s location at the UCAN Center, located in North Lawndale, creates a formalistic

person, they wait for their case to be called in a hospitality suite, which is a room with seating arranged in a circle and some refreshments.¹⁹⁴ While these changes may appear minor at first glance, they play a major role in connecting the person with the process. Even if a person never visited the UCAN Center previously, the environment is welcoming and less intimidating than a typical courthouse.

It is important to acknowledge that the RJCC is not a perfect model and there are ways that it could become more accessible to members of the community and participants. For example, the UCAN Center is not necessarily representative of the rest of the North Lawndale community and is surrounded by security gates.¹⁹⁵ Individuals have to go past security before entering the RJCC. These are concerns that the RJCC will have to address as it continues to expand to ensure that its practices align with the community in which it operates and is fully welcoming.

B. AFFIRMANCE OF DIGNITY

The right to dignity is not a new or profound right for the criminal defendant; it has been an undercurrent throughout the criminal procedure jurisprudence of the Supreme Court.¹⁹⁶ In the Eighth Amendment context especially, the Court has recognized the power of cruel and unusual punishment to not only harm the individual physically, but to degrade their human dignity.¹⁹⁷ In *Hope v. Pelzer*, for example, the Court found that tying an incarcerated person to a hitching post for hours in the hot sun was a violation of the prohibition on cruel and unusual punishment and “antithetical to human dignity.”¹⁹⁸ There is a right to basic human dignity, however, that extends beyond the context of grossly cruel and unusual punishments to the courtroom and criminal legal system itself.

The Supreme Court, in *Deck v. Missouri*, emphasized the importance of the dignity of the courtroom when prohibiting the routine use of shackling

presence and the presence of security screening undermines the warm hospitality restorative justice seeks to create. Author’s personal observations.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Dignity serves as the foundation for many of the constitutional criminal procedural rights created by the Court, such as the privilege against self-incrimination and freedom from intimidation. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“[T]he constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.”).

¹⁹⁷ *See* Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 87–89 (2011); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”).

¹⁹⁸ *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

criminal defendants.¹⁹⁹ While this case broadened the notion of dignity beyond punishment and applied it to the courtroom, it divorced our understanding of dignity from the criminal defendant, grounding dignity in more abstract notions of formalistic legitimacy within our procedural system.²⁰⁰ Restorative justice programs acknowledge the dignity of the individual defendant, rather than the courtroom. Dignity is achieved not merely through the procedural protections that due process provides, but through comprehensive consideration of the individual.

The RJCC, unlike the traditional criminal legal system, affirmatively places the dignity of the individual at the core of the proceedings. The focus of the status hearings is not on the wrong that was previously committed, but on the individual's progression through the process, their satisfaction with the support they received, and general inquiries about their life.²⁰¹ This reaffirmance of the individual as the center of the process undermines the alienating effects of procedural rights, thereby allowing new relationships to develop and promote healing.

C. LONGEVITY OF SUPPORT

A major tenet of the RJCC is that the individual's interaction with the RJCC does not stop once they graduate from the program. After someone successfully completes the ROHA, Judge Spratt encourages the individual to continue with the relationships they developed through the program and to return, if they wish, to assist other people coming through the process.²⁰²

When a person's interaction with the traditional criminal legal system concludes, they might receive formal support through probation, which imposes conditions that the individual is expected to abide by in order to cease all interaction with the system.²⁰³ The RJCC, on the other hand, seeks to focus on repair of the harm in the individual's community so that when they are no longer a member of the RJCC, they can receive support from the community to move forward.²⁰⁴

¹⁹⁹ *Deck v. Missouri*, 544 U.S. 622, 631 (2005).

²⁰⁰ *Id.* (“The courtroom’s formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual’s liberty through criminal punishment.”).

²⁰¹ Author’s personal observations.

²⁰² Author’s personal observations.

²⁰³ Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 295 (2016).

²⁰⁴ Zoom Interview with Judge Spratt, *supra* note 109.

The prevailing system of mass incarceration promotes the opposite value. By depriving individuals of their physical liberty on such a large scale, the criminal legal system dispossesses local communities of their own members and in turn alienates that individual from the community to which they belong.²⁰⁵ When the person is released from incarceration, there are little to no resources in place to promote the healing of the relationship between the individual and the community, thereby irreparably harming the relationship and denying the individual a main source of support.²⁰⁶ With its emphasis on relationships and interconnectivity, restorative justice can promote healing and growth outside of the confines of the practice itself.²⁰⁷

The RJCC furthers this goal by seeking to create a community that survives outside the formal process for dismissal and encouraging input and participation from people who have successfully completed the program. However, there is room for improvement in this area as well by gaining more genuine engagement from community members. In order to ensure that the RJCC has this vital engagement, the State should focus on providing the North Lawndale community with the necessary funding, resources, and support to cultivate the capacity for community-guided mentorship and support.

D. OPPORTUNITIES FOR EXPANSION

The next step is to consider where we can go from here. With the opening of Avondale and Englewood RJCCs in 2020, it appears that the Cook County Circuit Court system is prepared to increase investment in the RJCC system. There are discussions of opening a RJCC in the Austin neighborhood.²⁰⁸ Because the RJCC model relies on the participant being a member of the local community, opening new courts in different neighborhoods will greatly increase the reach of the RJCC. In order to increase the capacity of the RJCC, another option is to increase the geographical reach of each RJCC location. Again, because only cases involving community members are referred to the RJCC, the case numbers

²⁰⁵ See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 102, 122–23 (2008).

²⁰⁶ See Jeffrey D. Morenoff & David J. Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 ANN. REV. SOCIO. 411, 419 (2014).

²⁰⁷ See John Braithwaite, *Setting Standards for Restorative Justice*, 43 BRIT. J. CRIMINOLOGY 563, 569 (2002) (identifying values derived from human rights that restorative justice seeks to maximize, including: restoration of human dignity, damaged human relationships, and communities).

²⁰⁸ La Risa Lynch, *Cook County Seeks to Expand Restorative Justice Court*, AUSTIN WEEKLY NEWS (Sept. 30, 2019), <https://www.austinweeklynews.com/2019/09/30/cook-county-seeks-to-expand-restorative-justice-court> [<https://perma.cc/KX64-4LHR>].

coming through the court remain relatively low.²⁰⁹ However, this option challenges the notion that restorative justice efforts must be community-driven as it would expand the geographical reach of the community involved in each RJCC.

Currently, the RJCC in Chicago only accepts nonviolent felonies and misdemeanor arrests from individuals between 18 to 26.²¹⁰ As a community-guided process, the RJCC will only consider those harms that the community feels should be diverted to a restorative process.²¹¹ As restorative justice becomes a more prevalent alternative to the traditional criminal legal system, there is hope that these methods of conflict resolution will expand to address a more serious range of harms. For example, the RJCC has expanded to consider some offenses involving firearms, acknowledging the impact of the gun related violence in the community.²¹²

In considering these opportunities for expansion, the RJCC should reconsider the efficacy of its current model. The RJCC must be evaluated using different indicia of success, questioning how the court might better align its procedures with restorative principles and the desires of the local community. As discussed, the non-adversarial nature of the RJCC and the procedures that it implements alleviate many of the due process concerns cited by members of the traditional legal community. Instead, a comprehensive analysis of programs like the RJCC should seek to question and interrogate what rights these initiatives can afford participants that are missing in our present system and how these programs can avoid the harmful effects perpetuated by the criminalization and punishment.

CONCLUSION

Restorative justice as a viable alternative for traditional punitive methods of justice has been the subject of concern and critique in legal scholarship. While such a significant departure from our traditional emphasis on procedural due process may cause concern for some, as applied to the restorative justice system these concerns were misplaced. Consideration of the entire person, not just the harmful act that they committed, alleviates the need to rely on procedural rights to assure the protection of individuals within our criminal justice system. Further, the RJCC is a non-adversarial system. It seeks to address sources of harm holistically and comprehensively,

²⁰⁹ Zoom Interview with Judge Spratt, *supra* note 159.

²¹⁰ *Restorative Justice Community Court – Cook County Circuit Court (North Lawndale)*, *supra* note 78.

²¹¹ Zoom Interview with Judge Spratt, *supra* note 159.

²¹² Telephone Interview with Audrey Dunford, Ct. Coordinator, Restorative Just. Cmty. Ct. (Sept. 13, 2022).

creating a collaborative and supportive environment. As the RJCC demonstrates, there are ways to assure the protection of the rights of participants in restorative programs which occur against the backdrop of the traditional punitive system.

Diversionary programs like the RJCC also expand our idea of what protections individuals in the criminal legal system are due, including, flexibility, dignity, and support. In this way, restorative justice represents not only a shift in practice and methodology, but a drastic shift in our common conceptualization of what justice means. The RJCC is by no means perfect, and these state-integrated approaches are criticized by legal practitioners and the Chicago restorative justice community alike. It does, however, represent a positive departure from the harmful ideologies that gave rise to mass incarceration and the carceral state. As restorative justice gains a more robust place in our justice system, the fundamental justification for the traditional criminal system will be challenged. Hopefully, this will lead to more expansive attempts at addressing harm through even more radically restorative practices.