UPROOTING MASS INCARCERATION: FROM RESTORATION TO TRANSFORMATION

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Over the past three decades, the grim realities of the American criminal justice system have become undeniable, as the notorious injustices of mass incarceration have produced widespread international outrage. With calls for reform growing louder and stronger, many advocates are turning to restorative justice as an alternative to the retributive philosophy that has produced increasingly punitive criminal policies. In contrast to retributive justice, restorative justice strives to be more responsive to the needs of both offenders and victims, and to restore their relationships to their communities. Yet, because restorative justice is often defined primarily by what it is not, namely, retributive justice, the term has been used to refer to a wide range of practices with a wide range of different underlying philosophies. As restorative ideologies gain popularity and momentum, however, it becomes increasingly important to distinguish various restorative practices. If the ultimate aim is to dismantle mass incarceration and reverse the punitive trends of retributivism, I argue that restorative justice must target not only immediate crimes but also the underlying structures of social inequality that perpetuate crime in the first place. To that end, this article will distinguish more narrow forms of restorative justice that focus primarily on healing the immediate harms of criminal conduct from broader, transformative forms of restorative justice that also take aim at the underlying structural causes of criminal behavior. Having drawn this distinction, I conclude by considering the transformative potential of two particular forms of restorative justice, family group conferencing and circle sentencing, assessing the extent to which they might affect broader social transformation.

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I. INTRODUCTION

"The world teaches you to be afraid of certain people; if something bad happens to get angry and take revenge. But the more I listened and looked at the boy's circumstances, the more my life expanded instead of shutting down. It gave me courage." – Susie Lomax[1]

On June 22, 2011, fifteen months after she had her world turned upside down by a mother's worst nightmare, Kate Grosmaire pulled her daughter's killer into a deep, silent embrace.[2] A year earlier, after weeks of fighting, Conor McBride had taken his fiancée's life with a shotgun as she knelt on her knees begging for mercy.[3] Now, in a small room outside of their local county jail, Kate and Andy Grosmaire would spend the next few hours listening to Conor's story.[4] They would spare him no mercy in expressing the pain and anger they felt at his senseless act of murder.[5] They would tearfully grieve for their daughter and force him to relive and own every decision he made on that fateful day, and to explain to them exactly how Ann spent her last dying breaths begging for her life.[6] Eventually, though, they would turn to the prosecutor in charge of Conor's case and ask for a more lenient sentence, charging Conor to "do the good works of two people because Ann is not here to do hers."[7] Theirs is a tale of senseless heartbreak and incomprehensible tragedy. But it is also a tale of forgiveness, redemption, and love. It is a story that feels utterly outlandish in an age of mass incarceration where nonviolent drug offenders can expect to spend an average of over 5 years behind bars.[8] It is a story of grace, compassion, and empathy.

Crime can impose unimaginable, tragic costs on families and loved ones. It can instill fear in communities and tear apart the entire social fabric of a neighborhood. But it is becoming increasingly clear that incarceration can also impose serious costs on families and communities, taking fathers away from children, husbands from wives, friends from schoolmates. Aggressive policing can marginalize vulnerable populations and bring communities to their knees, particularly when it results in systematic, normalized patterns of incarceration. Such patterns can also disrupt a child's sense of self and doom future

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[1] Susie Lomax, *Stories*, THE FORGIVENESS PROJECT, https://www.theforgivenessproject.com/stories/susie-lomax [https://perma.cc/8556-NEKY].

[2] Paul Tullis, *Can Forgiveness Play A Role in Criminal Justice?*, N.Y. TIMES MAG. (Jan. 4, 2013), https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html?ref=magazine [https://perma.cc/3TWH-Z554].

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See Fact Sheet: Trends in U.S. Corrections*, THE SENTENCING PROJECT 3 (Aug. 2020), https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf [https://perma.cc/E242-BHSY].

generations to lives of poverty, crime, and further incarceration.

Over the past few decades, the grim realities of the American criminal justice system have become undeniable, as the notorious injustices of mass incarceration have garnered international attention.[9] The United States incarcerates more individuals than any other country in the world.[10] Despite evidence suggesting that such high levels of incarceration do not effectively reduce crime, America's prison population has grown by 500 percent over the past 40 years.[11] Mass incarceration also leaves the most disadvantaged communities the most vulnerable: black men are six times as likely to be incarcerated as white men in the United States, and one in every three black men born in 2001 are predicted to spend time in prison at some point in their lives.[12] For many, the badges of incarceration remain long after their release, as years of disenfranchisement and discrimination await their return to society.

Many reformers now recognize that the unprecedented rise of incarceration in America can be traced, at least in part, to an overly retributive philosophy of criminal justice.[13] Mass incarceration becomes justifiable when crime is viewed as a product of individual culpability and blame, while the structural, social causes of criminal behavior are ignored or discounted.[14] When crime is narrowly reduced to individual choice, even very harsh punishments can be justified as just and deserved because, on this account of criminal justice, offenders autonomously accept harsh punishments when they choose to commit crimes.[15] Increasingly punitive criminal policies in America were driven in large part by a desire to appear "tough on crime," as politicians raced to appease Americans' retributive impulses in a time when public fear of violent crime was mounting.[16] This conviction that very harsh treatment of criminal offenders is justifiable relies on the notion that offenders *deserve* punishment in some meaningful sense, which in turn relies on the premise that criminal offenses are the products of purely individual choices for which we

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[9] *See* Nicole Puglise, *Black Americans Incarcerated Five Times More Than White People – Report*, THE GUARDIAN (June 18, 2016, 8:00 AM), https://www.theguardian.com/us-news/2016/jun/18/mass-incarceration-black-americans-higher-rates-disparities-report [https://perma.cc/7CLP-AVGH].

[10] THE SENTENCING PROJECT, *supra* note 8, at 2.

[11] *Id.*

[12] *Id.* at 5.

[13] *See, e.g.*, David Min, *America's Desire for Punishment*, DUKE CHRON. (Sept. 25, 2019, 11:00 PM), https://www.dukechronicle.com/article/2019/09/social-justice-mass-incarceration-americas-desire-for-punishment [https://perma.cc/25YY-TQ82].

[14] *See* Katie Wetstone, *Breaking Out of a Broken System: America's Fixation on Retribution, Punishment, and Incarceration*, BERKELEY MDP, https://mdp.berkeley.edu/breaking-out-of-a-broken-system-americas-fixation-on-retribution-punishment-and-incarceration/ [https://perma.cc/2EXM-PXVW].

[15] ALEC WALEN, RETRIBUTIVE JUSTICE, STAN. ENCYCLOPEDIA OF PHIL. (June 18, 2014), https://plato.stanford.edu/entries/justice-retributive/#Ret [https://perma.cc/CP3K-URW7].

[16] James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration [https://perma.cc/27CJ-4DBN].

can hold offenders individually accountable.

As reformers began to expose the injustices of mass incarceration, however, it became increasingly clear that the true picture was much more complicated. Incarceration disproportionately targets society's most vulnerable populations, and can cripple families and communities.[17] Younger generations, in turn, are often left to fend for themselves and may turn to crime to meet their basic needs or those of their families.[18] Victims of violent crime in marginalized neighborhoods are also more likely to be convicted of violence later in life, suggesting that a view of crime that reduces criminal conduct to individual choice may be too simple.[19] As these disparities were exposed by writers like Michelle Alexander, widespread outrage spurred creative calls for reform, and some of the most vocal critics of mass incarceration have argued that dismantling mass incarceration requires dismantling the underlying philosophy that sustains harsh criminal punishment in the first place.[20]

In particular, many advocates are encouraged by a reformed model of criminal justice that has gained global momentum in the past decade: restorative justice.[21] Embraced by a growing number of diverse jurisdictions around the world, restorative justice is a resurrection of a criminal justice philosophy with deep historical roots in various indigenous cultures around the world.[22] In contrast to retributive justice, restorative justice seeks not to punish offenders, but to restore and heal both offenders' and victims' relationships to society and to each other.[23] It aims to vest decisions about interpersonal crimes in the parties most affected by them: offenders and victims.[24] Restorative justice can empower victims to confront offenders while also giving offenders an opportunity to understand the ramifications of their actions and offer restitution. It can offer a space for genuine reflection, empathy, and forgiveness, cathartic experiences that are often entirely alien to traditional retributive processes.

However, because restorative justice is often defined primarily by what it is not, namely, retributive justice, the term has been used to encompass a wide variety of practices that often draw from very different philosophies.[25] This article seeks to offer an intervention in the movement for restorative justice by

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[17] KATHERINE BECKETT & MARTINA KARTMAN, VIOLENCE, MASS INCARCERATION AND RESTORATIVE JUSTICE: PROMISING POSSIBILITIES 3–4 (June 20, 2016), https://jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2017/02/Restorative_Justice_Report_Beckett_Kartman_2016.pdf [https://perma.cc/R34N-E6DG].

[18] *Id.*

[19] *Id.* at 1.

[20] *See* Michelle Alexander, *Reckoning with Violence*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html [https://perma.cc/Z6EM-3TMR].

[21] BECKETT & KARTMAN, *supra* note 17 at 1; *see also* Alexander, *supra* note 20.

[22] JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 4 (2001).

[23] *Id.*

[24] *Id.* at 11.

[25] *Id.* at 10.

arguing that, if restorative justice is to offer a serious, concrete alternative to retributive justice, reformers must distinguish among a wide array of restorative practices. I will work from a premise shared by many advocates of restorative justice, that the injustices of mass incarceration require uprooting and replacing the underlying retributive philosophy of American criminal justice. I will begin by identifying and refuting the view of crime that I see as central to this retributive philosophy, which emphasizes individual choice and accountability. I will then explore how restorative practices can displace this view of crime and offer a wholesale alternative to mass incarceration. In doing so, I will distinguish among a variety of restorative practices, assessing how each one might fare in transforming American criminal justice. Ultimately, I will conclude that displacing retributive justice as the dominant model of criminal justice requires reformers to move beyond restorative justice to transformative justice, which explicitly aims to use criminal conflicts to transform structures of social injustice.

Part II of this article will provide a brief history of restorative justice and explore its re-emergence as an alternative to retributive justice in various jurisdictions. In Part III, I will argue that, if the aim of restorative justice is to displace the retributive impulses that have sustained mass incarceration, it is essential to distinguish between various restorative practices. In particular, this article will distinguish more narrow forms of restorative justice that focus primarily on healing the immediate harms of crime from broader, transformative forms of restorative justice that also take aim at the underlying structural causes of criminal behavior. I will refer to these broader practices, often included under the general umbrella of "restorative justice," as "transformative justice," and argue that any serious attempt to uproot retributive justice must embrace this transformative philosophy. Finally, in Part IV, I will explore two particular forms of restorative justice that are gaining momentum on different stages across the globe: the Wagga Model of Family-Group Conferencing (FGC) and Circle Sentencing. I will discuss the history and conceptual frameworks of both forms of restorative justice before assessing their transformative potential. Based on limited concrete applications of both restorative practices, I aim to assess whether these forms of restorative justice can qualify as "transformative justice" by not only promoting the individual accountability of offenders but also dismantling the structural causes of criminal behavior.

II. RESTORATIVE JUSTICE

"Everyday, I am humbled by the generosity and kindness shown by many victims and by the spirit of generosity and sacrifice which is displayed when young people and their families meet with victims and their supporters and are properly supported by communities to act as human beings in contact with each other rather than as people apart." – D.J. Carruthers, Principal Youth Court Judge in Wellington, New Zealand[26]

In his groundbreaking 1990 work, Howard Zehr conceptualized restorative justice as a fundamental shift in the underlying paradigm of criminal justice.[27] While retributive justice conceives of crime as "a violation of the state, defined by lawbreaking and guilt," restorative justice views crime primarily as "a violation of people and relationships."[28] For Zehr, this fundamental shift in how we view crime should also transform the way we treat criminal offenders.[29] While the retributive view of crime aims to vindicate the state by imposing state-sanctioned punishment, restorative justice aims to repair the ruptured relationships between the offender, the victim, and the community.[30] Restorative justice aims to heal rather than to punish, to restore rather than to disrupt.[31] Under a restorative lens, "Crime is not first an offense against society, much less against the state. Crime is first an offense against people, and it is here that we should start."[32] The practical differences between restorative justice and retributive justice flow from this fundamental shift in how we view crime. A view of crime as a violation against the state naturally lends itself to harsh, state-sanctioned punishment because it reinforces the idea that the state is the wronged party, and thus the legitimate arbiter of punishment. A view of crime as an interpersonal violation of people, by contrast, naturally empowers victims and recognizes the needs of the offender by emphasizing the importance of restoring them to their rightful places in society. Changing how we view crime also changes who we view as the stakeholders in criminal justice. As Zehr notes, restorative justice "involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance."[33]

Restorative practices today are informed by their deep roots in indigenous cultures around the world. The central insight of restorative justice, that crime violates an interpersonal relationship between the victim and the offender,

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[26] D.J. CARRUTHERS, *Foreword* to RESTORATIVE JUSTICE FOR JUVENILES: CONFERENCING, MEDIATION AND CIRCLES (Allison Morris & Gabrielle Maxwell eds., 2003).
[27] HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 180 (1990).
[28] *Id.* at 181.
[29] *Id.* at 180.
[30] *Id.* at 181.
[31] *Id.* at 186.
[32] *Id.* at 182.
[33] ZEHR, *supra* note 27, at 181.

dates back much farther than the retributive view of crime as a violation against the state.[34] Indeed, on one account, "[r]estorative justice has been the dominant model of criminal justice throughout most of human history for perhaps all the world's peoples."[35] The restorative view of criminal justice as a way to repair relationships and foster forgiveness has deep roots in ancient Buddhist, Confucian, Arab, Greek, and Roman Civilizations.[36] Notions of interpersonal repentance and forgiveness feature prominently in a wide range of cultures and philosophies, stretching from Christian thinkers like Desmond Tutu to Buddhist thinkers like the Dalai Lama.[37]

On this account, it was not until the Norman Conquest in 1066 that retributive justice displaced traditionally restorative models, as "[t]ransforming crime into a matter of fealty to and felony against the king, instead of a wrong done to another person, was a central part of the monarch's program of domination of his people."[38] Such a view of crime bolstered the state's legitimacy as the sole arbiter of right and wrong, while naturally justifying the state's authority to impose punishment.[39] Elsewhere in the world, restorative practices persisted, but came to coexist with retributive, state-centered notions of criminal justice informed by the British model, and when British colonizers settled the thirteen colonies that would make up the United States, they naturally carried with them the retributive principles of the British monarchy.[40]

While restorative traditions persisted in many parts of the world, they only re-emerged in the West as recently as the mid-1970s, as Western democracies grappled with the externalities of their increasingly retributive policies.[41] In response to widespread opposition to its increasingly punitive juvenile justice policies, Canada established an experimental victim-offender mediation program in Ontario in 1974, which was initially designed as an alternative to probation that allowed the victim and the offender to come together and speak about the offense in an effort to work towards restitution and restoration.[42] The program experienced remarkable success, surpassing the expectations of even the most hopeful advocates by not only reducing recidivism among offenders

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[34] BRAITHWAITE, *supra* note 22, at 5.
[35] *Id.*
[36] *Id.* at 3.
[37] *Id.*
[38] *Id.* at 5.
[39] *See id*.
[40] *See generally* BRAITHWAITE, *supra* note 22, at 5 ("While restorative justice may have been the dominant model of justice, it simplifies too much to say that restorative justice remained the dominant practice in societies beyond the direct role of European kings. Most premodern societies sustained side-by-side restorative traditions and retributive traditions that were in many ways more brutal than modern retributivism.").
[41] DANIEL VAN NESS, ALLISON MORRIS & GABRIELLE MAXWELL, *Introducing Restorative Justice, in* RESTORATIVE JUSTICE FOR JUVENILES 4 (Allison Morris & Gabrielle Maxwell eds., 2003).
[42] BRAITHWAITE, *supra* note 22, at 8.

but also increasing satisfaction levels among victims.[43] In retrospect, this success was unsurprising, as victim-offender mediation empowered victims who were often forgotten in—or shut out of—traditional criminal justice processes by affording them the opportunity to directly confront and understand their offenders. Contrary to the traditional retributive narrative of mass incarceration, one 2016 report found that victims of crimes generally distrust prisons and retribution and would prefer rehabilitative or restorative alternatives.[44] At the same time, the program benefitted offenders by affording them an opportunity to understand the tangible consequences of their criminal behavior and offer some form of restitution.

Over the course of the next few decades, restorative practices spread to countries around the world, including Australia, Singapore, the United Kingdom, South Africa, and the United States.[45] In practice, restorative justice took different forms in different parts of the world, informed in part by the restorative traditions that had persisted in small pockets of different countries. In New Zealand and Australia, Maori traditions informed the institutionalization of Family-Group Conferencing (FGC) and the popularization of the "Wagga Model" of restorative justice.[46] In Canada, the Canadian First Nations' healing circles informed sentencing reform and restorative innovations.[47] As restorative justice continues to spread, a growing body of evidence confirms that restorative practices can decrease repeat offending for violent and property crimes while also increasing rates of victim satisfaction.[48]

However, "[r]estorative justice is most commonly defined by what it is an alternative to."[49] As a result, the term has grown to encompass a wide variety of practices with a wide range of underlying philosophies, which often seem to share little in common with each other. Many scholars have come to accept Tony Marshall's working definition of restorative justice as "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[50] But this broad definition has been extended to incorporate a wide range of traditions around the world that differ widely both in practice and in theory.[51]

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[43] VAN NESS ET AL., *supra* note 41, at 4.
[44] Jessica Pishko, *How One Woman Was Able to Forgive the Man Who Shot Her*, TAKE PART (Sept. 19, 2016), http://www.takepart.com/feature/2016/09/19/violence-and-redemption-forgiveness [https://perma.cc/F72M-WT35].
[45] BRAITHWAITE, *supra* note 22, at 8.
[46] *Id.* at 25, 26.
[47] *Id.* at 8.
[48] LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 8 (2007).
[49] BRAITHWAITE, *supra* note 22, at 10.
[50] VAN NESS ET AL., *supra* note 41, at 5.
[51] MICHAEL P. SENG, *Reflections on War and Restorative Justice*, *in* RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH 305 (Sheila M. Murphy & Michael P. Seng eds., 2015).

While some use the term "restorative justice" to refer to a specific set of processes, others use the term more generally to refer to a set of shared values.[52] These restorative processes, in turn, differ along several important dimensions. First, restorative justice encompasses practices that serve a wide variety of *functions*. While some restorative programs are intended to displace traditional court processes entirely by diverting offenders from the court system, others work alongside retributive systems at the sentencing phase, and still others accept the results of retributive justice but work to restore and heal relationships for prisoners post-sentencing.[53] Meanwhile, some restorative practices primarily work outside of the courtroom by focusing on preventing crime in the first place, or on altering the social circumstances that may motivate criminal behavior.[54] These practices might place a particular emphasis on identifying the underlying causes of criminal behavior and may accordingly function to prevent crime rather than to deal with its negative consequences. Secondly, restorative processes can also differ widely in their *scope*: while victim-offender mediation involves only a direct conversation between the victim and offender, circle sentencing is explicitly designed to involve the entire community.[55] This in turn can lead restorative programs to differ in their actual *substance* as well: while one-on-one counseling with the victim and offender may focus more narrowly on their respective needs, circle sentencing can involve the entire community in a broader discussion about how to reform social structures that may have contributed to the immediate offense.[56] Finally, restorative practices operate in a wide range of different *settings.* To complicate things even further, "restorative justice" has also been construed to encompass practices that are outside of criminal justice altogether, stretching from transitional justice programs such as the South African Truth and Reconciliation Commission to conflict mediation practices in schools and workplaces.[57]

If restorative justice is to offer a concrete alternative to retributivism and mass incarceration, however, we must be able to distinguish among various restorative practices and understand where particular practices succeed and fail. As researchers continue to document the successes of restorative programs and reformers continue to push restorative justice as an alternative to mass incarceration, it will become increasingly important to understand the ways in which various practices differ. To that end, Part III of this article will distinguish more narrow forms of restorative justice, which focus primarily on

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[52] Chris Cunneen, *Understanding Restorative Justice Through the Lens of Critical Criminology* 290 (Univ. of N.W.S. Fac. of L. Rsch. Series, Working Paper No. 20, 2008).

[53] M.S. UMBREIT, B. VOS & R.B. COATES, UNIV. OF MINN. CTR. FOR RESTORATIVE JUST. & PEACEMAKING, RESTORATIVE JUSTICE DIALOGUE: EVIDENCE-BASED PRACTICE 1 (Jan. 1, 2006), http://www.antoniocasella.eu/restorative/Umbreit_2006.pdf [https://perma.cc/PW4W-B9U3].

[54] *See* Cunneen, *supra* note 52, at 290.

[55] UMBREIT ET AL., *supra* note 53, at 1–2.

[56] *See* RUTH MORRIS, STORIES OF TRANSFORMATIVE JUSTICE 120 (2000).

[57] Cunneen, *supra* note 52, at 291.

the immediate offense, from broader, "transformative" models, which take explicit aim at the underlying systemic forces that perpetuate crime in the first place. I will argue that the most widespread restorative practices ultimately fail to challenge the underlying premises of retributive justice and mass incarceration because they operate under the same flawed, narrow conception of crime that lies at the heart of retributivism.

III. TRANSFORMING RESTORATIVE JUSTICE

"The idea of restoring justice implied we had had justice, and lost it. In fact, distributive justice abounds everywhere, and most offenders are, more than the average person is, victims of distributive injustice. Do we want to restore offenders to the marginalized, enraged, disempowered condition most were in just before the offense? This makes no sense at all!" – Ruth Morris[58]

Retributive Justice accepts as its central premise that criminal behavior is a product of individual choice, and thus deserves retributive punishment.[59] On this account, harsh punishment is a just response to an offender's decision to commit a crime, and respects the offender's agency as an autonomous member of society.[60] I will begin by challenging this central premise underlying the dominant paradigm of American criminal justice, arguing that violent crime in the United States is in many ways a product of underlying, structural injustices that pervade American society. I contend that this understanding of crime, which seems increasingly undeniable in the face of mounting criminological evidence, should radically transform the way we think about criminal punishment. If we are serious about addressing crime, individual accountability should give way to structural transformation. Armed with this understanding of what drives and sustains violent criminal behavior, I argue that while restorative justice undeniably improves on the myopic view of crime central to retributive justice, most forms of restorative justice are still too narrow to adequately address the underlying systemic causes of crime. At least in its most common forms, restorative justice overlooks and reinforces the underlying structural drivers of violent crime by narrowly focusing on restoring the relationships of the parties immediately involved in the criminal offense. I will also introduce the alternative paradigm of "transformative justice," a term coined by Ruth Morris to describe practices that explicitly aim to transform the structural injustices that breed criminal behavior.[61] I will argue that this model of justice is better equipped to address criminal behavior than narrow forms of restorative justice, particularly when crime is understood to be a product of underlying structural marginalization.

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[58] MORRIS, *supra* note 56, at 19.
[59] ALEC WALEN, *supra* note 15.
[60] *Id.*
[61] MORRIS, *supra* note 56, at 21.

A. The Structural Causes of Violent Crime

James Baldwin, an acclaimed essayist and civil rights activist, once documented how racial and socioeconomic injustice drove criminal behavior in his neighborhood of Harlem, New York.[62] He wrote,

> Crime became real, for example – for the first time – not as *a* possibility but as *the* possibility. One would never defeat one's circumstances by working and saving one's pennies; one would never, by working, acquire that many pennies, and, besides, the social treatment accorded even the most successful Negroes proved that one needed, in order to be free, something more than a bank account . . . . I certainly could not discover any principled reason for not becoming a criminal, and it is not my poor, God-fearing parents who are to be indicted for the lack but this society.[63]

Decades later, in the face of stark, growing social inequality and mounting criminological evidence, Baldwin's insight seems increasingly undeniable. Despite incarcerating more people than any other country in the world,[64] the United States experiences more violent crime than most other similarly industrialized countries.[65] Violence in the United States is also disproportionately concentrated in the most vulnerable, socioeconomically marginalized communities.[66] Indeed, the most powerful predictor of violent crime in the United States is socioeconomic disadvantage.[67] Members of these marginalized communities are disproportionately likely to be both incarcerated for and victims of violent crime.[68]

According to one school of thought, this strong empirical correlation, coupled with the stark, growing socioeconomic disparities between the rich and the poor in America, are evidence that violence and crime are *symptoms* of the racial, social, and economic inequalities that pervade American society.[69] On this view, espoused by critical criminologists, crime is ultimately explainable by underlying structures of racial, gender, and class inequalities, and America's history of racial and socioeconomic marginalization has created conditions that breed and sustain violent crime.[70] There are several rich strands

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[62] *See* JAMES BALDWIN, *Down at the Cross: Letter from a Region in My Mind*, *in* THE FIRE NEXT TIME (Mod. Libr. ed.1995) (1963).
[63] *Id.* at 20–23.
[64] Joan Gottschall & Molly Armour, *Rethinking the War on Drugs: What Insights Does Restorative Justice Offer?*, *in* RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH 94 (Sheila M. Murphy & Michael P. Seng eds., 2015).
[65] WALTER S. DEKESEREDY, CONTEMPORARY CRITICAL CRIMINOLOGY 5 (2011).
[66] *See id.*
[67] *Id.*; *see also* Michael T. Light & Jeffery T. Ulmer, *Explaining the Gaps in White, Black, and Hispanic Violence since 1990: Accounting for Immigration, Incarceration, and Inequality*, 81 AM. SOCIO. REV. 290, 307 (2016).
[68] *See* DEKESEREDY, *supra* note 65, at 16.
[69] *Id.* at 7.
[70] *Id.*

of critical criminology, each emphasizing a different dimension of distributive injustice and its relationship to crime, but they share the conviction that "the unequal distribution of power or of material resources within contemporary societies" is the root cause of criminal behavior, and regard "major structural and cultural changes within society as essential steps to reduce crime and promote social justice."[71]

This article does not purport to offer a robust defense of the more radical position of critical criminology, that violent crime is explainable *entirely* by structures of social and economic inequality. However, it is appropriate for the purposes of this section to acknowledge what most opponents of mass incarceration have realized: criminal behavior and incarceration are motivated and sustained, at least in large part, by underlying, structural injustices. In doing so, I rely on the vast body of mounting criminological evidence linking concentrated deprivation and disadvantage to violent crime. In the face of this evidence, it is becoming increasingly implausible to deny the causal link between structural, concentrated disadvantage and violent crime.

Social science overwhelmingly confirms that violent crime is strongly correlated with structural disadvantage.[72] Indeed, according to one review of existing studies, "virtually all prior research" confirms this relationship between structural disadvantage and violent crime.[73] This relationship is consistent across a wide geographic range of localities, and holds true for different measures of structural disadvantage, including poverty, joblessness, and low access to education.[74] The link between structural disadvantage and violence also "transcends racial boundaries," as concentrated socioeconomic disadvantage also explains differences in violence within racial groups.[75] In the past few decades, social research has been remarkably robust and nearly universal on this point: even when controlling for confounding variables like race and geography, socioeconomic disadvantage is the strongest predictor of violent crime.[76]

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[71] *Id.*

[72] Robert J. Sampson, William Julius Wilson & Hanna Katz, *Reassessing "Toward a Theory of Race, Crime, and Urban Inequality": Enduring and New Challenges in 21st Century America*, 15 DU BOIS REV. 13, 19 (2018); Ruth D. Peterson & Lauren K. Krivo, *Macrostructural Analyses of Race, Ethnicity, and Violent Crime: Recent Lessons and New Directions for Research*, 31 ANN. REV. OF SOCIO. 331, 337 (2005); Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 392 (2005); Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOCIO. REV. 114, 126 (1982); Edward S. Shihadeh & Wesley Shrum, *Serious Crime in Urban Neighborhoods: Is There a Race Effect?*, 24 SOCIO. SPECTRUM 507, 526 (2004).

[73] Lauren J. Krivo, Ruth D. Peterson & Danielle C. Kuhl, *Segregation, Racial Structure, and Neighborhood Violent Crime*, 114 AM. J. OF SOCIO. 1765, 1793–94 (2009); Light & Ulmer, *supra* note 67, at 296.

[74] Sampson et al., *supra* note 72, at 20 (reviewing different studies considering the link between structural disadvantage and violent crime).

[75] *Id.* at 14; *see also* Shihadeh & Shrum, *supra* note 72, at 510 (finding no relationship between race and violent crime rates once controlling for structural disadvantage).

[76] *See* Sampson et al., *supra* note 72.

Beyond the undeniable empirical correlation between structural disadvantage and violent crime, existing research also offers persuasive reasons to believe that systemic disadvantage is an underlying *causal driver* of violence.[77] First, on a purely individual level, intense deprivation can drive criminal behavior by forcing members of marginalized communities to turn to crime to support themselves or their families.[78] Socioeconomic disparities are growing at alarming rates in America, and disadvantage and deprivation are becoming increasingly concentrated in vulnerable communities.[79] Indeed, before the Coronavirus pandemic, thirty-four million Americans were living in poverty, and thirty-five million Americans lacked reliable access to food.[80] Meanwhile, wealth is becoming increasingly concentrated in a small subsection of American society. Five percent of Americans own two-thirds of the country's wealth and the wealthiest 0.1 percent of Americans bring in 196 times the income of the bottom ninety percent.[81] Economic inequality also has a social dimension, as these disparities do not affect all communities equally. The median Black family in America owns just two percent of the wealth of the median White family, while the median Latino family owns just four percent of the wealth of the median White family.[82]

Such concentrated deprivation can leave individuals feeling that they have no choice but to turn to crime to support their basic needs or those of their families. Moreover, concentrated disadvantage can leave individuals in marginalized communities feeling powerless and alienated from society outside their communities, which may make their decisions to turn to crime more acceptable.[83] The reality of socioeconomic inequality is that different communities are afforded radically different access to basic resources.[84] Violent crime and incarceration are heavily concentrated in the most disadvantaged of these communities, where younger generations must often grow up with no guarantee that their most basic needs will be easily met.[85]

Secondly, in addition to the effect that concentrated deprivation can have on individuals, structural marginalization can also shape the cultural norms of disadvantaged communities in a way that makes violent crime more likely. The concentration of disadvantage can create subcultures and conditions within

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[77] *See* DEKESEREDY, *supra* note 65, at 7.
[78] *Id.*
[79] *See Wealth Inequality in the United States*, INEQUALITY.ORG, [hereinafter *Wealth Inequality in the United States*], https://inequality.org/facts/wealth-inequality/ [https://perma.cc/2AWG-XWJ3].
[80] *Facts About Poverty and Hunger in America*, FEEDING AMERICA, https://www.feedingamerica.org/hunger-in-america/facts [https://perma.cc/2SVF-QTYD].
[81] *Income Inequality in the United States*, INEQUALITY.ORG, https://inequality.org/facts/income-inequality/ [https://perma.cc/6E5W-NR3E]; *Wealth Inequality in the United States*, *supra* note 79.
[82] *Wealth Inequality in the United States*, *supra* note 79.
[83] Peterson & Krivo, s*upra* note 72, at 332.
[84] *See id.* at 333.
[85] *See id.* at 350.

marginalized communities that in turn produce higher rates of crime.[86] For example, marginalized communities are likely to distrust law enforcement and the rule of law because they are severely underserved by existing structures of power, which may in turn make crime or violence more acceptable than it might be in a more affluent community.[87] Similarly, disadvantaged communities are more likely to have weaker internal, informal controls over criminal conduct, and younger generations are more likely to turn to their peers for solidarity or guidance in the absence of strong support institutions, which may motivate group crime or gang formation.[88] These subcultures form as natural consequences of intense, concentrated disadvantage, as communities are forced to adapt to systematic deprivation.[89] As William Julius Wilson, Hanna Katz, and Robert Sampson explain, "Under conditions of severe and persistent concentrated poverty, high crime, and ineffective policing, residents come to expect crime, disorder, and the illegal economy to be a part of their daily lives."[90]

Moreover, incarceration itself exacerbates the disparities between privileged and disadvantaged communities by creating a self-sustaining cycle where the most heavily policed and incarcerated populations produce future generations that are themselves disproportionately likely to face poverty and incarceration.[91] In doing so, incarceration worsens the conditions that sustain and drive violent behavior in marginalized, vulnerable communities. It is this cycle that Michelle Alexander views as responsible for sustaining a stable, lasting underclass in America, where the most disadvantaged populations are systematically kept there by mass incarceration policies.[92] As Joan Gottschall and Molly Armour put it, "our imprisonment policies have created several generations of 'children of the incarcerated.' These young people grow up without access to at least one parent for a significant portion of their childhoods and are greatly affected both psychologically and socially as a result."[93]

According to Walter DeKeseredy, "[I]n most impoverished neighborhoods in the United States, as many as 20 percent of adult males are incarcerated on any given day."[94] Just as crime imposes a serious human cost on the communities it affects, so too does incarceration. To put a convict behind bars is often also to take a parent away from a child, a spouse away from a family. It is to take an indispensable source of income from a household

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[86] Sampson et al., *supra* note 72, at 24.
[87] *Id.* at 25; *see also* David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOCIOLOGY 1190, 1198 (2011).
[88] Sampson et al., *supra* note 72, at 16.
[89] *Id.*
[90] *Id.*
[91] Gottschall & Armour, *supra* note 64, at 97.
[92] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2012).
[93] Gottschall & Armour, *supra* note 64, at 97.
[94] DEKESEREDY, *supra* note 65, at 76.

starving for resources, a community leader from a neighborhood that may be in short supply of role models. It is to normalize a world of instability and chaos, where families are often left without any clue as to how they can make ends meet. Put differently, "the perennial removal and return of large numbers of young men destabilizes communities by exacerbating residential instability and diminishing the well-being and earning power of residents."[95] This is not just theoretical conjecture; empirical research reveals that "incarceration worsens health outcomes not only for prisoners, but also for their families and communities," as "mass incarceration harms families by reducing child well-being, increasing the likelihood of divorce and separation, and reducing family income."[96] Incarceration destabilizes already vulnerable communities by systematically removing community leaders and separating family members.[97] When incarcerated offenders are released, moreover, they return to a world where they cannot gain employment, find housing, or vote.[98] This harms not only the offenders themselves, but also "the labor market prospects of others in the neighborhood, as well as affecting the voting patterns and election outcomes in some communities."[99] The ultimate result is to further marginalize the most vulnerable, socioeconomically underprivileged communities.

For younger generations left to make ends meet in the absence of an incarcerated family member, crime is often a natural answer. The solidarity of similarly situated peers, themselves at a loss for how to provide for their families, may motivate group crimes and gang violence.[100] As DeKeseredy explains:

> [M]ost violent street crimes, especially those committed by youths, are committed in groups. This is why incarcerating or 'treating' several gang members does nothing to lower the rate of violent crime in the United States. You can lock people up or make them undergo therapy, but such measures do not eliminate the social, psychological, or interpersonal forces that influence people to harm others. For every gang member you take off the street, others will replace him or her.[101]

Younger members of heavily incarcerated communities may be more likely to turn to group crime because it can offer solidarity with peers in the absence of a more stable support network, or they may simply turn to crime as a way to make ends meet in the absence of a more stable source of income for their families.

In short, incarceration itself exacerbates the conditions that already make

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[95] BECKETT & KARTMAN, *supra* note 17, at 3–4.
[96] *Id.* at 3.
[97] Gottschall & Armour, *supra* note 64, at 96.
[98] *Id.* at 95–96.
[99] DEKESEREDY, *supra* note 65, at 76–77.
[100] *See id.* at 5.
[101] *Id.*

marginalized communities disproportionately susceptible to violent crime by worsening the deprivation and social isolation that younger generations in those vulnerable communities already experience. Thus, the very punitive policies purporting to restore public order and safety instead further marginalize the disadvantaged communities facing the highest rates of violence. Indeed, the very concept of "crime" reflects policymaking commitments that further disadvantage these vulnerable communities.[102] "Crime" is a social construct that is defined and enforced by the criminal justice system. The very process of determining what conduct is to be considered criminal, and therefore deserving of retributive punishment, is one that necessarily involves policy decisions. Yet, it is overwhelmingly conduct that occurs in marginalized communities, including nonviolent drug offenses, that are heavily criminalized and severely punished, while white-collar, corporate conduct is rarely criminalized or seriously punished, even when its consequences are just as harmful.[103]

Taken together, the empirical and analytical evidence overwhelmingly suggest that structural disadvantage and marginalization are themselves *drivers* of violent crime.[104] Indeed, any other explanation for the stark correlation between concentrated disadvantage and violence, which holds even when controlling for confounding variables like race and geography, seems highly implausible. It simply cannot be the case, for example, that disadvantaged communities just happen to contain inherently worse people. Such a conclusion is not only preposterously offensive but also intensely naïve and frankly implausible. The simplest, most persuasive explanation for the concentration of violent crime in the poorest, most disadvantaged neighborhoods is simply that social and economic disadvantage are themselves major underlying drivers of criminal behavior. This view does not entirely dismiss the role of individual choice or undermine individual accountability, but merely acknowledges that criminal behavior is shaped in large part by the environments we inherit, and that conditions and cultures can impact what we perceive to be choices.

From this premise, it is easy to see where the retributive account of crime goes wrong: it relies exclusively on ideas of individual accountability and blame, without recognizing the underlying causes of crime like social and economic inequality. Mass incarceration is justifiable when we view crime as a product of individual freedom and nothing more, and disparate rates of incarceration can be easily dismissed if we discount the structural causes of

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[102] *See* Fay Knopp, Barbara Boward, Mary Jo Brach, Scott Christianson, Mary Ann Largen, Julie Lewin, Janet Lugo, Mark Morris & Wendy Newton, *Demythologizing our Views of Prison*, *in* INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS (Mark Morris ed., 2d ed. 1977), https://www.prisonpolicy.org/scans/instead_of_prisons/chapter2.shtml [https://perma.cc/NFZ3-WGA8].

[103] *Id.* at 104.

[104] *See* DEKESEREDY, *supra* note 65, at 7.

crime.[105] This model, however, disproportionately targets the most vulnerable communities, who are predisposed to higher rates of crime by structures of socioeconomic inequality that often leave them crippled and powerless.[106] In doing so, it proactively exacerbates the underlying causes of crime by compounding concentrated, structural disadvantage. The philosophy of mass incarceration is thus both internally flawed and counterproductive. It is internally flawed because it necessarily relies on an erroneous view of criminal behavior as a product of unfettered individual choice, which merits individual accountability. But it is also counterproductive because it exacerbates the conditions that actually breed and sustain criminal behavior.

B. Restorative Justice

Any serious alternative to retributive justice that aims to dismantle mass incarceration must therefore do two things. First, it must recognize that crime is driven, at least in large part, by broader structures of injustice that produce concentrated disadvantage. Secondly, it must contribute to the transformation of the social conditions that breed violent crime, rather than mask or reinforce them, while also addressing immediate violations of human dignity and safety. Any alternative to retributive justice that leaves deeper social injustices intact will be a band-aid on a bullet wound; violent crime will continue to disproportionately plague the most vulnerable, disadvantaged communities, and incarceration—whatever form it may take—will continue to target the same marginalized communities.

Many restorative practices, however, fall far short of the deeper, transformative social change that is necessary to dismantle mass incarceration. While they challenge retributive justice in critical ways and usually offer more humane responses to criminal behavior, restorative practices also often mask and perpetuate the underlying structural causes of crime, further entrenching a view of crime that reduces criminal behavior to unfettered individual choice. The most widespread models of restorative justice, aimed largely at reintegration and restitution, usually neither recognize the structural causes of violent crime nor contribute to their transformation.

When restorative justice re-emerged in Canada in the mid-1970s, it did so in the form of an experimental "Victim Offender Reconciliation Program" (VORP) in Kitchener, Ontario, designed as a post-conviction sentencing alternative for youth offenders.[107] Since then, Victim-Offender Mediation

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[105] I do not mean to suggest that the philosophy of retributive justice alone gave rise to mass incarceration. On the contrary, systemic racism and structures of concentrated power undoubtedly informed the increasingly punitive criminal policies that ignited mass incarceration. I do not mean to discount the other causes and drivers of mass incarceration. Instead, my argument is merely that retributive justice sustains and justifies mass incarceration in a way that we must interrogate and dismantle if we are serious about challenging mass incarceration.

[106] DEKESEREDY, *supra* note 65, at 7.

[107] *Victim Offender Mediation*, CTR. FOR JUST. & RECONCILIATION, http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-

(VOM) has become the most widespread form of restorative justice, with over 290 programs in the United States and over 500 in Europe.[108] With empirical and anecdotal support for VOM growing, the American Bar Association even endorsed the practice and recommended its use throughout the United States.[109] Like most restorative programs, VOM differs widely in practice in different parts of the world, ranging from programs meant to divert offenders from court entirely to post-conviction programs meant to reintegrate offenders and victims after sentencing.[110] They share, however, the fundamental tenets of Canada's original VORP program. As the Centre for Justice and Reconciliation explains, "In essence, VOMs involve a meeting between the victim and offender facilitated by a trained mediator. With the assistance of the mediator, the victim and offender begin to resolve the conflict and to construct their own approach to achieving justice in the face of their particular crime."[111] As restorative justice has spread, new forms have emerged or re-emerged in different parts of the world, and the term now refers to a wide range of different practices.[112] Many of them, however, draw from the central ideas of VOM and share VOM's general approach.[113] In particular, they share VOM's narrow focus on the immediate, particular crime, and its involvement of only the offender and the victim in the mediation process.[114] This narrow view of criminal behavior, however, drastically limits the ability of restorative justice to dismantle mass incarceration and retributivism in several ways.

First, the very language of restorative justice problematically entrenches underlying structures of inequality.[115] Restorative justice seeks to "restore" the relationships that existed in the community prior to the immediate crime. This narrow focus on healing the effects of the immediate offense implicitly presumes that the state of society prior to the crime is one that ought to be restored and forecloses the possibility of further interrogation into the underlying causes of crime. The view that the mission of criminal justice is to heal the community in the wake of an immediate offense reinforces the legitimacy of the society that predated the criminal offense and discourages decisionmakers from looking past the immediate crime to the underlying structures that sustain crime in the first place. As Donna Coker puts it, "The concept of *restoration* suggests that a prior state existed in which the victim

programs/victim-offender-mediation/#sthash.W8CcmlVp.dpbs [https://perma.cc/M5BC-YFND].

[108] U.S. DEP'T OF JUST., RESTORATIVE JUSTICE FACT SHEET: VICTIM OFFENDER MEDIATION, http://www.courts.ca.gov/documents/VictimOffenderMediation.pdf [https://perma.cc/G9DW-XEY3].

[109] *Id.*

[110] *Id.*

[111] CTR. FOR JUST. & RECONCILIATION, *supra* note 107.

[112] *See* BRAITHWAITE, *supra* note 22, at 8.

[113] U.S. DEP'T OF JUST., *supra* note 108.

[114] *Id.*

[115] Donna K. Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, *in* RESTORATIVE JUST. & FAM. VIOLENCE 143 (Heather Strang & John Braithwaite eds., 2002).

experienced significant liberty and the offender was integrated into a community; in many cases neither is true."[116] This model reduces criminal justice to a series of narrow conflicts, leaving no space to interrogate the deeper systemic causes of crime that pervade American society.

This is more than a semantic quibble; the language of restorative justice seeps into the mindset of key decisionmakers and affects how restorative programs operate in practice. In the context of child abuse, for example,

> the emphasis on restoration assumes the conditions that existed prior to an individual incident of abuse are desirable and should be restored. This ignores the common lack of rights for children, abuses of power, gender inequality, legacies of slavery and colonization, and other types of violence that pre-date and co-exist with ongoing incidents of violence.[117]

In more tangible terms, narrow restorative practices may simply return an abused child to an environment ripe for future abuse, because they often do nothing to identify or address the root causes of the abuse.

Without discounting the role of personal choice, many reformers and activists now recognize that child abuse is informed by cultural and systemic forces like male supremacy and economic exploitation.[118] Child abusers are disproportionately men who feel powerless in a society that has taught them that men should feel powerful, and who respond to extreme economic hardship by lashing out against children.[119] In a VOM session, an offender may express serious, genuine remorse without understanding how underlying cultural and social forces motivated the abuse on a deeper level. When the aim of the process is to "restore" communal relationships, authorities may overlook structural injustices in their efforts to restore victims and offenders to their places in the community. These narrow restorative practices risk leaving those underlying causes intact by focusing solely on the immediate offense, often "restoring" the child and the offender to a situation ripe for further abuse. When the aim is to "restore" relationships, key players are unlikely to question whether those relationships were flawed in the first place.

This implicit notion that the society that pre-existed the immediate crime is one that ought to be restored, as well as its twin view that criminal justice must do nothing more than ameliorate the harms of the immediate crime, mask underlying social injustices. As Chris Cunneen puts it, "Basic to this understanding is a concern that the notion of community presents a harmonious

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[116] *Id.*

[117] SARA KERSHNAR, STACI HAINES, GILLIAN HARKINS, ALAN GREIG, CINDY WIESNER, MICH LEVY, PALAK SHAH, MIMI KIM & JESSE CARR, TOWARD TRANSFORMATIVE JUSTICE, GENERATION FIVE 21 (June 2007), http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Document.pdf [https://perma.cc/5ZYC-73JE].

[118] *Id.* at 14.

[119] *Id.*

view of social and political relations, which masks conflict, power, difference, inequality and potentially exploitative social and economic relations."[120] This framing of criminal justice not only masks deeper inequalities, but may actively reinforce and legitimize them by aiming to restore a state of affairs that actually engendered crime in the first place. More concretely, it may artificially restore offenders and victims to a state where future offenses are likely to occur by simply masking more complicated systems of violence.

Secondly, by involving only the parties directly involved in the immediate offense, narrow forms of restorative justice like VOM reduce crimes to isolated phenomena that occur between an offender and a victim, which masks the role that society itself may play in sustaining the underlying social inequalities that breed and perpetuate criminal behavior. Reducing crime to the two people most directly involved in the immediate offense reinforces the flawed notion that crime is a product solely of individual choice, and merits nothing more than individual accountability. Such a narrow focus masks and perpetuates the underlying causes of crime by "constructing a victim vs. offender relationship which makes absent the issue of social oppression."[121]

For offenders and survivors of intimate partner violence, for example, narrow restorative practices that fail to acknowledge the role of structural and cultural forces may be counterproductive for both parties. Like child abuse, intimate partner violence is sustained, at least in part, by structures of gender inequality, cultures of male supremacy, and systems of economic exploitation.[122] The problem is often not simply in the mind of the offender himself, but in the culture of the broader community, which may be tainted by deeply ingrained ideas of toxic masculinity and male power.[123] Research with men who batter confirms, for example, that "friends and family often play important roles in supporting the batterer's view of himself as a victim rather than a victimizer," while most male friends and family members either say nothing or actively support the batterer's behavior.[124] Men in intensely marginalized communities, moreover, are more likely to feel economically or socially powerless.[125] Women in the same communities may feel powerless to turn to traditional authorities who have failed them again and again. Of course, none of this excuses the choice to turn to violence, but activists now widely recognize that "battering is not only the product of the operation of systems in the batterer's life, it is also shaped by structural inequalities in the lives of women."[126] One need not overlook individual accountability in order to recognize the role of social and cultural forces in sustaining intimate partner

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[120] Cunneen, *supra* note 52, at 295.
[121] Anthony J. Nocella II, *An Overview of the History and Theory of Transformative Justice*, 6 PEACE & CONFLICT REV. 1, 4 (2011).
[122] Coker, *supra* note 115, at 139–40.
[123] *Id.*
[124] *Id.* at 139.
[125] *Id.* at 140.
[126] *Id.* at 142 (citation omitted).

violence.

With this in mind, it is easy to see how the narrow view of crime that restorative practices like VOM take is misinformed. Crime is in fact not an isolated phenomenon that occurs between a victim and an offender, but instead a product of complicated social and cultural forces that inform and sustain criminality. By reducing criminal behavior to the immediate offense, however, restorative practices often mask the underlying social injustices that perpetuate and legitimize violent behavior. While it may solicit genuine remorse and accountability, VOM is unlikely to address the underlying drivers of criminal behavior. Instead, processes like VOM are likely to return victims and offenders to the same society whose cultural and social shortcomings informed and sustained the criminal behavior in the first place.[127]

Thirdly, the structure of VOM and similar restorative practices limits their ability to effect broader, transformative change because the practices often do not involve the broader community in any meaningful capacity.[128] This is a more practical, concrete failing of narrow restorative practices: restorative justice is unlikely to lead to broad social change when it does not involve the authorities in the best positions to effect that change. VOM, for example, facilitates dialogue between the victim and offender in order to understand why the immediate crime occurred and restore both the victim and offender to their respective places in society. In doing so, VOM excludes community members outside of the victim and offender from the process entirely and minimizes the power of the state in resolving interpersonal violence to nothing more than a mediator or facilitator charged with ensuring procedural rather than substantive adequacy. This exclusion is not unintentional. Restorative justice is commonly justified as a response to traditional retributive models that "steal" criminal conflicts from the parties most affected by the offense by redefining crime as a violation against the state.[129] Restorative justice is meant to return interpersonal conflicts to the parties most affected by them: the victim and the offender.[130] VOM and similar practices are thus explicitly designed to minimize the power of the state in setting the terms of criminal justice, liberating affected parties from the state's monopoly over force.[131] In doing so, however, restorative practices like VOM leave no space for the communities of the victims and the offenders to participate in any meaningful way.

This structure is inherently limiting because it affords no opportunity to hold the state itself accountable for the systemic injustices that it may have a role in perpetuating. Instead, it completely overlooks the state's role in sustaining systems of inequality that in turn perpetuate crime. It also does not involve the community or any other informal organization in place of the state

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[127] Nocella II, *supra* note 121, at 4.
[128] Brian Sapir, *Healing a Fractured Community: The Use of Community Sentencing Circles in Response to Hate Crimes*, 9 CARDOZO J. OF CONFLICT RESOL. 207, 231 (2007).
[129] Coker, *supra* note 115, at 131.
[130] BRAITHWAITE, *supra* note 22, at 11.
[131] *See id.* at 47.

who might be able to address the underlying cultural and social forces at play that private parties have no power to challenge themselves. To be sure, VOM challenges a central premise of retributive justice in a critical way; in removing the state from criminal proceedings, VOM challenges the notion that the state is the rightful arbiter of punishment and justice.[132] In doing so, it implicitly challenges the state's long history of structural violence and marginalization, a history reflected in modern trends of mass incarceration.

But VOM also excludes the community—or informal community institutions that might be influential—from exercising any role in the criminal justice process. This can create the perverse effect of reducing communal problems to narrow interpersonal conflicts, which will ultimately leave the underlying social causes of those conflicts intact.[133] As Sampson, Wilson, and Katz note, one effect of concentrated disadvantage that drives violent crime in marginalized communities is the lack of social controls and strong informal institutions within vulnerable neighborhoods.[134] If restorative justice seeks to transform the underlying structures of concentrated disadvantage, it must strengthen and empower institutions within marginalized communities to find communal solutions to communal problems. Leaving the fates of vulnerable communities in the hands of the state has proved disastrous, but narrowly reducing interpersonal conflicts to the victim and the offender is not the only alternative. There is a third option that VOM overlooks: engaging and empowering vulnerable communities themselves by giving them a voice in criminal justice.

For example, the perpetration of hate crimes against historically marginalized minorities presents an especially communal problem where a narrow criminal justice proceeding may offer little in terms of transformation or even restoration. Hate crimes, defined broadly, are crimes that are committed against a person "motivated in whole or in part by the offender's bias against a race, religion, disability, sexual orientation or ethnic/national group."[135] Hate crimes are an unfortunate but undeniable reality in an American society that is in many ways defined by group difference and conflict, and can leave victims feeling particularly marginalized and targeted because they are often motivated by characteristics that victims cannot control. They can force victims to question their sense of worth or fear for their basic safety, and often leave them feeling afraid, vulnerable, and broken. Moreover, victims of hate crimes "tend to suffer these debilitating symptoms for longer periods of time than do victims of ordinary crime."[136]

At the same time, hate crimes are also uniquely communal in both their causes and impacts.[137] As Brian Sapir notes, "In communities where there is a

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[132] *See id.*
[133] *See*, *e.g.*, Sapir, *supra* note 128, at 231.
[134] Sampson et al., *supra* note 72, at 25.
[135] Sapir, *supra* note 128, at 221.
[136] *Id.* at 222.
[137] *Id.* at 227.

large population of members of the same minority targeted by the crime, the message of hate has a greater impact, often leading to feelings of fear and outrage and sometimes escalating to violent acts of revenge and retaliation."[138] Relatedly, hate crimes are often motivated by group animus that is bred by socioeconomic or racial inequality.[139] Reducing hate crimes to victims and offenders, therefore, is uniquely counter-intuitive for two distinct reasons. First, hate crimes have broad communal impacts, and can destabilize entire populations or groups. This dimension is likely to be ignored in narrow restorative practices that reduce the hate crime to an isolated offense that occurs between the victim and the offender. Indeed, "[t]he fact that Victim-Offender Mediation limits the participants to victims and offenders means that the members of the community affected by the crime do not get to benefit from the mediation process."[140]

Secondly, excluding the community from mediation structurally limits the ability of restorative justice to address the underlying causes of hate crimes in any meaningful way. Hate crimes are uniquely "fueled by the ignorance, bias and stereotypes harbored by the offender," which are in turn sustained by systems of privilege and inequality that breed ignorance and hatred.[141] Excluding the offender's community from the restorative process is likely to leave the underlying structures that breed hate crimes intact because the individuals directly involved in the immediate offense are not likely to be in positions to effect broader communal change on their own. On the other hand, communities are better equipped to address widespread problems with deep roots in the community's culture, and communal institutions may be able to hold the state itself accountable in ways that individuals acting alone cannot. As Donna Coker puts it, "Rhetoric that highlights the power of individuals to address crime may serve to make invisible the manner in which state power is deployed to define crime and to enforce criminal laws."[142]

To truly dismantle mass incarceration, any alternative to retributive justice must at least do two things: acknowledge the underlying structural drivers of criminal behavior; and contribute to the transformation of those structures. The most widespread restorative practices, however, are ill-equipped to fulfill either task. First, narrow restorative practices like VOM are not equipped to recognize the underlying drivers of crime on either a theoretical and practical level. On a theoretical level, the very language of restoration suggests that criminal justice should not aim to transform underlying injustices, but to restore individual offenders and victims to their respective places in the community. On a practical level, narrow restorative practices reduce criminal behavior to the parties most directly involved in the immediate offense, implicitly accepting the underlying retributivist view of crime as a

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[138] *Id.* at 228.
[139] *Id.* at 222–23.
[140] *Id.* at 231.
[141] *Id.* at 233.
[142] Coker, *supra* note 115, at 149.

phenomenon that occurs between two individuals and not as a social product of structural injustice. Secondly, narrow restorative practices are not equipped to actually effect social transformation because they do not involve the community as a whole, or communal institutions who might be in a position to ignite broader change. Because the individuals most immediately affected by the offense are unlikely to be in positions to engage the entire community or to interrogate underlying social systems of privilege and deprivation on their own, these processes are likely to leave structural injustices intact.

C. Transformative Justice

The shortcomings of restorative justice have not gone unnoticed. In the late 1990s, a Canadian Quaker named Ruth Morris sought to capture the restorative critique of retributivism while also overcoming the shortcomings of narrow restorative practices like VOM.[143] While restorative justice certainly offered a significantly more humane alternative to retributive justice, Morris noted that it "did not address issues of oppression, injustices, and social inequities within conflicts."[144] Criminal justice, Morris argued, should reach beyond immediate crimes to transform the underlying conditions that breed crime in the first place.[145] As long as restorative justice did not address the underlying injustices that sustain and motivate criminal behavior, it would not succeed in displacing the retributive framework that sustained mass incarceration.[146] For Morris, this revelation demanded a new lexicon altogether.[147] Where restorative justice aims to heal the immediate effects of crime, "transformative justice sees crime as an opportunity to build a more caring, more inclusive, more just community."[148] Transformative justice, as Morris conceived of it, refers to criminal justice processes explicitly designed to recognize and transform the social inequalities that breed criminal behavior in the first place, as well as to promote individual accountability among offenders.[149]

Since Ruth Morris first introduced the terminology of transformative justice, the term has been used in different ways. While Morris herself conceived of transformative justice as an alternative to restorative justice, others have used the terms interchangeably, while still others view restorative justice as a distinct but necessary step on a continuum between retributive and transformative justice.[150] As an initial matter, it is inherently important to

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[143] MORRIS, *supra* note 56, at 4.
[144] Nocella II, *supra* note 121, at 4.
[145] *See* MORRIS, *supra* note 56, at 4–5, 21–22.
[146] *See id.*
[147] *Id.* at 21.
[148] *Id.*
[149] *Id.*
[150] *See* Howard Zehr, *Restorative or Transformative Justice?*, ZEHR INST. FOR RESTORATIVE JUST. (Mar. 10, 2011), https://emu.edu/now/restorative-justice/2011/03/10/restorative-or-transformative-justice/ [https://perma.cc/B33Z-X2SF].

distinguish narrow restorative practices from broader forms of justice that aim at social transformation as well as individual accountability. We must know precisely what we mean when we offer restorative justice as a concrete alternative to retributive justice. Thus, in this article "restorative justice" will refer to practices like VOM and other similarly narrow processes. Transformative justice, on the other hand, should be understood as an alternative to both retributive and restorative justice that explicitly aims to identify and transform underlying structural injustices.[151] As Anthony Nocella explains the distinction, "While restorative justice only addresses the specific conflict between the victim and offender, transformative justice strives to use the conflict as an opportunity to address larger socio-political injustices."[152]

Any serious attempt to undermine mass incarceration and displace retributive justice must embrace these broader, transformative models of justice. These models, which explicitly recognize the underlying social causes of criminal behavior, overcome the critical shortcomings of restorative justice in ways that are essential if we are serious about reversing the trends of mass incarceration. They are designed to both recognize the structural drivers of violence and to transform them.

First, the *language* of transformative justice explicitly calls us to use criminal justice to address and transform the underlying social injustices that breed crime. Where "the concept of *restoration* suggests that a prior state existed in which the victim experienced significant liberty and the offender was integrated into a community,"[153] the language of *transformation* suggests the opposite: that crime should be viewed as an opportunity to address and transform something more fundamental about society. Like the language of restorative justice, moreover, the language of transformative justice seeps into the way that transformative processes might operate in practice. In the context of intimate partner violence, for example, transformative practices "consider[] reintegration of the batterer important but secondary to enhancing the victim's autonomy."[154] By shifting the language of restoration to one of transformation, transformative practices encourage decision-makers to look beyond the society that predated the immediate offense for more creative solutions.

Moreover, the language of transformation is less susceptible to being co-opted by programs masquerading as progressive reform while in fact entrenching traditional retributive philosophies. As Generation FIVE—a grassroots organization that aims to provide innovative transformative solutions to interpersonal conflicts—notes, "[Restorative] models have been appropriated by the criminal legal system as a way to involve the community in punishing the person that has been violent and then 'restoring' the

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[151] Nocella II, *supra* note 121, at 4.
[152] *Id.*
[153] Coker, *supra* note 115, at 143.
[154] *Id.* at 144–45.

conditions that already existed when the abuse originally took place."[155] Many restorative models operate only after an offender has been convicted and incarcerated, aiming to "restore" their relationships to their communities by preparing them for their release.[156] These models do nothing to challenge retributivism, and in fact explicitly concede the authority of the state to exact harsh punishment.[157] They do nothing to challenge the state monopoly over interpersonal violence or empower victims, instead co-opting the language of restorative justice and applying it to programs that implicitly concede the validity of mass incarceration. As Morris writes, "Any language can be co-opted, but I became convinced that the language of transformative justice is truer to our meaning, so harder to distort."[158]

Secondly, the *philosophy* of transformative justice is better equipped to achieve the ambitious goal of dismantling mass incarceration and retributive justice. Restorative justice overlooks the underlying causes of crime, leaving intact the systems of privilege and injustice that defined mass incarceration in the first place. Restorative practices may treat offenders more humanely, but if the underlying systemic motivations of criminal behavior remain intact, violent crime will remain concentrated among our most vulnerable populations and incarceration, no matter how humane it is, will continue to target the same communities. Transformative justice explicitly aims to do more, and "challenges all aspects of authoritarianism, domination, and control within society today."[159]

Moreover, as long as the criminal justice system continues to reduce crime to such a narrow model of individual accountability, the prospect of increasingly punitive responses to crime will always loom on the horizon, particularly if violent crime rates rise and more affluent, influential communities demand an aggressive state response. Transformative justice, in aiming to expose institutional and social causes of crime, explicitly reinforces the idea that crime is a product not only of individual choice, but also of systemic injustices. The basic philosophy of transformative justice requires decisionmakers to explicitly acknowledge that criminal conduct is sustained by underlying social injustices. This central conception of crime is fundamentally incompatible with the logic of mass incarceration and retributivism.

In many ways, the idea of transformative justice is still very theoretical. It has not been proposed or analyzed seriously as a wholesale alternative to retributive justice on a national scale. However, local organizations have formed to answer the call of transformative justice, offering conflict resolution services that attempt to capture the spirit of transformative justice.[160] Their evolving insights are testaments to the power of the philosophy of

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[155] KERSHNAR ET AL., *supra* note 117, at 21.
[156] *See, e.g.*, U.S. DEP'T OF JUST, *supra* note 108.
[157] KERSHNAR ET AL., *supra* note 117, at 21.
[158] MORRIS, *supra* note 56, at 19.
[159] Nocella II, *supra* note 121, at 8.
[160] *See, e.g.*, Kershnar et al., *supra* note 117, at 5; *see also* Coker, *supra* note 115, at 145.

transformative justice. The Institute for Family Services, for example, is an organization based in New Jersey that takes a transformative approach to intimate partner violence.[161] The organization works with abusive men in Asian Indian-American communities, who may either participate willingly or be court-ordered to the program.[162] The program aims to hold individual abusers accountable for their actions, while simultaneously acknowledging and working to disrupt power dynamics connected to gender.[163] If the survivor agrees to participate, the program offers couples sessions where the offender is forced to come to terms with the human effects of his abusive behavior and encouraged to take responsibility for his actions.[164] But the organization ultimately aims at transformation, not restoration. The program connects abusive men to sponsors of the same sex who encourage them to reflect on how their racial, gender, and cultural identities may have affected the power dynamics in their relationships, and the men gather in "culture groups" to collectively reflect on how they might work to transform the underlying social drivers of intimate partner abuse.[165] The program aims to incorporate the restorative criticism of traditionally retributive models by empowering victims to reclaim their autonomy by holding their offenders directly accountable, without forcing them to do so.[166] At the same time, observers have reflected that "the process was also transformative because it reinforced the emerging egalitarian norms of the men's culture group and in turn the process in the group linked the struggle for gender equality with the struggle for racial and economic justice."[167]

If restorative justice is to offer a true alternative to mass incarceration, it must dismantle the underlying tenets of retributive justice. Simply treating offenders more humanely does nothing to address the underlying injustices that concentrate crime and incarceration in the most vulnerable communities. Broader transformative practices are critical to dismantle the deeper causes of mass incarceration. Anything short of transformation will, at best, extinguish the flame of mass incarceration while leaving the kindling intact, ready to be sparked by an aggressive, kneejerk reaction to the next crime wave.

Thirdly, the *structure* of transformative models should empower the community itself to find communal solutions to structural injustices. Transformative models stretch beyond the offender and victim to engage their broader communities to understand how communal and structural forces may have led to the immediate offense.[168] In this way, transformative justice forges a partnership between the community and the parties most affected by crime,

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[161] Coker, *supra* note 115, at 145.
[162] *Id.*
[163] *Id.*
[164] *Id.* at 146.
[165] *Id.* at 145.
[166] *Id.* at 146.
[167] Coker, *supra* note 115, at 146.
[168] *See, e.g.*, KERSHNAR ET AL., *supra* note 117, at 5, 9, 21.

empowering them to challenge the ways in which the state sustains unequal power dynamics and turns a blind eye to structural violence. By including community leaders, transformative practices present an opportunity for the community itself to understand the deeper causes of crime, which may motivate leaders to take transformative action.

While transformative models explicitly aim to engage communities, however, they often share the conviction that the state itself should be excluded from criminal justice because interpersonal conflicts do not "belong" to the state, but to victims, offenders, and communities.[169] Indeed, Generation FIVE explicitly disavows any type of partnership with the state, noting that "The modern State defines itself by its monopoly over the means of coercion and the exercise of force. The State is the institutionalized legitimization of violence."[170] Similarly, many proponents of transformative and restorative justice argue that the state's involvement in criminal justice in the first place is illegitimate, a colonialist effort to bolster the State's control over the most intimate parts of its citizens' lives.[171]

This article does not take a strong position on whether the state ought to be excluded from criminal justice *entirely*. While the deep suspicion of state power espoused by organizations like Generation FIVE is well-founded, particularly in the area of criminal justice, it may be difficult to completely displace retributivism as the dominant model of criminal justice without engaging the state at all. Crime will always have an inherently public dimension.[172] It can shake entire communities and breed widespread fear across diverse populations. Because the state is responsible for the wellbeing of its citizens, it will be extremely difficult to push the state to disavow its role in criminal justice altogether. If the state seeks to maintain its authority over criminal justice, insisting that transformative justice must exclude the state will foreclose the possibility of entirely displacing retributive justice. To limit transformative justice to grassroots, private organizations is to concede that transformative justice must always coexist alongside state-sponsored retributive models that will respond to the majority of crimes. This deeply privatized framework of transformative justice cannot displace mass incarceration because it does not offer an alternative on a national, institutional scale. Moreover, if transformative processes can force state officials to internalize and understand how structures of disadvantage inform criminal behavior, they may transform the institutional cultures within the state to embrace social transformation.

The next part of this article will consider how two particular restorative models of justice might advance transformative ideas of justice. These two

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[169] *Id.*
[170] *Id.* at 9.
[171] Clarissa Rojas, Alisa Bierria & Mimi Kim, *Community Accountability: Emerging Movements to Transform Violence*, 37 SOC. JUST., at 1, 3 (2011–2012).
[172] Zehr, *supra* note 27, at 196.

programs, the Wagga Model of Family Group Conferencing and Circle Sentencing, have been swept into the general category of restorative justice alongside VOM, but involve community and state authorities in ways that might empower communities to pursue broad, transformative change.

IV. TRANSFORMATIVE JUSTICE IN PRACTICE

"Over the past four decades the pendulum of societal thought has begun to swing away from viewing crime as an offense against the State and has moved towards focusing on the victim, their needs, and the underlying cause of crime." – Brian Sapir[173]

As restorative justice gained global momentum as an alternative to overly punitive retributive models, two restorative institutions emerged on opposite sides of the world that reintroduced indigenous ideas of justice as state-sponsored reform.[174] In New Zealand and Australia, the idea of Family Group Conferences (FGC) was based on Maori traditions of conflict resolution, and aimed to incorporate the direct support networks of the victim and offender in resolving interpersonal conflicts.[175] In Canada, a federal judge reintroduced the philosophy of Circle Sentencing into the Canadian criminal justice system, a practice with deep roots in the peacemaking traditions of the First Nations of Canada.[176] As restorative justice spread to new parts of the world, both FGC and Circle Sentencing spread as less popular alternatives to Victim-Offender Mediation (VOM).[177] Both practices modify the mainstream model of VOM by broadening the circle of engaged stakeholders, empowering family members, community leaders, and state authorities to take part in mediation processes.[178] In doing so, both models raise the question of whether criminal justice processes can do more than respond to the immediate crime and reach broader questions of social and cultural transformation. Below, this article will assess the transformative potential of both of these models in turn, first considering a particular model of FGC before turning to Circle Sentencing practices.

As Part III discussed, any alternative to retributive justice that seriously aims to dismantle mass incarceration must do two things: recognize the structural drivers of criminal behavior and aim to transform those structural injustices. I will assess how these two specific restorative practices might fare in accomplishing these two tasks. In doing so, I will offer a brief history and conceptual explanation of each model before assessing how they might operate to transform deeper social injustices. Finally, I will conclude by discussing

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[173] Sapir, *supra* note 128, at 235.
[174] Carol LaPrairie, *Altering Course: New Directions in Criminal Justice Sentencing Circles and Family Group Conferences*, 28 AUSTL. AND N.Z. J. OF CRIMINOLOGY 78, 78 (1995).
[175] *Id.* at 78–79.
[176] *See id.*
[177] *See id.* at 80.
[178] *See generally* LaPrairie, *supra* note 174.

potential shortcomings and costs of both models.

A. Family Group Conferencing: The Wagga Model

Family Group Conferencing (FGC) has roots in the ancient traditions of the indigenous Maori people of New Zealand.[179] In the 1980s, New Zealand incarcerated more juveniles than almost any other country in the world, and its harsh, overburdened juvenile justice system faced many of the same criticisms that American institutions face today.[180] Like the American penal system, New Zealand's juvenile justice system was severely criticized both for being overly punitive and for disproportionately marginalizing vulnerable populations.[181] In particular, Maori critics argued that New Zealand's approach to juvenile crime was an inefficient, cruel imposition of Western justice on marginalized populations whose cultural values were fundamentally at odds with such a punitive, retributive approach.[182] Maori reformers insisted that a better, more humane way to deal with the most impressionable, vulnerable criminal offenders existed.[183] Remarkably, almost unimaginably, the New Zealand government listened.

In 1989, New Zealand revolutionized its approach to juvenile justice by passing the Children, Young Persons and Their Families Act, becoming the first country in the world to institutionalize a form of restorative justice other than VOM.[184] The Act completely reimagined juvenile justice, empowering the legal system to divert the most serious juvenile cases to FGC.[185] While conferencing was originally introduced as an alternative to be invoked at judges' discretion, it has become the norm, not the exception for serious juvenile offenders in New Zealand, who make up about twenty percent of youth processed by the country's juvenile justice system.[186]

When juvenile offenders are diverted to FGC by the New Zealand legal system, they are assigned a youth justice coordinator, who is a government employee.[187] The coordinator is responsible for organizing and convening a conference that involves the offender, the victim, and their respective families and support networks.[188] The conference may be convened to either completely replace court proceedings or to determine how the offender should be sentenced after an admission of guilt has been made in court.[189] A trained

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[179] ALLAN MACRAE & HOWARD ZEHR, LITTLE BOOK OF FAMILY GROUP CONFERENCES NEW ZEALAND STYLE: A HOPEFUL APPROACH WHEN YOUTH CAUSE HARM 10 (2004).
[180] *See id.*
[181] *See id.*
[182] *Id.* at 10–11.
[183] *Id.*
[184] *Id.* at 11.
[185] MACRAE & ZEHR, *supra* note 179, at 11–12.
[186] *See id.* at 14.
[187] *Id.* at 12.
[188] *Id.*
[189] *See generally id.* at 14–15.

facilitator, normally the youth justice coordinator, is responsible for "involving those most affected by the offending—specifically the offender, the victim and the community of care of both the victim and the offender—in determining appropriate responses to it."[190] While the precise procedure will vary from case to case, conferencing generally begins with the offender recounting their memory of what happened.[191] Next, the other parties involved will explain how the crime has affected them, starting with the victim.[192] The victim may ask the offender questions about why the crime occurred if they wish.[193] The process is designed to force the offender to confront the impacts of their actions, and to empower all affected parties to face the offender and shape the community's response to the crime.[194] Ideally, all participants work together to draft an agreement wherein the offender makes certain commitments to make the victim whole again, and to ensure the community that the offender will not repeat their offense.[195]

The program experienced immediate success, as empirical studies in the early years of New Zealand's system returned positive results along several different dimensions.[196] First, families of both offenders and victims reported higher rates of satisfaction with FGC than with traditional court processes, which may be driven by the higher degree of participation they are afforded in conferences.[197] Secondly, a study of the early years of FGC in New Zealand also revealed that "family group conferences can contribute to lessening the chance of reoffending even when other important factors such as adverse early experiences, other events which may be more related to chance, and subsequent life events are taken into account."[198] The process overwhelmingly left victims feeling satisfied and empowered without shaming or ostracizing the offender, and often succeeded in integrating both parties into the decision-making process in a way that traditional legal proceedings never did.[199]

Encouraged by New Zealand's early successes, other countries were eager to adapt their own models of FGC. Conferencing was first introduced in Australia in 1991, when Australian government officials observed the benefits of the "New Zealand Model" and urged local authorities to embrace a similar

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[190] Gabrielle Maxwell & Allison Morris, *Family Group Conferences and Reoffending*, *in* RESTORATIVE JUSTICE FOR JUVENILES 243, 243 (Allison Morris & Gabrielle Maxwell ed., Hart Publishing 2003).

[191] U.S. DEP'T OF JUST., RESTORATIVE JUSTICE FACT SHEET: FAMILY GROUP CONFERENCING, http://www.courts.ca.gov/documents/FamilyGroupConferencing.pdf [https://perma.cc/GWG6-3C3J] [hereinafter FAMILY GROUP CONFERENCING].

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] FAMILY GROUP CONFERENCING, *supra* note 191.

[198] Maxwell & Morris, *supra* note 190, at 261.

[199] *Id.*

approach.[200] Australia's first adaptation of FGC was pioneered in Wagga Wagga, New South Wales.[201] The "Wagga Model" differed from the New Zealand Model in one significant way: it relied on police officers to facilitate the conferences.[202] The Wagga Model aims to operate as a community policing paradigm, drawing from a concept John Braithwaite calls "reintegrative shaming."[203] Reintegrative shaming, Braithwaite writes, "communicates disapproval within a continuum of respect for the offender; the offender is treated as a good person who has done a bad deed."[204] Unlike stigmatization, reintegrative shaming is meant to be forgiving, to disapprove of the offender's actions only as a means to reintegrate the offender back into the community.[205] The heart of the theory is the idea that "the manner in which a society handles the emotion of shame will determine its degree of crime and violence. When shame is used to humiliate or stigmatize, those who are stigmatized will seek out criminal subcultures where they can find positive self-images."[206] The actual process of the Wagga Model largely resembles conferencing under the New Zealand Model, but the involvement of a police officer is meant to represent the community itself, and to express disapproval on behalf of the community without stigmatizing the individual.[207] While the Wagga Model only persists in three jurisdictions in Australia, it has been experimentally replicated in jurisdictions in different countries around the world, including the United States, Canada, England and Wales.[208] Since it was first introduced to North America in 1995, the model has gained popularity throughout a range of jurisdictions, and more than 2,000 police officers and other public officials in American and Canadian jurisdictions have now been trained as conference facilitators.[209]

While the Wagga Model is most often justified with the philosophy of reintegrative shaming, there are a few reasons to believe that the model may also serve transformative purposes beyond the parties immediately involved in the crime. First, unlike VOM, conferencing models in general enlarge the circle of stakeholders empowered to "restore" the offender and victim back into the community.[210] While VOM reduces crime to a phenomenon that

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[200] Kathleen Daly, *Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects*, *in* RESTORATIVE JUSTICE FOR JUVENILES 59, 63 (Allison Morris & Gabrielle Maxwell ed., Hart Publishing 2003).
[201] *Id.*
[202] *Id.*
[203] Maxwell & Morris, *supra* note 190, at 252.
[204] John Braithwaite, *Shame and Criminal Justice*, 42 CAN. J. OF CRIMINOLOGY 281, 282 (2000).
[205] *Id.*
[206] PAUL MCCOLD & BENJAMIN WACHTEL, RESTORATIVE POLICING EXPERIMENT: THE BETHLEHEM PENNSYLVANIA POLICE FAMILY GROUP CONFERENCING PROJECT 9 (1998).
[207] Paul McCold, *Primary Restorative Justice Practices*, *in* RESTORATIVE JUSTICE FOR JUVENILES 41, 46 (Allison Morris & Gabrielle Maxwell ed., Hart Publishing 2003).
[208] Daly, *supra* note 200, at 64.
[209] MCCOLD & WACHTEL, *supra* note 206, at 7.
[210] *See generally* McCold, *supra* note 207.

occurs solely between the offender and victim, family conferencing creates a space to reflect on how family values may have shaped the offender's conduct and how the offender's most direct support network can inform the conditions that lead the offender to thrive or fail. It creates a community surrounding the offender that is directly confronted with the impact of the offender's behavior and encouraged to support the offender's reintegration into society. This implicitly recognizes that crime is more than simply a product of individual choice, and that criminal behavior can be discouraged or sustained by one's environment and support network. It also encourages all the parties involved to understand where the offender comes from and how conditions surrounding the offender's life may have informed the immediate crime.

Secondly, the involvement of police officers or other local officials, a feature unique to the Wagga Model, potentially presents an opportunity for the offender, the victim, and their respective support networks to hold the community itself accountable for systems of inequality that may have contributed to the immediate offense.[211] Conferencing can force facilitating officers to reflect on how institutional cultures of law enforcement adversely impact the vulnerable, heavily policed communities that the offender or victim may be a part of. Police officers who routinely facilitate conferences must listen to the stories of offenders whose families may be incarcerated or whose communities and neighborhoods may be heavily policed. Ideally, they are forced to internalize the various ways in which their attitudes toward the communities they most actively police can shape and sustain inequality and oppression, which in turn can breed crime. Hearing the stories of offenders and their families can humanize offenders for police officers, who might otherwise see offenders only at their worst moments.

A jurisdiction whose police force is routinely responsible for conducting family conferencing can become one in which law enforcement officials collectively understand how their institutional culture can itself sustain and concentrate criminal behavior, and how aggressive policing and incarceration can impose a cost on marginalized communities as much as crime itself can. Police-led conferencing can thus ideally transform the cultures of the institutions at the front lines of mass incarceration, whose behavior can contribute to social inequality and marginalization, by forcing them to internalize the costs of aggressive incarceration. Indeed, early studies of family conferences in Wagga Wagga, New South Wales, Australia "suggested that the program had significant effects on changing the attitude and orientation of the police department, from a punitive, legalistic approach to a problem-solving, restorative approach."[212]

Bethlehem, Pennsylvania attempted to replicate the Wagga Model's success in an experimental pilot program in 1995.[213] Bethlehem became one of

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[211] *Id.* at 46–47.
[212] MCCOLD & WACHTEL, *supra* note 206, at 39.
[213] *See id.* at 15–16 (The Bethlehem Experiment involved first-time juvenile offenders who had

the first American jurisdictions to apply family conferencing on an institutional basis, measuring the results of its conferences across a period of two years.[214] The experiment reported positive results in terms of participant satisfaction, but the Bethlehem researchers also wondered whether police conferencing could effect a larger, cultural change on the police department itself.[215] While the study observed no overall changes in the attitudes of the police department as a whole across the two-year period, it found that "officers who had conducted conferences did show a significant increase in their perceptions of community cooperation and a decrease in their orientation toward a crime control approach to policing."[216] This is a generally promising, although limited, result. A large-scale cultural shift was unlikely in only two years given that only eighteen officers in the 140-person Bethlehem Police Department routinely facilitated conferences.[217] But the fact that conferencing did change the attitudes of the officers most involved in facilitating conferences suggests that exposure to the stories of offenders, victims, and their families can humanize offenders and force officers to understand the various ways in which incarceration can itself breed crime by marginalizing and crippling vulnerable communities. To definitively determine whether these smaller-scale changes in the attitudes of individual officers might translate to a broader cultural shift, a more comprehensive study should evaluate whether a police department can experience institutional, transformative change if it is regularly engaged in facilitating family conferences across a longer period of time.

There are promising reasons to be optimistic about the Wagga Model and FGC in general. Broadening the circle of involved stakeholders to include the support networks and families of victims and offenders is a potent remedy for several of the shortcomings of VOM and other narrow forms of restorative justice. FGC creates a space to interrogate underlying causes of crime by looking beyond the offender to the conditions surrounding the offender. It recognizes crime as more than a product of individual choice and engages the offender's support network to create conditions where the offender can thrive. It recognizes that restoration requires a community and is not a simple matter of individual remorse and repentance. The results of the Bethlehem Experiment confirm that conferencing is more responsive to the needs of victims and offenders alike: family conferencing produced higher rates of satisfaction, perceptions of fairness, and participation rates than VOM

committed less serious offenses like theft or other property-based crimes, as well as some offenders who had committed simple assaults. These juveniles were randomly assigned either to police-led conferencing or formal adjudication in the criminal justice system. Participation in conferencing was voluntary for both the victim and offender, and a conference would only be convened where both participants consented. Otherwise, the case would be processed by the court system. The program's results were measured by participant surveys and observable outcomes).

[214] *Id.* at 15.

[215] *Id.* at 13.

[216] *Id.* at 3.

[217] *Id.* at 15.

programs.[218] The Wagga Model, in particular, carries intuitive appeal as a potential source of transformative change because it directly engages police officers or other local officials who are in positions to effect larger, transformative change and forces them to listen to the stories of offenders and their families.

However, there are also good reasons to temper optimism about the Wagga Model's transformative potential. For one thing, any transformative effect the Wagga model might have will be incremental and piecemeal. At best, family conferences can slowly change the attitudes of individual officers and can only hope to eventually touch enough officials to effect institutional, cultural change. The lessons of the Bethlehem Experiment confirm this: conferencing only changed the attitudes of the officers most directly involved, and this did not translate to any measurable institutional change in the two years that the experiment was conducted.[219] Moreover, while family conferencing broadens the circle of involved stakeholders to include families and support networks, it may not expand the circle far enough to empower broad social change. Family members may be able to improve the day-to-day conditions of an offender's life, but the underlying drivers of crime often go far deeper than the offender's immediate support network. The offender's family itself may not be in a good position to challenge the deeper social inequalities that actually drive criminal behavior; in fact, an offender's family is likely to be victims of those inequalities as well. FGC's emphasis on strengthening support networks and families is certainly an improvement over the myopic view of VOM, but it still may not engage the right actors to effect transformative social change.

In addition, family group conferencing must move beyond the philosophy of reintegrative shaming if it is to serve as a truly transformative process. In emphasizing the reintegration of offenders into their communities, reintegrative shaming risks reproducing many of the troubling premises of retributive justice and mass incarceration. The idea that criminal justice should "shame" the offender in order to reintegrate her into society suggests that the offender is individually culpable for the immediate offense, which may discount the underlying structural forces that breed criminal behavior. It also narrowly focuses on restoring the offender, as opposed to transforming the conditions that bred the offense in the first place.

As for the Wagga Model in particular, there are obvious reasons to be wary of a form of conferencing that empowers police officers to officiate disputes between offenders and victims. First, minority communities that are heavily policed and incarcerated at disproportionate rates may have good reasons to distrust officers and, by extension, to distrust the process itself.[220] This mistrust would also be empirically well-founded, as the Bethlehem

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[218] MCCOLD & WACHTEL, *supra* note 206, at 113.
[219] *Id.* at 3.
[220] Cunneen, *supra* note 52, at 292.

Experiment revealed that "without adequate training and supervision, some officers tended toward authoritarian behavior patterns and may have undermined the process of reintegrative shaming."[221] This is a uniquely disconcerting tendency because police officers are more likely to have particularly harsh views of criminal offenders, as their jobs often require them to see offenders at their very worst. By expanding the authority of police officers in criminal justice, the Wagga Model may produce even harsher sentences than retributive justice, and it may further alienate the vulnerable communities who are disproportionately policed and incarcerated.

Moreover, expanding police discretion may further undermine police accountability at a time when disadvantaged populations already have good reasons to distrust law enforcement.[222] As Chris Cunneen notes, "[T]he police exercise significant discretionary powers over restorative justice programs," which may be "especially problematic given concerns over the inappropriate exercise of police discretion . . . and the lack of accountability of police."[223] Police conferencing gives officers a qualitatively different type of discretion, expanding their role from initial identification of crimes to the actual resolution of criminal disputes. This may empower police officers to act as "judge and jury" in criminal disputes,[224] a possibility that is particularly disquieting in an age when abuses of police power seem more and more widespread with each new controversy.

In terms of transformative potential, the Wagga Model of conferencing is a promising alternative to VOM, but there are also serious reasons to doubt whether family conferencing goes far enough to effect truly transformative social change. Even the most optimistic empirical data regarding the transformative potential of family conferencing must concede that transformative change in conferencing models happens incrementally—one police officer at a time.[225] Moreover, while family conferencing improves the narrow approach of VOM by incorporating the support networks of the offender and victim, there is good reason to believe that it does not expand the circle of stakeholders far enough to motivate transformative change. After all, while families are in good positions to support offenders and victims, they may not necessarily be in ideal positions to foster broader social change, particularly because most families of offenders and victims are likely to be a part of marginalized communities themselves.[226] Family conferencing seems

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[221] McCold, *supra* note 207, at 103.
[222] *See generally* Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG. (July 27, 2017), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/ [https://perma.cc/X62H-P2Z7].
[223] Cunneen, *supra* note 52, at 292.
[224] Richard Young, *Just Cops Doing "Shameful" Business?: Police-led Restorative Justice and the Lessons of Research*, *in* RESTORATIVE JUSTICE FOR JUVENILES 195, 197 (Allison Morris & Gabrielle Maxwell eds., Hart Publishing 2003).
[225] *See* MCCOLD & WACHTEL, *supra* note 206, at 3.
[226] *See generally id.*

likely to succeed in acknowledging that criminal behavior is driven by structural injustices, but it may not be fully equipped to truly transform those underlying injustices.

B. Circle Sentencing

Circle sentencing is a restorative practice that was first popularized on an institutional level in Canada.[227] The practice has roots in the traditions of the indigenous First Nations People of the Yukon region in Canada, but also closely resembles processes adopted by a wide variety of indigenous cultures around the world.[228] A sentencing circle is a "community directed process, in partnership with the criminal justice system, for developing consensus on an appropriate sentencing plan which addresses the concerns of all interested parties."[229] Like VOM and FGC, it is a restorative approach to crime in that it vests the primary responsibility over interpersonal conflicts in the parties most affected by them, rather than the state.[230] However, circle sentencing broadens the field of stakeholders empowered to discuss and resolve immediate crimes even beyond the families and support networks of the victim and offender.[231] As Paul McCold notes, "The sentencing circle process is inclusive. Everyone in the community has a stake in the outcome, and thereby may participate."[232] The circle engages the community at large to hear from the offender and victim in order to address both the immediate crime and the underlying social structures that may have contributed to it.[233] Circle sentencing usually exists in partnership with the criminal justice system, empowering judges to convene circles where they feel it is appropriate.[234] While the practice has spread beyond the Yukon region of Canada, its first institutional manifestations continue to shape the way similar practices operate in different jurisdictions around the world.

Like the United States, Canada has faced intense criticism for the punitive nature of its justice system. While Canada's incarceration rate trails the United States', it still incarcerates more individuals than most other countries in the world.[235] Like New Zealand, Canada's juvenile justice system in particular drew harsh criticism in the 1990s, as Canada incarcerated more juveniles than even the United States.[236] Most of the juveniles processed by Canada's

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[227] LaPrairie, *supra* note 174, at 78.
[228] *See* Heino Lilles, *Circle Sentencing: Part of the Restorative Justice Continuum*, *in* RESTORATIVE JUSTICE FOR JUVENILES 161, 162 (Allison Morris & Gabrielle Maxwell eds., Hart Publishing 2003).
[229] McCold, *supra* note 207, at 50.
[230] Lilles, *supra* note 228, at 162.
[231] *See* McCold, *supra* note 207, at 50.
[232] *Id.* at 51.
[233] *See* LaPrairie, *supra* note 174, at 82.
[234] *See id.* at 83.
[235] Lilles, *supra* note 228, at 161.
[236] *Id.*

juvenile justice system, moreover, were nonviolent offenders who often received harsher jail sentences than adults convicted of the same offenses.[237]

Just as in New Zealand, Canada's aggressive policing and incarceration of juvenile offenders disproportionately targeted vulnerable minorities. Aboriginal people in Canada faced an incarceration rate eight times the national rate.[238] Like the Maori people of New Zealand, indigenous aboriginal communities in Canada demanded reform, outraged by the disproportionate, oppressive imposition of Western retributive norms on their youths.[239] While widespread outcry did not spur legislative reform as it did in New Zealand, judges with the most direct exposure to juvenile incarceration took notice. In 1992, Judge Barry Stuart of the Yukon Territorial Court became the first Canadian judge to convene a sentencing circle to inform the sentencing of a juvenile offender who was also a member of the First Nations People.[240] Having witnessed Canada's alarming juvenile incarceration rate firsthand, Judge Stuart revolutionized juvenile justice in *R. v. Moses* by recognizing that the Canadian justice system had failed Philip Moses.[241] His decision came at the behest of a community who had been repeatedly failed and marginalized by traditional court processes, and was driven by Judge Stuart's conviction that Moses was far more likely to respond positively to a process consistent with his community's values.[242]

After *R. v. Moses*, other judges continued to convene sentencing circles for appropriate cases, most often for offenders from aboriginal communities.[243] As criticisms of the Canadian juvenile justice system grew, the practice spread to other parts of the country, and even reached the United States in 1996 when an experimental pilot program was instituted in Minnesota.[244] Unlike FGC in New Zealand and Australia, sentencing circles in Canada had no statutory basis in law, and were convened purely at the discretion of the judge.[245] Their rise is not a story of legislative reform, but of individual decisionmakers recognizing the shortcomings of the retributive process and empowering communities themselves to control the fate of their juvenile offenders. Judge Stuart's initiative inspired so many of his peers that by 2014, the Ministry of the Attorney General announced that a new courthouse in Ontario would be equipped with rooms reserved for sentencing circles.[246] Canadian reformers and likeminded judges "effectively transplanted Aboriginal healing circles as

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[237] *Id.* at 162.
[238] *Id.*
[239] *See* LaPrairie, *supra* note 174, at 79.
[240] Toby S. Goldbach, *Instrumentalizing the Expressive: Transplanting Sentencing Circles into the Canadian Criminal Trial*, 25 TRANSNAT'L L. & CONTEMP. PROBS. 60, 67 (2016).
[241] *See* Lilles, *supra* note 228, at 162.
[242] *See id.* at 170.
[243] *See* Goldbach, *supra* note 240, at 67.
[244] U.S. DEP'T OF JUST., RESTORATIVE JUSTICE FACT SHEET: SENTENCING CIRCLES, http://www.courts.ca.gov/documents/SentencingCircles.pdf [https://perma.cc/PCY4-DATS].
[245] Lilles, *supra* note 228, at 164.
[246] Goldbach, *supra* note 240, at 67.

'sentencing circles' into the criminal trial."[247] In 1996, their progress became codified in law, as Canadian lawmakers revised the sentencing provisions of the Canadian Criminal Code to allow judges to tailor sentencing as they see fit to restore communities affected by crime.[248]

The process of circle sentencing is informed by aboriginal values and ideas about interpersonal conflict.[249] In particular, three central ideas about criminal behavior shape circle sentencing:

> Firstly, a criminal offence represents a breach of the relationship between the offender and the victim as well as the offender and the community; secondly, the stability of the community is dependent on healing these breaches; and, thirdly, the community is well positioned to address the causes of crime, which are often rooted in the economic or social fabric of the community.[250]

Circle sentencing is a uniquely communal approach to crime, empowering the entire community where VOM empowers only victims and offenders and FGC empowers victims, offenders, and their immediate support networks. Indeed, "[t]he value of sentencing circles derives less from their impact on the offender or the victim than their impact on the community."[251]

Because circles can be incredibly time-consuming and cost-intensive, however, they are generally reserved for the most serious or complicated cases, and exist in partnership with the traditional court system.[252] Judges like Barry Stuart still exercise discretion in determining when to convene a circle, and different jurisdictions have developed different criteria to guide judges in making this determination.[253] Once a judge determines that a circle should be convened, a respected member of the community is often appointed as "the keeper of the circle," and mediates the discussion just as a facilitator might do in a Family Group Conference.[254] The participants generally take turns to describe how the criminal behavior impacted them and how they believe the community should proceed, and a "talking piece" may be passed around to ensure that each member of the circle is afforded an opportunity to speak.[255] In some jurisdictions, circle sentencing actually involves two circles: an inner circle composed of offenders, victims, and their families and an outer circle composed of interested community members.[256]

Like family group conferences, circles aim to foster agreement among

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[247] *Id.* at 77.
[248] *Id.* at 79.
[249] Lilles, *supra* note 228, at 162.
[250] *Id.*
[251] McCold, *supra* note 207, at 51.
[252] Lilles, *supra* note 228, at 163.
[253] Goldbach, *supra* note 240, at 86.
[254] Lilles, *supra* note 228, at 163.
[255] Sapir, *supra* note 128, at 219.
[256] *Id.*

affected stakeholders about how to respond to the offense. Because circles engage entire communities, however, they can often impose indirect obligations on the community itself, unlike more narrow restorative practices. Indeed, "[t]he result of the circle sentencing hearing is most often a community-based disposition involving supervision and some kind of programme,"[257] and may require an investment of community resources as well as individual commitments.[258] Moreover, because circles are implemented across a diverse range of communities, the process must be flexible enough to respond to the different needs of various communities. Accordingly, circles often produce creative solutions that involve "culturally relevant conditions that would rarely be found in a probation order made in court."[259] Unlike conferencing or mediation, circles engage the entire community to respond to the immediate offense, and can impose indirect obligations on the community as a whole. The circle may also be followed by subsequent circles charged with ensuring that the offender is on the right path, engaging circle participants to ensure that the offender has been honoring his commitments.[260] While the exact process may vary between jurisdictions, the central insight is the same: the community itself is the first line of defense against crime, and should be empowered to act accordingly.[261]

Sentencing circles have not gained the momentum or popularity of VOM or FGC, and "very little research has been conducted to date on the effectiveness of sentencing circles."[262] While some researchers have found greater participant satisfaction and lower rates of offender recidivism than for traditional court processes,[263] others have been unable to replicate the success of Judge Barry Stuart's sentencing circles, and one study concluded that circle sentencing has no effect on offender recidivism.[264] As the practice spreads to more jurisdictions outside of Canada, further research should clarify the empirical results circle sentencing can have on offenders' reintegration into their communities.

Even with this empirical ambiguity in mind, however, circle sentencing has the potential to produce truly transformative results in ways that no other institutionalized practice has been able to. Unlike VOM or even FGC, circle sentencing seems equipped to both recognize the underlying structural drivers of criminal behavior *and* to transform them. Circle sentencing is explicitly

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[257] Lilles, *supra* note 228, at 166.
[258] LaPrairie, *supra* note 174, at 84.
[259] Lilles, *supra* note 228, at 166.
[260] Sapir, *supra* note 128, at 220.
[261] LaPrairie, *supra* note 174, at 82.
[262] U.S. DEP'T OF JUST., *supra* note 244.
[263] *Id.*; *see* Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 276 (2005).
[264] JACQUELINE FITZGERALD, NSW BUREAU OF CRIME & STATS., DOES CIRCLE SENTENCING REDUCE ABORIGINAL OFFENDING? 7 (2008), https://www.bocsar.nsw.gov.au/Publications/CJB/cjb115.pdf [https://perma.cc/M6RY-WDEB].

based on a *communal* conception of crime, empowering the entire community to take an active role in responding to criminal offenses.[265] Anyone in the community may participate, and a properly implemented circle "generates dialogue among offenders, their families and their communities."[266] Judge Barry Stuart himself was motivated by the central insight that "by empowering community members to resolve their own issues, sentencing circles restore people's sense of collective responsibility."[267] This communal view of criminal behavior acknowledges that crime has both social causes and communal impacts, and engages entire communities in ways that make broader transformation possible. In the context of hate crimes, for example, circle sentencing uniquely acknowledges that the immediate offense has a serious impact on the community as a whole, and not just the immediate victim. It explicitly affords members of the community who may not have been the immediate targets of the hate crime an opportunity to confront the offender and interrogate the underlying causes of his criminal conduct. In doing so, circles acknowledge what VOM and FGC overlook: that hate crimes are uniquely communal and have indirect impacts on the community at large. These indirect impacts may be just as severe and may breed future animosity and hatred in a way that perpetuates future hate crimes. As Brian Sapir notes:

> The effects of hate crimes are particularly damaging to the community, as such, it is imperative that a technique be used which incorporates the community into the healing process to allay the community's fears as well as prepare them for the eventual reincorporation of the offender back into the neighborhood.[268]

Moreover, by including leaders and interested members from the broader community, circles are uniquely equipped to interrogate the underlying injustices and inequalities that breed crime in the first place. The community is engaged not just to punish the offender, but to reflect alongside the offender on why the offense occurred in the first place, which creates a space for a deeper interrogation of structural disadvantage and social inequality. Indeed, circles in practice often include discussions not just about the immediate offense but also about "the extent of similar crimes within the community," "the underlying cause of such crimes," and "what must be done to help heal the offender, the victim and the community."[269] The circle is encouraged to separate the criminal offense from the offender, and the offender is encouraged to explain his account of the offense and its causes in a setting without the strict hierarchies of a traditional court room, where all members of the circle are viewed as equals in pursuit of justice.[270] Community members are meant to

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[265] *See* McCold, *supra* note 207, at 50–52.
[266] Lilles, *supra* note 228, at 168.
[267] LaPrairie, *supra* note 174, at 81.
[268] Sapir, *supra* note 128, at 232.
[269] Lilles, *supra* note 228, at 163.
[270] *Id.* at 167–68.

reflect alongside offenders about why the crime occurred, and how it may be prevented in the future.[271] As Brian Sapir explains:

> [I]t is the expansion of the healing environment to include the community along with the victim and offender which sets Sentencing Circles apart. By involving the community in the decision making process, Circles empower community members to achieve an understanding of why the crime was committed and what needs to be changed so as to prevent any further occurrences.[272]

In this way, circle sentencing may be ideally designed both to hold the offender accountable and to foster broader social change.

Circle sentencing improves on the intuitions of FGC by casting an even wider net of stakeholders empowered to respond to crime. It is the most promising example of a truly transformative practice that has been embraced across jurisdictions in Western countries. However, institutionalizing circle sentencing can be difficult. Circle sentencing has ambitious goals, and serious resources are required to fulfill its promise of transformative change. Even more so than VOM or FGC, circle sentencing imposes tremendous costs in terms of time and effort.[273] Every community member cannot be expected to respond to every crime by taking the time to participate in a sentencing circle. Even community leaders, who might be in the best position to effect social transformation, cannot be expected to sit in a sentencing circle every time a serious crime is committed. Circles can usually be expected to last between two and eight hours, and may be followed by subsequent circles to check in with the offender.[274] Circles are also likely to demand a serious emotional investment from participants, as community members must genuinely internalize the offender's experiences and insights if circles are to effect transformative change.[275] It is simply not feasible to expect a circle to be convened every single time a crime is committed.

For these reasons, circle sentencing is usually a matter of judicial discretion, and exists in partnership with traditional court processes.[276] As a result, circle sentencing may not offer a satisfying wholesale alternative to retributive justice because it would likely leave the fundamental structures of mass incarceration intact. In the punitive culture that has bred mass incarceration, moreover, leaving even more discretion in the hands of judges to determine which cases are appropriate for circle sentencing may be especially alarming, and risks simply exacerbating the racial disparities of mass incarceration.

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[271] Goldbach, *supra* note 240, at 89.
[272] Sapir, *supra* note 128, at 220.
[273] Goldbach, *supra* note 240, at 82–83.
[274] Lilles, *supra* note 228, at 164.
[275] *Id.* at 168.
[276] *Id.* at 164.

On the other hand, circle sentencing may transform the problematic institutional culture of the criminal justice system in a way that makes us more comfortable with judicial discretion. Even if circles must ultimately coexist with traditional structures of criminal justice, they may transform those structures entirely by transforming the social attitudes that underlie retribution and mass incarceration. If judges and other judicial authorities are responsible for convening and facilitating the circles, for example, they may internalize the harms of structural, systemic injustice in a manner that changes the way they think about their roles as agents of criminal justice. Even if they do not directly transform the attitudes of officials, circles may breed cultural and institutional change in the criminal justice system by transforming the attitudes of ordinary community members who participate in circles, who may in turn work to reform the criminal justice system's punitive outlook on crime. Circles may motivate participants to recognize and transform social injustices in their day-to-day lives, and to translate their insights into electoral and policymaking decisions. They may drive communities at large to challenge social inequality and view offenders not as people to fear and lock up, but as humans with real struggles that are in part sustained by the broader community. They may force police officers and local officials at the front lines of incarceration to understand the costs that incarceration can impose on impoverished or marginalized communities. Even if judges convene circles irregularly or disproportionately, the circles themselves may still have transformative power for the community members engaged in them. Circles present an opportunity for the community to understand the causes of the criminal offense alongside the offender, creating "an opportunity for participants to discuss larger socioeconomic issues facing the community."[277] Circle sentencing may thus leave the formal structure of the criminal justice system intact, but still transform the community surrounding it. In this way, circles can have a "bottom-up" effect in transforming criminal justice: by changing the attitudes and outlooks of communities at large, they may slowly change the institutions that shape the criminal justice system in a way that makes the idea of judicial discretion less disconcerting.

Indeed, circles may even transform communities' understanding of what constitutes criminal behavior in the first place by changing community leaders' ideas about what harmful behaviors should constitute crimes. Crime is, in part, a social construct: it is often those in the halls of power who are insulated from the problems of marginalized communities who determine what harmful behaviors constitute "crimes" and merit imprisonment or retribution.[278] As a result, harmful conduct that occurs predominantly in vulnerable communities tend to be criminalized and severely punished, while equally harmful conduct that occurs in white-collar settings tend to be under-criminalized or punished

[277] Goldbach, *supra* note 240, at 89.
[278] Knopp et al., *supra* note 102.

less severely.[279] In exposing community leaders or even state officials to the voices of the most marginalized populations, circle sentencing may transform the institutions of criminal justice in a much deeper way by motivating communities to challenge what gets labelled a "crime" in the first place. The potential transformative effects of circle sentencing, in other words, are much more far-reaching than we might anticipate. These effects may manifest themselves even if circle sentencing does not completely replace traditional court processes. Even if circles must ultimately coexist with traditional criminal justice institutions, they may transform those institutions entirely by making them more responsive to structurally disadvantaged communities.

Moreover, jurisdictions where circle sentencing has been incorporated into traditional court processes have developed criteria to guide judicial discretion over when to convene a circle, so the decision is not unbounded or arbitrary. These criteria often include considering whether the accused offender appears to have accepted responsibility, whether the accused offender has deep roots in a community, and whether the community is willing to participate.[280] As circle sentencing becomes more common, jurisdictions will continue to develop legal norms to guide judicial decision-making, which may mitigate concerns about unfettered judicial discretion over the sentencing process.

If circle sentencing is institutionalized in the United States, this will be a difficult balance to strike. On one hand, the idea of empowering judicial officials to exercise even broader discretion over sentencing outcomes is troubling, particularly given the racial disparities that already plague the criminal justice system. On the other hand, however, circle sentencing must be institutionally flexible enough to adapt to diverse communities with diverse needs. Judges must retain the discretion and flexibility to adapt the actual process of circle sentencing to particular communities. Otherwise, the process risks becoming exactly what it was introduced in Canada to reform: an imposition of the majority's cultural norms on minority communities. The court must consider the distinct needs and cultures of each community, and legal norms that guide the court's decision-making should be flexible enough to allow adaptation. In Canadian jurisdictions, for example, circles often reflect the cultural norms of unique communities. As Judge Stuart observed, "This is a good and necessary development. Significant differences in demographic composition, cultural, social, economic, and geographic conditions render each community unique. A process for resolving conflict must accommodate the special circumstances, blessing or hindering the specific ability of each community to process conflict."[281] While we may want legal standards to constrain judges' discretion over *whether* to convene a sentencing circle, we should be careful not to constrain judges in deciding *how* circles should be conducted in a way that prevents them from incorporating the cultural norms

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[279] *Id.*
[280] Goldbach, *supra* note 240, at 87.
[281] Lilles, *supra* note 228, at 165.

of distinct communities.

A final challenge that circle sentencing may face concerns who may participate in the circles in the first place. It is not always easy to identify a discrete community of interest, and it may be unwise to empower the state to define where a community begins and ends.[282] In aboriginal groups occupying small, discrete reservations, the community is often easily identified and limited by geography.[283] In a diverse, interconnected urban setting, however, it may be more difficult to define the community of interest who should be invited to participate in a sentencing circle, as geography may be a poor estimation of an offender's true community.[284] A member of an aboriginal tribe in an urban neighborhood, for example, may share little in common with her immediate neighbors in terms of cultural values, and a circle composed only of her neighbors may simply recreate the problem circle sentencing was introduced to solve: the imposition of Western values on marginalized minorities. Many of an offender's immediate neighbors may in fact have little interest in the offense or the offender herself or may not be meaningfully engaged with the community. Their involvement can distort the circle sentencing process by incorporating the wrong voices and interests, potentially enabling remote interests to determine the fate of the offender or community.

Conversely, people outside of an offender's neighborhood may also be impacted by the community's response to the offense, particularly those who have cultural, religious, or familial ties to the offender. Defining the community of interest too narrowly risks excluding voices with a very real stake in the offense and the offender. On the other hand, defining the community too broadly risks diluting the voices most directly impacted by the crime and incorporating the wrong interests into the sentencing process. Finally, there is also an inherent problem with empowering the state to determine who belongs to the community and who does not. Defining a community is a process that necessarily includes and excludes; allowing the state to determine who should be excluded from an offender's community can have problematic consequences for populations that the state has a history of marginalizing.

None of these problems are inevitable, and they should not be read to dismiss circle sentencing or to discount its transformative potential. Alone among the restorative practices that have gained international traction, circle sentencing is explicitly designed to foster communal change along with individual accountability. It offers the broadest view of crime of any restorative practice and challenges the basic underlying assumptions of retributive justice. It places the community at the front lines of criminal justice and empowers marginalized populations who bear the cost of mass incarceration most heavily to shape their communities' responses to crime. It is

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[282] *See id.* at 169.
[283] *Id.*
[284] *Id.*

also cost-intensive and time-consuming, and often must leave the structure of retributive justice intact. Nevertheless, circles may transform the substance of criminal justice even while leaving its formal structures largely unchanged. In its best form, circle sentencing can be a truly transformative response to crime, one that fosters reflection and challenges the underlying structures that breed criminal behavior in the first place.

V. CONCLUSION

"Forgiving and being reconciled to our enemies or our loved ones are not about pretending that things are other than they are. It is not about patting one another on the back and turning a blind eye to the wrong. True reconciliation exposes the awfulness, the abuse, the hurt, the truth. It could even sometimes make things worse. It is a risky undertaking, but in the end it is worthwhile, because in the end only an honest confrontation with reality can bring real healing. Superficial reconciliation can bring only superficial healing."
– Desmond Tutu[285]

America is facing a crisis of incarceration that has been brewing for decades. In many ways, mass incarceration challenges America's basic perceptions of its own identity, casting serious doubts on the country's fundamental commitments to egalitarianism and liberty. I have reviewed one alternative to the retributive philosophy that has bred and sustained mass incarceration, restorative justice, which has gained international momentum among serious reformers. In doing so, I have discussed the empirical and theoretical frameworks of two particular restorative practices that have steadily gained popularity among countries facing crises of overincarceration, like the United States. The real power of restorative justice, however, is not in the statistical figures of recidivism or participant satisfaction, but in the personal, human stories of forgiveness, empathy, and humanity.

This article is about the empirical potential of restorative practices to effect transformative change. It stresses the importance of distinguishing between various restorative practices if restorative justice is to offer a true, concrete alternative to mass incarceration. But even more than that, it is a basic call to change the way we think about crime and criminal law. It is about infusing the law with empathy and forgiveness, and not revenge or punishment. It is about acknowledging humanity even when humans are at their very worst, about cultivating forgiveness and mercy in moments when we have no right to expect it. It is about Kate Grosmaire, who found liberation in mercy, and Conor McBride, who found redemption in repentance. It is about foregoing a right to anger and retribution in favor of understanding and

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[285] Desmond Tutu, *Truth and Reconciliation*, GREATER GOOD MAG. (Sept. 1, 2004), https://greatergood.berkeley.edu/article/item/truth_and_reconciliation [https://perma.cc/6P32-MVBF].

forgiveness because, in the words of Desmond Tutu, "When we see others as the enemy, we risk becoming what we hate. When we oppress others, we end up oppressing ourselves. All of our humanity is dependent upon recognizing the humanity in others."[286]

[286] DESMOND TUTU, GOD HAS A DREAM: A VISION OF HOPE FOR OUR TIME 49–50 (2004).