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LETTER FROM THE EDITOR

Elizabeth A. Ritchie
Dear Readers,

On behalf of the *Richmond Public Interest Law Review*, it is my honor to present the second issue of Volume XXIII. Our Symposium focused on Restorative Justice and was held on Friday, October 4, 2019 at the University of Richmond School of Law.

We hope that this Symposium Issue illuminates the importance of Restorative Justice and how it can improve the criminal justice system and other disciplinary systems. We are honored to feature the insight of our brilliant speakers, authors, and panelists in this Symposium Issue.

The publication of this issue would not have been possible without the incredible efforts of our Symposium Editor, Jackie Cipolla, and our Managing Editor, Sahba Saravi. We are grateful for their hard work and dedication. Additionally, we are thankful to our keynote speaker and author, Dr. Johonna Turner. We are also thankful to our panelists, moderators, and authors: Brenda Waugh, Rachel Hott, Erin Barr, the Honorable Richard B. Campbell, Jerald Hess, Professor Julie McConnell, Vickie Shoap, Suzanne Praill, Sylvia Clute, Professor Doron Samuel-Siegel, Paul Taylor, Weldon Prince Bunn, and Professor Tara Casey. The *Richmond Public Interest Law Review* sincerely hopes this issue provides an understanding of how Restorative Justice can improve the criminal justice system.

Sincerely,

Elizabeth A. Ritchie

*Editor-in-Chief*
WHAT IS RESTORATIVE JUSTICE?

Doron Samuel-Siegel
INTRODUCTION

Lizzy Ritchie: Good morning everybody. We’re going to go ahead and get started for today. Welcome to the University of Richmond School of Law and to the Public Interest Law Review’s Annual Fall Symposium. My name is Lizzy Ritchie, and I am the editor in chief of PILR’s 23rd volume. PILR is the scholarly voice for issues pertaining to social welfare, public policy, and a broad spectrum of jurisprudence. PILR publishes three issues per year: the general assembly issue, the symposium issue, and our general topics issue. Our authors include experienced practitioners, esteemed legal professors, and insightful individuals working to change the world around them. On behalf of PILR, I would like to thank you all for being here today and for dedicating your time to focus on an extremely important topic. Today’s agenda is filled with interesting panels that will entertain challenging and productive conversations on restorative justice. Following an overview of restorative justice by Richmond Law’s very own Professor Samuel-Siegel, Dr. Johonna Turner will give her keynote address. After a short coffee break, we will dive into our first presentation from Brenda Waugh, who will discuss implementing restorative principals in the lawyer discipline. Our second panel will examine how to implement restorative justice practices in the criminal justice system, and our third panel will discuss programs and resources for clients in the community. In our final panel, we will have the opportunity to hear from two returned citizens and their perspectives on what lawyers need to know about victim offender mediation. We will conclude with closing remarks from PILR symposium editor Jackie Cipolla, followed by a desert reception in the atrium this afternoon. Before moving forward, I would like to thank our panelists and moderators who have graciously given their time to participate in today’s event, the faculty and staff at the University of Richmond School of Law for their support, and PILR’s editorial team and staff for their hard work. Particularly, I’d like to thank PILR’s communications editor, Rachel Campbell, our Managing Editor, Sahba Saravi, and Mary Ruth Walters from the Dean’s Office. I’d also like to thank Professor Samuel-Siegel, who was instrumental in helping to create today’s schedule. Finally, I would like to give a very special thanks to Jackie Cipolla, PILR’s symposium editor.
Jackie has a genuine passion and excitement for restorative justice and has done an incredible job planning this event. She is an absolute pleasure to work with and without her, none of this would be possible. So, if you happen to speak with Jackie today, I encourage you to thank her as well.

And without further ado, I’d like to invite the Dean of the law school, Dean Wendy Perdue, to say a few words.

[applause]

Dean Perdue: Good morning, everyone and welcome to the University of Richmond School of Law. It’s great to see you all here… um, a special welcome as always to, uh, returning alums. It’s, uh, wonderful to have you all back and for those of you who are new to visit the law school, we’re delighted that you’re here. This is a fabulous program, uh, the topic of restorative justice is one that we see at every level um in this country and around the world. Both at - very local, you see it happening in high schools, um, elementary schools, you see it in the criminal justice system, you see it in, uh, at the national level . . . Canada has had an interesting project on on uh… restorative justice with respect to its um native populations. You see it around the world, you see it in in Africa and uh in other countries that are dealing with the horrible issues of uh genocide and oppression. And, so, it manifests itself in lots of different ways. There are - there are issues and controversies. Not everyone is a fan. The question of can you, can you do justice at the same time you are restoring peace? Are there tradeoffs? There are always tradeoffs. But these are topics that are so, so valuable, as we all think as lawyers about how we can actually implement justice. So, I’m enormously grateful to our PILR staff for put – putting this together. I’m told this program has the longest waiting list of any program we can remember doing in, in, uh, recent history. So, it really speaks to what an important topic this is and how much it resonates. Uh, I hope you have a terrific program, and again thank you to our students.

[applause]

Aishaah Reed: Good morning. My name is Aishaah Reed and I’m one of the Manuscript Editors for PILR. This morning I have the good luck of introducing our first speaker, Professor Doron Samuel-
Siegel. Professor Samuel-Siegel, a University of Richmond alumni, teaches in the areas of legal writing and analysis and restorative justice. Prior to joining the faculty full-time in 2013, she practiced at a general practice firm in Charlottesville, Virginia. Professor Samuel-Siegel is active in the community, currently volunteering at the Albemarle Housing and Improvement Program, where she was a member of the board of directors. She was also a founding member of the mentorship program committee of the Charlottesville Albemarle Bar Association Women’s Lawyers’ Section. Today Professor Samuel-Siegel will present on the topic of what is restorative justice, discussing restorative justice practices, definitions, principles generally, as well as various implementations of restorative practices. Without any further ado, Professor Samuel-Siegel.

[applause]

WHAT IS RESTORATIVE JUSTICE?

Professor Samuel-Siegel: Good morning. Can everybody hear me okay? Up in the back? Oh yes there’s the sound. Thank you, Carl. Um … It’s really a huge honor for me to be here, and I want to offer some thanks. I also want to admit that I’m really not a morning person. So, when I arrived here this morning at about 8:00 am, I said to myself this is a testament to your appreciation for this day. One of the things I like to do because I’m not particularly a morning person is move around a little bit, so I’m going to not stand around the podium. I don’t like podiums very much. Um, but I hope that by the end of my 40 minutes or so of time, um I will have provided some beneficial sort of frame-working for the day. Before I do that though, I want to offer my own thanks, uh, starting with, um, a reiteration of the thanks that you just heard a moment ago, in particular to Jackie Cipolla, who is not in the room any longer, but whose leadership as, uh, a student both in, uh, late in her 2L year and now in her 3L fall, has been just, um, absolutely at the highest level of professionalism and enthusiasm and I’m very, very proud to be a colleague of hers and of all of the students who are members of the Public Interest Law Review. Um, I’m also very thankful to Carl Hamm who’s in the back there and operating all of our, uh, multimedia equipment today and to Mary Ruth Walters and Emily Cherry, who are staffed here at the law
school, um responsible for making these sorts of events possible. And I think Dean Perdue has left but I want to thank her as well for her support of PILR and her support of me over the years. So, my task today, uh, as Aishaah said and as the power point indicates, is to offer an introduction to restorative justice. Um … and I think it’s a very hard task. So, I want to explain some of the challenges I think that are presented by this task, but first I thought I’d ask sort of for a sense of who’s in the room. So if you are someone who um is new to restorative justice and maybe you’ve read a little bit, uh you’ve heard a little bit about it, thought a little bit about it but you’re not spending a lot of time thinking about it on a week to week basis, could you raise your hand? Relatively new to RJ. Okay… great. How about folks who’ve given a good deal of thought or reading to this, but you’re not practicing in the restorative justice area. Okay. And I know we also have a number of people who are on a day to day or week to week basis, working or volunteering as a restorative justice practitioner or scholar or teacher. Could you raise your hands please? Okay, fabulous. So, we have a great mix of, um, members of the audience community, and I think that that reality provides something of a challenge to any speaker at the front of the room, right? Do you sort of pitch your introductory information to the folks who are newest to this subject matter? Or do you sort of join the folks who are very experienced and take the conversation forward? My aim today is largely to sort of build a bridge for those of you who are relatively new to the area . . . build a bridge from sort of where you are now to what the rest of the day will offer. Uh, and of course I think what I’m going to do in this short period of time is going to be relatively simplistic, maybe an oversimplification at times, and those who are experts in the area will recognize that that’s happening. Um, I apologize for that, uh, and I just beg your forgiveness but my, uh, excuse or, uh, explanation is that the rest of the day is going to provide a great deal of nuance. Lots of opportunities to hear in detail and to elaborate on some of what I might oversimplify. So, I will rely on that nuance arriving as the day goes on. I think, uh, introducing restorative justice is also a challenge because there’s no agreed upon definition of it. Even among the scholars, the practitioners, the teachers who are thinking about this every day, not only is there no agreed upon single definition but in fact … I’m talking fast, aren’t I? In fact, restorative justice is a contested concept. There are some who believe very strongly that restorative justice is a term that refers to a set of methods or processes for
responding to crime. Restorative justice is simply a set of processes or methods. You might even think of it as sort of as a new way of thinking about criminal sentencing maybe if you like. There are others who reject what they see as a rather narrow, uh, this rather narrow definition, and they take the position that restorative justice is actually a theory of justice, sort of a way of thinking about what we mean when we talk about justice, and in particular when we talk about responding to crime or conflict. Still others like to focus on thinking about restorative justice as a set of values. A set of values that can be importing – imported – into all sorts of settings. So, is it a simple set of methodologies? Is it a broad theory of justice that can be applied universally? Is it a set of values? I don’t have a particular answer to that question, and I don’t think it’s necessary for us to take a single position on that, but I want you to be aware that it’s an uncertain area. Uh, and as an aside, I should mention, I think the uncertainty provides . . . let’s say some challenges for those who are proponents of restorative justice. If you’re trying to advance the use of restorative justice in a community, but you and your colleagues, who are also proponents have all different definitions of it, how do those who are not knowledgeable about restorative justice receive you if they can’t sort of hear you in a single unified way? Uh, the goal of today, I know, is not to develop a unified definition of restorative justice, but I think it is important to challenge ourselves as the day goes on, to be aware of that, um, and I appreciate seeing some of the nods from my colleagues in the front of the room, uh, around the complexity of this. Ok, so what’s my plan, as said Aishaah said, I want to talk just a little bit more about definitional, broad ideas and then share some, um, a little bit of context from a theoretical level, followed by just a bit of an overview of the sort of practical ways that restorative justice is being implemented today in the United States in particular. Um, so. One thing I think we can say fairly is that, um, most, if not all people, who are advocates of restorative justice and who are employing restorative justice in the community share a set of values that they believe are important, not that there’s a single set, but I think there is quite a bit of overlap. And, I want to mention, by the way, before I talk about these values, sort of where I come from. I think of myself really as a student in this area. Um, and uh, I shy away from taking the position that I have expertise, um, and so, uh, I hope that it . . . as you sort of reflect on what I have had to say this morning as the day goes on if you have – if you want to push me in a different direction or help me
clarify and speak more clearly in the future, please let me know around lunch or at the reception at the end of the day. So, what I have observed, I think, is a certain amount of consensus around . . . I want to talk actually about four values. The fourth one, I decided to talk about after I submitted the PowerPoint presentation so it’s not up here, but I want to add to these three, the value of relationship, or the focus on relationality. So, I would . . . I think it’s fair to say there’s a consensus among folks who are interested in restorative justice that we value, uh, an approach to responding to crime, conflict and wrongdoing, we value an approach that pursues the healing of harms, and I am going to talk more about that as time goes on today. There is also a great interest in, uh, moving the resolution of, uh, disputes from the sort province of professionals, only judges and lawyers, maybe social workers and guardians ad litem, de-professionalizing to a large extent, and moving the resolution of conflict to the community where the conflict has occurred. Uh, um, and for those of you familiar, um, there a criminologist, I think a sociologist named Nils Christie from the seventies who really sort of advanced this notion that it’s important for communities to resolve their own conflicts. And, so, I think restorative justice practitioners strive to embody this value. I want to talk now, before I talk about the encounter methodology to, um . . . I want to talk about relationships. So, I think it is fair to say, that, anyone you ask, who’s really thought a lot about restorative justice would agree that, um, it is about relationships. Thinking about the relationships that have been harmed by crime or conflict and attempting to arrive at a state where those relationships are healed . . . which is a problematic notion for a few reasons, I want to talk about a bit later. Uh, relationships don’t always start out rosy, and then there’s a bad thing that happens, and then we heal them, that’s too simple of a narrative, right, so a little bit later on, um, when I talk about, um, sort of the theories of restorative justice, I’ll talk about what we mean by restoration. Ok so, uh, values. We focus on healing harm, we focus on a de-professionalized approach to conflict resolution, we focus on relationships, and, finally, um, there’s a value placed on encounters, so what do we mean by this? Uh . . . when a crime occurs, let’s say, our traditional criminal justice system does provide the defendant with the opportunity to, to confront the witnesses against him or her, right? So, there is in some sense an encounter between a harmed person and the harm-doer, but that encounter is sort of mediated, right, by Judges and other professionals,
and restorative justice may be as sort of an elaboration of that de-professionalization point. Restorative justice really strives to create environments where, uh, people who have committed harm or created harm and those who have been harmed as well as others who are related can come together and can counter one another directly. So, whatever else is true about restorative justice, I feel comfortable saying that these values are operating to some degree in the mind of, uh, most of the people who are engaged with . . . with the practice. Ok. So, these values I think, um, help us to start to think about some characteristics that are common to restorative justice and restorative practices, and, um, I want to just make a note here, sort of coming attraction . . . in a few minutes I want to talk about what . . . what people actually do when they do restorative justice or what restorative practices are. I recognize I’m still at the abstract level now, so just give me a few more minutes with abstraction and then I’ll . . . I’ll talk for those of you who are not familiar about some of the methodologies. And, by the way, anyone who has arrived and has a seat up here, please don’t hesitate to come on through, um, I’ll get out of the way for a little while here. Um, ok so . . . these values rather abstract, how do we start to bring them down into the concrete? Restorative justice and restorative practice, tends to, many would say, I think, strive for a le . . . somewhat less formal approach to, um, conflict resolution or crime response than the systems that we are . . . we are familiar with. You already got this idea, right? We’re interested in in encounters, um, you can imagine that we are interested in dialogue, a focus on relationships, so one might say that many restorative practices are characterized by some degree of informality as compared with our traditional criminal justice proceedings. Again drawing on those values and, uh, all of the values are present here in this sort of characteristic, that restorative practices tend to strive to draw on the wisdom of the participants so that again we are not making a presumption that there are certain people who are experts, and they are the ones that resolve things, and the rest of us are just somewhat passive recipients of their resolution. Instead, we all bring wisdom to the table, both those of us who . . . who have created harm, those of us that are harmed and affected by harm. Uh, I think it’s also fair to say that we have a focus on empowering. This flows naturally right, from this point about recognizing the wisdom of participants. Some people who have been drawn I think to restorative justice, over the years have particularly sort of come to that interest from their, uh, focus in, um . . . focus on
the needs of people who have suffered harm from crime. Um, people who, uh . . . some people may call victims’ rights advocates, so, um, that restorative practices, uh, often, um, strive to . . . make available to victims what our traditional criminal justice system does not tend to make available, and I think you’ll see more about that when I talk about the specific practices. Similarly, uh, the, uh, experiences of those who offend, people who created harm are prioritized in restorative practices, um, and . . . as opposed to thinking of someone as created harm as, uh, someone who needs to be the recipient of punishment, right, or experience their just desserts, restorative practices strive to, um, sort of facilitate, uh, offenders, uh, opportunity to recognize the harm that they may have created to, um, take responsibility for them and also to create opportunities for them to, uh, experience reintegration into the community if the crime they’ve committed, um, has resulted in an alienation or a separation, whether, uh, it’s more spiritual or physical in the form of incarceration. Ok, so . . . oh, so community values right . . . all of this flows beautifully into a recognition that if we’re trying to resolve conflict, uh . . . if we are trying to facilitate the resolution of conflict by the people who are most affected by it, that means by definition that the values of those people can come into the process, in a way that’s not quite possible when you’re in a professionalized, sort of sterile, um, very, um, due process, uh, oriented, uh, system. There is an asterisk there though, right. We have concerns sometimes about whether restorative justice, uh, processes in any way limit our ability to provide due process to people who are subject to punishment, something to think about as the day goes on.

Ok. So. I want to back up for just a minute now, before and a couple of minutes moving on to talking about the specific ways that restorative justice is manifesting itself in practice, um, sort of where did this come from? So, I want to situate us, especially for those that haven’t, um, yet really been exposed in depth to these topics, situate us in, um, the theories that have historically, uh, undergirded punishment in . . . in our society. So, I want to talk about sort of punitive justice versus . . . I think my sound is back. Ok. Um, so here’s a caveat for those who are familiar with these discussions. I recognize I’m about to tread into the territory in the risk of oversimplifying for real. Um, I want to talk a little bit about that for just a moment. So, uh, in the early, um, writings and discussions about restorative justice in the United States, um, many will recognize the name of Howard Zehr, who is
considered to be one of the sort of fore parents of restorative justice in the US. Howard Zehr is an example of someone who wrote early on about a vision where he described sort of our existing system of justice and compared it with a restorative vision for justice, and he talked about them as though they were opposites or a pure binary. Whatever punitive justice is, restorative justice is the opposite. Since then, there’s been a lot of consensus, and I think this is appropriate, that there isn’t this simple binary. Restorative justice is not the opposite of punitive justice, it’s not the opposite of our current criminal justice system. That said, as a student of this and someone who teaches, I do think it’s valuable to sort of engage with an understanding of what punitive justice or punitive theories of justice look like, just as sort of jumping off point. If, for no other reason, that many of us who are interested in restorative justice sort of came to it because of a concern about our existing punitive systems. Okay. So, this is a refresher for those who are criminal practitioners. It’s probably not a refresher, you know, maybe since yesterday when you were last in court, and maybe a little bit of new information for those who have not thought a lot about the criminal law. But, um, in the United States, we, uh, we justify punishing people . . . When they commit crimes, we justify punishing people with a couple of different theories. Uh, you can think of them in two categories, retributive theories and utilitarian theories. Retributive justice, or retribute . . . retributivism, is the theory of justice that is, um, uh, most functioning today . . . functioning most predominantly today in our sentencing, our approach to sentencing, um, and I think that’s been true since roughly the ’70s. So, retributivism is a theory that holds that when someone commits wrong or commits a crime, they should be punished. They should be punished because they deserve it. And, that’s the theory. We punish people because they deserve it. So, when we punish, when we decide how to punish, what we are focused on is – what does the person deserve, and this sort of manifests itself, or is concretized, in the form of proportionality. So, if I commit a crime, how should I be . . . how should the system inflict pain on me in proportion with the pain I have inflicted on society. So, it’s about proportionality. Retribute . . . retributivism does not strive to achieve any outcome in the future, or at least that’s my understanding of it. In contrast, utilitarian theories of punitive justice punish with the aim of accomplishing some future . . . goal. So, if I commit a wrong, I am punished possibly with the goal of, um, . . . rehabilitating me. So, I
get punished and hopefully rehabilitated so I won’t commit such harms in the future. Another reason for punishing me might be to incapacitate me. So, you might incarcerate me so that I can’t commit crime, at least not in the . . . un-incarcerated world. So, for the period of time that I’m incarcerated, I’m incapacitated, and that is a utilitarian aim that we achieve with punishment. The sort of third, most common, um, utilitarian objective that people cite, uh, for punishing people is . . . what am I forgetting, uh, oh, deterrence. So, if you say to the world, if you do these bad things, you will go to jail. The world, people . . . members of the world, community, might be deterred from committing crime. That’s the notion of general deterrence. Also, if I commit crime and am then punished, there’s the prospect that specifically I will be deterred from committing crime in the future. So, these are the theories that undergird punishment in the United States today. Predominantly, I think retributivism is at play in most of our laws, but sort of in the common imagination, many people believe, I think, that punishing people and in particular incarcerating them, uh, has the potential to accomplish some of these utilitarian goals too. Ok, so, people have concern about this. Does deterrence really work? The social science says not mostly . . . sometimes, but mostly not. Are people being really, really rehabilitated by our carceral system, today. Eh? I don’t think so. Um, so, so, people come to restorative justice, many of them, not all, sort of on this journey of looking for some better way to respond to crime and conflict. Uh, and it’s for that reason that I think it’s helpful to sort of come at the theories of restorative justice with this framework. So, uh, this is instead of responding to crime with the aim of punishing . . . on the theory that punishment is deserved or that it will achieve some utilitarian aims . . . instead of responding to crime with the aim of punishing, we respond to crime, and other sorts of conflict, with the aim of healing. So, that means that we have to . . . when a crime or conflict occurs . . . we have to identify what harm has occurred. And then, focus on actually healing that harm. And you can see, especially for those who are new to this . . . you can see how, if I commit a crime, uh, and I’ve, um, harmed my colleague, Tamara, who is sitting in the back, uh, and then I go to prison, Tamara knows I’m in prison, so I’m not going to be in her neighborhood for a while, but besides that, whatever my crime has evoked in her, feelings of insecurity, a loss of property maybe, some kind of health or physical ailment . . . my incarceration does nothing to heal her. So, restorative practitioners are
aiming to identify the harm, some of which is not obvious, right? My car just got, my back window just got smashed the other day when I was parked downtown in Charlottesville, and it is really annoying, but I can afford to fix the window. I feel different now, at least I will think for a little while, about parking downtown in Charlottesville. And I have to go through this thought process, right . . . that feeling of a loss of security. Imagine if my car had been smashed in front of my house? How might that make me feel about my house and going back to it. Does incarcerating the person who did the harm do me any good, of course it doesn’t. Ok, so, um, I want to reverse the order of the next two things I want to talk about. We come at . . . we respond to crime with a focus on identifying harm and hopefully healing it. We focus on, um, relationships. So, um, one helpful way of framing the sorts of harms that occur when crime occurs is that relationships are, uh, are damaged. And, this is coming back now to something I alluded to earlier. Is it really realistic to think about restoring relationships? So, um, theoretically, many crimes do harm to relationships. They might be, you know, uh, relationships between two people where one committed a crime. They might be broader community relationships. And, um, a lot of restorative justice practitioners are aiming at emerging from a restorative process, uh, with a relationship that is more healthy, or is sort of intact, uh, and whatever was broken in the relationship, uh, sort of being healed. But this vision oversimplifies, and it sort of relies on a, a premise that relationships are good, good, good, good, good, then a crime happens, then they get broken, then they get fixed, fixed, fixed, right? But the presumption that relationships are good, good, good, good, good is, uh, a false presumption in many scenarios. So, many different scholars and practitioners have offered ways of thinking about what we’re really doing with relationships, and one of them that I find particularly, um, appealing is Margaret Irvin Walker, who suggests the idea of, um, restorative justice being a method . . . a set of methods to achieve morally adequate relations. So, uh, Walker talks about what she means by morally adequate relations, and I have notes about that that I’m gonna take a look at because I think it’s, um, interesting and valuable. She defines morally adequate relations as having three, um, characteristics or conditions. The first is in such relations people are confident that they share some basic standards for the treatment of each other, so some shared standards. Morally adequate relations are ones where people are able to trust each other to abide by those standards
or at least acknowledge fault if they do not abide... by them. And finally, in these relations, people are entitled to be hopeful that unacceptable treatment will not prevail; that unacceptable behavior will not be defended or ignored where it occurs; and that victims will not be abandoned in their reliance on our shared commitment to standards to one another. Um, there’s a lot, I think, to explore there. And a lot of what I find particularly interesting about restorative justice is this, uh, set of thinking about, um, relationships. And, um, some have proposed the notion, and it comes from some feminist theory, that restorative justice is a relational theory of justice. It’s a theory of justice that sort of relies on the concept of relationships. But anyway, um,... the last point I want to make about how restorative justice is sort of providing alternatives to, or expanding on retributive and utilitarian theories of punishment, is this point about emphasizing, um, process as much as outcome. So, unlike the criminal justice system that many of us are familiar with, where we... many are sort of most highly prizing procedural justice, so did the defendant get treated in accordance with the Constitution? And if so, then whatever he or she gets, he or she deserves, right? Instead of focusing merely on prioritizing procedural justice, we focus on, um, also the process itself, um,... or the outcome, as well as the process. So, I hope that that, as sort of abstract as it’s been, helps situate us in sort of the values, the sort of characteristics generally, and the theoretical underpinnings of restorative practices. And now I want to talk for just a couple of minutes about those practices. Um, really just a few minutes, but I’m doing great on time, right? Because I have until ten till. Um... okay so, victim-offender mediation, group conferencing, peacemaking circles, impact panels, and truth and reconciliation commissions. These are, uh, I think five of the most common, sort of methods... restorative methods... but certainly, they don’t describe all restorative methods. Uh, and I just want to offer a sentence or two about each one. I think as the day goes on, you’re going to be hearing, extensively, about some of these in particular. Victim-offender mediation is, um, sort of what it sounds like. It’s a methodology, uh, where... when a crime has been committed and the... the existence of the crime is agreed upon, essentially, that is to say the, the person who would be the defendant, um, has, has admitted to the existence of the crime. This is, um,... the victim-offender mediation is a facilitated process, where someone who has some expertise meets together with the person who’s been harmed by the crime and the person who committed the
crime, and conducts a mediation. And it looks, in a lot of ways, very much like mediation you might be familiar with from the civil arena, for those of you who are legal practitioners. Uh, and the aim of these mediations often is to come to basically, uh, sort of an agreed, uh, way of responding to the crime. So, in lieu of, for example, sending somebody to be incarcerated, some, uh, set of agreements that might include some service to the, uh, community, service to the person harmed, compensation to the person harmed, education, uh, for the person who committed the harm, therapy or other sorts of opportunities, uh, for the parties so, um, group conferencing . . . sort of, looks similar in a lot of ways, except, rather than being, uh, sort of, uh, two party and mediator set up, it aims to bring together both the harm committer and the . . . those harmed, as well as maybe others who are affected – people who might be in the community of care for each of those people, or those persons. Um, group conferencing is also facilitated, um, as are really all of these, um, practices. But they aim, in those ways that I talked about earlier, to draw on the wisdom of, uh, those who are together, and come up with a way to respond to and ultimately, um, hopefully develop healing or achieve those morally adequate relations, and both, I think, VOM and, um, group conferencing, often is not just a one shot deal where there’s like one meeting and then it’s all over. Sometimes it’s a process that happens over a series of meetings. Both of these are often being facilitated through partnerships between, um, criminal, just . . . like governmental criminal justice . . . uh, you know, prosecutors’ offices, and non-profits, separate non-profits, so that you’ll have a non-profit, that, that, provides the mediators, for example, and the criminal justice apparatus will refer the matter to the non-profit and then the non-profit will provide the mediation, spend time, um, with the parties, and then often, if the matter is being adjudicated, there will be a system for the non-profit to report back to the judge who’s doing the adjudication and, um, um . . . so that the judge can incorporate, or adopt, whatever the mediation or the conference has led to – incorporate it into the order, or whatever’s appropriate in the apparatus that’s at play. Peacemaking circles are, um, uh, a practice that, I think in some ways, are similar to group conferencing. Uh, they come, specifically though, out of the influence of, uh, some North American aboriginal Native American traditions, um, that involve some, uh, sort of, very specific practices around who speaks, how the speaking occurs. These, uh . . .
often, peacemaking circles employ a talking piece – some of you have been exposed to this idea – where um, each person, if they’d like to speak, takes hold of a particular item – often, it’s . . . the item has some important or sacred quality to it, and so there are ways that dialogue occurs, um, in, a, a manner that’s, um, been arrived at through a set of cultural norms. Impact panels are, uh, a restorative process that has been employed, where particular victims and offenders can’t come together for some reason or other. So, imagine for example, that, um, I have driven while drunk and caused injury to someone, and I, the offender, am not able or willing to engage in a restorative process with the person or people I’ve harmed. Uh, uh, a facilitator might bring together the people I’ve harmed with others who have committed offenses similar to mine, so other people who have harmed people through drunk driving, and there can be an opportunity for dialogue, not about the particular, you know, offense that occurred, but about, learning, the … the offender having the opportunity to learn about the experiences of the victim and vice-versa, and, um, sort of achieve a heightened level of awareness, and potentially a sense of, um, being, being more whole and being rehabilitated, et cetera. Finally, truth and reconciliation, uh, processes, or truth and reconciliation commissions, there is some, I think, um, differing … there are some differing opinions about whether TRCs are properly considered a form of restorative justice. I think it’s appropriate to think of them that way but that’s not a universal, um, uh, uh, belief, and I’m sure . . . and I think Dr. Turner and others, um, today are going to talk, probably in more detail on this, but many of you will be familiar with the truth and reconciliation process that occurred in South Africa after the apartheid, uh, regime, was, uh, displaced by a democratic election, and, um, my students mostly haven’t heard of the South African Truth and Reconciliation Commission, which is one of those like, signals that I’m getting older and they’re getting younger. Um, but, I don’t, I think with, uh, a group of practitioners who have, um, some experience, I probably don’t need to talk about the South Africa TRC or even about TRCs more generally. Um, I will just mention quickly that they have been employed in many settings, both, uh, internationally and in the United States, to respond often to systemic injustice, systemic, um, atrocities and, uh, are an effort to allow the truth of what has occurred to emerge. Uh, um, those who have offended to acknowledge and put on the record the offenses they have committed, and, um, ideally, the, the payment of
reparation, or the making whole of those who have been harmed. Um, and I’ll mention quickly for those who don’t know, I think this is very interesting, there’s actually been one government-related, or government-sponsored, TRC in the United States, and it uh, happened just not that . . . not long ago, I think it, it re . . . resolved just in the last, um, ten years or so, but it’s the Maine Wabanaki Truth and Reconciliation Commission, which is a commission that was convened to, um, to explore and come to reconciliation around the, um, sort of admittedly genocidal practice of, um, state, uh, child welfare agencies, going into Native American communities, removing children from those communities and placing them with, um, Caucasian families with the explicit intent of tearing those children away from their, um, their ethnicity and their culture and their heritage. There was also a TRC in Greensboro, North Carolina, um, that arose out of an event in 1979. It was not government-sponsored, the TRC, but there’s a lot of really interesting stuff to read about it, if you’re curious. Um, there’ve also been interesting efforts in Mississippi to, um, pursue a TRC around the racial, uh . . . the history of racial injustice and in particular the, um, you know, violent and murderous, uh, Jim Crow era and, um, there’s, there’s some people who’ve been working in Mississippi who are now sort of making the recommendation to all of us who are interested in truth and reconciliation that, rather than focusing on, like, convening commissions and having meetings and coming up with a single report, that we think of truth and reconciliation as more of a, sort of a society-wide approach to telling the truth more and better and achieving reconciliation – a topic I’m particularly personally interested in – so, um, I’d love to talk with folks who are also interested in that as the day goes on. So, in my last, um, three or four minutes, I’ll just mention that, in the United States now, as of the last information I was able to get, and I, I wouldn’t swear by this under oath, we have at least thirty-two states who have enacted some form of legislation relating to restorative justice. I think the number might be a little higher now, but, um, it was certainly thirty-two a few years ago, um, from the last scholarship I’ve been able to find, and, um, lots of very recent activity, lots of activity in the last few years. So, most commonly what you’re seeing in these, this legislation is the authorization of the use of restorative practices as a diversionary approach, especially in juvenile justice settings, so offering restorative alternatives when a juvenile is arrested for, uh, a crime, um, rather than, um, um, placing the juvenile into the traditional system, moving
the juvenile into a restorative-based system. Those are very common in, um, both juvenile and adult settings, there’s much legislation now that allows, um, restorative techniques to be used in the sentencing, uh, sort of phase of the process, and it . . . Virginia actually has a statute that, uh, authorizes, um, local victim witness, uh, assistance programs, which are, I think, arms of, of the Commonwealth’s Attorneys’ offices, they actually have statutory authorization to create victim, uh, offender mediation programs. Uh, you also see the use of restorative justice being statutorily authorized for the use in re-entry processes. So for, um, members of the community who have been incarcerated and are now returning to the community, um, employing, um, group conferencing, peacemaking circles, and those sorts of approaches to facilitate the, um, re-integration of folks, who, who are emerging. And in the school discipline setting, something you’ll certainly hear more about, I think, later today, uh, there, there’s both some state level statutory authorization, and lots and lots of local authorization for the use of restorative practices to respond to students who are, um, violating the rules in school. Um . . . also it’s interesting, I think, for example, Vermont has a statute that says that if somebody has been . . . has committed a . . . has been convicted of a crime and has to pay . . . is required to pay court costs or other fees and can’t afford them, there’s actually a restorative . . . like a, like a, a restorative justice . . . like a victim-offender mediation type of alternative for figuring out how that person should have an alternative to having to pay the fees. Um, so, I think the Virginia legislation I mentioned a minute ago is on this slide which you’ll have access to if you’re interested, and I’m ready to wind down now, I think, and hand over the front of the room, or um, yeah, to whoever’s next. But before I do that, I want to say thank you. I worked for a, um, a judge for a couple of years after law school who said, and this is a religious reference, so, for . . . take it or leave it, but, “no preacher ever converted anyone after the first twenty minutes of a sermon.” So, um, I know I’ve spoken for thirty-five or forty minutes. Um, I hope that the information I shared is helpful and helps sort of to frame up, but without limiting us in any way, um, and I, I hope it has, um, been, en . . . sort of engaging enough to get our morning started off well. And I just really want to say, thank you for being here. Your support of the work that our students are doing . . . it’s probably hard for me to convey adequately how much it means to them that there’s a waiting list today, right? All of the work they have put into this . . . I’m going to
get CLE credits, which I need, and I know many of you will get CLE credits too, but it’s something for you to come and be a part of the law school community and, um, sort of stay engaged, so, um, it’s very meaningful for all of us who work here every day to have such a community come together today, so, with that, I will hand over, and thank you very much.

[applause]
KEYNOTE SPEAKER: TRUTH AND RECONCILIATION IN HISTORICAL HARM (SLAVERY, MASS INCARCERATION, CONFEDERATE MONUMENTS, GENDER)

Johonna Turner
INTRODUCTION

Ken Anderson: Good morning, everyone. Good morning, everyone. Oh, there we go … good morning, everyone. If we could all just return to our seats for, uh, the next, uh, speaker. Um, before I introduce our keynote speaker, I was told by facilities that those of you who are sitting in the balcony, I promise, relief is coming, um, with the air conditioning and the temperature, so, they’re working on that as we speak, um, I see, I see it. Um, and then, um, also, for, um, people looking to, uh, fulfill the CLE credit requirements, um, just to let you know, that the link that is on the website is being updated right now so that you’ll be able to, um, put in your information so you can get your proper credits. Um, and that will be on the website that’s in the . . . on the back of your programs, um, by the end of this panel. Alright, so now that the housekeeping is over, good morning, everybody. It’s, um, so great to see everybody here ready to learn more about restorative justice. My name is Ken Anderson, and I am a student of restorative justice, but I’m also the General Assembly Editor for the Public Interest Law Review. And today, I have the distinct pleasure of introducing our keynote speaker, Dr. Johanna Turner. Dr. Turner currently serves as the assistant professor and co-director of the Zehr Institute of Restorative Justice and Peace-Building at the, I’m sorry . . . at the Center for Justice and Peacebuilding at the Eastern Mennonite University in Harrisburg, Virginia. For those of you who are new to learning about restorative justice, I’d like to note that the Zehr Institute, uh, continues to be one of the premiere institutions of restorative justice scholarship and action. Dr. Turner’s work is at the forefront of the Institute’s many great works. In her time with the Zehr Institute, Dr. Turner has brought together broad coalitions that have . . . developed young leaders, empowered the disenfranchised, and cultivated transformational approaches to safety and justice. Simply stated, Dr. Turner is brilliant. Uh, she is the quintessential interdisciplinary scholar, she is a graduate of the University of Missouri, and received her doctorate from the University of Maryland, and she holds post graduate training in a multitude of subject areas, including US cultural studies, women’s studies, biblical theology, and, of course, restorative and transformative justice. Indeed, a scholar servant, Dr. Turner has spent years working in the DC public
school system and has trained . . . trained organizations on the benefits of restorative justice, ranging from Washington, D.C.’s Latin American Youths Center, to the General Board of Church & Society of the United Methodist Church. So, all this to say, you are in for what I’m sure will be a transformative treat. So please welcome . . . me . . . welcome Dr. Turner.

KEYNOTE SPEECH

Dr. Turner: Thank you so much for that very generous introduction. That was a very generous introduction, wasn’t it? Can we give some applause for the introduction? That was very generous. I, I really appreciate that, Kenneth, and I want to thank you all for being here. I also want to thank Rachel Cipolla, and . . . I’m sorry, Jackie Cipolla, Rachel Thinnes, and other staff of the, the Public Interest Law Review for inviting me to be here. It is indeed a great honor for me to be here and engage with you all today. One of the, um, areas, um, small areas of confusion that we had earlier on is that my, my title is accurate here in the brochure Race, Gender, and Restorative Justice, but earlier on, in some of the advertising, it was advertised as around historical harms, and so I will not be specifically engaging the topic of historical harms or confederate monuments, but my talk does have implications, I think for all of those areas. What I actually want to talk about is very much in relation to this moment in which we’re in. In this moment, largely because of the efforts of the movement for black lives and multiple MeToo campaigns, our society is increasingly aware of the realities of racialized police violence . . . against people of color in particular, as well as a continuum of sexual violence and harm against women of . . . women and girls. And we know that these forms of violence, as well as other racial, gender, and sexual harms, are interconnected and interlocking. And, so, I’m going to talk about this topic and particularly to consider what restorative justice has to say, what restorative justice might contribute, and also specifically what a criminal-race-feminist approach to restorative justice might contribute. And, so, with that, I just want to invite all of us to take some deep breaths together. [Deep breaths taken by the room] Let’s take a few. [Breathing continued] The reason I’m inviting us to take these deep breaths together is because that the topic of violence is one that we can feel even as we talk about, and some of us more than others of us, in our bodies. It is a topic that requires us . . .
to keep pace with the emotions, the experiences, the memories, the bodily sensations that might come up for us, as we engage these issues, including our commitments, our prejudices, our blind spots, the areas in which we are not aware, the areas in which we seek to be aware, and the areas in which we are vividly, powerfully aware. So, I’m going to spend a little bit of time here, um, talking from the podium and then for most of the time, for much of the time I’ll actually come and, um, come a little bit closer to you all as I go through the handout in which you have, and we’ll get to that in a moment, but particularly the title that I’m engaging with today is “Ten Gifts of a Critical Race Feminist Approach to Restorative Justice.” And, so, we’ll get to this in a moment, um, but I want to actually spend some time . . . I want to thank Professor Samuel-Siegel for that foundational introduction, and I’ll actually be engaging with some of her words and the foundation she provided for part, for part of the time here. So, as I mentioned, we are very aware . . . our society is very aware right now of police violence, particularly against people of color, and sexual violence, and gender violence, more broadly, particularly against women and girls, including women and girls of color, of course. And as I mentioned these forms of violence are interconnected and they are interlocking, so an example of that, is that women and girls, including transgender women and girls, in ICE detention facilities, in prisons, in juvenile halls, experience higher rates of sexual violence. So, this is an example of the interlocking nature of racialized violence, particularly racialized violence vis-à-vis mass incarceration, and gender forms of violence, which are at the forefront of MeToo campaigns that are happening now . . . so we’ll say the MeToo movement as a whole. Restorative justice is a framework, as we heard, it’s a philosophy, that emphasizes healing and accountability to repair harm and wrongdoing, to build community, and to strengthen relationships. As we heard, it’s a relational theory . . . a relational approach to justice. And although mainstream literature on restorative justice, and particularly, when I say mainstream literature, I mean that which is the ideas, the concerns that are reflected, in more of the scholarship that we read about restorative justice that’s most readily available, academic scholarship and professional literature, it’s actually been largely silent about sites and forms of interlocking racial and gender harms. And so, that . . . especially in this moment requires us to ask this question of what are the intersections of race, gender, and restorative justice? And what would be a restorative
justice approach that would allow us to both conceptualize, understand, and respond to the realities of racial and gender violence at this time? And, so we’re going to spend some time on that. I would say that all . . . although conventional approaches to restorative justice have had very little to say, grass . . . there is a grassroots tradition of restorative justice, and that grassroots tradition is which I’ve found to be largely practiced by feminists of color restorative justice practitioners, that have themselves been formed and shaped by participation in social justice movements. And that their practices, their perspectives, their principles, and their politics, especially reflect critical race feminism, which some of you will be familiar with, it’s a framework primarily advanced in the academy by feminist legal scholars of color, and influenced by multiple theoretical and disciplinary approaches including black feminist theory and critical legal studies. How many are you familiar with critical legal studies? Great. What about critical race theory? Excellent. And critical race feminism? It’s an offshoot of critical race theory. Fantastic. Excellent. So, I’ve spent a little bit of time, I saw many people whose hands were not raised, so I will spend a little bit of time on just unpacking, especially critical race feminism, as it relates to those topics. And I’m also specifically building on the work of legal scholar, Angela P. Harris, whose also been foundational in the work of, of critical race theory and critical race feminism. Angela Harris has argued that conventional approaches to restorative justice require the contributions of critical race feminism in order to address the realities of racial subordination and gender violence. So, I’m really building on, um, what she said in a number of ways, but specifically, I’m going . . . I’m building on that by outlining, as I said, the Ten Gifts that a critical race feminist approach offers restorative justice advocates and practitioners. This is inspired not only by Harris’ insights, but also my own life experiences . . . and the way in which, before I became an educator and advocate of restorative justice, I was actually involved in, and very much learning about and working from, the philosophy of transformative justice and community accountability, which wholly embodies a critical race feminist approach, and so part of what I’m doing is I’m going to talk to you not only about restorative, but a relative philosophy and framework that is called transformative justice. And what I’m offering is that together, the principles and practices of those grassroots restorative justice practitioners, who are primarily feminists of color, and the transformative justice movement together
reflect this critical race feminist approach to restorative justice that we can learn from generally in regard to restorative justice, but also specifically as think about racial and gendered violence, which are interlocking and intersectional. In terms of critical race feminism . . .

I’ll just give a few points on critical race feminism as background. So, as I mentioned critical race feminism both emerged from and includes core aspects of critical legal studies, critical race theory, and feminist theory, but it also responds to the shortcomings of each approach. So, for example, critical legal studies is this approach that in part, uh, . . . is a critique, right, of conventional approaches to understandings of law that said that law is not objective, it is not neutral, and it’s also embedded with subordinationist ideas. And it was par . . . particularly a class critique, um, at the time, in early, uh, critical studies, and then critical race theory came and said we agree that law is not su . . . objective or neutral or always already, um, informing the best approaches to reforming society. But we also need to . . . understand this critique in relation to race and racial justice. And so critical race theorists, in particular, were critiquing dominant power relations vis a vis the law as were also using this methodology of narrative, of storytelling, of using their own stories as ways to critique . . . ideas and understandings that seem to . . . that were dominant. And saying we need to understand the experiences and ideas of communities that are marginalized as a way of understanding, uh, more broadly, what they called a liberationist perspective, or anti-subordination perspective. So critical race feminist, um, is an outgrowth, or offshoot, of critical race theory that says in addition to that we also need to incorporate a stronger gender analysis.

Now, critical race theory definitely does have an intersectional analysis looking at intersections of race, gender, class, sexuality, but critical race fem . . . feminists went even deeper in, in that. And so together, what critical race feminists were also doing is saying we need to place the experiences of women and girls of color at the center of our theorizing and practice because women and girls of color experience racial harms, gendered harms, classed—often times as well—harms related to heterosexism, for example, sometimes ableism, and so we need to understand the stories of women and girls of color in relation to legislation, policy, institutional norms, um, dominant frameworks, advocacy agendas, in order to understand their blind spots, their assumptions. And so that’s a little bit about kind of
critical . . . or critical race feminist approach. And so now I’m going to just share a little bit briefly about transformative justice and then spend the rest of the time talking about the ten gifts that a critical race feminist approach offers. As I mentioned whereas a critical race feminist approach is imbedded, or reflected, in many of the grass roots approaches to restorative justice, so that which is largely practiced outside of criminal justice agencies . . . largely practice outside of the state . . . it’s actually this movement called transformative justice that actually wholly embodies a critical race feminist agenda. And that is, in large part, because transformative justice emerged entirely from women of color who were involved in movements to challenge racial violence, in particularly mass incarceration understood as violence, particularly police brutality, but they were also involved in movements against sexual and domestic violence. So, what actually happened is that many of these women . . . they were women of color, were advocates that were working, um, for example, by day and in shelters, or as caseworkers of sexual and domestic violence shelters, um, uh, anti- . . . anti-rape clinics, for example, but they were also involved in social justice movements. So they were involved, for example, in movements against police brutality and movements against mass incarceration, and out of their intersecting experiences, they found . . . that many of the strategies that were most . . . suggested are lifted up by the mainstream . . . anti-domestic violence and sexual assault movement . . . were actually counter to some of the approaches . . . that were being advanced and advocated by racial justice movements, particularly movements against mass incarceration. So just give an example of that. They found that, um, for example undocum . . . um, many of the women, for example, were working in, um, immigrant communities, domestic violence shelters, and they found that mainstream approaches would say the first thing that you do if you’re experiencing domestic violence is to call the police. But, they found that for example undocumented women, um, could not call the police . . . they often failed to call the . . . they often . . . when they called the police, they had been . . . they had been arrested and deported, for example. So, they found these gaps in this mainstream, um, reliance on the criminal legal system as the . . . at the . . . at the center of efforts to challenge . . . to respond to sexual and domestic violence. They also found that multiple survivors of gender-based violence, particularly, um, women of color, but also working-class women, when they’ve been . . . they’ve been incarcerated when their actions
they take to survive were criminalized. And so overall, they began to critique what has become known as carceral feminism. How many of you have that . . . that term? Carceral feminism? Carceral feminism. So, it’s C-A-R-C-E-R-A-L. Carceral, from the word incarceration. Carceral feminism. So carceral feminism, it’s . . . it refers to this increasing shift towards seeing the criminal legal system, or the criminal legal apparatus as a whole—or its expansion—as the solution to gender-based violence. We need more police. We need more punitive policies. Because that is actually what’s going to protect more women, getting tougher. And there’s been some critique of that by women of color who actually said that that doesn’t actually, um, help women of color who are already at the brunt . . . or face the brunt . . . of increasing, uh, police and punitive policies within their communities, particularity in communities of color. So, their critique . . . there was a critique of this law and order approach. And so that critique led to, particularly women of color, um, but there were other comm . . . other marginalized communities that were involved who said that we need to advocate for strategies that address intimate violence, particularity sexual violence, dating violence, but do that without reliance on policing and prisons . . . do that without reliance on the criminal legal system. And you heard Professor Samuel-Siegel talk about the connection between that approach and restorative justice, with this de-professionalization, a move to shift away from, um, primary reliance on professionals and the state, to communities. And so, we’ll talk a little more about that. So how I . . . how I got involved in learning about, um, this movement, transformative justice, is that in 2007 I was involved in juvenile justice reform. And in my work with juvenile justice reform, I experienced . . . I and other colleagues experienced . . . that each time we had seemingly made some . . . some headway in challenging what we saw as pol . . . as punitive polices that actually weren’t actually helpful in, um, supporting the development and the well-being of young people . . . but each time there was a high-profile incident, so what was called youth-violence, for example, there was a shooting or a robbery, then the legislation that we had worked for, that was actually helpful in addressing and forwarding juvenile justice, it then . . . eroded the efforts that we had worked so hard for. But we also found that communities that were advocating for some of those punitive policies, were communities that were also bearing the brunt of, for example, urban . . . urban violence, violence within communities. And so, we said how do we actually have an
understanding of the multiple forms of violence that impact communities, structural violence, state violence, and . . . interpersonal violence within communities, and also work to challenge all those forms of violence at the same time. And this was a question for me and at that time is when I learned about an organization called Insight Women of Color Against Violence. And that organization introduced me to this transformative justice movement that actually was started again by women of color and queer people of color who said that, by centering our experiences of harm, we can actually create a society that challenges all the kinds of harm that we experience at the same time, and that also does that without reliance on . . . on the state. And so, I’m going to talk a little bit, um, about this movement as we’ll go through these ten gifts to . . . and it’ll become clear, I think. But that is how I got introduced to it through, um, through my engagement with the organization Insight Women of Color Against Violence, which actually grew out of these groups of women of color, who again were involved in these multiple movements and said, we need to figure out how to address racial violence, particularly, um, racial violence in the form of mass incarceration, and sexual violence in the form of, um, especially intimate forms of violence at the same time. And so, Insight Women of Color Against Violence was an organization that said, we’re going to build a holistic anti-violence agenda. And that is actually, um, really critical, and it’s one point that I’ll come . . . I’ll come back to. So, I want to talk about the ten gifts that a critical race feminist approach as embodied in the transformative justice movement and in the work of grass roots restorative justice practitioners offer to us as we think about restorative justice and its significance to understanding and challenging racial and gendered harms. And when I say . . . and I use the term gifts intentionally. One of the reason that I’m using this terms gifts is because for some of us, and particularly I think for some of us who were already aware of restorative justice before we came in the room, and it was really, um, helpful in terms of, uh, really naming the excitement . . . the, uh, some of the experiences that we have already had, some of our own analysis, we experience it as a gift. We said yes, this is a name for what I felt or what I’ve longed for all this time. This captures my ideas. This captures my analysis. This captures my vision. We experience restorative justice as a gift. And so, in that same way, these insights are offered as gifts, which, like many gifts when you first receive them, some might say yes, this is clearly helpful for me right now, I’m so glad I
got this gift. And then there are other gifts, which you say I actually have no idea how I’m going to use this. And so, some of the gifts that I might name may be like that. I have no idea how I’m going to use this. It doesn’t seem relevant to me, and I might regift this to somebody else. It may be that way for you. I . . . I . . . I actually believe that some of them will be that way. But the f– . . . and I group these gifts into three areas. The g– . . . There are gifts of consciousness, gifts of vision, and gifts of strategy. Consciousness, vision and strategy. This three-part framework comes from, actually a social movement organization called Project South: Institute for the Elimination of Poverty and Genocide. And Project South talks about consciousness, vision, and strategy as being kind of the crucial building blocks of social movements. And one of the reason I’m talking so much about social movements is because as . . . as historian Robin Kelly has articulated, social movements are incubators of critical theory and social vision. So, the first, uh, gift of consciousness . . . when I say consciousness, I mean gifts that relates to how we understand, how we theorize, how we analyze, how we conceptualize . . . is integrating our own identity and experiences. Critical race feminists emphasize this idea of positionality. Positionality means that we locate ourselves in relation to multiple dynamics of I– . . . social identity, power, and privilege in society. So, for example, in relation to race, in relation to gender, in relation to class, in relation to formal education, disability, sexuality, where do you stand? What are your experiences of privilege? Of marginalization? And what is your experience of the multiple ways that society has deemed you valuable, or less valuable, in relation to those areas, in relation to those social dimensions of identity. We must locate ourselves for a number of different reasons. One of the reasons that critical race feminists emphasize that we must locate ourselves is because by looking at, and deeply understanding, our own experiences, we are better able to access the insights that our experiences have afforded us. So that it’s one . . . one key idea. And particularly they argue that those who experience multiple marginalizations in society are especially able to have a keen analysis of social reality. To have a keen analysis, for example, of legal theory because of how they have experienced marginalization in society, how people have experienced subordination. But also, it’s important for everyone because when we locate ourselves, when we p– . . . understand our position, we’re also able to understand the ways in which our worldviews, our perspectives, what we see as important, what we see
as avenues to justice, may differ from those individuals and groups whom we purport to advocate on behalf of. It may be different because we are located differently in society, because of our social location. In addition, integrating our own identity and experiences within a practice of restorative justice means that we have to be attentive, also, to our own experiences of harm. How have we experienced harm? How have we experienced being victimized, for example? How have we experienced and thought about our participation in harming others? It is . . . it is absolutely imperative that we more-so integrate our own identity and experiences in our approaches to justice, and particularly restorative justice, because it allows us to move with a deeper sense of integrity . . . and that is a contribution, a gift, of a critical race feminist approach. Sujatha Baliga, who just recently, uh, was awarded a MacArthur fellowship. How many people are familiar in this room with Sujatha Baliga? I see a couple of hands. Sujatha Baliga . . . what about the MacArthur fellowship? You all familiar with the MacArthur fellowship? It, uh . . . significant, significant award, um . . . fellowship that is given out to people really identified as geniuses. So Sujatha Baliga is a restorative justice practitioner who was just, this past month, awarded a MacArthur fellowship. It is just amazing, and Sujatha, uh, is . . . is . . . her practice has been always informed by this commitment to locating herself. She locates herself as a survivor of child sexual abuse and incest. She locates herself as a South Asian restorative justice practitioner. Similarly, when I think about my own work and my own motivations and commitments, it’s in many ways informed, not only by my studies, but also because of my own experience of child sexual abuse, because of my own experiences of sexual violence. And so, even those of us who may not have those experiences, we have all experienced harm. We have all also experienced participating in harm, and we have also had experiences of justice and healing that we can use as we think about, um, what restorative justice might mean to us, and what does it mean for us to practice it. And I’ll go through some of the other gifts a bit more quickly. The second gift is commitment to a holistic antiviolence agenda. The term holistic antiviolence agenda comes from both, uh, the organization Insight: Women of Color Against Violence and, specifically, scholar, practitioner, activist, Julia Sudbury, who talks about how Insight, as an organization, has created and promoted a holistic antiviolence agenda. This holistic antiviolence agenda incorporates a number of components, and I’ll just,
um, g – . . . give you some examples . . . quoting from . . . a book by Insight called “The Color of Violence.” They name as examples of violence against women of color: attacks on immigrants’ rights, attacks on Indian treaty rights, the proliferation of prisons, militarism, attacks on the reproductive rights women of color, medical experimentation on communities of color, homophobia, heterosexism, hate crimes, economic neocolonialism, institutional racism. And, so, as you can hear, there is a much broader understanding of what counts as violence, and this understanding is also reflective of what we find in peace studies. So, I’m coming from the Center for Justice and Peace Building, which is a center and . . . we practice and teach peace building and conflict transformation. And one of the central theorists of our field is Johann Galtung, and Johan Galtung talks about violence as a triad. So, there is direct violence, which is often times what most of us tend to think of when we think about violence, is that direct harm from indiv – . . . individuals to other individuals. It can be physical, it can be mental, it can be emotional, it can be verbal, right? Abuses. But Johann Galtung also theorized violence in relation to structural violence. So, an example of structural violence within this . . . this theoretical framework is poverty, for example. So, by structural violence, he talked about the ways that institutions and the way that society is organized can give some the chances to live more abundantly, to live to their fullest potential, and others, um, subjected to more of a s – . . . a death that kills slowly, harms that take place over time based upon societal structures and organizations. And the third part . . . the third kind of aspect is cultural violence, which means the attitudes, beliefs, social norms that justify structural and direct violence. And so, using that, to kind of . . . ideas of violence, we can understand violence as so much more broader than what we usually think, and understanding violence much more holistically and intersectionally is critical . . . to the work of restorative justice. But again, conventional approaches often don’t reflect this approach. They tend to more so center direct harms for the individuals and discount, for example, structural forms of violence and then, therefore, tend to end up relying a lot on facets of structural violence in attempt to ameliorate individual, uh, acts of violence or harm. The third gift is acknowledging multi-layered histories of harm. Acknowledging multi-layered histories of harm. Both restorative and transformative justice . . . center the needs of survivors, center the needs of people who have survived, for example, um, . . . experienced sexual harm,
who’ve been victimized and saying this is absolutely imperative for us to find out when someone is harmed, want do you need? And that your needs, your experience, should guide and be fundamental to the process. In addition to that, a critical race feminist approach offers us intersectionality and an ability to see complexity. An ability to see people in their fuller and fullest sense of humanity, which means that, rather than rest – . . . in conventional restorative justice, we have usually this binary—we have victims, and we have offenders. Let me incorporate some call and response, thank you. We have victims and we have offenders, right? And so, that is the conventional restorative justice approach to say there’s always victims and offenders and typically, although this became, um, a part of restorative justice because it was talking about victims and offenders within a particular situation. In this situation, this person is a victim, this person is offender. What has happened in restorative justice is because . . . is that these labels have become fixed markers of identity. That what became a label in a situation then becomes this person is always and forever a victim, and this person is always and forever an offender. What a critical race feminist approach allows us to do is to not only understand . . . and particularly, this is especially important when we think about gendered violence and intimate violence, specifically. It allows us to understand the experiences, not only of the person in this immediate case who has experienced harm, but it also allows us to acknowledge the harms, the survivorship, of the person who is responsible for the harm as well. Let me give you an example of that, just to bring it home. An example . . . come of this, um, . . . it really come . . . um, comes from an or – . . . a restorative justice organization based in the Oakland/San Francisco Bay Area called the Ahimsa Collective. Ahimsa, a Sanskrit word for nonviolence, and it was founded by Sonya Shah, who’s also a brilliant, amazing Southeast Asian woman who is also a survivor of . . . of sex – . . . child sexual abuse, of sexual violence, and, and shares about that in her work. And she started the Ahimsa Collective in p – . . . really to . . . particularly to address sexual abuse, and particularly sexual abuse that happens, um, to children. The Ahimsa Collective, part of their work is they go into prisons, and they hold, you heard about peacemaking circles, so, they hold peacemaking circles in especially men’s prisons with men who have committed sexual abuse. And part of their work with men in supporting them in internal accountability, although they are, they are within the criminal legal system already. But part of their work is
acknowledging these men, most of them who also were victimized, who also experienced sexual violence, who experienced sexual abuse at a very young age. And they believe, they have found that accountability is linked to healing, and that healing also rests on not only seeing what they have done, horrific, awful, right, abuses, but also with acknowledging and understanding, and helping these men to also understand and to better grapple with their own histories of abuse. It is critical, so . . . that is, that is one example. Another example . . . I’ll just name briefly another restorative justice practitioner who, I would say, works from a critical rights feminist approach is Rob Howard, who works in the . . . in schools in the same area, and he, for example, uh, sits with high school students. He’s brought restorative justice into the school, but part of his work involves talking about sex and consent. And in these conversations, and particularly in his conversations with young men, who have . . . um, may have touched, for example, a young woman without her consent, sexually. Talking with them about their own histories of harm. Talking with them about their own histories of abuse. Talking with them about how they have learned, for example, about sex, about abuse, about consent, has been critical. And so that . . . and that’s going to come up again, but that, um, is another aspect of, um, this attention to multi-layered histories of harm. We have to go beyond the simple victim . . . dualistic victim-offender binary. It is insufficient, and it doesn’t allow our work to actually go to the depth and complexity that it must and that it needs to in order to actually bring about the full-seeded transformation that it . . . that it requires. So, now I want to talk about gifts of visions, and when I say vision, I mean gifts related to goals, objectives, and, uh, also connecting to what Professor Samuel-Siegel mentioned, kind of this vision of what should be, right? This vision of what should be, which is critical . . . What transformative justice and restorative justice approaches that I would say reflect as critical race feminist approaches have done is to be very intentional about learning from and promoting the ideas and insights of communities that are most impacted by multiple forms of harm, oppression, and violence . . . What do I mean by that? Let me give you another example. There was an organization . . . it was actually a short-lived organization . . . it’s is no longer active, but it was actually very much fundamental to the rise of what is called community accountability approaches, and it’s called Creative Interventions. Creative Interventions was founded by Mimi Kim, an Asian-American, uh,
now scholar. She is a professor now, but at the time she was a social worker, she was a case worker, especially working, again, in immigrant communities. The – . . . and within, uh, domestic violence . . . within the anti-domestic violence and anti-sexual assault movement. And so, Mimi Kim was one of these women of color who found that many immigrant women did not have the ability to go to, for example, the police, or to rely on the state, and didn’t want to, for a variety of reasons, did not want to rely upon the state. And, what Kim and others at Creative Intervention recognized is that like these communities, there have been many communities, and especially communities of color, who have never been able to fully rely on the state for protection. So, for example, if you think about slavery. Right now, in Virginia, we are recognizing, right, the . . . 1619, we’re recognizing, um, the significant moment of recognizing the . . . the . . . when the . . . when the first Africans were brought to the shores of Virginia . . . to be used, abused, exploited, for capital. And, when we think about violence . . . when we think about racial violence and sexual violence, we have to think about enslaved, for example, black women, who were experiencing sexual violence from their captors, who were also experiencing harm from those who they were also living with, right, um, other enslaved persons. And they weren’t able to run to, for example, um, their captors or run to the criminal legal system because that was ordained. It was in law. It was allowed. It was justified. It was legal. Particularly for their captors, right? They were property. And so, that tells us that there have always been people . . . in the United States . . . always been communities that have never been able to fully rely, for example, on criminal justice agencies for protection. It is maybe, uh, surprising, um, idea for some, but for some of us it’s very familiar. And so, because of this insight, they said . . . they recognized . . . they said, therefore, many communities who have never been able to fully rely, right, on institutions . . . on formal institutions for protection, they have had to find some means to assure safety within their communities . . . some other kind of means. So, they begin to collect stories to do that, and they collected stories, um, from people to ask them how had they gone about this. The fourth – . . . the fifth, um, . . . and those stories, I’ll just mention a brief thing about these stories . . . they cited a project called the Storytelling and Organizing Project, and they used . . . they collected stories of how people had actually addressed . . . particularly sexual violence, domestic violence, outside of the criminal legal system and
then they begin using those stories as a means of organizing, as a means of saying how can we learn strategies from this approach. The fifth, um, gi – . . . gift of vision, which is connected to the sixth, is to foster a shared political vision of a world that doesn’t depend on prisons, detention centers, and policing for safety and security. And so, this is a central vision of the transformative justice movement, but it’s also a vision that is, uh, offered and really held onto quite tightly by restorative justice practitioners, who have more of a liberationist agenda, which means an agenda that is, connected to number six, recognizes and confronts systems of oppression. What do I mean by that? I mean that we can recognize racism exists, patriarchy exists, homophobia exists, capitalism exists, ableism exists, xenophobia exists. That’s recognizing it, and that inner effort to you challenge . . . [inaudible] . . . to secure . . . [inaudible] . . . we have to acknowledge the incidents of oppression. There’s an idea within the practice of peacemaking circles . . . uh, Professor Samuel-Siegel talked about peacemaking circles . . . that when everybody sits in a circle, all of the systems of oppression and hierarchy magically leave the room [laughs]. Yes, there are some ways in which peacemaking circles help to, um, balance power relations. For example, by giving everyone a voice. But those hierarchies are in the room. Whether you use a peacemaking circle, or a conference, and so, it is absolutely imperative that we not only deepen our understanding of these systems of oppression, but how they are operating in our relationships, in our practices, and how they might have also played a role in the harm that took place. That is the sixth gift. Um, I’ll go through the gifts of strategy in connected ways. The . . . the seventh gift . . . and so gifts of strategy, when I talk about gifts of strategy, I’m talking about gifts that relate to practice, or what’s called praxis, right? This confluence of theory and practice are this cycle by which we engage in action and form by theorizing that informs our action—cyclo-praxis. One of the . . . so Professor Samuel-Siegel also wonderfully talked about these approaches, these practice models in restorative justice, which include, um, conferencing . . . there’s community conferencing models, there’s family conferencing models, different kinds of conferencing models. There’s peacemaking circles that are used for a . . . in a variety of different ways. Uh, there, um, is a practice that, uh, started as victim offender mediation . . . some still use that title, some . . . some . . . some do not. And . . . but those are some core practice models in restorative justice. Critical race feminist
approaches help us to think more broadly about strategies or practices that might integrate into those, but also might diverge, and one of those is political education. So, with alongside recognizing and confronting instances of oppression . . . one way that we do that is political education, and by political education I mean intentional education that builds awareness of how society is organized, structures and institutions within it, systems of power and privileges, and how we can create new ways of being and relating with one another in the world. That is what I mean by political education. So, for example, education around whiteness and white privilege, or . . . education around patriarchy, and, um, what is enthusiastic consent? What is all those things mean? That is part of, uh, pol – . . . political education, and that’s often done in participatory ways, right? That is lectures, I’m doing now, but ways in which people share and talk together about their experiences and build some collective analysis and think about what then do we do with our understanding of how the world is working for or against us? And so, part of the reason that political education is critical in relation to restorative justice, especially when we think about racial and gendered harms, is because . . . and I’ll example of, again, sexual violence, sexual harms . . . sexual harms are sustained, I would say, and also, um, not only sustained, meaning kept going, but also, um, the roots of harm . . . And, I’ll . . . and . . . a transformative justice perspective will say that all harm . . . all violence in society has its roots in systemic oppression, but we can think about that, for example, maybe more easily, by thinking about just the example of sexual harm, right? Um, Angela Harris, critical race theorist, legal scholar . . . Professor Harris, she talks about how gender violence . . . she says we need to think about gender violence more broadly than only, um, violence that women and girls experience. She says that one example . . . or one additional way to think about gender violence is to think about how men and boys use violence to police no – . . . rigid notions of masculinity. You’re not conforming to what we say a man should look like, be like, show up like, dressed like; therefore, you are attacked, beaten, ridiculed abused. That happens very often . . . very common. And so, in order, for example, to disrupt that notion of gender violence or other notions, we have to undo and really retrain, for example, notions of what it means to be a man in society. So much of violence rests on these dominant and really restrictive and harmful ideas, and so, really undoing those, those ideas and confronting those harmful cultural and social norms.

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cultural and social norms, again, that place some people, um, at higher values than others. Challenging those ways of understanding has to be a part of restorative justice practice, and one reason that that must be the case . . . and I’ll just . . . I’ll give you an example of what that could look like, um, uh, Noori Nusra who also worked with the Ahimsa Collective, she used to work with, uh, Impact Justice, and one of the things I do with the Zehr Institute for Restorative Justice is I get to host wonderful conversations. Uh, we do this usually through webinars, and so, once a month, I and my colleagues host webinars . . . they’re usually on the third Wednesday of the month . . . brief commercial . . . uh, and, so I hosted a conversation . . . that’s where these anecdotes come from that I’m referencing . . . called . . . it was about transforming sexual harms, and Noori Nusra actually created the first, um, I think it is . . . the first diversion program for young people responsible for sexual harm . . . of experiencing sexual harm . . . the first diversion program through the organization of Impact Justice.

So, she was talking about . . . talking to a young man who had, again, touched a young woman without her consent and . . . sexually . . . and, so, she asked him, “Why did you do that?” And, as she talked with him . . . ongoing meetings, ongoing meetings, ongoing meetings . . . she was able to get to some of the ways that . . . for example, he had internalized the idea that it’s better to touch someone, he can go back and tell, you know, his friends that he had done that . . . touch someone sexually . . . than go back to his friends and say “I liked her.” Of course, there’s ideas, of course, connected to that about power, about control, acknowledging that, but, but part of it also was these ideas, and so she began . . . within the . . . to work with him to try and help him to rethink his notions and understandings, rethink what was normal, meaning what was normal, but . . . what was normal . . . but what was also harmful. So that is also . . . including that political education, both within restorative justice process and outside of it, is really helpful because it also helps restorative justice to be more than just a responsible approach, but one that also prevents. The . . . the . . . last three strategies, pursuing long-term engagement strategies as prerequisite alternative options to primary party encounter models have to do with not only using, or relying on . . . Professor Samuel-Siegel called “the encounter” between primary parties, but actually, for example, in transformative justice there are . . . there is a reliance on a much deeper engagement of a group of people connecting with a person who is harmed and the person who is responsible
for harm, providing safety, support, providing accountability on an ongoing basis rather than rushing to bring them together, and those processes often last for more than a year. And they found that those are actually more likely to address the critiques that restorative justice has received by anti-domestic violence advocates, which is an insufficient power analysis and also insufficient attention to the safety of survivors, so those processes are used. Similar to that, sustained and collective approaches to prevention, intervention, and response, including community organizing, is practiced by groups such as the Audre Lorde Project in New York City, they’re safe outside the system collective. They are a group of, of . . . of queer people of color, who are being beaten up, often times, on the street because of both their sexuality and their race, and so they had to create ways of being safe and also responding to those harms, and they began to use community organizing, for example identifying places people could go to in their communities, organizing with, um, with local organizations to transform norms and ideas around, um, harm and also, um, problematic ideas around queer people of color. And the last gift, um, that I’ll just mention briefly, as my time is up, is to build capacity to challenge violence within informal networks. This one is especially important when we think about the notion of community which is often lifted up in restorative justice. The notion of community is often very abstract. The Bay Area Transformative Justice Collective says we need to get more specific about community, and so they created the notion of PODS, which is actually identifying, if you were harmed, who would you go to? If you participated in harm, who would you go to? And then they began teaching these networks of people, even basic skills. How do you give an apology? How do you listen deeply? And so those are some basic skills we also need to incorporate into our commitment to restorative justice. And I believe that with the critical race feminist approach, that incorporates these and many other insights, we will not only be able to build a more robust restorative justice, but also one that is much more attentive to issues of social identity and oppression and give us an increased capacity to address racial and gender violence. Thank you.

[applause]
Ken Anderson: Everybody, let’s give Dr. Turner another round of applause. [Applause]. [Inaudible background talking with more applause].

Jackie Cipolla: We’re going to take a five-minute break before our 11:10 panel.
RESTORATIVE LAWYERING AND WELLNESS

Brenda Waugh
INTRODUCTION

Rachel Hott: Hello everyone. Good morning again. [inaudible speaking and laughs] You’re fine. I hope you all are enjoying yourselves. Um, I’m Rachel Campbell, I’m the current communications editor for the Public Interest Law Review, and it’s my pleasure today to introduce you to someone whom I’ve gotten to know very well over the past few months, um, Ms. Brenda Waugh. Brenda is a lawyer and mediator licensed to practice in Virginia, West Virginia, and DC. She graduated from the University of Virginia in 1982 and West Virginia University Law School in 1987. After law school, she began working as counsel to the West Virginia Senate Judiciary Committee and with the West Virginia Supreme Court of Appeals as a clerk to the committee, creating professional rules for family court. Her later work as a prosecutor in Kanawha and Berkeley counties created an interest in finding ways to address harm experienced by victims, prompting her to earn her master’s degree from Eastern Mennonite University in 2009. Brenda has taught at both West Virginia University College of Law and Eastern Mennonite University. She has published several articles in academic journals pertaining to restorative justice and has presented on the topic of restorative justice at conferences throughout the United States and Canada. Together, Brenda and I have co-authored an article on the attorney disciplinary process, and an . . . the imposition of an alternative restorative based approach that would help to contribute to overall lawyer wellness. Thank you, Ms. Waugh, for coming to speak with everyone today on a very important topic.

RESTORATIVE LAWYERING AND WELLNESS

[music]

Brenda Waugh: Can I get the next slide? And I, um, I have really enjoyed working with Rachel Campbell. When, um, Jackie and Rachel asked me to, uh, participate in this program, uh, I was pretty hesitant. I am too busy and overcommitted, but their zealosity and excitement about restorative justice lured me in. Um, and I agreed to participate only if I could find a student to collaborate with. I think it’s really important that we lawyers learn how to collaborate on all levels and find ways to . . . to work together in ways that, uh, share
our vulnerabilities, um, and still we find ways to mend those and work together and create, you know, a nice collaborative process. So, Rachel and I have had a lot of challenges, um, over the last several months. We’ve had to do almost all of this via the internet or emails or video conference, but it’s been a great pleasure to work with Rachel Campbell, and I am so happy, um, that I was able to work with her on this project. So, what an idea. This came up when, um, when Jackie first talked about this with us, and Rachel, when we first talked about it, um, I was going to talk about my, my practice as a restorative lawyer. Um, I’ve been working on that since I graduated from EMU, trying to figure out how to bring the principles and practices of restorative justice into the ordinary practice of law. But, I went to a conference back in April, um, where I was presenting on lawyer wellness and the relationship between restorative lawyering and restorative wellness, and I heard a lot about lawyer discipline, and I really never thought about it in my thirty-year career, but all of a sudden, after all of this time, this idea went off in my mind, like, what if we married restorative justice and lawyer wellness and attorney discipline? So, I reached out to Rachel and said, “I have this idea – what do you think?” And she said, “Let’s explore it.” So, this is our effort to explore, um, this idea. We want to invite you to participate with us, and so we’re going ask you to raise your hands, and we’re going to ask you to raise your hands for two reasons. One is so we know kind of who’s here, but we also want to be able to see . . . and we want you to see and for us to see, what kind of baggage we bring to this topic. You know, um, lawyer wellness is a very . . . we’re going to get into some more detail about that later . . . but it’s important and highlighted issue right now, and the reason being, um, is that lawyers are suffering. So, a lot of this is to help us connect with that part. So, we’re going to ask you to volunteer . . . can we get the next slide up . . . you’re going to volunteer, to raise if your hands if you agree . . . uh, Rachel’s agreed to do this part of the program.

**Campbell:** Okay so first, raise your hand if you agree.
“I am a lawyer.”
A lot of people here.
Raise your hand if you agree, “If I could quit practicing law, I would.”
[laughter]
Raise your hand if you agree, “Sometimes the practice of law feels overwhelming.”
[laughter]
Raise your hand if you agree, “When I read the Rules of Professional Responsibility, I feel confident that I’ve never acted contrary to any rule.”
[laughter]
We got one back there.
[laughter]
Raise your hand if you agree, “I work in the judicial system.”
A couple people.
Raise your hand if you agree, “When lawyers show weakness, it kills their business.”
Raise your hand if you agree, “I often skip meals or get less sleep in order to get my work finished.”
Raise your hand if you agree, “I feel competitive with colleagues in my office.”
[laughter]
Raise your hand if you agree, “I enjoy my work because I like to help people improve their lives.”
Raise your hand if you agree, “The practice of law is hard work. It drains a person emotionally and to do it right, one has to spend very long hours on the job.”
Raise your hand if you agree, “Difficulties with my personal relationships is a necessary by-product of practicing law.”
[laughter]
Some honest ones out there,
Raise your hand if you agree, “I personally know of profess – . . . professional associates or colleagues who have suffered from abuse of drugs or alcohol.”
And raise your hand if you agree . . . if you agree, “I have felt helpless when I had a colleague who was suffering from depression or abuse issues.”
Okay.

Waugh: So, on those raising your hands, um, anybody raise your hand, um, and kind of surprised that you found yourself raising hand, or were there any observations that you looked around the room that you were surprised to see other people raising their hands? . . . Nobody raised their hand on the question about whether or not, um, . . .
having difficult personal relationships is a byproduct of practicing law. I, I found that . . . curious. Is anyone willing to tell me why they did not agree with that statement?

[Inaudible audience member response]

**Waugh**: So, you didn’t raise your hand because you’re like it, it is a byproduct for most of us, but it’s not necessary . . . that we could invent ways that it’s not going to have to flow. Anybody else have any more comments on that one? I put that up there just . . . oh go ahead, I’m sorry.

**Audience member**: [inaudible] . . . the aspect of, I think there are a lot of people out here who really have problems with their personal relationships, but it isn’t always a necessary problem, um, sometimes it is . . . [inaudible]

**Waugh**: So, what he was suggesting was that there are . . . that, that it’s also not a necessary byproduct, but it’s not unique to the legal profession, that there are other professions that potentially have this, um, detrimental effect on personal relationships via byproduct of their profession. Um, and I think it might be depending upon what your profession is training you to do, um, as to exactly what that might look like. So, the legal one might look different going back to what you said, just because we’re trained to be combative, we’re trained to argue over things, we’re trained to never be wrong, we’re trained to push our way, and so we go home, and we tell our spouses and our kids this is the way it’s going to be and everybody goes “whoa.” [laughing]

Or, I mean, I’ve, I’ve seen it in so many offices I’ve worked with where we’ve got all the lawyers together and everybody’s got that same kind of that personality and that same training and everybody wants to be in charge, everybody wants to run the show, everybody wants to argue until they get their way right. But other professions, or I guess in the medical profession, maybe it’s the long hours that are demanding, that that impairs personal relationships. Police officers having to do different varying shift work could impair personal relationships. So, um, is that what you were kind of thinking?

**Audience member**: [inaudible]
Waugh: Any other sides anybody want to comment or discuss? I’m not going to ask you all to divulge what rule of professional responsibility you may have breached [laughter]. There was one person here that hasn’t breached any. Um, I honestly probably couldn’t even count them if I tried. So, I’ve been practicing since ’87 so, um . . . so let’s move on a little bit and talk about lawyer wellness. Those questions, you may have noticed, kind of start, uh, start bringing up this issue. What do you guys know about lawyer wellness? What do you think that means or what has anybody heard about that? . . . Anybody working on any projects with lawyer wellness? What . . . lawyer wellbeing?

Audience member: I’ve heard of it in relation to Lawyers Helping Lawyers or, um, people with substance abuse issues.

Waugh: Yes, there’s organizations Lawyers Helping Lawyers, um, that, uh, do work with folks that are dealing with substance abuse, and I think they are kind of extending their net a little broader to hit depression as well. Um, the other day I was talking to a colleague about doing this presentation, and I told him we were going to be talking about depression and substance abuse. And he, um, . . . we were texting each other because we were talking about our running schedule and he said, “I suffer from depression,” and I said, “well yeah, you’re a lawyer.” And he said . . . I said, “I think practicing law actually feeds depression, I know, you know, it feeds anxiety, it feeds all of those things because we’re just dealing with conflict so much. So when you look at lawyer wellness, there’s the Lawyer’s Helping Lawyer’s folks, but I think they’re getting broader, and the work I’ve been doing in lawyer wellness has been trying to look at, um, what is there about the practice of law that is . . . that does potentially create a toxic environment? Because I do this mediation, and I do this restorative justice, and I do collaborate law, and when I’m doing a collaborative law meeting – I feel great. I feel like I’m solving problems, I feel happy. I go home. I mean I . . . you know it’s not all rainbows and unicorns . . . but I mean I go home, and I don’t feel like I need to go run 15 miles to feel better. On the other hand, if I’ve been in a contested hearing all afternoon or a trial for three days, I mean, my whole body is changing. It’s a completely different feeling, so I’m curious about lawyer wellness and whether we can move out of the
adversity, out of the competitive, out of the angry pushing pro–practice and still advocate for our clients in a way that’s healthy for our clients and healthy for us. So, where does this whole concern about lawyer wellness come from? Um, if you’ve not read Susan Daicoff’s *Lawyer Know (Yourself) Thyself* and you’re a lawyer, I recommend you read it. She kind of hits the nail on the head about our personalities, who we are before we go to law school, how law school makes parts of our personalities bigger, and the practice of law makes parts of them bigger and some other parts of them get suppressed, and so, I feel like Susan Daicoff’s book is great about that. Um, I used her for a source on this. You can find any number of sources to, to support this, but the bottom line is, is that lawyers have one of the highest instances of depression, alcoholism, and substance abuse. I got very interested in this topic in 2015 when, within a six-month period, three of my colleagues from my professional life all died from suicide. Um, all very good lawyers, one of them had been in bar leadership, one of them had clerked for a fourth circuit judge, um, and one of them had been a prosecutor with me. And, um, within six months they all died from suicide and I was like what is going on? Fortunately, that hasn’t happened again, but that’s what raised my concern. It’s like this is, this is a problem for me. What is going on? So, the factors that impact lawyer wellness, um, . . . looking at those, anybody have any comments about any of those? Anybody agree, disagree, or want to make a statement or . . . what am I missing? Because I think that’s one of the one’s I made up.

**Audience member:** I’m just going . . . I’m going to comment on the, uh, stigma attached to help seeking behaviors . . . uh, just to remind everyone that because there may be some stigma attached to seeking help, that . . . that’s part . . . the reverse of that is for us to be sensitive to projecting a willingness, making an offer to help, so that nobody has to seek it.

**Waugh:** Yes, so you’re saying that, that, you’re seeing the stigma attached to help seeking behaviors, and one way to help mitigate that as lawyers is to offer help before somebody has to ask for it.

**Audience Member:** Yeah, and that, I mean, in incremental and small ways, you can help people, and they don’t have to feel like they had
to go out and seek help, you know, and, and honestly, little, little things help a lot. So.

**Waugh:** And you know, this isn’t just about alcoholism and drugs and depression. There’s little tiny things too. Um, you know when I was a brand-new lawyer, I was told not to tell anybody that I had to leave court early to pick up my kids because people would think I was not serious about my profession. One time, I called somebody at a, at an office I was working in to ask them to send the discovery over in Word rather than PDF and somebody said, “You can’t do that, that’s going to show that we’re weak!” And I was like, “Holy cow!” And . . . but just yesterday I, uh, emailed a colleague because I’m going to be late on some discovery, and I told him that, um, I need a little more time because I’d had a health issue with my family member, and, um, and I was working on this project with Rachel, um, and between those two things I was overwhelmed and having a really difficult time. And this is the opposing counsel, and he said, and he, he emailed me, and he called me and wanted to know if he could do anything else to help. And so next time when he has that happen, then maybe he’ll have, he’ll have that same experience. So, I think we can reduce the stigma with like the little things like you’re talking about. And . . . and actually, it’s just being kind. So instead of being a jerk and a jackass, you could just be nice and helpful. And that can change the environment.

**Audience Member:** I think the, uh, general public perception of the lawyer is, uh, poses a lot of people being shy saying that they’re a lawyer because it’s a stigma sometimes that people have at home, or a bad impression of lawyer.

**Waugh:** Yes, people . . . the . . . your, your comment goes to the, the public impression of lawyers and how some of us were ashamed to even say we’re lawyers anymore. And I do tell people sometimes, especially when I’m traveling or something, “Yeah, I’m a mediator.” Yep. Mediator. Um, the, the thing is though, and we’re going to get to that in a little bit longer . . . in a little bit, why we feel restorative justice components to our discipline system can actually help improve, uh, public perception. So, I’m glad you brought that up because that’s a good segue into, into kind of the next part of our, our segment here. So, this is just, uh, how did we get into this situation
with lawyer discipline? What does our lawyer discipline system look like and how did we get here? The lawyer discipline system has been self-regulatory in the United States for at least about a hundred years. Ah, you can go back further than that and there are other components of it, but at least for a hundred years lawyers are in charge of ourselves. So, we have a massively great opportunity to fix it. We’re not like the professions that have to get somebody else to fix it or go to the legislature and say, “You fix it.” We can fix it! It’s self-regulatory. The other thing, um, that . . . that you need to think about is that there’s the model code, and that’s what the rules are, and then there’s the process for enforcing the model code. The changes we are talking about today could impact the model code, but they’re primarily focusing on the processes to enforce the model code. So, um, that’s kind of how we got here, where the, the standardized rules that have been adopted by the ABA off and on in different formats since about 1969, and the states then, the bar, self-regulatory committees, deciding what the process looks like to enforce those.

Campbell: And in Virginia specifically, um, most of you lawyers should know, that the process starts when, uh, an individual . . . it could be an attorney, it could be a client, it could be anybody . . . files a complaint with the Virginia Committee on Lawyer Discipline. And I tried to shorten this up as much as possible, but it’s, it’s a long, long . . . and we talk about in our paper . . . a long and draining process, especially for all the people involved. But if, after the complaint is filed, staff finds that an alleged misconduct violates the Virginia Code of . . . Virginia Rules of Professional Conduct . . . then the complaint . . . or, does not find that it violates it, the claim will be dismissed. Uh, but if they do find that it could be a potential violation, they’ll categorize it, um, and start an investigation, but they categorize it based on seriousness, so they do have a spectrum of seriousness of offenses, um, with category one being the most serious, and category four being the least serious. Um, an attorney whose conduct is under investigation will receive notice once the investigation has started and then they have 21 days to respond. And after the investigation, the Disciplinary Committee will decide whether the complaint should be certified to, um, the Virginia Bar for, uh, formal adjudication. Or they can impose, uh, a limited punishment, um, and throughout this whole process, the . . . the committee has the ability to dismiss the complaint at any time or impose that limited, um,
punishment, which the attorney can either accept or reject and opt for the . . . the formal adjudication. And once the complaint is adjudicated, there’s a variety of sanctions, many of which you’ve probably heard before, um, that could be imposed including license suspension. Um, there’s a variety of private and public sanctions, and then even disbarment in serious cases or cases of repeated misconduct. And so, um, this quote from the ABA Report on the National Taskforce on Lawyer Well . . . Well-Being really sets forth the notion that wellness and competence are two related concepts. Um, you really can’t have effective competence without being a well lawyer and taking care of yourself. And I also want to remind all of you of the Virginia Bar’s stated mission, um, so they . . . they . . . their mission is to protect the public, to, uh, regulate the legal profession, to advance legal services, and to assist in improving the legal profession and judicial system. Um, so in reference to the quote on the last slide, we asked, “Are we really meeting these goals?” And, “Is there another way?” Um, what can we do to improve upon lawyer wellness in the lawyer disciplinary system, and that’s what we’re here today to talk to you about.

Waugh: Did anybody recognize the lawyer that I had in a . . . two slides ago? It’s, uh, it’s Jeff Daniels playing Atticus Finch on Broadway. Has anybody seen it? I want to go so bad. And, I like . . . I couldn’t figure out what slide to use for that . . . what picture to use for that slide, and I was like, No this is great! Uh...uh, a modern Atticus Finch. So, he’s still this great lawyer, but I think what I’ve . . . what I’ve I read about the Broadway production, it takes the great lawyer that Atticus Finch is and makes him a lot more complex as a human being. And so I think that that’s our mission here, um, in marrying lawyer wellness and lawyer competence, is to think about the lawyer as a whole person with . . . that’s, that’s complicated and has a whole life and has a lot of skills, interpersonal skills, that need to be grown and nurtured so that they can be better lawyers by working better with their clients. Um, . . . so, the question becomes, like, what can we do? Is there another . . . is . . . and . . . and I . . . I’ve really, I’ve got to say I’m embarrassed that I studied restorative justice and graduated with my Masters at EMU in 2009, and I have advocated restorative justice in forums all over the place and all kinds of weird ways in civil cases, everything you can imagine. And yet, it took me ten years for the light to go off over my head that said, “Wait a
minute, can’t we use restorative justice in lawyer discipline?” Why would we do that? Well the first thing is... the problem with the way the system works now when a complaint gets filed, the complainant doesn’t even know what happens to it. They just disappear. Kind of like a victim in the criminal justice process. When they go and get... and, and... I’ve represented a lot of victims in the conventional criminal justice problem and sometimes they don’t... sometimes they don’t even know when their hearing is going to be. They have no input in some situations about the outcome. They’re just kind of kept in the dark. Same thing happens to the complainant in a, um, bar disciplinary proceeding. They have no idea what’s going on. So to go back to your comment about public perception... I mean, if my lawyer stole my money, and I file a complaint and I’m pissed off at him, and nobody tells me anything for a year, I’m going to think that lawyers just suck, and I’m going to tell that to all my friends, and I’m going to be disgusted by lawyers. So, the first question is how can we be more inclusive and include the victim in the lawyer discipline process? The other thing is, my friends that all died from suicide... one of ‘em... I mean we knew for ten years that he was really suffering and really needed help, and we didn’t know what to do. Everybody did everything they could. He worked for a really good firm. He had a fabulous family. Everyone did everything they can, but we didn’t have a good institutional way to help him. I want to have an institutional way, that when someone is suffering, we have a group of colleagues to come in and help. In restorative justice there’s a program called COSA, Circles of Support and Accountability, and sometimes when someone is being released from incarceration, or in other circumstances, you may form this COSA. It’s a group of people that the, uh, person that may be... reentering society, uh, or may be going on a probation... it’s a group of people that can all look out for him. They’re going to look out for him to make sure he’s getting the resources he needs... he or she needs... make sure that, um, they have some place to live, make sure their life is ok, but also make sure they’re not reoffending, support and accountability. And I’m like, what if we could have COSAs for lawyers that are having trouble? Whether they’re having trouble because they’re disorganized and they can’t manage their practice, or because they’re depressed, or because they’re suffering from substance abuse. What if we could have COSAs? So, when I talk about what would be more inclusive, that’s what I’m talking about. Bringing the victims in,
bringing other lawyer colleagues in, and the families. When some-
body files a bar complaint, it’s just seen as like this inquisition. This
investigation. We’re just going to look at this. We’re going to look at
this. We’re going to look at this. We’re going to look at this. And we’re . . . we might send the
lawyer off this way or that way, but it’s kind going in a straight line.
What if it’s not on a straight line? What if it . . . it’s weaving, and
we’re picking up family members, saying, how can . . . how can these
family members participate in this outcome? How can these col-
leagues participate? How can the judiciary participate? What can we
do to broaden the participation? And faster. We need to be faster. I
mean, uh, it’s just amazing when I read these reports of the lawyers
that are eventually disbarred. Sometimes it takes two and three years.
Meanwhile there’s all this chaos going on. What can we do to exped-
it? And by . . . well let me keep going here, I don’t want to get
behind . . . And then what can we do to promote lawyer wellness?
The system we have now is not promoting lawyer wellness. It’s . . .
just mirrors the criminal judicial system where a complaint gets filed,
it gets adjudicated, and sanctions gets awarded if the . . . they decided
to be awarded. What can we do to make it more re – rehabilitative?
Um, so, can we create a process that would do that? . . . Bravo! Re-
storative justice. And, um, I believe that restorative justice can be
used to create the framework to really reconfigure what our judicial .
. . our, our, our disciplinary process looks like, and . . . Can you hear
me ok? Somebody was making a sign back there, and I didn’t know
it, uh, maybe I shouldn’t have brought it up because maybe it was an
obscenity and I didn’t know it, but, uh, I wanted to make sure you
could hear me. Trying to figure out if there’s a frame . . . that . . . how
restorative justice might be that kind of a framework to both improve
lawyer well-being, and, consequently, improve, um, legal services.
Next slide. The key here is looking at restorative justice, um, I’m not
sure, I couldn’t get here this morning, so I’m not sure what you guys
know about Restorative Justice, but to me, the heart of restorative
justice is looking, uh, at wrongdoing and looking at what the harm
was and how that harm can be addressed. What needs result from
harm and how can those needs be met. Rather than what rule was
broken and what punishment can be inflicted. And, so, that’s the
heart of restorative justice, and that is what I would like to see be the
backdrop for lawyer discipline. Um, here is a chart that, most of the
time when I’m telling my fellow lawyer colleagues about restorative
justice, they all like this. Um, they feel like it’s concrete and it helps
them understand a little more about, you know, what restorative justice is all about. And so, as you can see, as a whole, it really just kind of shifts everything from rule, and guilt, and sanctions, to harm, needs, and responsibilities. So, um, has anybody else talked about Howard Zehr today? [laughter] Howard is, um, . . . he’s just like one of my favorite people in the whole world, so I had to put his picture up here. He would be kind of mad if I, I think he wouldn’t like it very much, but . . . and a friend of mine pushed me, who was a fellow student at the same time I was at EMU, and she took this picture, and I loved it because it gave me the space to put the five principles on. Um . . . But Howard, um, he, he was one of the original folks to start using restorative justice here in the United States, uh, with a program called Warp out in Indiana, and he followed up with Warp, uh, with his book, Changing Lenses, and if you’re interested in restorative justice, reading Changing Lenses it’s, it’s really . . . oh, you’re not going to take a picture and show it to Howard, are you? [Laughter] Who’s going to repair the harm? [Laughter] Now look, can you go back to the principles for just a second . . . okay, well having, having been busted on this, and yeah, these five . . . so, I was going to suggest, Changing Lenses is really important to read and there’s, . . . and if you’re like a really kind of overworked lawyer who’s so exhausted and can’t really bear to read anything very long, uh, there’s a series of little books, and Howard co-authored a little book on restorative justice. It’s really boiled down, and, um, I love it because you can read it in about half an hour or an hour, and it’ll give you more of an essence of what restorative justice is. But when I talk about my restorative lawyering and my restorative practice of law and how I do that, the way I do that is I just kind of keep these principles kind of tattooed on my eyelids, and so when somebody comes into my office and they tell me about their case, I think well, what can I do? How can I be more inclusive here? How can I put right the wrongs? And whenever I’m dealing with opposing counsel that’s really mean and horrible and driving me crazy, I try to go back to the principles and say, “is there anything I can rely on these principles to, to help me make this more restorative?” Um, both Dan Van Ness who, um, . . . Dan Van Ness has done some really good videos, you can google him . . . Dan Van Ness and Howard both talk about restorative justice, um, . . . and any practice to resolve harm doing or wrong can be placed along a continuum, but some practice is more restorative than others and so in my work, I’m always . . . that’s why I’m looking at
the restorative law. I’m trying to figure out, what can I do to move the bar? This practice right now of being in this case with this trial and the judge making the decision and everybody else being in appall is missing as many restorative features as possible. It’s in this far end of not one bit restorative. What can I do to at least do to move it two steps over? Can I . . . can I find a way to get this into some mediation to move it over a little bit further? Could I move a little bit of collaborative practices into the way that I am dealing with opposing counsel to move it over? What can we do to make it more restorative? So, these principles are a good way to check in with yourself about what you’re doing and figure out how to make what you’re doing more restorative. Clearly, um, it would also . . . its . . . of course, our argument that, that this would also really change the face of, of lawyer discipline if we could find ways to incorporate this into our processes. So, here are . . . let’s see how I’m doing on time . . . here are some practices that are often associated with restorative justice when it’s in the criminal judicial system. Anybody do any of these? Yeah? Which one? [answer is inaudible] You do victim-offender conferencing? Can you describe for everybody what it is?

**Audience Member:** Bringing together a person who was harmed and the person who caused the harm, having preparation meetings with both parties beforehand to discuss the process, to explore possible concerns, um, and bringing them together in a space with facilitators to talk about the harms they occurred and recognizing the harm that the victim . . . for lack of a better word . . . experienced and then, um, taking steps to identify some of the needs and what can be done to address those needs.

**Waugh:** So, basically what you are saying, and I’m trying to boil it down a little bit, but if I do I’m going lose some nuances that are important so if you are interested please . . . please do research on it because there’s a lot of nuances. I think there’s sometimes a public perception that, um, victim-offender conferencing, it means, uh, to kind of throw the victim and the offender in a room and see what happens, and that’s not it. I think what you’re suggesting is that it’s a facilitated discussion with a lot of preparation where the offender and the victim and again the language fails us, um, come together and have the opportunity to examine the harm and what could be done to make, the uh, . . . to right the wrongs. Is that right? Okay. Anybody
else, uh, familiar with any other processes or they want to add anything else about victim-offender conferencing? Well we talked a little bit about COSA and circles of support and accountability, and the, the first case that I am aware of with that that had to do with, uh, a sex offender that was going to be released because he had served his time, and he was just straight up going to be released back into the community, and there was no parole, probation, nothing. he was straight up just going to be released, and the community was really upset, they were worried about the kids. It was a small community, everyone knew him, and they were worried about him being loose in the community. So, uh, the church got together, and they created circles of support and accountability to meet with the offender and check in with him, uh, and watch what he is doing, but also provide resources. And, uh, that . . . there’s going to be a little bit more about that case in our paper, but, um, basically the guy lived in the community, and there was never another report of, uh, of abuse, so that’s considered successful. Kind of the neighbor to, uh, re – . . . to COSA, uh, is a reentry circle. I know there’s a lot . . . there’s really successful programs in Hawaii, and there’s also some I’m familiar with up in Maryland. Where . . . when an offender is ready to be released from prison, a lot of time there’s no plan, it’s like, here’s your bag, good luck! And, um, and a reentry circle is usually convened prior to the release of the person that has been incarcerated to help figure out what the reentry is going to look like and try to create support with professionals and family members and employers and everybody else to make sure that the reentry is successful. Sentencing cir – . . . Sentencing circles, um, have typic – . . . most of the ones I’m aware of, have been in Canada and Minnesota. But in those, the judge convenes a circle and a circle process, um, which usually uses a talking piece and restricts the person who may be conversing to whoever is holding the talking piece and is passed sequentially around the circle. Um, the judges have used that often for an advisory opinion about what would be the appropriate sentence. Um, the first . . . I think the first one that I am aware of was Judge Berry-Stewart, he was ready up, in the Yukon territory, to sentence a repeat offender that just kept coming through over and over and over, and he’s like, I’m not doing this again, we have to come up with something else, and so the, uh, the indigenous community talked about how they had used, uh, these circles, so he said let’s try it. And, um, that was, as far as I know, the first time that, uh, circle sentencing
was used. So, the next slide are other applications of restorative justice, and, I just want to make sure . . . school discipline is one of the areas that I have worked least in, but it’s one of the most successful areas, um, in restorative justice. Um, I know Fairfax County’s, uh, entire system is now based on restorative justice. There is a lot of critique that I have read, um, about restorative justice for school discipline, but when I go to read the articles usually they are talking about something that’s not the kind of . . . that doesn’t fit the definition of restorative justice I’m, I’, familiar with. It’s, it’s . . . I don’t know, it’s almost just like a word someone is using, I, you know, and they’re afraid . . . afraid it’s not hard enough, and I have seen that criticism, but, um, but I’ll tell you, there’s, there’s great success in it, with, with, uh, far less suspensions and disciplines. I, I’ve worked with two different counties in West Virginia that changed their systems from being entirely punitive to being as restorative as possible with no money, and, uh, one school system went from having, I don’t know, I think like a very large number, I can’t remember, more than 20 suspensions in a year, it’s a very small system, to none the next year. Um, so it’s . . . I’ve seen it. And that’s with very little training and very little resources, but a lot of dedication, and they were able to do it. Um, Lorraine Studsman Ampstead has written a little book on restorative discipline for schools, and I recommend that book as well.

Restorative justice is also used with juvenile offenders and child dependency proceedings. With juvenile offenders, that began in New Zealand, um, in 1989, when the government passed a new scheme to deal with juvenile offenders. Um, and basically . . . what it requires is a series of meetings between the family members, professionals that might be involved, the victim, and offender, following a juvenile offense. And child dependency proceedings, there are several . . . many, many areas in the United States that use restorative justice processes, especially talking circles, um, to address child dependency issues, and they usually call that family-group decision making. The, um, Casey Foundation, online, has some really great resources on family-group decision making . . . So, what is all this . . . anybody, anybody have any ideas . . . what does all this have to do . . . what do you think all this restorative justice stuff has to do with lawyer discipline? Anybody have any ideas or thoughts on that? But where do you think that the, the match might occur? . . . One of my law school professors said whenever she says something in class, and nobody says
anything, to just keep waiting until somebody says something, and they will.

[Laughter]

Waugh: She’s like . . . I’m going to want to eat lunch, okay?

**Audience Member:** Thank you for building on [inaudible] . . . The kind of scenario that I referenced to the . . . uh . . . the takeoff . . . airline flight, and we all get that instruction, the, the planes losing altitude, or oxygen, or whatever, the mask is going to drop down. So, if your, if your practice is losing altitude because you’ve got problems, uh, the historic part is, the thing you do first is help yourself to get to some stability. It always tells you, put on your mask first, and then you can help the dependents, or the clients, or the others that, that need your help when you . . . you’ve got to do something to restore yourself to be able to provide the trained good that you can provide others.

Waugh: That’s a really great point. So, so the key there is that, that if you’re going to be working to help your clients, or if you’re going to be helping other lawyers that might be in need, or if you’re going to be helping, even your family, the first person that has to be healthy is yourself. And, um, . . . most of my studies at EMU also had a very big component of self-awareness. And I think that that is something that lawyers often overlook. I mean, we’re very aware of ourselves as far as how we look in court in front of the jury, and, um, how we look when we’re storming out of a mediation because they won’t negotiate, but we’re not necessarily very aware of what our triggers are, what is upsetting us, what’s making us maybe not perform at our best level. And so, yes, being able to get in touch with that is, is really key to being a good lawyer and to be able to being a restorative justice practitioner as well.

**Audience Member:** *inaudible* Let me just out myself now. I’ve represented the Bar off and on for over twenty years. Um, there are actually an amount of opportunities for restorative justice within the process, but they are not explicitly written in the process. So, for example, back in the 90’s, I had a case in which I was representing the Bar. The lawyer had been, um, uninformed, or unable, to handle his
trust accounts appropriately and anyone who’s ever had to manage a trust account knows there’s very specific rules about how to handle a trust account. And, so, the Bar actually worked with him during the disciplinary process, so there’s no question he was mismanaging his trust accounts, but the Bar worked with him, and part of his discipline was to do quarterly reporting and have an accountant who would oversee that reporting to try to educate him and give him the tools which really to me falls into this restorative justice because you truly address the harm. The Bar’s responsibility, as you mentioned earlier, is to protect the public. So, the goal is to have lawyers who aren’t mismanaging your trust accounts, who aren’t mismanaging money that doesn't belong to them, so, the Bar took that opportunity to try to educate this person to protect the public, insert Bar's goal, but also to educate this individual lawyer which would then protect that lawyers clients, and it did directly address the harm that was occurring, which was the mismanagement, mismanaging of these funds by this lawyer. So, there might be opportunities that aren’t explicitly in the process that are out there, and it takes, we mentioned earlier that, in the process, a lawyer can accept or reject certain discipline. They can offer certain things too. And so just to evangelize a little bit, because there a lot of people here in this room, a lot of lawyers in the room, if you are aware of the disciplinary process, there are opportunities to propose, or to suggest something like this, that might actually address the harm, that would give a lawyer an opportunity to be educated, or if it’s a substance abuse, that’s obviously one of the things that’s being talked about a lot these days, with the um . . . the, the committee that the, that the Bar put together about lawyer wellness . . . but, but if you see a problem, there’s a lot of ways to address it, ways to refer Lawyers Helping Lawyers now that didn’t use to happen. You just got a dis . . . you got a disciplinary action against you. But . . . *inaudible*

Waugh: I love . . . I love that story. And yeah, I didn’t . . . I don’t . . . I think that the . . . there's nothing wrong with a lawyer disciplinary committee in as much as, they haven’t . . . nobody’s intentionally done anything wrong, I just want us to put on . . . I want a new lens. That’s what I mean . . . restorative justice is a new lens, I want a new lens, and you’ve given a great example of what that lens could look like, when a lawyer is having problem managing your trust account, then, provide them resources to teach them to manage the trust
account. That is addressing the harm straight up front, and I would love to be able to find ways to institutionalize that, that type of a response, even expand it, so that everybody knows that just because somebody has turned in for that, maybe you’re going to bring in their . . . their other lawyers that they may associate with, or maybe family members to say, I want to be part of the, the improvement period, you know, design, um, because [inaudible] the chaotic. And that might tip you into something else to say, maybe there’s something else going on, or maybe [inaudible] fine. I think it’s just he needs to learn how to do this math. So, I mean, I think expanding to be more collaborative and bigger and institutionalizing the story you’ve told is exactly the track I would love to see us go down. That sounds perfect. So, thank you for sharing that story. . . . And so, what, what would a, a practice look like in . . . you know, this is, I only thought of this idea in May, so, it’s really kind of . . . definitely coming into focus . . . Rachel and I, neither one of us had thought of it, and we’d say, well, there’s all kinds of neat things, but we're . . . it's still developing, and I don’t know what it would look like, and it’s not something that will go to buy in a kit from the ABA, because what works in Virginia is not going to work in Wyoming and not going to work in Hawaii. So, it would have to be something that would be designed from our own community, for our community, to benefit our community. So, um, so what, what, what, what could it look like? What are some potential applications? . . . And so, we’ve talked about a little bit . . . a few of these. So, the, the stigma that you brought up before, so instead of attaching the stigma, learn collaborative ways to problem solve. Um, when, when I did a training with the Virginia Bar recently, they had a factual scenario about what you’re supposed to do when you see this lawyer who seems like they’re probably . . . or always a little bit drunk or hungover in court, and everybody talked about what role they were violating . . .

Carl Hamm: Your mic's cutting out. Can I just, um, let me make sure this is plugged in properly, okay.

Waugh: What rule they were violating and how to report it and all that stuff. And I thought, Well, why don’t you just go off lunch with them or have ‘em to dinner and check it out? You know, maybe, maybe that’s not . . . they’re not drunk at all. Maybe they just never sleep because they’re working too hard, or maybe they are
developing a drinking problem. Maybe if you can have for dinner, you can get a sense of that. I mean, so what would be some more collaborative ways to problem solve rather than going to, to the reporting and the sanction, and how can it not be a stigma to be able to need some help? What? . . . You know when a, when a lawyer has to miss some deadlines because they’re sick or has miss deadlines because they’re overwhelmed. Isn’t there a way we can work collaboratively to deal with that rather than to attach a stigma to not being independent enough? Um, these are just some ideas that I was thinking of. There’s probably thousands of idea, um, but this would just be a way to kind of get started on looking at ways to bring restorative justice into lawyer discipline. . . . And I think we are about out of time, let’s, let’s . . . let me just ask you guys this first. Can you go back just a second?

Campbell: Okay.

Waugh: I think, do we have five minutes?

Campbell: Like, three.

Waugh: Go to the next one. I’m sorry. There we go. Anybody have any ideas to, . . . anybody have any suggestions here on what we can do to improve lawyer wellness, or what the program, a program could do, if they think depression is adversely impacting a practice?

Audience Member: I don’t know if we have something that can get that far. Sort of having a, a council of elders having some sort of an advisory group of other lawyers of those who’ve been through it, those who work through the process, that someone can turn to. Not just the Bar, um, though the Bar’s got a great ethics line, if there's something where, hey, I may have crossed the line, you don’t want to report it to them and even ask hypothetically, but to have a group that you can turn to that, that can sort of assist and either help guide you back on that path or say, you know, okay, I did it right. Maybe there’s an opportunity *inaudible*.

Waugh: Yeah, so, you’re suggesting that we, that we kind of take a responsibility for ourselves, and our fellow attorneys, and make ourselves available to be more of a community and to deal with each
other’s struggles more communally, uh, rather than targeting them, uh.

**Audience Member:** But one outside of the disciplinary process.

**Waugh:** Right.

**Audience Member:** of the Bar.

**Waugh:** Move it outside that and have it be completely, uh, independent of the disciplinary process. That would certainly take care of a lot of issues with confidentiality, and, um, fears of, uh, repercussions. Anybody else have ideas to either of those? . . . You guys can’t rely on her up here every time. C’mon, if we can up finish a little early, we can get an early lunch. Back in the back.

**Audience Member:** I think to improve lawyer wellness there should be a real effort to forgive student loan debt. [audience clapping and laughing].

**Waugh:** Yes, the, the problem of having giant . . . I mean, lawyer wellness is definitely impacted by financial pressures, um, and then you add the pressures that you guys have that, that we didn't have, um, I can’t imagine what that feels like.

**Audience Member:** We can’t choose the careers we want. We can’t choose the practice areas we want. We can’t choose where we want to live. We have golden handcuffs when were lucky enough to get a job. So I mean, I had 180 grand in student loan debt when I got out from undergrad and law school, and I got a pretty good . . . decent help undergrad, but law school not much so, and I got out 15 years ago, and people younger than me are a lot worse shape.

**Waugh:** I, I appreciate you bringing that point up because I, I graduated with $20,000 in debt, um, and that is like [scared noise]. I, I worked through school, I didn’t work all the way through but . . .

**Audience Member:** [inaudible]
Waugh: And so, I think, I forget about what . . . even that was a horrible burden. I actually . . . I did end up filing suit against one of my, uh, loan companies, and I did win and that took care of some of the debt, but, um, I think that that does create a big cloud for you to even get started so that, that . . . of course it's going to be depressing to try to be working and then never ever be able to, to make any financial gain. Okay, I’d like to move on. Um, if you – there are . . . if you have any ideas, suggestions, criticism, anything at all, please contact us. This is in your materials. We’d love to hear from you. Um, you know, again, it’s a, it’s kind of an idea that’s in its infancy. So, I think it can go anywhere, and I’m hoping that, uh, there’s some interest. And the next slide I put up this to remind us of what’s at stake here. Um, this is a woman, Joanna Litt. She wrote a piece for a blog called Big, . . . How Big Law Killed My Husband, and this is her husband, Gabe, making a speech at his brother’s wedding, and I love her quote, because we do need people like Gabe. We need good lawyers. And we can’t just exclude people who need, who have . . . he was a really great lawyer, I think he was the one . . . he, he shot himself in the parking garage of his Los Angeles law firm when he was working on a case for a big mattress company that was going into bankruptcy, and a number of other things happened—the firm was putting a whole lot of responsibility on him, and, and he was a really good lawyer, and he just couldn’t stand it. And we . . . I don’t want to see anymore Gabes. I want, I want, I want us to have a new day, where, where lawyers can be healthy and happy, and that the public perception is that we’re helpers, and that we’re not just stinkers. So, thank you guys very much. I really appreciate you sharing this time with me, and I hope you have a good day. [applause].
IMPLEMENTING RESTORATIVE JUSTICE PRACTICES IN THE CRIMINAL JUSTICE SYSTEM

Erin Barr, Richard B. Campbell, Jerald Hess, Sr., and Julie McConnel
INTRODUCTION

Sahba Saravi: Good afternoon everyone. Welcome to those who have joined us for this afternoon portion of our Symposium. My name is Sahba Saravi, and I’m the Managing Editor of Richmond’s Public Interest Law Review. I’m very excited to introduce our next panel: Implementing Restorative Justice Practices in the Criminal Justice System. This panel will feature the Honorable Richard B. Campbell, Chief Judge of Richmond’s Juvenile and Domestic Relations Court and an awesome family law procedure professor. Joining Judge Campbell will be Erin Barr, Deputy Commonwealth’s in Chesterfield County, and Jay Hess, Senior Public As – . . . Senior Assistant Public Defender in the City of Richmond and also Co-Founder of the Virginia Holistic Justice Initiative. This panel will be moderated by Richmond’s very own Professor Julie McConnell, Director of the Children’s Defense Clinic. Please join me in welcoming our wonderful panelists. [Applause].

IMPLEMENTING RESTORATIVE JUSTICE PRACTICES IN THE CRIMINAL JUSTICE SYSTEM

Julie McConnell: Good afternoon everyone. We are so thrilled to be here and to share with you some of the ideas that have been percolating in the central Virginia area about how to do restorative justice and transformative justice in the criminal justice system, and I just want to say to – . . . before we start, that Judge Campbell is going to present first, and he is . . . has been so incredibly generous to come today. He unfortunately has to leave for a funeral at 1:30, so he’s going to speak first, we’ll ask him a couple of questions, and then, unfortunately, he’s going to have to head out, but thank you so much for coming in spite of all that, we appreciate your presence here. And one of the joys that I have as a juvenile defense attorney and, and the director of the Clinic here, is that I get to regularly appear in front of fine judges like Judge Campbell who really try to think outside of the box and find alternative ways to best address the needs of children
and families in a trauma-informed and evidenced based way. I hear him use those words almost every time I’m in his courtroom, and one of the ways that he has tried to do that is through restorative justice. So with that, Judge Campbell.

Judge Campbell: Thank you. Um, it’s a pleasure to be here, uh, I graduated in ‘93, and this was a very brand-new courtroom during those years, and Justice Scalia opened us up, it was a momentous occasion. Um, and I do, uh, love teaching the family practice and procedure class, so for students who are here, please join us next semester. It’s a very nuts and bolts practical kind of, um, experience. And I apologize for having to leave early, um, the funeral is for the husband of my regular clerk, any of you who have practiced in my courtroom know Mrs. Gordon keeps me straight. In fact at the visitation last I spoke to her mother, and I said, You know, I could not do what I do without your daughter at my side. She’s worked next to me for over ten years, and, um, her mother, who’s a bit elderly said, “She told me that.” [laughter] Well it’s true, it’s true.

Um, but I do love restorative justice, and I was sharing with the prosecutor and the public defender in my courtroom today that I probably, for someone who is, I hope, probably more, more restrained in terms of being terribly active on the bench, it’s something that I transgress a little bit with on plea agreements because I . . . if it has not been entertained in a, particularly juvenile, plea agreement, I will . . . I hope I am ethically correct in doing this . . . but I’ll say, You know, I’ve noticed this is not a part of your plea agreement but has anybody thought about restorative justice because it sure would be a great thing for somebody to think about, but I’m not saying you have to do it, you know, and we incorporate it. Um, so I’m a big fan of it, not only with juveniles, but in our adult criminal cases, which actually, in our court, outnumber juvenile cases in the City of Richmond. We have enough domestic violence and, and family crimes that that is a sizeable portion in what we do. Because it’s about accountability. And I think, I . . . I . . . I am a big proponent of accountability in all of life, but I think that it really brings to bear, um, so much of that, not only for the offender, but it, it . . . um, I guess satisfies accountability, uh, for the victim. So, um, you, you know, I have a couple of anecdotes that I was telling, um, Professor McConnell just yesterday. I had a case where we had, um, required a young man to complete a
restorative justice if the . . . if the victim was amenable, and so in this
case, um, the . . . it hadn’t happened, and I don’t know who had
dropped the ball, but it hadn’t happened, and the case had been con-
tinued for six or twelve months, and that was one of the conditions,
and so hi – . . . his attorney was saying, “Well, he – . . . it’s not his
fault it didn’t happen, so we just need to close it now, and this is silly,
we shouldn’t extend it, and he’s done what he’s supposed to do, and
it’s somebody else’s fault, and, and you know, I really think you need
to go ahead and dismiss the case, pursuant to the plea agreement.”
And I responded, “Well, this is an important thing though. This isn’t
just one little extra fluff thing that we thought. This is very much a
part, I feel like, of him having the case dismissed.” So, um, that’s one
anecdote I share.

Um, a, a couple of other things occurred to me as I thought about just
experiencing it in the courtroom. I run into more and more, um, . . .
shall I say crafty, or savvy, uh, defense attorneys, who before they
even get into the courtroom . . . this happens a lot with traffic cases . . .
they’ve already fashioned their community service, or they’ve al-
ready fashioned driving school, it’s almost as if they’ve beat the, the
court to the punch, and it’s a little frustrating in the, uh, driving cases,
you know, they’ll come in and say, “We’ve already done driving
school, we’ve done this much community service, and we’ve done
this, and I . . .” and there’s nothing left for me to do. Uh, but you
know restorative justice, they really can’t do, I mean they can affect
an apology, um, but I, I also feel like it’s something that’s particu-
larly and special to the court. So, um, I, I’m quite an advocate, if, if a
court can be an advocate for, or proponent of I guess would be a bet-
ter place to say it. Um, it is something that, though I think I’m run-
ning a bit against of the tide, just, there’s . . . it’s not as known. Um,
obviously we have to have an amenable victim. Um, in Richmond,
the way it works, practically, is that, uh, before trial, if we have cases
which are diverted, which in our court are cases where we hope to
handle the situation. We do this with shoplifting a lot, um, before a
child even needs to go into the courtroom. Because, you all probably
all know, and if you don’t know should, the social science shows that
it, it . . . we want to keep a child out of the courtroom as much as pos-
able, if we can, and address the behavior, particularly younger chil-
dren. So, in cases that are diverted, so we’re trying to address them
before we have an actual, um, uh, judicial experience, um, we use our
in-house, uh, mediator, who does a lot of mediation for custody
cases. Um, if the restorative justice is taking place after we have adju-
dicated a matter, then the Department of Juvenile Justice and our
Court Services Unit has, uh, a group that they use. So, we have sort
of two ways of, of going. Um, I would say statistically, uh, 30% is
probably a healthy a, amount of cases that actually . . . we have some
sort of, of, uh, meeting, of the offender and the victim. Um, a lot of
times it is the victim’s desire to do so. Although I’ll tell you some-
thing interesting about that. We had a recent case, where there was an
offender, uh, at, uh, in a school, and, um, the victim did not want to,
um, participate, but, this is very curious to me, the schools did. The
Richmond Public Schools actually sort . . . are you familiar with this
case? It’s a recent case . . . so they literally kind of stood in, if you
will, so that the young person could at least have some sense of, this
is what it was . . . what it was like. That’s still never the same as
when you’ve got to kind of face and deal and work through, um, um,
what we, um, experience when we’re victims of crimes. So, um, I
would just say that, that if you are a practitioner in our court, or in
any of the sister jurisdictions, I encourage you as prosecutors, or, uh,
um, public defenders or defense attorneys, to ask for it, or to inquire
about it. Um, certainly to me, it seems like, on the defense side, it’s
something that can be put into . . . as well as the prosecution . . . it
can be part of a plea agreement, use it, it’s a, it’s a thing of value. It’s
not, as I said earlier, it’s not a throwaway. I mean this, to me, is a val-
uable thing, particularly for juvenile defendants, but I do think that
it’s something that we don’t . . . it’s not enough of the warp and weft
of what we do. Um, and even . . . I would say that with my colleagues
on the bench, you may have some education that you need to do in
terms of, you know, some materials, or say this is what I propose, or
we’ve already talked about this. Um, so I do see it more in our court
with juvenile offenders than, than adult, uh, offenders. A lot of the
reason for that would because the lion’s share of our adult crime is, is
DV, and that’s not always going to be the best, uh, uh remedy, uh, in
those situations. So, why don’t I pause now, and if there’s questions,
either from my colleagues here, or you all, with respect to . . . to
courtroom.

McConnell: I have a couple of follow up, follow up questions, I
know you’re shocked to hear that. Um, so on the issue of when it’s in
your courtroom and you send it to restorative justice, you said an outside agency does that. Who is that?

**Judge Campbell:** It’s AC. I can tell you. It’s AC. ACIMF

**McConnell:** AMI Kids?

**Judge Campbell:** Yeah, that’s it.

**McConnell:** AMI? Um, I didn’t know that, I just guessed.

**Judge Campbell:** *inaudible*

**McConnell:** AMI Kids. So, AMI kids, I understand, is also doing that in Henrico and perhaps in some other jurisdictions. So, if you’re practicing, in juvenile court, that’s something to ask about, is whether there’s a contract with AMI Kids to do restorative justice. This is something that came about because when we closed Beaumont Correctional Center for the first time, the money was actually reinvested in the juvenile, um, continuum of services for kids. And so, AMI Kids got a contract out of the money that was saved when Beaumont was closed. So, hopefully that going to become something we see statewide. So, you mentioned, um, attorneys requesting it, or suggesting that it might be a good way to go. Are guardians ad litem getting any training on, perhaps, asking for that as a matter of the best interest of the child?

**Judge Campbell:** I am not aware of that. It’d be a great thing. Um, uh, and it would probably be. I would say that would be one of the most appropriate things for a GAL to, um, offer and suggest in a criminal proceeding. Yeah, I think sometimes it gets a little hairy when I get a guardian ad litem who’s arguing one side or the other in the terms of a criminal sentence, but, you know, I think that restorative justice is, is on both sides of it. So, I, I would say I have not experienced that. I think there’s some that know what it is more than others, you know, and would be more vocally supportive, but I’m not aware of it being part of their training.

**McConnell:** Thank you. I’d also be curious to know whether you had any thoughts about doing restorative justice before kids even get to
the stage of diversion. So, I believe in Fairfax . . . and we are going to hear from Vicky Schoap this afternoon, who will talk more about that . . . but in Fairfax, my understanding is, that at the school-level, when there might be a disorderly conduct situation, or a fight, that restorative justice would occur there, rather than even going to court service unit for diversion.

**Judge Campbell:** I, I’d be a tremendous fan of that. I mean, I, I’m not aware of it going on. But, you know, I think with everything going on with our schools, particularly . . . Because a lot of our, um, yeah, . . a lot of our juvenile crime and violence is very, um, concomitant with school issues, so you know, a lot of times, we don’t have a horrible gang problem in the city, but we do have these neighborhood gangs that, that permeate our high schools particularly, and so, there’s going to be some real overlap so, I think that would be tremendous, I mean they’ve got a lot already going . . . but something even like, you know, sort of like our PASS docket, but we’re working it in schools, and, uh, yeah, I think it would be tremendous.

**McConnell:** Thank you. Um, we heard earlier today from, uh, Doron Samuel-Seigel that restorative justice is essentially a relational approach to justice, and it seems to me that in the school setting, in particular, where so many of these fights are about relationships that, that have not [laughter] fully formed are . . . there’s a discussion over a particular male, or something along those lines, um . . .

**Judge Campbell:** Or female.

**McConnell:** Or female. Um, and so sitting down and having those kids talk it out and get to the root causes, because what I see all the time in court is that we never really have that opportunity, once that case gets to court, it’s . . . everybody’s duking it out.

**Judge Campbell:** Yes.

**McConnell:** The, the victim doesn’t really get to do anything other than say the terrible thing that happened to them. The defen – . . . defendant may or may not say anything. And there’s no real discussion between them where there’s an apology, or any discussion about
what led to it, and we never really solve that, that cycle of violence in the court system.

Judge Campbell: Yeah, absolutely, and as you, as you speak, I’m thinking another sort of place where this would be tr – tremendously helpful would be one of the, the most, um, unpopular kind of hearings I can have is when I hear I am going to have a protective order on behalf of the juvenile, but it’s about what you are talking about. So, I’ve got a mom of a 15-year old girl against another mom of another 15-year old girl, and it’s this melee mess, you know, I have the cellphones with all kinds of, you know . . .

McConnell: The video [laughter].

Judge Campbell: Yeah, long furniture beatings, and all this sort of thing. What, um, . . . it would . . . so amazing in those cases, if in-between the preliminary, the ex parte hearing, perhaps, and the other, we could order them into restorative justice, you know, I mean it would be, uh, . . . I think it would probably lance the boil pretty quickly. Uh, so yeah, I think that would an amazing thing to happen and . . . and I just hope that as we . . . I mean we’ve come so far just in how we think about detention and how we think about probation and how we think about commitment, that, that this is going to get more steam, because I think the efficacy of it is, I mean . . . when, when it happens, it’s tremendous. I mean, what I see in the courtroom when it happens, is it’s . . . it’s very, very impressive.

McConnell: What do you see? Can you just tell us a little about that . . .

Judge Campbell: Well I see, um, you know, even though they’ve already gone through the restorative justice, uh, proceeding, with, with the victim, oftentimes, I’ve got the victim still there for the sentencing, and I see the, the defendant turn around, and it’s not like the, the, the defense attorney is saying “do this.” I mean, you can tell they really know each other, they’ve spoken to each other coming in, and I’ve literally had them turn around and say “you know, I want to say again, I’m really sorry that I hurt your family . . .” or the . . . you know, “I’m going to make this right” or, um, “I didn’t know that this . . . this . . .” and they’ve thanked the court before: “I want to thank
you for that experience.” Um, not always, but, you know, for every one of those that you have, I, I think that we may have just prevented another five or six, uh, you know . . . uh, other acts of violence or violations. So, um, I mean I think it is particularly helpful with young people with things like, um, robbery, you know when they’re, they’re assaulting and robbing, um, or a carjacking somebody that they don’t know to get something and then when you slow it down and realize what that did to that person, and how it, it’s . . . it’s been very effective. So, so, I can, I can see the effects, I guess I’d say, personally in the, um, defendant and what it’s helped them realize, which is something you can’t do on probation, and you can’t do in the detention center, you know.

McConnell: I am thrilled to hear you say that you think it is appropriate even in the context of a violent crime like robbery or a carjacking.

Judge Campbell: Oh, absolutely.

McConnell: Because I think a lot of times we think that this is an appropriate thing to do with first offenders . . . kids that haven’t committed a violent crime and that, that once you’ve gotten to the point that you’re committing a violent crime with a gun that you’ve lost that opportunity . . .

Judge Campbell: No.

McConnell: . . . so, I’m thrilled to hear you say that you don’t believe that’s the case.

Judge Campbell: No, absolutely. I mean, I wouldn’t put a limit on it. I mean that might be . . . seem kind of silly, but just, you know, it . . . particularly, they haven’t had the opportunity until it’s gotten violent, okay, or maybe the, and maybe that’s because the victim wasn’t amenable . . . maybe, maybe he wanted to and the, uh, . . . or she wanted to, . . . and the victim wasn’t amenable. You get to that battle and again, it’s less and less likely that a victim of a violent crime is going to be more amenable . . . some are . . . and, uh, you know, that’s where you really need the expertise of the, uh, folks who are involved in restorative justice because sometimes the, the, the victim’s
indignation and their wrath has got to be, um, you know, managed. So, but, but mediators do that. They do that in domestic cases all the time, so . . .

**McConnell:** Thank you. Do you all have questions before we open it to the audience briefly? Alright, we’re going to briefly open it to you for questions before Judge Campbell has to leave, if anyone . . .

**Judge Campbell:** I’ve got 10 to 12 minutes.

**McConnell:** Yes. If anyone has burning questions that you’d like to ask at this point in the panel? . . . Yes?

**Audience Member:** Judge Campbell, um, how many of your sister and brethren uh, are in favor of a restorative justice programs? On the bench and . . .

**Judge Campbell:** In my courthouse, I don’t even know. That’s the funny thing about being a judge, is that you don’t know what your colleagues do. [laughter] And I often say [inaudible] . . . child support . . . so I don’t know. They may all do it, they may . . . none of them do it, I don’t know.

**Audience Member:** So, the court itself needs a restorative justice program . . .

**Judge Campbell:** That’s right. That’d be great. In fact, as a matter of fact, I, um, whether it’s restorative justice or other issues, I’m responsible for our legal issues meeting in our court which means that these are issues where we would have some sort of tutorial for all the judges, um, and so that would be perfect. We’d love to have that, so . . .

**Audience Member:** Now, would it be appropriate in that circumstance to also invite, uh, members of the defense bar in, uh, . . . on the criminal side and your constant practitioners on the civil side . . . more civil side . . . to attend such . . .?
Judge Campbell: Well, we could do that. That would be a different kind of meeting. A legal issues meeting is strictly for the judges, associate judges, and our senior [inaudible] clerks, the Commonwealth Attorney within our courthouse, and, uh, the lead public defender. So, it’s sort of the leadership in our court that would be at that meeting. But we could do, I mean Carol Marcutez [inaudible] issues, issues on the hill [inaudible] view from the hill . . . that’s open to more the practitioners. So, we could both and, . . . but I certainly think it would be helpful for the practitioners to have the introduction and have a workshop and that sort of thing because it’s fine for us to know about it, but again, they need to kind of bring it us more than us . . .

Audience Member: Well the teaching the teachers often gets [inaudible] a much more universal . . .

McConnell: Other questions? Judge Campbell, I have one question for you. Um, is it . . . is there an expense involved when it’s done through, uh, diversion, or is that something that’s built into the diversion program?

Judge Campbell: I think it’s . . . I think it’s built . . . my understanding is that it’s built into . . . it’s budgeted for, so I, I think it’s . . . you know . . .

McConnell: So, the courts could essentially do this without adding anything to their budgets.

Judge Campbell: I think so . . .

McConnell: That’s great news. Um, I assume, there is . . . since there’s a contract with AMI Kids, for the kids who are actually in court and are being sent to restorative justice, there is a . . . there’s a funding mechanism for that.

Judge Campbell: I think so [inaudible] . . . but I think with the diversion ones because [inaudible], we have mediation and there’s a budget for that, so I think that’s what it comes out of because I know that mediation and, uh, independent mediation, which we do which is primarily [inaudible] that's done for juveniles you know [inaudible]. . .
McConnell: Is there a report produced at the end or something like that?

Judge Campbell: Uh, when I have a case, yes. And that, I was thinking about that when you and I spoke, that is very helpful to me. It will just come to me when it’s time for sentencing. And it’s fairly, you know, there’s not a whole lot on the table. But just, has it happened, and it was effective, and you know. But I do get some sort of report. And if it doesn’t happen, it’ll say, um, you know, that it was attempted, or the victim didn’t wish to participate. But it is some kind of confirmation that it did happen.

McConnell: So, when you bring it up from the bench when it hasn’t been presented by the attorneys involved, do you have to ask the victim at that point whether they’re willing to participate?

Judge Campbell: I don’t at that point in time. I basically throw it out and say you know, “I think this would be great,” and if the victim is present, I’ll say . . . I’ll make it clear, cause sometimes they’ll look at you like "what?” You know, that you’re going to have to agree to this, and this is nothing that is being required of you. But then I’ll do a plug for what restorative justice is, this is an opportunity for this young woman to have a chance to hear from you, how this affected you, and I would ask you, I will, I would actually . . . I would ask you to really consider it of this [inaudible] because it could be very helpful for you, it also could be very helpful for that young person because I will tell you . . . I would say over 50% of crimes like that, you know, robbing the, uh, the, uh, the, um, . . . robbery by, um, like the pizza robberies, or the shoe robberies, or the, you know, retail robberies, more of the home invasions . . . the victims come, and they want to be there, and they’ll say a lot of times, “I just don’t want them to have to lead a life of crime. You know, what do you need? Yeah, I need my restitution, but can you just . . . I don’t want that kid to go the wrong way.” I mean I have a lot of victims say that. Rather than, you know, “They’re a ne’er-do-well, flush ‘em down the toilet.” I get this, you know, “Please well, yeah, you know, what do you need me to do,” more often than you might would think from the victim. So, I think that’s encouraging to society.
McConnell: And if the, the victim and the offender successfully complete restorative justice is there a way to have the charge dismissed as a . . .

Judge Campbell: Yeah, well that’s often . . . I mean I don’t know if this hinges completely on that, but that is often one of the dispositions that is being contemplated. In fact, that is the one we had yesterday. So, it’s to be dismissed, but I wanted the restorative justice to, to happen before we did that. Everything else is kind of set in the case, that just hasn’t happened. I get that, but I want to see it through. And um, you know [inaudible] . . .

McConnell: That’s terrific. I think we have a question right here.

Judge Campbell: Good!

Audience Member: Um, yes uh. Good afternoon, your honor.

Judge Campbell: Good afternoon!

Audience Member: . . . and the entire panel. My name is Paul Taylor. My question is: In your guesstimation, how many kids do you think come to your court that were expelled from schools and then do you think had a restorative practice would have been implemented inside the schools, it would have prevented them from coming into your courtroom?

Judge Campbell: Um, loads. Yes and yes.

[audience laughing].

Judge Campbell: Um, and one of my biggest frustrations with the Richmond schools . . . I don’t know if it’s this way in Chesterfield . . . is that if they are charged with a felony, they’re out.

Erin Barr: They’re out. Yeah.

Judge Campbell: And so, while they’re awaiting to be tried on a felony . . . and there are plenty of felonies that are violent and maybe we don’t need to put the children back into the population, but there are
plenty where they could still pursue an education or pursue, pursue it in a, you know, court-involved setting. But they can’t. Now, they have Homebound and all that, but that’s not the same as the, the need to be in . . . function in society and get along with other people, particularly if you’re having that issue to begin with. So, many, many of them are at least suspended, if not expelled . . . I will qualify that . . . and yes, I think if, as we said, there was an opportunity in the school to work some of these things out before it got into the courtroom, it would . . . it couldn’t be anything but beneficial. Of course, it’s going to take manpower, it’s going to take, you know, patience, it’s going to take buy-in, um, but you’ve got to try, I think . . . you know, I think it’s a great idea.

Audience Member (Paul Taylor): *Inaudible*

Judge Campbell: Oh, thank you, thank you.

Barr: [laughing] Yes.

McConnell: [laughing] Yeah, and actually . . . usually that expulsion is for a year.

Judge Campbell: Yeah.

McConnell: Just so you understand. If a child commits a felony . . . or is even accused, hasn’t even been adjudicated yet . . . of a felony, they’re typically expelled for a year in a lot of our schools. Any last questions? . . . Judge Campbell, thank you so much. I really appreciate you being here.

Judge Campbell: Thank you.

[applause] [inaudible]

McConnell: Alright. So, with that, we will turn to Jerald Hess.

Jerald Hess: Sure.

McConnell: Who will do . . . who, is going to share a Powerpoint with you about an incredible project that he’s been involved in. I just
have to tell you a quick story about Jerald Hess. J was a very successful attorney at DLA Piper in Washington, making probably three times what he makes now, and he worked on a pro bono case and did an incredible job for, um, one of the Miller resentencing clients, the very first one to be resentenced in Virginia, and he went from . . . this is a young man who was sentenced when he was a juvenile to two life sentences and he went from those two life sentences to twenty-five years thanks to the incredible efforts, all pro bono, on the part of Mr. Hess . . . and after he finished that case he started talking to people like myself and saying, “I don’t think I want to be a big firm lawyer anymore. I think I want to come be a public defender.” So, he left his job in D.C. and moved here, and now he’s a member of the Richmond Public Defender’s office, and we’re all very grateful that he’s here.

[applause]

Hess: So what Professor McConnell is not telling you is that, um, my law firm did the federal habeas petition for that man, um, arguing that he had the right to a resentencing hearing, and through a lot of just lucky breaks that I can tell you over drinks sometime, we were successful. And, um, suddenly I found myself with a court order signed by a federal judge saying, “you get a resentencing hearing in Norfolk Circuit Court.” And I just panicked. Uh, oh my god, I get a resentencing hearing where. What do I have to do? And so, I literally started doing google searches, like, who could help me in Virginia? And I found Professor McConnell, I cold-called her. She was luckily on vacation, and for some reason answered her phone, and I just asked her, please take mercy on me, I need help, I’m about to commit malpractice. This young man is going to go to jail for the rest of his life when he has this wonderful opportunity. And she said, yes, you do need help [laughter]. Uh, and she co-counseled it with me. So that’s how we got to know one another. So, she did just as much work on that as I did. But, um, thank you all for being here and for the invitation to be here.

When I got the email asking if I would come participate in a restorative justice conference, I was at my office in the Richmond Public Defender’s office, just down the hall from the lunchroom. I could hear a bunch of my friends in the lunchroom. So, I walked down
there and said, guys, I’m supposed to go to the University of Rich-
mond and talk about restorative justice. What does the Public De-
fender’s Office have to say about restorative justice? Silence. Just, . .
. I could hear crickets outside. Really? And, so, one of my friends
said, I don’t . . . I don’t think we do that here. Do . . . do we do that in
Richmond? Is that like a thing? I just, I don’t think it is. And, so, we
started to have this conversation about how, um, the current criminal
justice system in Richmond is nowhere near restorative justice, ex-
cept perhaps in Juvenile Domestic Relations Court, and we heard
from Judge Campbell, I think that’s most definitely true. And, so we
decided, well maybe I should just say no, sorry, you should find
someone that’s actually doing this type of thing, but then we thought,
well, maybe we are trying to do holistic justice, and we’re trying to
set up this holistic justice initiative, and, so, I said, well maybe we’ll
come talk about that, and that might be interesting.

So, um, this falls far short of restorative justice, but let me try to in-
troduce you all to, um, the Holistic Justice Initiative. So, um, the way
that I like to try to explain the Holistic Justice Initiative is to try to
tell you my experiences as a public defender and why I think the cur-
rent model is broken, and I’m going to try to do this very fast, so that
Erin has time to talk and so that we can hopefully have a group dis-
cussion here. So, um, I’ve been with the Richmond Public Defender’s
office for about two years, and, uh, in two years, I’ve represented
around a thousand people. So, um, if you’re curious what that looks
like on a day-to-day level, that means that on any given day, I have
between a 120 and 150 open cases. Um, to me that’s outrageous and
unacceptable and is something that I have very strong opinions on.
That’s not what we’re here to talk about. So, we’re just gonna put
that issue to the side for a minute, okay. Um, out of those thousand
people, I would say 20 to 30 of them, after I spent some time with
them, I thought, oh God, you’re a dangerous person. You . . . you
should not be walking the streets. Um, sir, probably should not
be in the same community that my family’s in. I’m sorry, but you
can’t . . . can’t do it. So, some of my friends that are really sort of . . .
on the far-left political spectrum don’t believe in jails. Um, I have to
tell you, after representing a thousand people in two years, I met
some people that, I wish we had a better option, but probably should
not be walking the streets. But twenty to thirty. Now, Erin might be
thinking, he’s a public defender, that number is ridiculously low, he
is insane. Fine. Let’s double that. Let’s say it’s 50 out of a 1,000. That would be 5%. So, 5% out of 1,000 people are dangerous to the community. Now, I’ve been appointed to represent people charged with murder, I’ve been appointed to represent people charged with reckless driving, and everything between. So, 5% of the people that I’ve met in two years as a public defender, I would say, are truly dangerous. By comparison, I would say I’ve represented about 100 people that when I actually investigated the case, I thought, oh my God, they have the wrong person, or this person didn’t commit a crime, they are wrongfully accused. I also hope that those two numbers are really shocking to you because I am here telling you that twice the number of people in the criminal justice system are wrongfully accused as are truly dangerous. That’s a crazy statement. Again, we could have a whole symposium on that. We’re just going to put that to the side for a minute. I would also say about another 15% of my clients are what I would call legally innocent, which is a nice legal phrase. I’m not saying they didn’t do anything wrong, I’m just saying maybe police officer violated their Fourth Amendment rights or maybe that key witness that Erin really needs has disappeared. For some reason, if I do my job as a defense lawyer, the Commonwealth is not going to be able to get a conviction. I’m not saying they didn’t do anything wrong, just saying they’re not going to be able to be convicted. If you add those numbers up, I get to about 30%. Alright. We founded the Holistic Justice Initiative to talk about everybody else. So, I don’t actually want to talk about those people today, although, there is a lot of interesting things we could talk about in those numbers, right? Um, we could meet up somewhere afterwards if anybody wants to, but I want to talk about everybody else. Everybody else, I would say is, they are guilty of criminal behavior, but they are non-violent offenders. They are individuals that are not a dangerous to the community, or else, at a very minimum level, their dangerous level is something that could be managed. Right? And what I realized . . . and my cofounder of the Holistic Justice Initiative is a former prosecutor from Richmond who left the CA’s office to form this non-profit with me . . . what we realized is nobody’s really talking about these people that are below this line on this slide. To say the same thing but to say it slightly differently, when I talk to my friends that are prosecutors and I say, you know, what are you excited about? What motivates you to be a prosecutor? They talk about the murder trial they have
coming up, or they talk about trying to make this family safe from this person that has truly harmed them. In other words, they’re talk-
ing about the people that are dangerous to the community. And when you talk to defense lawyers, what do they talk about? They’re talking about that great not guilty verdict they just got. We go to trainings to talk about how to do motions to suppress, right? To keep out evi-
dence, to do all these things. In other words, all the lawyers in the criminal justice system are focused above the line, but the vast major-
ity of people that come through the system are below the line, and no-
body’s really talking about them, which is why we wanted to set up a non-profit to talk about this.

So, what do these individuals have in common? I would say 70% of my clients. Well they’re indigent, right? By definition, they’re poor. They’ve told a judge under oath that they can’t afford a lawyer. That’s why they come to me and then they have to share me with 150 other people. They are usually repeat offenders. This was sort of the big lightbulb that went off for me when we were thinking about, um, is the current system working?

So, for example, Holistic Justice Initiative, we wanted to try to put some numbers on this, we took, uh, dockets, over the course of sev-
eral days, from the four adult general district courts in Richmond, and then we ran criminal background checks . . . don’t ask us exactly how we did that . . . but we ran criminal background checks on everybody that was charged with a crime, so everybody that was on that docket, and we found pretty consistently between 90-95% of the people that were there had been there before, they had criminal records. So, these are nonviolent offenders that have been through the system be-
fore, which I think begs the question, what did the system do last time that was not particularly effective? What are these types of folks charged with? They’re charged with . . . I just put a list up here . . . trespassing, petty larcenies, a lot of drug possessions, probation viola-
tions. If you talk to any public defender, this is what we spend that vast majority of our time dealing with. If you talk to most prosecutors that are just assigned to a court room, this is what most of their dock-
ets look like, right? We do have more serious things come through, but this is the majority of stuff.
So, we have these folks, we have them charged with these non-violent offenses, we’ve already decided that for today’s conversation they’re guilty, right? They did it, they engaged in criminal behavior. What does the current criminal justice system do with them? I would summarize it this way. We take the crime that they’re charged with, we take the criminal record, and we come up with an appropriate punishment. So, for example, in the courts that I’m in most of the time, if you’re charged with carrying a concealed weapon, and you don’t have a record, or you don’t have much of a record, most judges that I’m in front of are going to give you a hundred dollar fine. They’re not going to send you to jail, they’re going to give you a hundred dollar fine. Similarly, if you’re guilty of trespassing, you were walking through Mosby Court when you’ve been banned from Mosby Court, and maybe you’ve got a couple misdemeanors on your record, but you’re certainly not a felon, and you’ve never been charged with trespass before, hundred dollar fine. Not . . . not going send you to jail. Second time, probably going spend a weekend in jail. Third time, ten . . . probably ten days in jail. That’s the current model. And then occasionally . . . I would actually say probably most of the time . . . then the prosecutor gets to come in, and I get to come in, and we sort of make an adjustment to that punishment. So, the prosecutor gets to say, well judge, never been charged with trespass before, but that’s only ‘cause we’ve given him a break the last six times, and we’ve nolle prossed all this stuff. C’mon the kid needs to learn a lesson. Or, I get to come in and say, ah, judge, sure he’s guilty of trespass, but his baby momma lives there. And yes, “baby momma” is an acceptable term in Richmond courts, in case you’re wondering. Please, he was just trying to visit his kids. Don’t . . . don’t put him in jail. So, there is sort of an adjustment, but this is the model that’s happening in our courts right now for nonviolent offenders.

So, what lead us to form the Holistic Justice Initiative is because we saw that, and then, as we tried to spend some time with these folks, we started to say, well wait . . . what is actually leading to this criminal behavior? And this is how we would try to summarize it. And so, if . . . if I could only show you all one slide, it would be this slide. So, this is how I would try to summarize crime. Somebody has their environment, or their circumstances . . . and they’re almost always real bad, and then they react to a situation, and that reaction is what we call “criminal behavior.” In my experience, most of the time, that
reaction is an impulsive reaction. Put that differently, I’ve represented hundreds of people on trespass charges . . . I’m yet to meet a client who said, well, Mr. Hess, I just woke up that day and thought, I feel like trespassing today, today’s the day I’m going do it [laughter]. Or, you know I weighed my options, and I thought my best option there was to engage in disorderly conduct. It’s just what I was going to do. It’s just not happening, right? And so, um, our, sort of, critique of the current model is if you focus on punishment when most criminal behavior is an impulsive reaction, there’s sort of a disconnect between those two things, right? Nonetheless, they engage in criminal behavior so then they get to meet me, and they get to meet the criminal justice system, right? And then I try to get the best outcome I can for ’em, but if there’s any type of incarceration, there’s going be collateral consequences, right? They’re going to lose their job. They’re going to lose their housing, right? So, if I have my cocaine addict, and I successfully convince a judge that really 60 days is the appropriate punishment, not six months, well in 60 days, they’ve lost their job, they’ve lost their housing, their support structure’s now weaker than it was, what do you think they’re going to do? They’re going to go use again, right? And so now we’re right back into this vicious cycle.

So, we set up a non-profit to try to address this and what we realized is we meet them when they come into the criminal justice system, but rather than simply just trying to focus on the criminal justice system, or perhaps ameliorating those collateral consequences, which are all worthy things, nobody’s really working on the other half of that circle. Nobody’s really helping, um, to address the environment or the circumstances or to change the reaction to those environments or circumstances. So, what did we do? Well, we set up a 501C3 this summer, so we’re officially a nonprofit, whoo-hoo! Um, we are set up as a sister entity to the public defender’s office . . . although we’ll, we’ll work with anybody, that’s just where we’re getting our referrals. We get a referral from a defense lawyer says, hey, this person’s . . . could really benefit from your assistance. So, what do we do? We work with the lawyer, but we also sit down with this individual, and we figure out what’s going on with their lives. We try to figure out the environment, the circumstances, they’re . . . they’re in. And we’ve learned sort of two key insights from having started to do this a little bit.
First of all, the idea that we could change somebody’s environment or circumstances is a great idea, but it’s sort of wishful thinking, right? I mean, maybe over the long term but you’re probably not going to be able to do that. What it . . . what we’re showing that we can be quite effective in, though, is helping someone get support systems in place so that next time they react, they react in a more appropriate way. So, we’re trying to help people address their environment or their circumstances by giving them tools so that they can react to crisis in ways that we would say are not criminal. So, what does that actually look like? Well, the great thing about Richmond is that we already have a lot of support agencies out there, right? Real life community centers doing some great stuff. Dr. Sarah Scarborough, if you don’t know what she’s doing, you should go check it out. We’ve got OAR. We’ve got RBHA. We already . . . I mean it’s not a desert out there, right? So, really what we’re trying to do is facilitate our clients getting to those services. What my co-founder likes to say is, if our clients could navigate the bureaucratic, quasi-governmental world that is those service organizations, [whispers] they probably wouldn’t be our clients, right? They would have the ability to not react in criminal ways. So, what it, . . . this all sounds really fancy, what are we doing? We’re giving a lot of rides. We give people rides to real life. We give people rides to their pre-trial appointments. We give them rides to their substance abuse class. But in doing that, then, we’re trying to build that relationship with that individual and trying to help them get that to a point where maybe they can eventually use public transportation. Maybe they can do this all by themselves. Our hypothesis is: if we do this, and we do this for non-violent offenders, we will reduce recidivism, and we will do it in a way that is far cheaper than incarceration. So just one final sort of statistic by way of, uh, comparison. Real Life Community Center, Dr. Sarah Scarborough’s non-profit, she has, um, shown that she can serve someone for a year for about nine hundred dollars. So, if you’re considering making a donation, a thousand dollars will allow her to help somebody for a year. Anybody know how much it costs to incarcerate somebody at the jail? It’s about two hundred bucks a day, last time I checked. So, a week in jail or a year of working with an amazing non-profit costs our community the same thing. Now one is taxpayer driven and one is fundraising, but still, if all we were talking about . . . and this is why I mean we’re not even anywhere near talking about restorative justice . . . if all
we’re talking about is recidivism and efficient use of resources, our theory is that this is a far better model. So, our plan going forward: we’re trying to fundraise, you guys can check out our website if anybody wants to help us out. Um, there’s been some recent press about it. But our plan going forward is we are trying to help some people, as many people as we possibly can, but then, um, start to collect the data. And so, for example, if we could have a hundred people that went through the Holistic Justice Initiative and then I could identify a hundred people that . . . sort of a control group, although I feel terrible doing that to them, but were, um, just regular criminal defendants going through the normal system, our theory is our hundred people would have a dramatically lower recidivism rate. So, thank you very much.

[applause]

McConnell: Erin, you’re up. So, Erin is the Deputy Commonwealth’s Attorney in Chesterfield Juvenile Domestic Relations Court. One of the things I really love about Erin is she’s a fine lawyer who is an incredible adversary in court and will hold people accountable, but she also truly believes in diverting people away from the system, particularly kids, and finding alternative ways to make sure that we address why they committed the acts that they’re accused of and that they don’t do it again. So, with that, welcome Erin.

Barr: Thank you. Um, I will say . . . right away, I don’t dispute J’s numbers at all. Um, I actually started, I was telling J before, uh, this presentation, . . . I started ten years ago in our main office in Chesterfield . . . we’re split into two offices . . . our main office does everything in general district court and circuit court, just your run-of-the-mill crimes. Um, and then our juvenile office, we have seven attorneys who do all juvenile-related crime, whether its committed by a juvenile or against a juvenile, all domestic violence, um, and then all sex offenses, uh, whether they are adult or juvenile related, whether they are, uh, domestic, family related or stranger related. Um, ten years ago I started . . . I was hired in our main office, and it took me a little over a year to realize that all general district court and circuit court was, was a revolving door. I was seeing the same people . . . I was at . . . up there advocating for 60 days at a time, and there was no real solution, and it was really frustrating. Um, luckily one of my
mentors, Dave Rigler, who’s now, um, on our juvenile bench in Chesterfield saw that and said, you should be in juvenile court, this is where we’re actually getting things done. Um, so I ended up in juvenile court, which I think Julie just alluded to, is kind of the best of both worlds, in terms of a prosecutor’s career, to me, because I do get to stand up and advocate that the . . . I don’t think . . . I think you put it at twenty out of a thousand people that deserve to be in prison and should not be in our community, our sex offenders, murderers . . . um, I get to handle those cases and jump up and down and be your true TV prosecutor, but I also get to handle a lot of family-related cases, um, cases where people are addicted and are stealing, uh, from their families or committing crimes against their families, our juvenile crimes, um, that we can do alternative things with, and I’m lucky in Chesterfield because we have a court services unit that works with our juveniles that is very progressive. Um, Jim Nanker . . . Nankervis is the head of our Court Services Unit, he is always on the forefront of juvenile justice, and I know that always surprises people when I say that about Chesterfield County because I think that the outside view of Chesterfield County is that we’re somehow very backward. Um, actually our juvenile justice is very much on the forefront of reform, and now, with the election of Scott Miles, our whole Commonwealth Attorney’s Office is on the forefront of criminal justice reform, both adult and juveniles. Um, but we are lucky to have a court services unit that’s progressive. We are lucky to have six judges that are open, I think someone asked the question about, is the bench on board? In Chesterfield, our bench is on board. I know Julie does some cases there, and I think she would back that up-

**McConnell:** That’s right . . .

**Barr:** . . . that they are open to alternate, uh, resolution of cases. Now, we are trying to get that message over to our General Districts and our Circuit, um, but change is coming.

Um, and we are lucky . . . I am lucky now to work for someone, Scott Miles, um, who is interested in doing these sorts of things, and very supportive, and often calls me before I’ve even heard of something and says, uh, should we do this? How do we get this done? Um, so, it is . . . it . . . we are, um, moving that way. Now, the unfortunate thing I will tell you is we have been talking about restorative justice in our
juvenile court for about a year in Chesterfield County. Um, Jim Nankervis with Court Services Unit has a program he wants to implement, he’s trying to find the right people, so, we don’t actually have a program right now. We are working to, um, figure out what that looks like. Um, the idea that we have right now, once we get the right people in the right place is somewhat akin to what Judge Campbell was referring to, um, one, that it would be used as, as, part of diversion, and for those of you not familiar with, with juvenile justice, when kids are first charged there’s an opportunity for probation to divert them from ever having to get an attorney, come to court, face detention time, never having to actually go through the system. Um, so our idea is that, uh, restorative justice would be an opportunity for kids coming through diversion. Um, it would be, . . . also be an opportunity for kids who come to court. I agree with Judge Campbell that I don’t think we should limit the cases. Cases in the criminal system are very fact and circumstance specific, so I always get a little frustrated when we are limited by a code that says you can do it on these cases and not these cases. It depends on the people involved, it depends on what happened, um, as to what alternative we should be allowed to do. And I think that . . . I think prosecutors and judges should have that discretion without being limited.

Um, so it would be an option once kids are in court to, uh, for the court to be able to order it, like Judge Campbell was referencing, and I also would support what Judge Campbell was saying, is that sometimes there is a place for it in serious crimes, uh, . . . serious offenses, even violent offenses. Um, the last carjacking case I did was . . . involved a fourteen and sixteen-year-old, um, as offenders, and I know my victim, um, even though she had been traumatized and through this horrible thing, every time I met with her, she just wanted them to know how she felt in that moment. What it felt like to have a gun held on you. She kept saying that over and over, I hope they just know what it feels like. And that’s where this sort of program is really valuable. Um, I know at some, uh, . . . our court . . . we have brainstormed in Chesterfield, um, making that a, a bigger part of some of our violent crimes, even when kids are looking at, what we call the Post-D program or commitment. Um, one thing that we do in adult court is victim impact statements, and the victim speaking and saying some of those things. We lose that a lot in the juvenile justice system, um, just because cases have so many court dates and reviews.
Um, I think it would be really valuable for that, um, to be more a part of what we’re doing, even on violent cases, even in serious crimes. Um, and then the other thing I know Scott Miles came to me and asked about I think after the, uh, pre—restorative justice conference last Friday, uh, was about imposing . . . implementing this in schools, and I think that’s been talked about a little bit, that it would be something before the criminal justice system even gets involved through probation, that a school counselor could handle it and sit down and work. Uh, some of the stuff that’s coming to court never needs to be in court, and that would be an outlet, um, that way.

Just to comment on a few things, I’ve taken some notes as everyone else is talking. Um, I think Julie had the point about once we get to court, it’s so adversarial, um, and it’s hard, at that point to have these conversations about, you know, the victim wants to speak to the defendant, or, you know, we’re in that adversarial system, and I can’t agree more with, um, . . . our system has become so contraver . . . can’t think of the right word . . . adversarial is the right word, I suppose . . . Um, that we don’t do things like this. And I . . . I concur with Judge Campbell that, not only that carjacking victim, but I’ve had a number of victims that have come in and said, especially in juvenile justice, because society recognizes that these are kids that, often times, don’t know exactly what they’ve done, or the impact and consequences of what they’ve done, so I do think it’s not only valuable for the offender, the juvenile, but also would be really valuable for a victim to have this option. I think a lot of times we become so adversarial that we take the humanity out of what has happened and out of the people involved, the circumstances involved. Um, so, I am glad we are moving back into the direction of remembering these are people. They’re not just the defendant, or just the victim. This is a situation that involves people, their lives, their families. Um, we get caught in this courtroom silo of like, this is everyone’s position, and there’s no humanity left in it.

**Hess:** Yeah, can, can I say something about that? So, um, when I first joined the Public Defender’s Office, I was assigned to the General District Courts in Richmond that are on the Southside, so they’re in the Manchester Courthouse. Two courtrooms there, um, . . . just outside of each courtroom are three conference rooms. And so, what routinely happens every day is both prosecutors and defense lawyers
are taking the people out of the courtroom that they need to talk to, going into a conference room, and having a huddle, and having various conversations that you can imagine. The walls between those conference rooms are really thin, so inevitably, you end up hearing what’s going on right next door, and I can’t tell you how many times we would just come next door, and then suddenly the victim, the prosecutor, the defense lawyer, and the defendant are all at a table, and although none of us speaks the phrase “restorative justice,” it happened. Right? And I have so many wonderful stories about just sitting down at a table, like Judge Campbell talked about, just organically happened, and then some wonderful things happened. By contrast, I’m now in John Marshall. I’m in the Northside General District Courts. We have no conference rooms outside the courtrooms, and, instead, everybody comes in, and there’s a divide in the gallery, just like this divide [gesturing toward the aisle between seats]. And everybody that’s here for the prosecution is there, and everybody for the defense is here, and we just stare at each other [laughter]. And we wait ‘til the cases are called, and so it becomes so much more adversarial just because of the physical layout.

Barr: Yes.

Hess: Go ahead.

Barr: Oh. [Laughter]. I only had one other note, and then I’d love to hear from everybody, your perspective or thoughts on, you know, what we can do, um, or if you have any ideas. Um, someone asked about training, I think, was the question to Judge Campbell. Um, I was, . . . in thinking of that, we need training. Definitely. The issue with training in these alternative programs always is getting people there. So, I guess this is more to practitioners or law students who are going into this field. If there is training, show up. There is nothing more frustrating as a prosecutor, I know the least about the situation, if there’s a family-involved situation, if there’s a juvenile that needs certain services, I know the very least because I have a police report only about what they’ve done wrong. I don’t know anything about their background. So, it is very frustrating as a prosecutor to go in and be the one saying, is this a mental health issue? Can you tell me more? Or, to be the one in court almost posing as the defense attorney, saying, Judge, I actually think this is a case where this child just
needs to be referred to these services. Um, so, it is imperative that our guardian ad litems, our defense attorneys, are trained in what services and programs are out there. I know in Chesterfield there’s a lot of programming for that population. It always seems like the people that show up are the people that already know and that are already really good at what they do. So just, that was one thought I had. Um, and then, I think someone over here made a statement. I think Paul, you did, asking about the schools and the expulsion. That is another issue. Quite frankly, one of the worst things, in my view . . . in my opinion . . . that we can do to a child who is already involved in the criminal justice system is then expel them from school, and they have nowhere to go all day. I don’t know what the thought behind that is and what we expect to happen, um, but that is a frustration that is shared. So, I . . . I am open to suggestions. Um.

**McConnell:** Ok.

**Barr:** That’s all the comments I had

**McConnell:** Let’s open it to questions. Thank you so much. We have just a few minutes left. Question here? Yes.

**Audience Member:** *inaudible* . . . um, you both talked about limiting to nonviolent offenses and also, once, once someone’s in the system, like, in, in stating that some people just need to be removed from society for a period at a time. However, like, . . . I think even a lot of the violent offenses just need that restorative justice, and once people are in the system, it just creates more crime. It creates more crime. And we’re, . . . we forget the humanity of the people who’ve committed violent crimes when they’re in the system. Do you have any thought about using restorative justice once people are already in the system?

**Barr:** So, I . . . I think the Department of Corrections does, I don’t know a lot about them, but I think with adults, because I obviously don’t work with a ton of adults, but, does some sort of restorative justice. Julie, do you know?

**McConnell:** Well, they’ve developed a reentry curriculum.
Barr: Is that what it’s called?

McConnell: I don’t know how strong the restorative justice component is, but I think it’s a great idea to have it be a very robust part of the reentry curriculum. So, we certainly, . . . should certainly look into that.

Barr: And I think that’s the model that our Court Services Unit was looking at for juveniles who have been committed to the Department of Justice, that part of their kind of therapy, and reengaging in society would be, um, some sort of restorative justice and recall what you did to get here and the impact it had on your victim. Um, so I, . . . I do think there is a place for it. Um, I think you’re going to get more pushback from victims in those cases, but not always. I know there’s this knee-jerk reaction, of course no victim of violent crime wants to sit down with the offender. I think that’s false. Um, so I . . . I do think there is a place for it. Um, when I talked about the twenty out of a thousand, I mean people that I’m going to advocate to be in prison for life, because they, . . . I mean, they cannot not hurt someone in society. So, I don’t, I, but, . . . to your point, I don’t want to dehumanize that person. That person is still a person, right? Who has rights as they make their way through the system, has rights in how they’re treated in the Department of Corrections, um, but I want to clarify that I’m not talking about someone who committed a robbery and is going to get five years and then be back out. You’re exactly right. That person needs the same, uh, reintegration efforts, or we’re setting ourselves up for failure.

Audience Member: Or even people who have committed murder, and then they’ve changed,

Hess: Sure.

Audience Member: changed themselves and are not a deviant.

Barr: Mmm-hmm.

Audience Member: Not all people who commit, um, violent crimes are a danger.
Hess: Yeah, so, um, I completely agree, Jodi, um, I . . . so, we . . . when we set up a Holistic Justice Initiative, we have focused on non-violent offenders because, those, that’s the low hanging fruit in our system, in our opinion. I, um, completely agree with everything you said, and I hope to be at a point five years from now where we’ve successfully provided these services to nonviolent offenders and then we can have the conversation about, well, wait, why aren’t we doing to someone that you know, brandishes, or someone who does something we’re little more uncomfortable with . . . so, um, yes, completely agree.

McConnell: Yes?

Audience Member: So, when I was in private practice, I was in the civil side, the hardest thing you have is having your client be honest with us . . .

Hess: Yeah . . .

Audience Member: . . . for fear that the information is being used against them . . .

Hess: Yeah . . .

Audience Member: . . . in some cases I was their lawyer . . .

Hess: Yeah . . .

Audience Member: . . . so what do you do to make sure then that the, the defendant, the perpetrator, or whatever you want to call them, is honest with you, and how do you handle those admissions so that there not used against them in court?

Hess: Sure, um, I’ll go first, that’s a great question so, um, I think . . . I’ve got two answers, the first sort of the legal technical answer, every time we work with a public defender, or a defense lawyer, we enter into basically a consulting agreement and then I would take the position that the attorney-client privilege, specifically the attorney work product doctrine, then is extended to me as a consultant because I’m helping that defense lawyer aid in the preparation of their defense, um. That’s an arguable point, right, um, but I think there’s
some pretty good case law, um and I’m comfortable with that, sort of the first thing we look at. So, we enter into a formal agreement with the defense lawyer so that if things do go south, which is really our concern, I mean, I have that concern too, but my concern for setting up a non-profit that going to try to help these folks, is well what if they just continue to not do what you’re supposed to do, and, now, we’ve set up this other agency that has to sort of say bad things about them in court, and so we’re trying to avoid that.

Um, so from a legal technical perspective, we enter into a consulting agreement every time we do one of these things that would then extend the attorney-client privilege and the attorney work product doctrine to the non-profit. I think more importantly and more to your point is, it’s really about building trust and, um, spending time with, with your client, and that’s the problem with the current model. So, we have a lot of great prosecutors that will do these deals with me . . . so we call them TUAs, ask the court to it under advisement, your client does the following six things, and when we come back we’re going to dismiss the charges, what more could we ask for of our own prosecutors? A strange day when I’m in here defending prosecutors . . . but what, . . . I mean that’s great! The problem is I have 150 clients, I do that deal, and then I’m in a courtroom down the hall with my next client and my client is left . . . often he doesn’t even have a plea agreement. He has what I told him he has to do, and I wrote down on a notepad. So, defense lawyers, because they’re overworked, and also I just think, because as lawyers, we’re not particularly good at earning that relationship, we’re not real good at earning the trust to get honesty from our clients.

But you know who . . . what field I think is really good at it? Social workers. And, so, why can’t we have people from a social work background do this initial intake . . . that we spend a lot of time in the summer working with social workers to try and figure out what that looks like. What that looks like is its several hours, and it’s emotionally exhausting. You’ve got to be invested, right? You can’t fake it. You can’t have check list. You know, so do you have mental health issues? Yes, okay. So, did your parents abuse you? I mean, you can’t do it that way. There’s a compassionate way to do it. And, so, . . . that’s our answer is to try to set up a legal protection and then try to
have up that initial holistic intake be meaningful and frankly [inaudi-
ble] . . .

McConnell: Alright, I think we’re done, our time’s up. Thank you.

[japluste].

Jackie Cipolla: Thank you, guys. We are going to take a five minutes
break. I do apologize, we’re running a little bit behind. We’ll take a
five-minute break just to transition into this next panel and then we’ll
start back at 2:05.
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PANEL ON RESTORATIVE JUSTICE IN THE COMMUNITY: PROGRAMS AND RESOURCES FOR CLIENTS

Vickie Shoap, Suzanne C. Praill, Sylvia Clute, Doron Samuel-Siegel
INTRODUCTION

Erica Rebussini: Hi everyone! Welcome back. My name is Erica Rebussini, and I’m the Notes and Comments Editor, um, for the Public Interest Law Review this year. Our next panel is on restorative justice in the community, which is going to cover programs and resources for clients, and it’s going to be moderated by University of Richmond Law’s very own Doron Samuel-Siegel, and our panelists will be Vickie Shoap, who is the director of the Alternative Accountability Program for Fairfax County Public Schools, also Sylvia Clute, who is a former adjunct faculty at Virginia Union University as well as Virginia Commonwealth University, and she is also president of the Alliance for Unitive Justice, and we are also joined by Susan Buffington, who is the . . . an attorney with, um, the Virginia Center for Restorative Justice.

[applause]

PANEL ON RESTORATIVE JUSTICE IN THE COMMUNITY

Samuel-Siegel: Thanks Erica, and hello everyone, good afternoon. I just before, um, ah, sort of just giving you a little bit of a housekeeping note about how we’re going to proceed with this panel, I want to take a moment just to, um, repeat my thanks to the students who organized this program, and, in particular, Jackie Cipolla. Is she here this time? No. She’s also outside of the room. I want to remark on though just how beautifully the day is proceeding from one segment to the next and how things are building on what came before, and that’s really a testament to the very thoughtful planning that Jackie, um, uh, undertook from the very beginning and all of the conversations she had with the various speakers and panelist. Not every CLE or conference you go to, like, keeps on giving you, uh, new stuff all afternoon long. Repetition starts to happen, and, uh, that’s not happening here so, uh, thank you, Jackie, and all of the students here again.

[applause]
Samuel-Siegel: Uh, I . . . I’m pleased to play a minor facilitating role in this, um, segment what the . . . my three colleagues have, um, requested is that we run this panel in a way similar to the one that just went before. Each panelist will take about eight minutes to share information about, um, her program and experience and reflections and then what I would like to do is wait until the end after all three have spoken. At that point, we should be about thirty minutes into our time, and that should give us about twenty minutes for questions from the audience. Um, and so I’d ask that . . . I’m sure that you’ll have questions developing as you hear Susan speak, for example, but if you hold your questions until the end, I think that’ll work great. And, um, without further ado I hand it over to Susan Buffington.

Susan Buffington: Two initial comments, I have two corrections to make. One, the repetition starts now [laughter], and two, I’m not an attorney for Virginia Center for Restorative Justice, I am an attorney, but I’m volunteering with the Virginia Center for Restorative Justice. I am retired, and my work with restorative justice is as a volunteer, not an attorney, and I think that’s an, um, an important distinction to make. But, um, the good news is that after I did retire from being an attorney, I started volunteering with the Virginia Center for Restorative Justice and have done so now for about five years. It’s been a very, very rewarding experience, and one that I would recommend to everyone here. Um, my goal today, and I think the goal of our panel, is to make you aware of the different restorative justice programs in Richmond that are actually working. We’ve heard a lot of conceptual ideas. We’ve heard a lot of, um, of the principals of restorative justice, but I’m actually a restorative justice facilitator and have facilitated numerous family group conferences, so, um, I understand . . . I just think today has been probably one of the most interesting CLEs that I’ve ever been to. I’m . . . you know, I’m ADHD, so I take notes all the time and scribble all over every piece of paper in front of me and . . . look at this, everything is clear . . . I have paid perfect attention today, so that speaks so well, so well for the other panelists.

Um, my goal is to make you aware of VCRJ and the ways we put the principles of restorative justice into practice. My hope is that when you realize the benefits of restorative justice, you can use the concept in your practice, or better yet . . . where’s the lady from Chesterfield? . . . Attend one of our training sessions, and you can volunteer your
time to keep a juvenile out of the legal system. Um, just a little about our organization . . . was founded by Judy Clark, who came in a minute ago, in 2010. We’re a 501C3 corporation, operated by a board of directors, an executive director, and restorative justice volunteers. We are all volunteers. The founder and former director, Judy Clark, is here today as well as our current executive director, Daniel Foxvog. We currently have three major, um . . . or main programs. The first one, we call the “game changer program,” which is an after-school program . . . and I think we talked around this issue earlier . . . It’s an after-school program to teach third through fifth graders how to handle conflict. Facilitators meet twice a week with the school kids to encourage them to think and practice trust, honesty, respect, empathy, forgiveness, integrity, accountability, determination, humility, and service. That’s a mouthful.

The program introduces the circle process that we’ve talked about and seeks to empower students as “game changers” in the school community. We started the program in 2016 and . . . listen to these numbers . . . and in Spring 2017, the 48 third graders that participated in the program received a total of seven behavioral referrals, compared to 84 referrals from the 22 students not enrolled in the program. That’s a rate of .09 for the extended students and 3.81 for those that didn’t participate.

The second program is what we call the “how to handle conflict” class that meets in four correctional facilities, and using the circle process, trained facilitators use the same tools of trust, honesty, respect, empathy, integrity, accountability, determination, humility, and service for the purpose of reducing conflict. This circle process has been just so useful in encouraging inmates to tell their story to an empathetic and forgiving audience. It allows partic – . . . participants to understand the harm they’ve caused and encourages repair of that harm once outside the facility. Then family group conferences, which we’ve talked about, um, with juvenile offenders and victims. VCRJ has a contract with AMI Kids and DJJ to provide restorative justice through family group conferences in Henrico and the City of Richmond Court Services Units. In those conferences, facilitators help . . . help offenders and victims come together in a safe environment, respectfully discuss how to make things as right as possible. Family members, supporters, and community members also participate in the
process. It’s important for us to emphasize to victims, or, to offenders . . . I’m sorry . . . that when they commit a crime, or commit an offense, it’s not just one person that’s being hurt, but, instead, it’s your family, your siblings, the community, by bringing in other people besides just the offender and the victim that, um, is emphasized, and it really allows the offender to understand and to take responsibility for what he’s done. During this process, as I was saying, each person’s given the opportunity to voice their concerns and describe the ways in which they and others around them were harmed. Victims can ask questions and tell how the offense impacted them and their family. Um, the one of the . . . you, I think, said your car had been vandalized or something in Charlottesville, but if that had happened outside of your house, you had small children, imagine the fear your children would experience going outside at night. A youthful offender doesn’t understand the consequences of their actions, so the family group conference really helps . . . that. So, after taking responsibility for the offense and hearing the harms caused, the offenders made accountable not only to . . . but not only to the law but also to the person who was harmed. Together, the offender, the community, and the victim make a decision how to repair the harm and how to restore relationships and how to restore the offender’s place within the community. Family-group conferencing brings the person harmed and the wrongdoer face-to-face in a way that makes forgiveness and reconciliation really possible. I explained restorative justice this way, and you’ve seen several, um, slides that are just another way of saying this. The legal system asks what law was broken, who did it, and how should we punish them. Restorative justice asks who was harmed, what are the needs of the harmed, and how can we make things right? Our restorative justice places responsibility on the wrongdoer to make things right with the person harmed, not just punishment by the legal system.

But let’s talk about how you can utilize restorative justice. Suppose if you were a defense attorney, and you receive a phone call from a parent asking you to represent their sixteen-year-old. He stole $800 from the cash register of the fast-food restaurant where he worked. You can agree to represent them, take them through the court system, maybe get them off. But you can also agree to represent him and explain that a diversion program called restorative justice is available and, if successful, will probably result in no record for the juvenile
and in fewer billable hours for you, [laughter] . . . I know you love that. You can suggest that the parent ask for restorative justice at the meeting with the Court Services Unit, or you can make that request. The intake officer will then make that referral to Virginia Center for Restorative Justice, saving time and money for the court system, and resulting in a real win-win for you and your client. You’ve recommended a successful diversion program, and the juvenile and the parents are happy with the result, without ever having to go to court. Now if you, on the other hand, represent the corporate client, such as the fast-food chain, you should like the idea of restorative justice too. Your ci – . . . your client can explain to the offender just how his or her actions affected the corporation, its profits, and its bottom line. Um, at one of, um, our family group conferences, several students had stolen from, um, Walmart, or Target, and we actually had the, um, uh, what’s . . . what are they called? Um, what are they called? Come on.

**Samuel-Siegel:** The officer in the store?

**Buffington:** Yeah, not the resource officer. The, um . . .

**Samuel-Siegel:** The theft-prevention group?

**Buffington:** Yeah, thank you! Theft-prevention guy, come in and explain just how, um, much money Target lost every year and how it affected his performance and the performance of those other employees, and it make quite an impact on those students that had shoplifted. They had no idea the impact or what it you know what it even did to prices of articles that we buy at Target because of the amount of merchandise that’s stolen every year. Um, you can ask for restitution and have a voice in how the harm is repaired. One interesting fact is that national averages show that restorative justice restitution is usually around 85%, where court-ordered restitution averages 30%. So, if you’re representing a corporate client from whom something has been stolen, that’s definitely something to think about so that your client’s participation, once again, becomes a win-win. Um, that . . . there are my remarks on Virginia Center for Restorative Justice. I will say that both Judy and Daniel Foxvog attended Eastern Mennonite, both are trained restorative justice facilitators. We have, um, usually four times a year, maybe, we do restorative justice training and
Samuel-Siegel: Thank you so much. Could the other folks from VCRJ just raise your hands so maybe others can . . . great thank you so much. Um, wonderful. Vicki, could I ask you to go, go next. Vickie Shoap from the Fairfax County Public Schools.

Vickie Shoap: Hi, everybody, um, I’m Vickie Shoap. I’m a Fairfax County Specialist, whose not just a specialist in the schools, but I work, uh, in the court as well. I work with police departments, so my job is in the schools, but I work with a variety of agencies, and I’ve been doing this work a long time. I previously worked in, um, in juvenile probation and intake but doing restorative justice in Northern Virginia, and there began to become a real connection, as we all know, between, um, crime in the community and crime in school. So, our caseloads went, after 1999 Columbine and admin zero-tolerance, . . . really went from 3% of kids we were working with got in trouble at school or on school property, to over 50% at the advent of zero-tolerance, so Fairfax County started looking at restorative justice a long time ago. In 2010-2011 . . . when then, um, uh, uh, Arne Dunkin’s, Secretary of Education, and Eric Holder, Attorney General, when we all heard about the changes in school discipline, 2010-2011 . . . that’s when the school board hired my position as a Restorative Justice Specialist, not only to bring restorative justice discipline to the school system but also to figure out how we can stop the constant flow of our students that were going to the juvenile justice system. As you’ve probably already talked about, um, Virginia is the highest in the nation for that pipeline and because of our demographics in Fairfax County, we have students from over 200 countries, and we have 200,000 students, and so, obviously, we’re . . . our numbers are going to be impactful, but Southern Virginia is even, uh, more frightening for that pipeline. And, a lot of people don’t really understand how that happens, you know, where . . . if two kids get into a fight and explain this to parents, is they’re always shocked and horrified that, you know, two kids get into a normal scuffle in the hallway, their disciplined, or suspended, whatever the administrator thinks is appropriate, what the school code says, and then the SOR often files the charge in juvenile court for assault. Um, now that the line between petit and grand larceny is $500, a cell phone is much more than that.
So, at one point, we had a ten-year-olds borrowing a phone from a friend, because they didn’t have one. I’ll just take it home for the day to play the game, and I’ll take it back. They now have a felony, for life, at ten years old, and that was happening all over Virginia, including in Fairfax County. When I started my position in 2011, there was about 900 to 1,000 kids going directly into the justice system from our middle schools and high schools. So, we’ve reduced that almost by half, um, with our Alternative Accountability Program, and that is a program that I wanted to spend most of my time talking about. Restorative justice is available in our school system, and I have a team of seven, not nearly enough, but a lot more than many school systems have for restorative justice, so we’re really grateful for those positions. So, when a restorative justice intervention is used in lieu of a traditional discipline, suspension, or recommendation for expulsion, my team can go in and, and facilitate a restorative justice process like, like, like, like you just heard about. It looks very similar to that in lieu of discipline, and then at the . . . if you think of a long continuum, I really, strongly believe that it has to be a full continuum for restorative processes to work and to be discipline or justice reform . . . you have to have the continuum, so we make sure that our teachers are trained in restorative practices so that they can do those circles that, that we . . . you just heard about, where kids can learn those social, emotional skills at a really young age, learn about restorative processes, learn about resilience, and then . . . but the problem is when something happens, what happens then? So, in schools, restorative practices, that term that you’re going to hear a lot, the kinder, gentler word for restorative justice. It came out . . . the principles of restorative practices, those early preventative measures, really came of the process of restorative justice, so it’s important to understand those two terms cause they’re often mixed, but they mean something very different. In Fairfax County, we try to define them, um, to say restorative practices are those skills that you can use, preventatively, but a restorative justice process is for after harm, wrongdoing, or a crime is committed. That’s the formal process where people need skills and training to bring people together who have harmed each other, so that’s how we define it. So, on the lower end, we train staff, and we use those restorative practices and then as . . . if you think of the seriousness of harm increases, we have groups for attendance and other issues that a lot of students may be experiencing that’s more of a prevention circle group, and then at the top of that
continuum, is restorative justice for discipline when there’s been an incident at school for which the administrator has to dispense some sort of discipline, and then the AAP program, which is Alternative Accountability Program, that’s the program where we work with our juvenile court and our SROs. It’s also available to any juvenile across Fairfax County. Uh, we have over 3,000 officers, they’re all in the AAP, and their goal is to refer as many juveniles in the county as possible to the Alternative Accountability Program, which is a restorative justice program. So, it . . . the eligibility criteria is that the, the juvenile has to have no prior, um, involvement with the court, no prior record, um, that’s the eligibility requirement at, that’s it. Um, and so the officers have to give a reason why they didn’t use it. If they’re . . . the juvenile they arrest is a first-time offender, and we also take felonies, uh, which was an alarm in our community. But we go out and do a lot of community meetings, and we talk to the community about what we’re doing, and this is actually a pre-diversion program. Intake hates that word, they hate when I say that, but you all will understand what that means. It is pre-diversion, and diversion programs are great. I worked in them for twenty years, they’re great. The problem is, you are court-connected. That kid has a court connection, even if it’s a diversion, and our . . . Herring’s office will tell you, colleges and universities want to know if there was a charge, not if they were convicted of a felony. That’s back in the old days. Now the, the applications literally say, have you ever been charged with a crime? As do many, um, many applications. These kids can’t get a job because in middle school they got in a fight, and they have an assault charge. And so, our goal is to reduce the collateral consequences of early arrest in the county. So, so far, um, we’ve had hundreds of kids, um . . . I have some data that I brought. If anyone’s interested, I left, um, a stack of information on the table, the registration table, with some of our data from our AAP program. So, traditional diversion in our county is about 29% recidivism. That’s when we put in a kid in a shoplifting class or an anger management class for an assault charge, and they’re . . . they’re quote diverted in the system. They’re told they don’t have a record, and the parents are told that, but they do. They’re connected to juvenile court, and they’ve had a charge, even if it doesn’t go to petition, it goes to complaint, and that’s a juvenile complaint. So, in the AAP program, it doesn’t even go to complaint. It’s a complete community diversion in the community. So, there’s no court connection at all as long as the
juvenile finishes the program, there’s no court connection at all, and if they have another offense, that would be their first diversion opportunity.

One thing before I run out of time is . . . one thing I wanted to tell you, uh, that we did in Fairfax County that will helped many of you in your communities in Virginia, is passed, um, House Bill 451 and, again, that information is on the handout, so, if you’re more interested in that detail. And that . . . what that did is allow us . . . it took us a couple of years to pa – . . . to get that legislation passed, but what that does is allow my staff, as school personnel, to see the police record because there used to be that line of confidentiality where you couldn’t see the police record. So, my staff actually gets the police record now from the SRO, or the patrol officer, so we can do that restorative justice in the community, and we often do it, literally, in the community so that those kids never go to court. Um, with the first thing we did was a Capstone project where all six agencies went together to a Capstone project at Georgetown University, and we came out of there thinking, why does a kid have to go to court to get diverted from the court? That’s really what we walked out of there with, so all of us agencies decided we have to do something different. So, it truly is a community restorative justice program, and that’s something that you can do anywhere in Virginia now with this new legislation that allows you to have that confidentiality, um, it, it has to be a court connected program, obviously, the legislation is pretty specific, but it really does back up the work that we’re doing and hopefully . . . we’re hoping that some of other communities can, um, can start to develop that.

Samuel-Siegel: Thank you so much Vickie. Sylvia, will you finish us up . . .

Sylvia Clute: Yes, I will . . .

Samuel-Siegel: . . . before the questions come? Thank you.

Clute: So, my name is Sylvia Clute, and I practiced law for twenty-eight years. I was a civil trial attorney. A life changing event happened for me and about a decade into that, that practice I discovered there are actually two models of justice. Vengeance and love. I
immediately knew what justice’s vengeance was because that was what I was doing. I had no idea what justice’s love would look like, but I was going to find out and that’s been a thirty-year journey. So, I left my law practice in 2003, and now I practice and teach, uh, a restorative justice model called “Unitive Justice,” which has no punitive elements. So, with those two backgrounds, I would sort of like to look at, uh, what we’re talking about today in that . . . in those two contexts. When restorative justice began in the United States in the 1970s, it was an outgrowth, it came out of the criminal court process, and in order to allow the, the restorative justice process, there was a condition precedent, the defendant either had to have already either been convicted or had to plead guilty. So, when that happened, you know longer had the issues of due process requirements, so you didn’t need a lawyer in the process or a judge, and a lot of people thought, well, that right is a big improvement, but I think that really the biggest change was that there are no rules of evidence. The rules of evidence keep the inquiry very narrowly focused to what law was broken, who broke it, and how are we going to punish them. I now realize there are significant consequences of that. It dehumanizes everyone in the system. It dehumanizes the offender. They just become labeled. “The murderer.” “The rapist.” It also is a system that dehumanizes the victim. In the criminal courts, the victim is just a witness for the state, it’s not about their needs or their harm. It also dehumanizes the lawyers. That’s why we were hearing about that very high suicide rate. It’s not a, . . . it’s not a system built for really recognizing our humanity. So, when you don’t have the rules of evidence, you can bring everyone together, and you have a whole lot more information about how to hold that offender accountable. You can have the offender and the victim talking to one another. You can bring in community members. They can talk about what was going on in the community that was fueling this type of conflict. And so, with more information, you can hold the offender accountable in a much more reasonable way, and that often happens. However, that process I just described is still connected to the criminal court process, which is a punitive system, because that system is using the event to hold the offender accountable to decide what the punishment should be. We can use that event in a very different way. We can use that event to discover the underlying conflict dynamic out of which that conflict came, and when we do that, we have a process that can address those items that Dr. Johonna Turner was talking about this morning, the
complexity of human relationships and human interactions. So, when you have a system that does that then you’re getting into a system, uh, that really can be called justice’s love. Um, in the, in the punitive system, the offender is the object of the process, and in the, in the system where we’re getting at the underlying conflict, the event is the subject of the process, so that’s a major change. So, I now teach, um, Unitive Justice at the college level and do workshops and trainings, and so I . . . what, what came out of this thirty-year journey is a comparison of the punitive system, which I have some understanding from all of those years, and what would we need to change in order to have a system of justice that had no punitive elements? So, I just want to look at a, uh, a few of those comparisons. So, the punitive system is a punitive system of justice. Those scales of justice represent the moral principle on which that system rests, proportional revenge. So, the scales of justice, it’s an eye for an eye, a tooth for a tooth system. The scales of justice represent that the harm you do to someone is to be equal in measure to the harm they did to you and as long as there’s proportional revenge, it’s moral, and in our system, very often, even outside the court system, that proportional revenge is legal. We have terms. We have a lot of system blindness around, uh, around our justice system. We say the punishment fits the crime, or I’m going to get even. When we use those terms, we are talking about proportional revenge. So, if we were going to have a system that was built on a different moral principle [cell phone ringing], what would that be? [laughing].

**Audience member:** I turned it off!

[laughing].

**Clute:** Okay.

**Audience member:** I really did . . . Sorry.

**Clute:** So in a . . . It’s fine. And, if we’re going to have a different moral principle, it would be loving kindness. Do no harm. So, instead of answering harm with harm, we address what happened, but not in ways that compound the harm. That’s a, a major difference. Other differences are the punitive justice system is hierarchical, judgmental, and punitive. If we were going to have a non-punitive system, that
hierarchy would be replaced with equality. That judgment would be replaced with insight. We need to see into the truth of the matter, what was really happening. And, punishment is replaced with mutually beneficial action in which no one has to lose. So, there is a way to do this and just to describe, uh, briefly, the process we use, it is a three-stage process. First of all, stage one, we want to get to mutually beneficial . . . I mean, we want to get to a mutual understanding. So, we, we ask the question that opens it up, so people begin to understand one another, and we’re looking for that underlying conflict dynamic. So, in that discussion, they begin to discover unhealed wounds, unmet needs, and systemic injustices that people are trapped in . . . they, they are trapped in, and they begin to see where that conflict arose out of that underlying dynamic. When that happens, they begin . . . when it works, they begin to see their shared humanity and when we connect with another person at the level of our shared humanity, we do not want to hurt them. It doesn’t make sense, so the desire for proportional revenge disappears and when we’re no longer in that consciousness, what happens is a whole new set of possibilities become apparent. So, the people in the conflict with that new information about those new possibilities, they can come to a resolution that is mutually beneficial, and no one has to lose. I can tell you when that happens, it’s better than anything that ever happened in a courtroom. Um, so last year, I want to share, um, last of all, I met two amazing men: Paul Taylor and Weldon “Prince” Bunn. And I learned . . . so, as I’m on this journey, I keep learning more and more, and I learned something very important from them. So, they had each been incarcerated for over twenty years for murder, but while in prison they, they transformed their lives, and they changed the prison culture. So, out of circumstances, they joined my restorative justice class at Virginia Union in, uh, January, and so I’m teaching these fourteen structures, this is how the punitive system works. They understood that really well. And then I said ok, this is how Unitive Justice works, and they understood it at a deeper level than most people I normally teach. So, they said, well, in prison, this is what we were doing. So, as I’ve gotten to know more about what they were doing, they . . . one important thing was they discovered that they had to . . . they figured out that they had to get out of that mentality of proportional revenge, of needing to get even. And so, they discovered . . . it’s an amazing story . . . they discovered how to do that and to bring the other men with them, and so what they were doing and where I came
to, basically are the same thing, and this is my conclusion from that. When we can get out of that dualistic thinking, that need for revenge, when we think, that’s justice, what emerges is our shared humanity, and it’s beautiful. So, if we can escape that punitive mentality which our whole court system is built upon and instead have a system of justice which really supports and fosters our nurturing and recognizing our shared humanity, we’re going to have a better world. Punitive justice is not our only choice. We do have another choice and that is justice as love. Thank you.

[applause]

**Samuel-Siegel:** Thank you so much, Sylvia.

**Clute:** One thing I forgot to mention is we have a training on Unitive Justice, um, in November. I have brochures if anyone’s interested.

**Samuel-Siegel:** Thank you. Um, so it’s . . . We have about almost fifteen minutes, ten to fifteen minutes, before we need to transition. Are there questions from the audience for our panelists?

**Audience Member:** May I call you Vickie?

**Shoap:** Certainly.

**Audience Member:** To you: what is your budget?

**Shoap:** Well, because I don’t . . . I’m not high enough on the chain to know that. I can . . . I can give you a roundabout estimate. I’m thinking it’s probably about, if I add up my . . . what I think my staff members make, because, again, I’m not privy to that, um, I would say probably around maybe two hundred and fifty to three hundred thousand. But I will tell you, the gigantic program in Oakland that has an RJ person in every building, that have turned their system around to . . . to no kids being suspended or expelled, had a two and a half million dollar budget that almost got cut last year but ended up having a lot of donors come in. So, our budget is miniscule compared to what we need, and we’re lucky to have it. Most schools don’t even have that.
Audience Member: Beside your, um, ah, salary budget, do you have a separate budget for individual programs within your . . .

Shoap: No . . .

Audience Member: . . . purview?

Shoap: No, um, there are two specialist positions: mine and another specialist that does all of our data. They are funded by an IDEA grant, a federal grant, because obviously so much of the budget needs to be “instruction in Virginia,” and my R5 region leads that do the interventions are teacher contracts and that is the only way that we were able to get them. They’re teacher contracts, former teachers, that are now called Restorative Justice Practitioners.

Samuel-Siegel: Other questions at the moment?

Audience Member: Sorry, now . . . I just keep talking, don’t I? Um, Sylvia, I think to you probably on this one, but . . . um, so, I’m all in favor of the concept of, really, where does revenge get us? Um, so, we need something better than that, but I do think from a victim standpoint, um, most victims will be coming to the concept new . . . um, hopefully they’re not a repeat victim very often . . . um, when you’ve been harmed, you need some kind of satisfaction. Usually, we think that’s what revenge brings, probably doesn’t, but how do you convince victims, or what is the terminology that you use to get a victim to understand what satisfaction looks like, feels like, in the system that isn’t revenge?

Clute: So, um, the first place that I had the opportunity to actually implement this was at restor – was at Armstrong High School. We were there for two years, 2011 to 2013, and . . . so what we did is, if there was a conflict and a circle had been initiated, we would go to the people who had been harmed, the students who had been harmed, and explain to them that in the school there are two possible ways of dealing with the conflict, one is, you know, can go to the principal’s office and the principal’s going to decide what’s going to happen, but the alternative is that those . . . that everyone who was involved in the conflict can come together and talk about it and then they get to decide what the outcome is going to be, and very rarely did a student,
uh, not agree to do that. So, it is in how it’s, how it’s presented, but
we offered them the opportunity to have a say, you know, to be in, in
a conversation about it and get to have a say in the outcome and that
seemed to be . . . sound reasonable to most of them.

Audience Member: So, if I could just . . . Is what I’m hearing maybe
that the opportunity for the victim to be part of discussing solutions
even before they know what their, you know, possibilities might be,
that just that sense of control over an outcome might be what’s satisf-
ifying to a victim?

Clute: Yes, definitely. So, in the other system if they go to the prin-
cipal’s office, they don’t have any role at all.

Shoap: It’s confidential. They can’t tell the other family what was
done to that child that harmed my child. That’s confidential, and par-
ents always want to know.

Samuel-Siegel: I’ll . . . I can also mention I’ve read some literature
from some social science research that indicates that, um, sort of writ
large, people who have been victims of crime, aren’t as likely as, as I
might have thought originally, to desire revenge. Um, or at least it’s
not among their highest priorities . . . that, that sort of when polled,
there’s . . . victims often express a desire to be heard, to receive apol-
ogy, to see the person who hurt them, you know, be, um, . . . have ac-
cess to education or assistance, so it’s interesting, there’s some social
science out there that I think, um, helps debunk what we often as-
sume in our, um, political discussions that, you know, victims need
revenge, which is, which isn’t the point that you are making at all, but
it was really enlightening for me when I . . . when I first read about
that.

Shoap: I think it’s really important to say, too, that it’s a voluntary
process. It’s not for everyone, and if a victim, a person who has been
harmed says, listen, I . . . I don’t want anything to do with it, we don’t
twist arms. We say, thank you for your time, and we walk away from
that person. And then they . . . then there’s the alternative, which may
be a pun – . . . more punitive, um, response, but it is completely vol-
untary for anyone who participates. That’s incredibly important. It
doesn’t always happen that way when schools, particularly, adopt
these programs. That’s why it’s really important to remember it’s voluntary. No one should ever be forced into the process, especially a victim.

**Clute:** Right. Another aspect of it is, is that initial pre-conference that’s done. It’s . . . it’s the role of the facilitator to gain the trust of the individual that is involved in it. So, you go to the victim and it’s . . . and, and the way you approach the victim, the way you explain it, you’re looking to gain the trust of the victim, to trust you when they come in the circle. But when you go to the offender, it’s exactly the same. It’s also voluntary for the offender, and the offender has to trust the facilitator to also hold a safe place for them to be honest in that circle. So, the skill of doing the circle process right from the beginning with those pre-circles is crucial for the success of the, of the process.

**Samuel-Siegel:** There’s another hand back here, I think. Here come . . .

**Audience Member:** So, the victim, as I’m understanding it, the victim can completely negate the participation of the offender in the program . . . in the restorative justice program? Is that what you’re saying?

**Shoap:** It depends on the program, I think. In our, for example, our AAP program that I talked about, we have a track two for the juveniles, for the offenders who, for example, shoplifting. We have two huge malls, hundreds of shoplifting cases. Those . . . when those kids get referred to the AAP and there’s no quote victim participation, the loss prevention doesn’t want to . . . they go on a track two, which is an education class and the . . . working with the chamber of commerce comes in, and they do a circle with the business owners, and things like that, so there is a track two. We don’t want to deny any young offender an opportunity to be in the program because the victim doesn’t want to participate. Those kids would go into the track two, which is a more educational.

**Audience Member:** Ok, so then I have another question, and it’s about . . . say you have an assault at a school, and the victim does agree to participate. What . . . can you give us an example of what
kind of restorative justice type plans you might come up with to address that?

Shoap: I can tell you a very quick story, and I promise it’ll be very quick. Um, we had a very . . . we had a couple felony cases that we had to really go out into the community and work through because we had a young man recently who walked into the school . . . walked into one of our big high schools, and punched another boy and broke his jaw. Seemed like it was out of nowhere. That’s . . . that was a malicious wounding. The family of the victim, you know, they were claiming it was a racist act when it wasn’t. They were a Middle Eastern family. It was an African American boy who punched their child. So, they . . . there was a lot that . . . a lot around that that we had to work through. What happened with that young man was, this other boy had been picking on him for a long time. They just kind of had a thing between them. His mother . . . this is the offender now. His mother died on a Thursday night. His dad’s . . . of cancer . . . they knew she was dying, but she died unexpectedly. Quickly. His father was told, get back to normal as much as possible. He of course was grieving. Monday, he . . . kid got his wisdom teeth pulled, and Tuesday, dad sent him back to school. He walked in the door and his kid . . . his rival had been saying, oh, you look like a chipmunk, or something, and so the officer knew the, the backstory. Although he couldn’t share it, he and I went out to the home of the victim many, many times and finally convinced that family to sit down with the other . . . the father and his son. By the end of that circle, the mother of the victim was saying, I can be here for you when you need a mom. It was very powerful and when we drove out of the school that night, the two dads were still sitting on the bench in front of the building talking. We didn’t need an agreement in that case, because all that other family needed . . . and they wanted that child incarcerated for hurting their child . . . All they wanted to do was help that family . . . that man and his son. That is not just a pie in a sky story, that happens every day in our school system. So, yes, that would be an outcome. It would be, just understanding each other. Sometimes it’s cleaning up the mess they made. But in assault, it’s really figuring out, what you can . . . what do you need? What does the kids who has been harmed need? And what does that family need? And what can the offender do? Whose obligation is that, and what can they do? And, really, that’s a typical response to an assault. Usually it’s two
kids fighting, and both families, they just want it to go away. They want to do the best they can. When they see the other family, that’s just another adolescent who made a bad mistake, and that’s just another family who’s hurting. That’s the power of the circle process and bringing people together. But that kind of a case takes time to work through. With the help of the SRO. That was something I worked with the officer very closely on.

Clute: So, what she was describing is they see their shared humanity.

Shoape: That’s right.

Clute: That changes everything.

Shoape: Thank you. That’s right [laughter]. Yes.

Samuel-Siegel: Other questions? I have one more. We have 2 minutes. This is a hard question to answer in 200 minutes, but . . . I’m thinking back about, um, some of what, um, Dr. Turner talked about, and in particular, it strikes me sometimes, I’m frustrated by wondering the extent to which restorative justice can have structural, um, implications. So, uh, that we, uh, you know. It’s important to . . . well anyway, I don’t need to elaborate on that question, right? I’m curious about what you all have observed in the communities where you’ve been working, if there have been broader implications, um, beyond.

Clute: Yes. Absolutely. So, in the process we use where were looking to get to the underlying conflict dynamic, you very quickly find those structural problems, and in the school that I mentioned . . . so one of the first things we discovered was that in the punitive system, there was a no contact contract. So, when there was a fight, the, the two kids were prohibited from speaking from each other. They had to sign this agreement, and it said that if they spoke to each other, they could go to jail. So, in the punitive system, there is only one remedy. Punishment, and if a little punishment doesn’t work, they just have to escalate it. So, what happened was we began to have these kids come in. They’d had a fight . . . and in the first couple minutes, they figured out what kid set ‘em up for the fight because the kids had learned that in that system, where the kids that had got in a fight couldn’t talk to each other, setting kids up for a fight became a perfect crime, they
would never get caught. And, so, we saw that over and over and over. But this is what would happen, when that mutually beneficial outcome that they can arrive at when they see the dynamic they are caught in, the kids would say, oh well let’s do this, if we are in a fight, you know, if we got something going on, let’s just talk to each other away from the other kids and work it out ourselves. And they began to do that. But when you begin to go to that, that, um . . . the level of conflict dynamic, you will see all of those structural injustices. They are there. They are fueling the conflict.

**Samuel-Siegel:** Thank you so much. I want . . . I want to thank you ladies in particular for concretizing the day’s work so far, and uh, just thank you so much for your time and presence, and your pioneering leadership, uh, in the community. Thank you.

[applause]

**Saravi:** Thank you everyone. We’re going to take a five-minute break and reconvene here at 3:00pm for our last panel.
A RETURNED CITIZEN AND WHAT LAWYERS NEED TO KNOW ABOUT VICTIM OFFENDER MEDIATION

Paul Taylor, Weldon Prince Bunn, and Tara Casey
INTRODUCTION

Marina Batalias: Hi everyone, we’re going to go ahead and get started with the next panel. My name is Marina Batalias. I’m the Senior Manuscripts Editor for the Public Interest Law Review. Um, this next panel is a very special one. It’s going to explore two returned citizens experience with the criminal justice system, and the impact that restorative-based victim-offender mediation had on their lives after being released. They’ll also discuss their very special program in the Richmond community, uh, which, uh, promotes restorative practices right here in Richmond. So, without further adieu, we have Paul Taylor, the co-director for the RVA League for Safer Streets and the founder of the Sanity Project. We have Prince Bunn, RVA . . . who is also at the RVA League for Safer Streets, and then our moderator is University of Richmond’s own, Professor Tara Casey.

[Applause]

A RETURNED CITIZEN AND WHAT LAWYERS NEED TO KNOW ABOUT VICTIM OFFENDER MEDIATION

Tara Casey: [inaudible] . . . I’m heartened that this is the program that comes at the end of today’s, uh, symposium. I just want to recognize the hard work that’s been invested by our students of the Public Interest Law Review in putting together this symposium, which I think has both been a benefit to us as practitioners but also as people. So, thank you very much to you all.

[Applause]

Um, for the closing program, you will see that the title of it is “A Returned Citizen and What Lawyers Need to Know About Victim Offender Mediation,” but what I want to start off with, is that phrase “returned citizen” because language matters, and, too often, we refer to people who have been incarcerated and who have been released as
“ex.” They are “ex-offender,” or “ex-felon,” or “ex-convict,” and that is negative. That is their past. What they are, are citizens, and these are citizens returning to our communities, and that’s their present, and that is their future. And so, what I hope that we all take away from this portion of the program, if nothing else, is to be mindful of language, and how we define people, and what those definitions mean to our concept of justice. So, it has been such an honor and a pleasure of mine to get to meet and know these two returned citizens, Mr. Taylor and Mr. Bunn, and what I have . . . was . . . we’ve met before and we’ve shared, um, they’ve shared with me their stories, and I’m heartened now that they are getting to share them with you. We always like to begin at the beginning, so can you all share with me, how did you two meet?

**Paul Taylor:** Um, how’s everyone doing? Shout out to the people up top [laughter]. Because you may not be getting too much love up there, so shout out to the people up top, and also to the people that were . . . are unable to be inside this room that are watching from another room in the back. I know some people that came all the way from Hampton to Richmond to be a part of this. So, shout out to the people that are watching in the rear. I would be remiss if I didn’t start off by saying that today is sort of special for me. Because almost 25 years ago . . . and I have been home now for about 2 years from 23 years of incarceration . . . 25 years ago, I was on a room such as this. A court, in Newport News, Virginia, and I felt that I was fighting for my life, and which I was on this side of the room with my lawyer, and on that side of the room was the prosecuting attorney to my case, and of course, behind me was your honor, the judge, and right here, I was told there would be a group of people in whom would be my peers, but I did not Kleon, I did not see Wink, nor did I see Richard, and I was sentenced to a life plus 26 years. And when they told me life, they really meant it. Now I will not stand before you and say that I was not guilty, but I have to go back even further to give you an illustration of what the punitive punishment was in our society in the community I derived from, that eye for an eye, tooth for a tooth, wound equal for a wound. About a year or two or so before that, I witnessed my own baby brother being killed . . . or, was killed and which, when I arrived at the scene, he was on asphalt, and all I could think of was punitive, punitive, punitive. And it landed me in penitentiary with a life sentence. But doing that time, I want you to
understand something. Most of the time in the court room, when the defendant is here, the person that’s charged, everyone that supports them like the public defender that spoke earlier said, on this side they are for you, on that side they’re not. But during this day, it was different. Usually the victim of the family, the family’s victim, will sit behind the prosecutor. But not this day. The mother and the sister sat behind me, and I can hear her crying, this mother, yearning for the loss of her child. The sister, crying, yearning for the loss of her child. . . her, her brother, and I had to hear this cry, and I like to believe that, now that I’m starting to understanding these sort of restorative practices, this punitive as well as, as Ms. Kulvia ex— . . . wonderfully . . . wonderfully explained to you, the unitive process, I want to believe that that mother sat behind me because she wanted me to feel exactly how she felt in the loss of her child. And this is a cry that I’ll never forget. In 23 years, to this day, I will never forget the cry. But over my time of incarceration, I knew in my mind she wanted to say, why Paul? And to this day, I have yet to been able to give her that answer because I have yet to be able to sit with her and describe what happened. And if she was to say she wanted that, I would welcomely give it. Restorative justice number one, or should I say that, paradigm shift in my head, or Thomas Kuhn’s “aha” moment in my head, number one.

The second experience was being incarcerated and receiving a letter. This wasn’t just an ordinary letter because when you in prison, you want every kind of letter that comes to your door, I don’t care if it’s a book from Jet. You want it. But this letter was different. It was a letter that described a scenario that happened, and someone seeking my forgiveness. And, bearing in mind, when you are in prison with a life sentence, you are hoping that someone one day will forgive you. It was from the victim, no, . . . it was from the perpetrator of the killing of my very own brother, asking me for my forgiveness. I turned to Prince. Shared the letter with him. He said, bro you have to say something about this, you have to respond. My respond was, yes. I wrote him back, and I gave him my forgiveness. Not only that, I also wrote the parole board and saying that he was young and didn’t understand what he was doing and that he needed an opportunity to be free. I also told my family, my father to do the same, in which he did. Restorative practice number two. And like she said, Prince and I on the inside, we described the whole culture, which I’ll get into later, but I
think the question was, how did we meet? Well we understand that there’s two ways that a person can graduate. The conventional way, as well know, which you all probably have done, you great students of the University of Richmond. [laughter] The first one is elementary, middle school, high school, college. Well, me and Mr. Bunn here took the unconventional way: detention home together, jail together, prison together. And funny thing about this, and not funny in the meaning of “aha,” . . . oh and y’all won’t forget, we also went to Beaumont, or what is now Bon Air, we went there together, too. But when I say funny, I don’t mean in the expression of “haha,” I mean funny in the aspect of here we are, two men that are now in prison, and some of the same people that we saw in juvenile detentions, or in juvenile facilities across this great Commonwealth of ours, were also in prison. So, we all grew up together in an unconventional way. So, Prince and I met through the whole process of incarceration. Prince.

Weldon Bunn: okay, so, uh, how everybody doing? I don’t think I got to tell y’all about how we met. Hasn’t today been a really great day? Um, I’m just sitting here and I’m really, uh, I’m humbled by this opportunity. I think for me I want to start off by saying ma’am, I don’t know your name, on the end but, uh, you had spoke . . . or you had asked a question about, um, the victims. Right, we’re speaking about victims, and I think that that . . . when you talk about restorative justice, that has to be the, in my eyes . . . probably the most important element of it, um. Like Paul, I went to prison, um, charged with, um . . . sometimes I just feel ashamed to even say it like, but, uh, homicide, robbery, um, possession of marijuana, grand larceny, I was all over the place, and I committed my acts because I was just selfish. Alright. I didn’t think about the impact of my decisions had on my environment. Once I was taken away, just like, uh, I think, uh, Mr. Hess has spoken about in representing some clients, that he looked at some and said, you really need to be off of the streets. You know, and I think that at that particular time, I needed to be removed because I didn’t have a sense of who I was as an individual, and I didn’t know what I was supposed to be doing with me. So, now here I am on the other side, still selfish, still blaming, and for me, my journey to restorative justice it, is, it’s not a formal training, right, because I kind of, I guess, learned about it without even knowing that this is what it was called in a sense. Um, mine started inside of a cell. Right? It did. And like I said, I wouldn’t call it that at the time, but
the reason why I have to tell you this is, my understanding of restorative justice is when I found the courage to go to the mirror. That’s right, they have a little piece of metal up in there, you have to try to wipe it down to see through it. But um, yeah it started there for me, and the reason why it started there, because the mirror has uh, uh, it really has a magical effect, you can go in front of it, but it’s going to always give you what you give it, and when I found the courage to go in front of it and stand and really look at myself and what I had became, I said, damn man your mother didn’t even raise you like this. So for me, I guess you can call that my “aha” moment, but it didn’t start initially. I went through the depression, alright? Cause once you get inside [makes a dismissive noise], it’s a depressing place. I went through the anger, and I was mad at the system, the system is working against me, uh, I was mad at white people [laughs] and just to be honest and didn’t even know why. Um, I was mad at my family, you know? Uh, and then from the anger, it started to blame. But then when I started getting into the accountability thing, it was like, hold on man. Yeah, granted, you might have came from some difficult, challenging situations in life, and, like I said, I don’t make any excuses for the things that I did, right, but I didn’t really even understand why I was doing what I was doing, you know. I was just responding to things without looking at the consequences. And on my . . . I went up for parole time times, alright, and on the thirteenth time the parole interviewer . . . I kind of knew that this one was different without knowing . . . and for me, I had a life plus eighty-year sentence, so, technically, I don’t even supposed to be sitting in this chair, alright? That’s how much time I had . . . And when I went up for my last interview . . . because people ask me now, how did you get out? I said, man, you know, favor I guess? But, on the last interview, the lady said to me, she said, Mr. Bunn, she says, how has prison changed you as a person? And I sat and I thought and I was like . . . I said ma’am, you know what, what I’m about to say to you may sound kind of crazy in a sense, I said, but, um, prison helped me find my humanity. I found my humanity in the worst of conditions because when you wake up in an environment that you can’t escape, right, and you are constantly surrounded by men who have every reason in the world to give up on themselves, you know, they are looking for outlets to, uh, express their frustrations because, okay I got life and eighty, and I’m thinking, wow, but my next door neighbor . . . he got three life sentences, so he don’t care about my time, and man to man,
to the left or the right, he may have 120 years under the new law, so now you in a situation where you have to find something to fight for. So, when I found the courage to go to the mirror of accountability, and I started thinking, I’m like, man, I done deprived some family of a father, a son, a brother, an uncle, a nephew, a husband, a grandfather, all of those potential things existed inside of one man, and I ain’t have no right to do that, but once again, when you is selfish, the only thing you can see is yourself. So, I had to, in a sense, be sat down so I could catch up with me, and it wasn’t hard, it wasn’t an easy thing to do. I, um . . . Paul had sent message to me, right? I was in, um, probably one of the most challenging buildings in Greensville, where it’s just straight gang culture, and when I tell you that it is a difficult way to live every day, because, you know, you got all these different sets, and you have to . . . if you don’t have any respect, you probably not going to live in there, but that’s a whole other story . . . But he had, um, got involved with the reentry process . . . and I heard, um, one of the panelists, and I think it was the judge, and they was asking did they have the restorative justice principles inside of prison and not in the sense of what it is called. We had things called “process groups” where we would sit around, and we would talk about certain things . . . but I learned this later . . . and we had another class which was called victim impact, which to me was probably the most important class that they could offer in the Department of Corrections because it forces you to gain some . . . well I ain’t going to say it forces . . . but it causes you, if you open to the process, to gain empathy towards other people, and I think that, um, once I got involved in that, it just clicked. But Paul called me . . . he sent a message over to me, he said Prince, you got to get over here to reentry, man, this is how we going to go home. So, you know when you’re in prison anything sounds good, just like when you first get your case, like when someone says habeas corpus, it’s going to get you home, and you be like, what, okay, let me go there, and not even understanding that process, but I went. And I went not because I selfishly wanted to go home, I went because I wanted to do something different, and I had made a personal commitment that I wasn’t going to die in prison. That was my commitment to myself. And a person might say, well how can you say that you not – No, first of all, it started with finding out who I am as an individual and then finding some type of spiritual connection or . . . cause I’m not a religious person, but . . . understanding that you have to have something to help you
get through that type of situation, so I internalized that, and I went over there, and I got exposed to some information, and I had to leave because it became a little overwhelming because during the time that I was over there, we in the building where you only have . . . everybody in the building is going home, and me, Paul, and the rest of the elders, we all had extensive sentences, so now I found myself being jealous and envious of people that’s leaving, and I’m like, man, what’s going on in your head? So, Paul made parole after I left, and he told me, yo, you got to get back. I said, hold on man. You home? Sh, he’s home. And he was doing great works out here, and he said, bro you got to go back, so I went back, and I got a chance to meet, um, the chairwoman of, of the parole board back in April of last year, ‘cause in eight days I would’ve been home one year, and I went up for parole on July the second, and July the 31st, I was granted after twenty-five years of incarceration, and I made a personal commitment that if I ever got a chance to walk out of those doors ever again, that I was going to dedicate my life to doing something better. I don’t have all the answers, but like I tell people when I speak, I have the courage to be at the table. Now, what that means in the context of restorative justice, I’m open for suggestions just like anybody else is. So, you know, I guess, um, they can go back to you now. [laughter].

Casey: Well, I think, I mean, one of the, uh, things that comes from both of your stories is the concept of restorative justice being hand in hand with the restoration of humanity . . .

Bunn: Oh, yes . . .

Casey: The humanity in yourself that you saw in the mirror . . .

Bunn: Yes.

Casey: . . . the humanity of the victims, Mr. Taylor, at the date of the sentencing. It’s this restoration of humanity of both the victim and the person who committed the crime. In the work that you’ve done, both while you were in Greensville, and since then, where does that restoration of humanity find its greatest challenge?

Taylor: Alright so, um, like she said, you know, our the points alluded to, uh, for five years, uh, Prince and I co-facilitated all the state
mandated programs in the Department of Corrections., meaning that we were in an environment where it was a melting pot of diversity. When I say we had all the alphabets, I mean we had A, B, C’s, GD’s, E’s, and what this is Aryan Brotherhood, Crips, Bloods, Gangster Disciples, all these people, and we had to make that structure get along. Now you’re probably saying, how? Because [inaudible] society deemed the worst of the worst, or it’s what [inaudible] society may deem as its waste. So, how does two individuals do it? Well, we firmly believe in the restoration of humanity inside of people, and if you were to ask us, “What is restorative justice?” We will tell you that it’s the restoration of humanity inside of people. I was once asked in a closing speaking, a person asked me one time, she said, how do you see a perfect world? And I said, a world when the word “thank you” no longer exists, because everyone is doing what they are supposed to do by each other. So, in this community, Prince and I knew that we had to come up with some unconventional strategies, and we firmly believe that unconventional behaviorisms calls for unconventional strategies, and we had ‘em. So, we made Greenville Correctional Facility the number one place in the Department of Corrections for reentry. We took offense when we found out that Oklahoma was number one.

[Laughter]

We wanted to be number one, so we worked even harder. So, one of the things that we did, and I . . . not understanding what we were doing as a restorative practice, but we started having interventions with people who had conflicts in these different organizations because if you call it a gang, they’ll swear to god it’s an organization, and we are CEOs. So, we would have these interventions along with some staff and some great treatment officers like a lady by the name of Moody . . . some great treatment officers that understood some practices. So, we used some of these skills that we were learning in this cognitive community, and thinking for a change, and problem solving, critical thinking and the likes of that, on the men, and gave it to them in a way that they could understand it. One of the first things we did, we put a sign up that said, “Self-Govern,” so everybody would look by like, self-govern? Self-govern? What is self-govern? So, we would say if you govern yourself, then no one else will have to. Think about it. That not only applies in prison,
that definitely applies in society when you’re dealing with law enforcement. Buckle up. So, as time go . . . started to go on, people started to take notice, and a lot of people would come in from, uh, the Department of Corrections headquarters, as well as politicians, and when they would come in and be in awe of what we were doing, and they would say, If you ever get out . . . or, I’m sorry, when you do get out, hey, look us up. So, Prince and I from the 757, but we decided to roll to Richmond and look them up. So, we have all these intentional conversations with people from Homeland Security, Secretary Miranda . . . we was just with them the other night . . . and we been doing the works in the community, and one of my partners that would probably be here today, his name was Jawad Abdo. Jawad passed away, but he and I started an organization called RVA Lead for Safer Streets, and we created this program while sitting on the benches in prison, and we decided to use basketball as a bait to get all of the areas in Richmond, the high crime areas together . . . the Mosby, the Jackson Ward, the Hillside . . . all of these people together, but basketball was just the bait. But before every game, you have to go to a workshop, at which Prince is the workshop coordinator . . . Senior Workshop Coordinator, and we . . . before every game, they have to go through these workshops, and we concentrate on problem solving, critical thinking, and conflict resolution. We decided to bring prison to them, so they don’t have to go to prison to get it.

**Bunn:** [Laughs] Yeah.

**Taylor:** And it’s working. When we see neighborhoods that was battling for years . . . when we could sit down and have two neighborhoods sit on the same bleachers, and we talk about conflict, we didn’t know we was doing restorative circles process. One day, Prince and I was riding around, and I get an email, and I forget all about it, and it was Ellen, Congress . . . no, uh, City Counsel woman, Ellen Roberts, “Are you coming to this meeting?” Man, we got to go. So, we go, and we get inside this meeting, and we share something with a whole group of people. On our way out, everybody is around us and wanting to talk more to us about what we just discussed. And then here comes this little lady, prying through the crowd, and she said, “Hey, you two.” And her name is Sylvia Clute.

**Bunn:** [Laughs] Yep.
Taylor: And she says, “I want to offer you, and what’s your name again, sir? Prince? Okay, well, Prince, Prince. I want to offer you two internships at Virginia Union on restorative justice.” “Is it free?” [Laughter] “Yes.” And from there, restorative justice has been our model. Restorative justice, thanks to Sylvia Clute, put in a title to what we were already trying to understand. And right now, we’re believing in, what we call . . . or, what they call . . . the returning citizens. And we are so game right now to describe in our relevance, and we’re starting to make Richmond, and other cities alike, understand that a lot of things that’s going on in a society that you just can’t do without us. And we’re ready. And I constantly say, it’s the time of the returning citizen. Prince.

Bunn: Okay, so, everybody familiar with Edward Thompson? Um . . . [inaudible] . . . The health food store? Okay well, that’s like our second office [laughter] . . . because that’s where we met Miss Clute at after the, um, initial meeting at the city council building. And . . . and this is about challenges too, I remember the question . . . and when we got there, I knew something was special about her, and I guess she knew the same about us. But, um, we sat down and talked about the possibilities of this, you know, because all of that conversation has led us here, and she just started crying. Imagine that you’ve only met a person twice in your life, alright, . . . and when you pair us up, right? You know, I’ve got my baseball cap on, my sneakers, you know, and stuff, just my regular wear, and then she started crying and I said, um, and she said, I just know that this is it, and I was like, what is she talking about? And she said, you just don’t understand right now, that this is it. And since that time, ah, what, ah man, I just . . . sometimes I just be feeling like, is this really, really happening? I feel so honored that she’s a part of my life because she’s, um, helped me just further explore my own humanity, you know, um . . . I heard earlier today . . . there’s been so many people that spoke . . . I wanted to talk about something that Ms., um, Professor Siegel has said . . . there’s just so many things cause it’s a lot . . . but it’s . . . Ms. Clute, when we talked about the circle process, right, and how, when you are present, the magic takes place, ‘cause everyone who’s spoke up here before, you know . . . I don’t think any of us are experts on it because we’re still learning, it’s a process, and we’re finding out what works and what doesn’t, but I do know that this right here is a key
component to it, being present, and then getting outside yourself. So, in regards to the question that you asked, what is the challenge? I think that, if you don’t know how to be in tune with your emotions and get outside of your own life circumstances to see things from someone else’s perspective, you know . . . I had a conversation, I think it was with Jodi earlier, and we were talking – nobody is bad. I don’t think there is bad people. I think that what happens is, their life circumstances harden them, and they become . . . they get callouses on their hearts, and they think that’s the only thing that’s going on in the world—what they’re been exposed to. But then, just like I said with my relationship with Ms. Clute, you know, inviting someone to your home is a real serious thing in this day and time that we’re living in now. The third visit we had was in her home. And mind you, I’m just weeks out of prison, you know, weeks out of prison, and just . . . in just eight more days it’ll be a year, but she invited me to her home, and not only did she invite me to her home, she introduced me to her daughter, her grandkids, her husband, her children . . .

**Taylor:** . . . her garden.

**Bunn:** Her garden. Yeah.

[Laughter]

**Taylor:** And kombucha.

**Bunn:** . . . and kombucha.

[Laughter]

**Bunn:** You know what I’m saying? And . . .

**Taylor:** . . . and kombucha. And not only did we also know how to make kombucha . . . matter of fact, we have her mother developing it right now.

**Bunn:** On her kitchen counter.

**Casey:** There you go.
Bunn: But here’s the thing, she took me outside of my experiences and allowed me into her world, and vice versa, and we came to understand that we have more in common than we do differences. Differences always exist, but people tend to focus on that, and what we have to focus on . . . and that’s the thing, the challenge . . . you want to magnify the differences as opposed to understanding the common, shared humanity we that we have. We’re all citizens of the planet.

Taylor: *inaudible* You want to also . . . now should we talk about the hard part?

Bunn: Well, I guess it gets hard . . .

Taylor: Okay so, no we’re going to sort of address the elephant in the room.

Bunn: Okay.

Taylor: So, when we talk about these restorative justice practices, you know, you have to understand a lot of things. We also . . . we have to go back and understand the trauma, of course. We have to understand what’s going on inside of our environments because one of the things that are mostly affected are people of color. While we was incarcerated, Prince and I had the luxury, if you want to call it that, of being able to do a lot of research, studying, books. I’ve come across Dr. Turner from when I was in prison, and people say, man, if you ever get a chance to listen to her. Today I found out why. Thank you so much. But we . . . we were able to educate ourselves on a lot of things, the root cause. The root cause. And we can also address so many different things, all the way back to the Thirteenth Amendment . . . we can definitely get into that if you wish, but it was something that I read a long time ago . . . two pieces of things. One was just introduced to me the other day by a man by the name of Ram Bhagat. You may know him from Drums With Guns . . . Drums Over Guns, and that was the Little Book of Restorative Justice. If you don’t know about that, you probably want to get it. But one of the most profound books that I read in prison was the one called Before the Mayflower and how it described so many different things that still affect us to this day. And how people of color are being targeted in certain circumstances . . . certain circumstances, in which we are still being
taken to prison. The way that I asked the judge the question today about the juveniles who are being expelled from schools, or suspended from schools, if these are kids that’s in my neighborhood, then I promise you they are going to find something to do, and it just might be your car. But the more they get out of school, they have . . . they don’t have any type of intervention programs inside of schools, sort es – . . . I’m sorry . . . like a restorative justice practice, then we are going to have this continuation of prison, of school to prisons pipeline. Well, Prince and I have returned, and a lot of men that are behind us, to eradicate some of the social ills that once upon a time ago, we helped create. Who’s better to do it . . . than men that understand the culture, that practiced these circles inside of our neighborhoods? See, I’m not the type of person that really loves to depend on politicians or law enforcement when I believe that we can do some things ourselves. But first, we have to get back together, and, bear in mind, I understand that in my community, that some wounds are self-inflicted. But then sometimes, those wounds are being salted, by others. So maybe take notice to this and bring an understanding to that concept. Again, I say, unconventional behaviors call for unconventional strategies. And I promise you right now that the returning citizens have ‘em . . . we’re just asking you to let us back in. Whether that’s to prisons, whether that’s to schools. Give them . . . give us an opportunity to help enlighten our own. Give us an opportunity to be relevant, because I promise you right now, our goal is to describe the relevance of those that are called “returning citizens” or “citizens who have returned.” We’re here, and we’re not going nowhere. There’s one thing the parole board said before she let us go. She said that, I’m looking for people in whom I feel comfortable with being my neighbors. And not only that, this is the parole board that’s on hand. They came to our RVA league game in the hood one time, two white ladies, to see what was going on. And that’s what you call investment. It’s not just like you get out of prison and that’s it. So again, let’s think about the whole concept and get to the root cause, and restorative justice will be relevant. I promise you.

**Bunn:** Tara, can I say this one thing about . . .

**Casey:** You can. Absolutely
Bunn: Okay so, you said about the challenges, I think one of the hardest things, too, was also just being defined by one event. You make one decision and then a person will try to use that as the defining thing of who you are as a person. You know, I remember after I was convicted, in my mind I . . . literally for probably about six months, maybe seven, maybe the whole year, the events that led me to prison played out like a tape recorder every night when I went to bed. Sometimes I didn’t even want to go to bed because I was being tortured by the act. And I knew then . . . this is when the depression came in . . . that I had to do something different. I had to find some type of forgiveness, and the hardest thing was forgiving myself. And then, not being able to extend that, or to share that with the victim’s family, so then I had to direct it towards my own family and the pain that I caused them. So, that, to me, I think, is one of the hardest things, too. And then you come back into society and then people look at you based upon what’s on paper. Like, well if you stuck there, you can be stuck there, I’m not going to be stuck there. I’m going to reclaim my citizenship. I’m going to live my life, and I’m going to do my job to be righteous, and, you know, help as much as I can, you know. So, you know, I know what it is to be on the other side. And it . . . and I tell guys, young guys, all the time. I say, man, you in a rush to get to prison? I said, man, everybody in prison in a rush to get out. I don’t know what you . . . they rushing, they trying to get out of there, and you rushing to get in.

Casey: And to follow up on that, and also Mr. Taylor, what you were saying, is that we hear a lot and we discuss a lot about this concept of trauma-informed mediation, and, and trauma informed policies, but often times that involves the victims, you know, of, of the crimes. But so often the people who are the accused, or the perpetrators, of the crimes are survivors of trauma themselves, and the populations you were working with, both at Greenville and in the community, are people who are also survivors of trauma.

Bunn: Yeah.

Casey: . . . How do we move the discussion to recognizing that, again the restoration of the humanity, the recognition that the people who are engaged, sometimes in those . . . in the criminal behavior, who are making those choices are the survivors themselves?
Taylor: You want to answer that?

Bunn: Uh, go ahead

Taylor: Alright, so, I can give an example of a circle process that we had at Union, in our class.

Bunn: Oh yeah, that’s a good one.

Taylor: And, I’ll just say her name was Rachel, and Rachel’s from San Francisco, California, and she witnessed her boyfriend, . . . as they sat inside of a car, a person walked up and executed him.

Bunn: Yup.

Taylor: And Rachel is white. So, when we come into this class and, you know, Ms. Clute introduced us to a bunch of college students, and, you know, Prince and I were the youngest ones in there. [Laughter]. But, she introduced us as who we were and told them what we were in prison for, and I know that probably affected Rachel in the beginning. So, each of us had to do a circle process in this class. Well, this particular day I was the facilitator, Bunn was the co-co-facilitator, and Rachel choose to describe her story as the event.

Bunn: Yep.

Taylor: We needed all of these [picks up box of tissues].

Bunn: Yeah

Taylor: But when it was over, it was like a lot was taken off of her. She felt so much better. And Ms. Clute played the perpetrator of the crime, and she did really well . . . to the point that Rachel opened up about the whole circumstance. And, of course, in this process you use reflective listening, and it was just a beautiful day that we all will never, ever forget. And now, to this day, Prince and I can’t shake Rachel, because she has an understanding now, and she come to realize that everybody that commits a crime is not exactly the worst person in the world. So, that day we experienced humanity. We was just
people . . . having a discussion, finding a common shared value. That love, or understanding, can actually bring closure. Again, I said, I really wish that I can have the discussion with the victim of my crime, but you are also told that you stay away from that. They’ll be the ones who have to initiate it . . . and I know that was the question, about the victim, would the victim . . . like Prince said, while we was in the inside, one of the best classes that we ever had was one called Victim Impact, and it addressed everything, all crimes. The very last one was homicide. So, I’m going through this twelve-session class . . . I went through burglary, robbery, everything, and I just can’t wait until we get to mine because I want something, and in that class, I actually got it. So, we understand the ripple effect that maybe that there is no such thing as a victimless crime.

Bunn: Yeah.

Taylor: So, yes.

Bunn: Well I’m a bag of water, right? But it felt good to be in tune with your feelings now. Um, you said how do we drive the conversation to those who, um, I’m kind of losing the question, Tara.

Casey: That’s okay.

Bunn: No.

Casey: Well, I was just wondering, because so much of the stories involve people who are committing crimes as being survivors of their own trauma.

Bunn: Right, Right. Trauma. Yeah

Casey: . . . either of their household or their neighborhood, and you’re reaching those people as well.

Bunn: I’m, I’m going to give you an example. We went to Bon Air Juvenile facility the other day. Had the governor out there, the chief of police, the director of the Department of Juvenile Justice, um, homeland security. It was a whole lot of people there. And then, you know, they had a basketball game and then they had a little dinner.
So, we went out, and we was talking to some of the youngsters, and we sat down, give ‘em a little tray or whatever, because I wasn’t even going to eat . . . I wasn’t really hungry, for real. It was two of us. Two of them. Two of us. Then an officer came and said can we sit, and we was like, yeah. Then the chief came. That’s our guy, Mr. Will Smith. Great man. He came. And then, next thing you know, it just seemed like we just got surrounded in a circle. And then, a few minutes later to the right, here come the mayor. Now you got Paul, the Mayor, the Chief, and me, and we are just surrounded by youngsters, and we started having the discussion . . . and this is in reference to what you’re saying . . . you know, we kind of was going in different ways. You know when you get . . . when someone gives you their attention, they actually giving you a power. So, when I realized that we had their undivided attention and, you know . . . ‘cause everybody in the program were juveniles from Richmond and had gun charges. So, you know, carjacking and all kinds of stuff. Malicious wounding. So, I said to them, you know, really simple. I said look bro, . . . I said, man, the kids can’t go outside and play. I said, they can’t go outside and play because your friends out here shooting in directions with no sense of the consequences of these bullets. I said, listen to me, man. Your brother can’t go outside and play, your sister, your daughter, your son, your aunt, your nephew, your grandmother, your niece. See, ‘cause when I speak to ‘em, I speak to ‘em like that. I can use no whole bunch of technical terms and fancy words because the issues that we are facing are too complex so I’m like, bro, they can’t go outside and play. And, whether or not it, um, resonated, I just know, for a moment, I seen faces kind of looking like . . . and for me, whether it just connects with one or fifty . . . just understanding that each one of us have a personal responsibility to the environments that we’re from, and you don’t have the right to go out and deprive someone of their sense of security or safety because you’re too selfish. So, I guess if that answers that question, I don’t know . . . I mean that’s just how I feel about it. You know, that’s how I feel about it.

Casey: As we’re getting to . . . and I do want to provide time for folks to ask y’all questions as well . . . but the one last question that I have is . . . getting to know you, and . . . before today and then also listening to you today . . . there’s something that you said earlier, Paul, about when you, you know, when you were . . . when you had committed the crime that you were convicted for, it was the word
punitive, punitive, punitive was going through your head. And as the two of you were speaking now the word that goes through my head is redemptive, redemptive, redemptive.

Bunn: Oh yeah.

Casey: . . . and that’s the word that goes through my head. But you two both were able to be paroled, the opportunity for redemption . . . for, for that type of, uh, of, of service, was available. What about for those who . . . who don’t have that opportunity? How does the concept of restorative justice, of redemption, resonate with those folks?

Taylor: You?

Bunn: I think that, um, I mean that’s a difficult thing because . . . especially for the guys that’s still in prison, and they don’t feel like they have anything to live for . . . for me, mines was two events in prison that clicked for me. When my grandmother, when she passed away, and I didn’t get a chance to go to her funeral and then . . . just the thought of her knowing that her grandson was in prison, and she didn’t get a chance to see me again, and then, uh, . . . yeah, that was one, Uh, and then my daughter’s mother . . . you said we was going to need them tissues. But it’s okay. So, look. So, then my daughter’s mother told me, she said that I had cheated our daughter out of her father. So, what I tell guys is that, bro, you have to . . . you have to dig deep, and you can’t feel like you alone, and you got to know help looks like. Help don’t always come in the form that you might think it’s going to come. You know, I wouldn’t have . . . if you would of asked me, do I think I’m going meet Ms. Clute? I would have been like, nah. But she’s like my mother now. You know, so, if you’ve counting yourself out, you’re going to be out. So, the first thing is that you’ve got to change your process . . . your thought process about the whole situation. You know, so, I guess that, um, I hope that answers it.

Taylor: Okay so, when you . . . when you make parole, you know, when somebody believes that you’re ready for society and that gives you an opportunity to make parole, and you’ve walked those yards out there for twenty something years with a bunch of guys that are looking for one opportunity, and bear in mind that Virginia has two
systems, you know, what we call the old law, which is if you were sentenced before January 1, ‘95, then you still under the ’85 system, meaning that you’re eligible for parole, 65%, parole. And what we call the new law, any time after ‘95 which is truth in sentencing that we’re all familiar with, meaning that if you get 40 years, then you’re going do about 38 of ‘em . . . 37 to 38. So, they have two systems. So, when you’re inside this environment and you’re meeting men and you see the transformation just as well as in your own self, but you get released. We’ve taken on the onus of doing what we have to do to show that people out here, that there are men and women that are still locked up that are ready for society, just need one opportunity. So, we’re down to General Assembly talking about restorative justice practices, talking about implementing this, wanting parole to be reinstated, as well as the fish back ruling. We’re down there at the General Assembly, and it’s all returning citizens, trying our best to aid our comrades that we left behind, that we know that are ready. And, bear in mind, we know that everybody may not be. Again that “aha” moment may not have touched everybody inside of prison, and we are well aware of it . . . aware of that. But right now, while we’re out here, we’re going to do what we have to do to show that the system is working as far as men rehabilitating, not by the system, but rehabilitating themselves because the onus is placed upon you. You have to rehabilitate yourself. They can provide all the programs they want . . . until a man comes to understanding, like the mirror Prince described . . . until a man understands that himself, that’s the first obstacle. But, that’s just not, just . . . that’s not affecting men. It’s also affecting the women that’s locked up. And we go back inside these prisons, and when we go in there, they say that Prince and I give them hope. So, they’re trying their best to do what they’re supposed to do because they say we give them hope. When I first came to prison in the ‘90s, the whole parole board system was at a snail pace. Not until now when Adrianne Bennett was hired that parole is being granted at a rate that’s never been seen before because they’re starting to do their due diligence on each case, and it’s not looking at a paper and rubber stamping no more. They’re paying attention. They’re sending out investigators to the prison to look at the person before they make a decision. All of these things are relevant in the transformation of us. Because once a man have hope on the inside, a woman have hope, even those kids that’s at Bon Air, once they have an understanding, they have hope . . . and speaking of those kids, they
told us the other day that some of ‘em have like nine years after they finish their juvie, but they have the opportunity to go back to court, meaning that if they’re doing what they’re supposed to do in Bon Air, then it’s a possibility when they go back to court, some time can be suspended. So, we understand the onus that’s place on our shoulders. We have to do what we have to do. But we’ve also have adopted a motto. No man left behind. No woman left behind. Free the guys, free the girls, and free the kids. Oh, and I have to say this . . . to furthermore understand that we have taken the onus and that people out here are taking notice. Last Tuesday . . . no, this Tuesday that just passed, I was sworn in, appointed by the governor on the Advisory Board for Juvenile Justice and Prevention.

Bunn: Yup.

Taylor: So, when I tell you . . . [Applause] . . . So, when I tell you that I’m describing . . . or we’re describing our relevance, when I tell you that the returning citizen, or the citizen that have returned, matters, we do. And we’re coming back to help. We were, once upon a time, a part of the problem. But now we believe we have solutions. And I’m thankful that Richmond is starting to agree. Thank y’all for allowing us to share that. [Applause].

Bunn: That’s pretty good man. That’s alright.

Taylor: Thank you.

Casey: Thank you gentlemen.

Taylor: And I would be remiss without saying that Miss McCullen back there, boy, she’s on the board too. We’re about to get to it. [Laughter and applause].

Bunn: Yeah.

Casey: Thank you gentlemen so much for, for sharing your time, and for sharing your story, uh, with all of us, and I think in many ways, you are sharing your humanity with us as well. And I personally feel honored to have been witness to that, so thank you.
**Bunn:** Thank you. Thank you, University of Richmond. You know. Alright.

**Cipolla:** Good afternoon everyone. Um, my name is Jackie Cipolla, and I’m the Symposium Editor of the Public Interest Law Review. That concludes today’s presentation. I wanted to thank each and every one of you for coming and attending. Um, just a few housekeeping, um, items. The CLE materials . . . I know some folks were a little bit concerned about that. On the back of the program is the link to the PILR website. If you scroll down after you hit the symposium link, there will be a google drive with all of the materials that have been posted. I think the link might have been a little bit incorrect, but we had our website guy go ahead and fix that. Um, and then I will go ahead and scan, um, the handout from Doctor Turner and the handout from Vicky Shoape, and I will make sure I upload those this afternoon, as well, for you all. Wanted to say a few thank yous to some folks, and if you notice Carl Hamm, who was kind of walking around doing all the tech-guy stuff sitting back there. [Applause]. Um . . . he is quite literally the backbone of this law school. Every single class I have ever attended we’re like, we need Carl, we need Carl, and he’s always there, no questions asked and fix everything. So, Carl, thank you very much. Um, I also wanted to thank Mary Ruth Walters from the Dean’s Office . . . she was walking around as well. She is the Events and Communications Coordinator here at the law school, and she is the event queen, so without her we wouldn’t have been . . . I would have been so disorganized, so she’s been wonderful in this as well. Also wanted to thank, um, the PILR executive board, Lizzy, Sahba, and Rachel, who are sitting in the jury box over there, um, for helping us plan this event, um, we wouldn’t . . . I wouldn’t have done it without them so I wanted to thank you guys so much, also wonderful friends of mine. And thank the PILR staff you’ve probably have seen them outside. Also wanted to give a quick shout out, um, to Professor Casey, to Professor McConnell, and to Professor Samuel-Siegel for moderating the panel and for all of their advice as well. Um, special thank you to Professor Samuel-Siegel. She’s one of the most beloved professors at this law school. Every single student of hers absolutely loves her. Her restorative justice class always has a massive wait list. Um, I regret removing myself from the waitlist second year of law school. I have not taken her class yet so maybe I should probably do that. Um, also wanted to thank our speakers who...
have devoted their time, um, and energy to coming down to Richmond, some of them have traveled quite a bit to give us this presentation. Extra special thank you to Mr. Taylor and Mr. Bunn, um, for coming and sharing your stories as well and sharing these with a group of lawyers and law . . . law students as well. Um, I can say on behalf of my classmates, we are so excited to begin our legal careers and to begin practicing law with you fine folks, and now that we have these restorative justice principles implemented, and we’re starting to get these rolling so, um, thank you guys so much for attending. I do invite you to a dessert reception outside in the atrium to come have some coffee, have some brownies and then just mingle with everybody. So, thank you and safe trip home.

[Applause].
RECKONING WITH STRUCTURAL RACISM: 
A RESTORATIVE JURISPRUDENCE OF EQUAL PROTECTION*

Doron Samuel-Siegel,a Kenneth S. Anderson,b and Emily Lopynski,c

* In doing this work, we strive to be mindful of how our own identities and biases (implicit and explicit) might affect our work as scholars. We are one black man—a student—and two white women—one student and one professor. We have striven to speak from our own experience and study, respect the experiences of others, and recognize our own limitations. We hope our readers—both those who are persuaded by our work and those who are skeptical of it—feel respected and will consider sharing their feedback so we may continue our individual and collective learning processes. Our intended audience includes jurists of the present and future, fellow scholars, as well as students and others who may be less familiar with the literature. Because of our broad vision of audience, we have departed in modest ways from law review convention, mostly by providing certain background information that might be nonessential to fellow scholars and learned jurists. We would also like to extend gratitude to our colleagues, teachers, and friends who read previous drafts and provided invaluable feedback and encouragement: Jud Campbell; Henry L. Chambers, Jr.; Erin R. Collins; Jessica Erickson; Ann C. Hodges; Janet D. Hutchinson; Jonathan K. Stubbs; Rachel Juhas Suddarth; and Laura A. Webb.

a Doron Samuel-Siegel is a Professor of Law, Legal Practice, at the University of Richmond School of Law. I offer immense thanks to my coauthors, Emily and Ken—your trust, vision, and generosity honor and inspire me. To my parents, Phil and Shosh Samuel-Siegel, thank you for your loving wisdom and for teaching me by example what it means to be forever learning. And, to my wife and partner-in-all-things, Angela M. Davis, you never falter; I appreciate you beyond expression.

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ABSTRACT
The United States Supreme Court’s equal protection doctrine ignores the existence of structural racism, thus eschewing the opportunity inherent in the Fourteenth Amendment to combat the oppressive race-based gaps in life chances that structural racism produces. This failure to reckon with racism as it exists today is due at least in part to two doctrinal barriers: the intent doctrine and the frequent decontextualization of race. These self-imposed barriers could be overcome through the use of a revised jurisprudence—what we call a restorative jurisprudence of equal protection.

Existing equal protection doctrine misconceives of race discrimination as the product of a strictly individual type of racism, i.e. interpersonal attitudes of racial superiority and intentional acts of bigotry. Our claim that equal protection doctrine needs revision to account for a more accurate conception of racism is not new. Numerous distinguished scholars, including Charles R. Lawrence, III, Ian Haney Lopéz, and many others, have voiced such criticisms and offered methodologies for conforming the law to the real world. Adding our voices to that choir, we offer an additional framework, rooted in restorative values, for refashioning the doctrine.

We suggest that a jurist who adopts restorative values is likely to interpret evidence of race discrimination and modify applicable doctrine in ways that are consistent with the realities of contemporary racism and inequality. Specifically, a restorative jurisprudence would help jurists acknowledge the importance of discriminatory effects and contextualize evidence, methodologies likely to result in a racism-combatting doctrine capable of interrupting structural racism and, in turn, advancing racial equality.

INTRODUCTION
The United States Supreme Court’s equal protection doctrine ignores the existence of structural racism, thus eschewing the opportunity inherent in the Fourteenth Amendment to combat the oppressive race-based gaps in life chances produced by structural racism. This paper offers a new way of envisioning equal protection doctrine, one that has the potential to combat rather than harbor racial inequality. This new way is a restorative jurisprudence of equal protection. It invites jurists to adopt a different set of values—values drawn from the realm of restorative justice—so as to overcome existing barriers to equal protection’s dismantling of structural racism.

Structural racism is a societal web of social, economic, and governmental practices, systems, and policies that, though typically race-neutral,
advantages people classified as white and disadvantages those who are classified as people of color. This form of racism operates regardless of the intent of individual actors and can only be understood by taking into account a given social and historical context. It is distinguished from individual-style racism by its systemic, self-replicating qualities. Where individual racism is about prejudiced attitudes and behaviors, structural racism is about societal systems.

Because structural racism is defined largely in terms of abstractions, concretizing it through the use of examples is often helpful. One such example is the events surrounding Hurricane Katrina. Black residents of New Orleans were disproportionately affected by the devastation triggered by the 2005 storm. Their experience was the product of long-term policies and practices—both governmental and private—of disinvesting in urban communities and segregating housing by race. These policies and practices, in turn, forced poor African Americans into parts of the city that were especially vulnerable to flooding. Furthermore, the evacuation plan deployed by city officials in advance of the storm was built on the assumption that evacuees owned cars, which was in fact not the case for many in the black community. This set of interlocking conditions and their devastating effects is an example of structural racism at play. However, in spite of the well-proven effects and permanence of structural racism, the Supreme Court has simply ignored its existence.

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4 Wiecek, supra note 1, at 5–7.
5 See id. at 18, 19.
6 Id. at 7–8.
7 Id. at 5 (“Because structural racism operates invisibly, and is difficult to define succinctly except in abstract academic prose, . . . the best way to convey a sense of what it is and how it functions is by concrete examples.”).
8 John A. Powell, Structural Racism: Building Upon the Insights of John Calmore, 86 N.C.L. REV. 791, 810 (2008) (“Katrina did not produce the deleterious realities of structural racism; rather it exposed them in a striking and stark way.”).
9 David W. Moore, Katrina Hurt Blacks and Poor Victims Most: Differences Larger by Race than Income, GALLUP (Oct. 25, 2005), https://news.gallup.com/poll/19405/katrina-hurt-blacks-poor-victims-most.aspx. For example, African Americans were more likely than whites to report having feared for their lives (63% vs. 39%), gone without food for at least a day (53% vs. 24%), had a vehicle damaged (47% vs. 31%), and spent at least one night in a shelter (34% vs. 13%).
11 Powell, supra note 8, at 794.
12 Id. at 794–95.
13 Wiecek, supra note 1.
Despite the Court’s refusal to employ it as such, the Equal Protection Clause of the Fourteenth Amendment provides the opportunity to address structural racism. Indeed, modern interpretations of the Clause support this assertion, holding that the clause contains an aspiration to protect individuals from race-based discrimination endorsed by the government. Given that structural racism is both a producer and product of racial discrimination carried out by the government—in the form of practices, systems, and policies—this anti-racist aspiration opens the door to an equal protection doctrine that can dismantle structural racism.\footnote{This paper is not intended to lay out a thorough defense of the assertion that structural racism is within the scope of the Equal Protection Clause, though we explore the contours of this premise in Part I(C). We rely instead on an extensive body of scholarship interpreting the Clause as a potential embodiment of the anti-racist aspirations present during the Reconstruction era (1866-77). We adopt this premise aspirationally and offer the piece as a jurisprudential roadmap for those who accept the premise, as well.}

By eschewing the opportunity available in the Fourteenth Amendment’s Equal Protection Clause to combat the pernicious effects of structural racism, the Court has created a safe harbor for the continued vibrancy of racial inequality. This state of affairs is due at least in part to multiple self-imposed doctrinal barriers, including the Court’s intent doctrine and frequent decontextualization of race-related facts. It is upon these two barriers that this paper focuses.

The first barrier is the intent doctrine. Existing equal protection doctrine is preoccupied with intent and does not account for the effect of government policies.\footnote{See, e.g., Village of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); Wieck, supra note 1.} It presupposes that, absent intentional discrimination by identifiable actors in a given local setting, the Fourteenth Amendment does not mandate a remedy for racial inequality.\footnote{See powell, supra note 8, at 798–99 n.42 (2008).} In so doing, the doctrine enables the persistence of harms created by all but individual racism, including the harms of structural racism.

The second barrier is decontextualization. By ignoring the history of racial oppression in the United States, and its modern-day manifestations, existing equal protection doctrine fails to acknowledge present-day systems of racial inequality.\footnote{Wieck, supra note 1, at 4.} In so doing, it decontextualizes equal protection claims, creating a jarring mismatch between the harm at issue—racial inequality—and the available remedies.

These barriers limit the racism-combating potential of both threads of the Court’s equal protection doctrine concerning race—(1) cases challenging
facially neutral policies that cause disparate harm to people of color, and (2) cases challenging policies designed to remediate the harms of discrimination against people of color, i.e. affirmative action cases. In both threads, the Court has opted to apply strict scrutiny—its most stringent form of judicial skepticism—in a way that makes it difficult to protect people of color from governmental race discrimination.  

As to the former thread, plaintiffs must prove malicious intent by the government actor to receive robust constitutional protection from a facially-neutral policy that creates a discriminatory impact, regardless of the policy’s discriminatory effects or context. Only once malicious intent is proven to a court’s satisfaction—a difficult feat—will the rights of people of color be protected in any meaningful way through the application of strict scrutiny. Without strict scrutiny, the government policy will almost always pass muster, leaving its discriminatory effects intact.

In affirmative action cases, the second thread of the doctrine, strict scrutiny is always applied to policies that explicitly use racial classifications—even if race is being used to remedy the effects of discrimination, and regardless of their projected effect or the context from which they arose. Therefore, when people of color seek to address unjust institutional patterns and practices that have long since been reinforced due to structural racism, remedial policies will almost always fail because strict scrutiny favors government actors.

Scholars have criticized the Court’s deference to these barriers since their inception, observing that the resulting equal protection doctrine offers little remedy for people of color who seek equal protection. Such critics have noted that existing doctrine misconceives of race discrimination as purely the product of intentional acts of prejudice carried out by individuals, and fails to recognize that institutional and structural forces are equally

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19 *Powell*, supra note 8, at 798–800.
20 Wiecek, supra note 1, at 14.
21 *Id.* at 14–15.
22 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”)
25 Wiecek, supra note 1, at 4.
responsible for contemporary race discrimination. Some have drawn attention to the Court’s misplaced emphasis on intentional acts of prejudice in challenges to facially neutral policies, while others have explained that the Court’s so-called colorblind approach to affirmative action policies ignores the racial realities that make them necessary. This article expands on these criticisms, and then offers restorative justice-based values as a framework for overcoming the critiqued barriers.

Restorative justice, while definitionally broad, is best thought of as a set of values, theories, and practices that seek to respond to crime and conflict using methods that involve all stakeholders in efforts to heal harm rather than merely punish rule breaking. Restorative approaches to justice involve victims and offenders in dialogue-driven, highly contextual processes that strive to set right what is wrong. Values that lie at the heart of restorative justice include healing harm, elevating stories of stakeholders, and creating long-lasting restoration. Employing a restorative framework to critique equal protection doctrine provides a unique lens—one rooted in values and oriented toward the goal of long-lasting restoration, rather than mere doctrinal betterment.

Specifically, the purpose of this article is to suggest that jurists who adopt a restorative jurisprudence in their analysis of equal protection claims have the potential to contribute to the dismantling of structural racism. A jurist who employs a restorative jurisprudence would consider the discriminatory effects of government action, not just the actor’s intent, and would analyze both the harm complained of and the potential remedy within their given social and historical context. As a result, the jurist would have a mechanism for understanding the entrenched patterns of structural racism as well as an analytical framework for accounting for structural racism. Ultimately, such a shift would open the doctrine to remedies capable of counteracting structural racism.

To achieve this purpose, the body of this article proceeds in three parts. Part I outlines the problem of structural racism and the specific barriers to its

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26 Id.
27 See, e.g., Powell, supra note 8, at 800 (“Externally imposed rules lack the connection to day-to-day practices and local context that is necessary to identify and correct more subtle cumulative and unconscious discrimination.”).
30 Id.
dismantlement that current equal protection doctrine erects. Part II proposes our solution: restorative jurisprudence. And Part III describes how restorative jurisprudence has the potential to interrupt structural racism.

We begin Part I with an exploration of the nature of structural racism and how it impacts communities of color in disproportionate ways. We then lay the groundwork for our proposed solution by briefly outlining existing equal protection doctrine, before turning to illustrations of why the doctrine is wholly ineffectual as a tool for addressing the self-reinforcing and domain-spanning patterns of structural racism. Finally, we argue that the Equal Protection Clause has at least the potential—if not the inherent mandate—to address structural racism.

Then, drawing on restorative justice theory and values, we propose our solution: a restorative jurisprudence. Part II begins with an introduction to restorative justice in theory and practice. It then outlines the restorative values that, if adopted by a jurist, have the potential to interrupt and, ultimately, contribute to the dismantling of structural racism. In this Part we suggest that a jurist who adopts restorative values is likely to interpret evidence of race discrimination and modify applicable doctrine in ways that are more consistent with the realities of contemporary racism and inequality. Specifically, a restorative jurisprudence would help jurists acknowledge the importance of discriminatory effects and contextualize evidence. Part III elaborates on how, precisely, these methodologies are likely to result in a doctrine that combats structural racism.

Before turning to the definition and effects of structural racism, let us acknowledge one additional central premise on which this piece is built. Our proposal presumes that the Justices of the Supreme Court are good-faith actors who, nevertheless, are likely influenced to some degree by dynamics such as implicit bias, insufficient empathy, or white fragility. And, even

32 Nicole E. Negowetti, Judicial Decisionmaking, Empathy, and the Limits of Perceptions, 47 AKRON L. REV. 693, 714–16 (2014) (surveying numerous studies that have identified evidence of implicit bias affecting judicial decisionmaking); see also Andrew J. Wistrich et. al., Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?, 93 TEX. L. REV. 855, 911 (2015); see also Andrew J. Wistrich, Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009).
33 Nicole E. Negowetti, Judicial Decisionmaking, Empathy, and the Limits of Perceptions, 47 AKRON L. REV. 693, 729, 703 (2014) (suggesting that judicial empathy is a tool that could “mitigate the inevitable implicit biases each judge brings to the bench,” and noting that a “growing body of research provides evidence that empathy, defined as perspective-taking or imagining oneself in the shoes of someone from a different social or ethnic group, is a cognitive strategy that can reduce stereotyping”).
34 Robin DiAngelo, White Fragility, 3 INT’L J. CRITICAL PEDAGOGY 54, 54–55 (2011). As Robin DiAngelo and many others have observed, some white people find it very difficult to communicate about race.
if these dynamics are not at play, what is certain is that the Court has been prevented by certain methodological barriers from fashioning a doctrine that actually responds to the problem of structural racism.

Some have taken issue with this assumption of good faith, and have wondered aloud whether the Court’s approach to race-based violation of equal protection has been driven by willful ignorance or partisanship. Indeed, if the barriers to fashioning an equal protection doctrine that actually counters—rather than enables—structural racism were, in fact, a matter of bad faith or prejudice, the proposals we offer here would be of little use. But we proceed here with hope—a hope borne of the belief that a restorative jurisprudence may be particularly well-suited to the task at hand, thanks to its inherently paradigm-shifting and framework-broadening character.

I. Equal Protection Doctrine: A Safe Harbor for Structural Racism

In the United States today, people’s life chances are influenced deeply by race. White people are more likely to survive infancy than people of and racism. The concept of white fragility, coined and defined by DiAngelo, helps understand why this is the case. White fragility is a product of the fact that white people are generally insulated from thinking about race, racism, and privilege. Id. It produces a tendency to respond defensively in the face of even minimal amounts of the stress induced by engaging with such topic. Id. at 54.

33 See, e.g., Scott A. Carlson, The Gerrymandering of the Reconstruction Amendments and Strict Scrutiny: The Supreme Court’s Unwarranted Intrusion into the Political Thicket, 23 T. MARSHALL L. REV. 71, 141 (1997) (“By refusing to recognize the grave reality that our country is far from color-blind, the Court is blind; blind to the real vision our Framers had in enacting the Civil War Amendments, blind to democratic choice, blind in failing to realize they have overstepped their role as Supreme Court Justices.”); William M. Wiecek & Judy L. Hamilton, Beyond the Civil Rights Act of 1946: Confronting Structural Racism in the Workplace, 74 L.A. L. REV. 1095, 1137 (2014) (wondering whether Justices refuse to acknowledge structural racism out of a desire to “advance [the] ideological agenda . . . [of] ‘movement conservatism’”).

36 “Race” has no single definition; its meaning varies depending on time and place. While always defined by its social context, the idea of race can emerge from “both essential and historical notions” about its meaning and can be a basis for both discrimination and solidarity. See Jayne Chong-Soon Lee, Navigating the Topology of Race, 46 STAN. L. REV. 747, 778–79 (1994) (book review). Race is “an unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle.” MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S 55 (2d. ed. 1994). It “is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies” using distinctions that are “at best imprecise, and at worst completely arbitrary.” Id. It is well recognized at this point, by biologists and sociologists alike, that there is no scientific basis for race, and similarly well accepted that race is not an innate, biological distinction between people. See, e.g., Elizabeth Kolbert & Robin Hammond, There’s No Scientific Basis for Race—It’s a Made-Up Label, NAT’L GEOGRAPHIC, https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa/ (last visited Oct. 3, 2019).

37 When using the words “white” and “black” as adjectives, we employ the lowercase form. When referring to black people using a noun, we use the term “African American.” When the context dictates, we use the term “people of color” to refer people who experience race discrimination and/or inequality. These language choices are the products of deliberate thought and discussion among us. Our aim is to use respectful language. We have striven to model our choices after those made by contemporary public intellectuals who share our anti-racist aspirations.
color, and their mothers are less likely to die as a result of pregnancy. White children are less likely to be suspended or expelled from school than black children, and they are more likely to receive competitive scores on tests that regulate access to higher education, such as the SAT. White households report a net worth nearly ten times that of black households, and more than five times that of Hispanic households. This list could go on, but the reality it signals is clear: white people in the U.S. live lives that benefit from advantages that are much less available to people of color—racial inequality is alive and well.

Why are white people’s life chances better than the life chances of people of color? The answer is not individual acts of interpersonal racism alone; nor are explicit policies of racial discrimination the sole culprit. In addition to these acts and policies, an integral cause of this mind-boggling and unjust disparity is structural racism. Nevertheless, in spite of significant cross-

38 The mortality rate for black infants is more than double that of white infants (11.4 vs. 4.9 per 1,000). Infant Mortality, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm (last visited August 30, 2019).
39 E.g., Amy Roeder, America is Failing Its Black Mothers, HARV. PUB. HEALTH (Winter 2019), https://www.hshp.harvard.edu/magazine/magazine_article/america-is-failing-its-black-mothers/ (“African American women are three to four times more likely to die during or after delivery than are white women. According to the World Health Organization, their odds of surviving childbirth are comparable to those of women in countries such as Mexico and Uzbekistan, where significant proportions of the population live in poverty.”). Anya Kamenetz, Suspensions Are Down in U.S. Schools, but Large Racial Gaps Remain, NPR (Dec. 17, 2018), https://www.npr.org/2018/12/17/775508707/suspensions-are-down-in-u-s-schools-but-large-racial-gaps-remain (“Black high school students are still twice as likely (12.8 percent [experiencing suspension]) to be suspended as white (6.1 percent].”).
40 E.g., Richard V. Reeves & Dimitrios Halikias, Race Gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility, BROOKINGS (Feb. 1, 2017), https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/ (In 2015, “the average scores [on the math section] for blacks (428) and Latinos (457) are significantly below those of whites (534) and Asians (598).”).
disciplinary consensus about the existence of structural racism and its effects, the Supreme Court’s jurisprudence—and equal protection doctrine in particular—simply ignores it. In this Part, we will draw on the substantial work of legal scholars considering racism to establish a definition of structural racism and elaborate on the Court’s deliberate indifference to its relevance for equal protection doctrine.

A. Structural Racism Defined

Structural racism is a present societal condition that categorizes people by race and perpetuates racial inequalities. In spite of its persistence, some in the U.S. wrongly believe we have become a post-racial society and, by extension, that racism is a condition of the past. For example, they argue, laws against discrimination based on race are on the books, and this has been the case in the United States for more than fifty years. The United States elected and re-elected President Barack Obama. Racial attitudes have shifted materially over the last few decades, with fewer people than ever, for instance, reporting they would oppose a relative’s choice to marry a person of a different race. Works by anti-racist public intellectuals such as Michelle Alexander, Bryan Stevenson, Carol Anderson, and Ta-Nehisi Coates have gained wide readerships and approbation.

The belief in post-racialism is, however, mere “wishful thinking.” In spite of signs that the United States is progressing in its relationship with race, the gaping inequality between the life chances of people of color and people who are white remains drastic and persistent.

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societal level in the United States and is the power used by the dominant group to provide members of the group with advantages, while disadvantaging the non-dominant group.”).

44 Wiecek, supra note 1, at 5–7.
45 Id. at 11.
50 BRYAN STEVENSON, JUST MERCY (2014).
51 CAROL ANDERSON, WHITE RAGE (2016).
54 See, e.g., DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 2 (2014) (contesting the assertion that “race no longer marks a salient social division in the country’s psyche,” pointing out that “on almost every measure of well-being, the numbers tell a grim story . . . and the gap between white and non-white shows no sign of disappearing”).

https://scholarship.richmond.edu/pilr/vol23/iss2/2
Structural racism is one cause of this inequality, and it is the form of racism with which this paper is occupied. It is an interlocking form—a societal system of policies, customs, and behaviors that advantages white people and disadvantages people of color. While no single moniker nor uniform definition exists for this societal condition, there is far-reaching consensus among legal scholars and social scientists that it exists. Furthermore, the consensus extends to the understanding that this form of racism creates privilege for people who are white and oppression for people of color.

The remainder of this section will first locate structural racism in the wide array of scholarship cataloging its existence and impact, before going on to provide a working definition upon which the remainder of the paper will rely.

1. Locating Structural Racism

Structural racism manifests itself not just in individual beliefs and actions but also in societal systems. While the seeds of this contemporary form of racism can be found in intentional, explicitly white-supremacist government policies and private actions that classified people according to race, the structural racism that has grown from those seeds is deeply entrenched in the present day and requires no intent for its perpetuation. It persists because of a collective failure to bring it to an end.

To understand structural racism, it helps to begin by acknowledging that we—all of us who live in the United States—live in a “racialized social system.”

Our choice to use the term “structural racism” to refer to this form of racism is based on the conviction that, of the available options, this term comes closest to being intuitively accessible to the broadest of audiences. We believe it captures most effectively the features of this form of racism that are most relevant for our purposes; it expresses both the significant breadth of this social condition, as well as the unnecessity of individual intent as a precondition to its existence.

E.g., Ian F. Haney-López, Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, 109(8) YALE L.J. 1717, 1723 (2000) (“[O]rganization activity that systematically harms minority groups even though the decision-making individuals lack any conscious discriminatory intent . . . may well constitute the greatest source of ongoing harm to minority communities.”); powell, supra note 8, at 147 (“A structural theory of racialization gives us the language and vocabulary necessary to talk about and understand why racial disparities persist in almost every area of well-being even as de jure segregation is largely a thing of the past and most white Americans claim not to hold racist viewpoints.”); Wiecek, supra note 1, at 6–7 (“White advantage is just as important an outcome of structural racism as black subordination, if not more so.”).

In such a system, racism is the ideology of the social system itself—it “becomes the organizational map that guides actions of racial actors in society.” In other words, racism is not only a set of irrational ideologies grounded in individual psychology. Racism is also a structural phenomenon that designates people into separate races whose wellbeing exists on a hierarchy. Furthermore, people and institutions act in a manner that reproduces that racialized hierarchy.

Structural racism can be contrasted with individual racism, as first described by Kwame Ture and Charles Hamilton in their seminal 1967 book, Black Power: The Politics of Liberation. Ture and Hamilton coined the phrase “institutional racism” and contrasted it with what they called “individual racism.” In the framework they proposed, the latter refers to overt acts by white people intended to cause violence or death to African Americans, while the former—institutional racism—“originates in the operation of established and respected forces in society.” Individual racism is a matter relating to individual action—harmful action by whites against African Americans. Institutional racism, on the other hand, “typifies the society . . . with the support of covert, individual attitudes of racism.” They explained that, while institutional racism is more subtle and less identifiable than individual racism, it is “no less destructive of human life.”

Since the publication of Black Power, a number of scholars have sought to define the form of racism that manifests itself not in individual beliefs and actions but in societal systems. Their work teaches that, unlike individual racism, structural racism is essentially self-perpetuating because it

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60 Id. at 467, 469.
61 Id. at 474; see also Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 12 GERALDINES 247, 249 (2011) (noting that “racism is a central ideological underpinning of American society).
62 Bonilla-Silva, supra note 59, at 476.
63 Id. at 470.
64 Kwame Ture was then known as Stokely Carmichael. Stokely Carmichael, BIOGRAPHY (June 18, 2019), https://www.biography.com/activist/stokely-carmichael.
66 Id.
67 Id.
68 Id.
69 Id. at 5. Ture and Hamilton also used the concept of colonialism to define institutional racism, commenting that it is an apt, if slightly imperfect, analogy. Id. at 5–6.
70 Id. at 4.
requires no explicit racial classifications nor individual prejudiced intent for its continued existence. The key element in structural discrimination is not the intent but the effect of keeping minority groups in a subordinate position. As Daria Roithmayr has explained, the subordination that originated in explicit racial classifications based on white supremacy now “reproduces itself automatically from generation to generation” due to the way that competitive advantage, once established, can become so “locked-in” as to be insurmountable. Only with significant, society-wide intervention can structural racism be interrupted.

Clarifying that structural racism is an embedded quality of social systems and requires no intentionality for its perpetuation, Ian Haney López has offered a theory of what he, like Ture and Houston, calls “institutional racism.” López observed that people routinely act in a nonintentional manner in reliance upon unexamined scripts and paths. Indeed, these unexamined scripts and paths, which have the effect of reproducing existing racial hierarchies, might be thought of as the infrastructure of the racialized social system outlined by Eduardo Bonilla-Silva. As López notes, his theory shares attributes with that of his fellow seminal scholar of this subject matter, Charles R. Lawrence, III, who has posited a “cultural belief system [that] has influenced all of us, [as a result of which] we are all racists. At the same time, most of us are unaware of our racism.” These conceptualizations help us think of racism in the metaphorical sense offered by Beverly Daniel Tatum—

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73 Fred L. Pincus, Race and Ethnic Conflict: Contending Views on Prejudice, Discrimination, and Ethnoviolence 82, 84 (Fred L. Pincus & Howard J. Ehrlich, eds., 1994). Pincus chose to use the term “discrimination” rather than “racism” because the latter “is a pejorative word often used imprecisely.” Id. at 82. He explained that structural discrimination “refers to the policies of majority institutions, and the behavior of the individuals who implement these policies and control these institutions, that are race-neutral in intent but have a differential and/or harmful effect on minority groups.” Id. at 84. He contrasted this form with individual racism, which he defined as “the behavior of individual members of one race/ethnic group that is intended to have a differential and/or harmful effect on the members of another race/ethnic group.” Id. at 82.

74 Roithmayr, supra note 54, at 4–5 (using the “lock-in model” developed by economists to explain that, “[e]ven if all people everywhere in the US were to stop intentionally discriminating tomorrow, . . . racial gaps would still persist, because those gaps are produced by the everyday decisions that structure our social, political, and economic interactions”).

75 See, e.g., id. at 4–5 (discussing several society-wide problems like social norms, feedback loops, and affirmative action).


77 Id. at 1811.

78 Bonilla-Silva, supra note 59.

79 Lawrence III, supra note 18, at 322.
that racism is like air—it fills any space we occupy; we cannot help but breathe it in.\textsuperscript{80}

Not only is structural racism a largely self-perpetuating condition, it also has a domain-spanning quality, as John A. Powell has explained.\textsuperscript{81} Unlike prejudiced beliefs that motivate bad acts by individuals, structural racism is the product of a set of “reciprocal and mutual interactions within and between institutions.”\textsuperscript{82} These interactions produce inequality through a set of “cumulative effects of discrimination ‘over time and across domains.’”\textsuperscript{83} Domains can be thought of as different institutional contexts: for example, the labor market, housing market, educational system, and criminal legal system.\textsuperscript{84} Powell elaborates that structures are both produced by individual human beliefs and actions and, in turn, produce human beliefs and actions.\textsuperscript{85} As such, as Lawrence has noted, refraining from individual racism does not absolve any person from bearing responsibility for society’s structural racism.\textsuperscript{86}

Weaving many of these themes together, William M. Wiecek’s work strives to concretize structural racism by offering eight characteristics that distinguish it from individual racism (which Wiecek calls “traditional Jim Crow” racism):\textsuperscript{87}

1. Structural racism is to be found in racially-disparate outcomes, not invidious intent.
2. Structural racism ascribes race as a basis for social organization to groups through a process of “racialization.”
3. White advantage is just as important an outcome as black subordination, if not more so.

\textsuperscript{80} Interview with Beverly Daniel Tatum, Clinical Psychologist, Expert on Race Relations, Author, Professor, and President, Spelman Coll., with PBS (2003), https://www.pbs.org/race/000_About/002_04-background-03-04.htm (where Dr. Tatum suggested notions of racial hierarchy might be thought of “as a kind of environment that surrounds us, like smog in the air. We don't breathe it because we like it. We don't breathe it because we think it's good for us. We breathe it because it's the only air that's available.”).
\textsuperscript{81} Powell, supra note 8, at 794, 796.
\textsuperscript{82} Id.
\textsuperscript{83} Id. (quoting Rebecca M. Blank, Tracing the Economic Impact of Cumulative Discrimination, 95 AM. ECON. REV. 99, 100 (May 2005)).
\textsuperscript{84} Id. at 797.
\textsuperscript{85} John A. Powell, Understanding Structural Racialization, 47 CLEARINGHOUSE REV. 146, 147 (2013) (“Structures not only distribute opportunity but also help create self-identity and community identity.”). Powell explained that “racialization” might be preferable over “racism” because is denotes “a continual process, a dynamic process that is unfolding in time.” Id.
\textsuperscript{86} Charles Lawrence III, Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”, 40 CONN. L. REV. 931, 946 (2008) (observing that, when his “white liberal friends . . . said they didn’t want to be called racist, they were also saying they didn’t want to be held responsible for society’s institutional and structural racism”).
\textsuperscript{87} Wiecek, supra note 1, at 3.
4. Structural racism is invisible and operates behind the illusion of colorblindness and neutrality.

5. Structural racism is sustained by a model of society that recognizes only the individual, not the social group, as a victim of racial injustice. This individualistic outlook [is problematic in that it ignores the society-wide dimensions of racism and] refuses to acknowledge collective harm, group responsibility or a right to collective redress.

6. The effects of structural racism are interconnected across multiple social domains (housing, education, medical care, nutrition, etc.).

7. Structural racism is dynamic and cumulative. It replicates itself over time and adapts seamlessly to changing social conditions.

8. Structural racism operates automatically and thus is perpetuated simply by doing nothing about it.\(^8\)

The phenomenon of structural racism has been documented by scholars across disciplines, and it plays a causal role in the United States’ persistent race-based gaps in health,\(^8\) wealth,\(^9\) education,\(^1\) and housing.\(^2\) However, in spite of the well-proven effects and permanence of structural racism, the Supreme Court has simply ignored its existence.

2. Defining Structural Racism

Having provided a sampling of the literature concerning structural racism,\(^3\) we offer here a definition for use in the analysis that follows. Our aim in stating this definition is not to establish an authoritative synthesis of the literature nor a universally applicable definition, but rather a working definition that is both faithful to the literature and suited to our task at hand.

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\(^8\) Id. at 6–7.


\(^3\) Id. at 6–7.

\(^4\) Indeed, this overview is far from comprehensive summary of scholarship concerning structural racism, but merely a sampling of works that have influenced us most heavily. For additional explorations of the nature of structural racism see, e.g., Darrell A. H. Miller, Racial Cartels and the Thirteenth Amendment Enforcement Power, 100 KY. L.J. 23 (2012).
Structural racism is the product of a society-wide web of social, economic, and political practices, systems, and policies—including ones that are facially race-neutral. This web, which includes both governmental and private action, creates structural racism by racializing social organization and, in turn, advantaging people categorized as white and disadvantaging those categorized as people of color. In a literal sense, human action does perpetuate structural racism since human actors are responsible for social, economic, and political life. But, importantly, the racialized advantage and oppression that structural racism creates require neither intent nor prejudice on the part of any actor. Rather, structural racism is self-perpetuating and will end only through intentional, anti-racist changes to social, economic, and political life.

Put even more simply: Structural racism is the race-based inequality created by a society that has not yet interrupted the cycles originally created by practices, systems, and policies intentionally formulated to advantage white people.

Thus, this form of racism is a product of both the past and the present, and it also shapes the future. It is a product of the past because it flows from a history of intentional discriminatory beliefs and actions. It is also a product of the present in the sense that it exists because of a current inability or unwillingness to stop the cycles that past discrimination set in motion. And, finally, structural racism creates the future because it shapes the society in ways that reinforce unequal pathways.

B. Barriers to Equal Protection’s Dismantling of Structural Racism

Despite its potential to achieve the opposite, the Court’s existing equal protection doctrine plays a significant role in harboring structural racism. This state of affairs is due in large part to two barriers the Court has erected for itself: (a) the prioritization of discriminatory intent over discriminatory effect, and (b) the tendency to decontextualize facts concerning race. These barriers create a glaring mismatch between the doctrine and the needs of the people and systems whose fates the doctrine shapes. As a result, the Court has crafted a doctrine that “ignores how race operates,”94 imposes a “barrier to racial equality,”95 “contributes to inequality . . . by creating a legal standard that prevents racial minorities from obtaining equal treatment, despite recognizing that discrimination exists,”96 and serves as “a significant vehicle for

the maintenance of white dignitary supremacy.” In this section we will provide a brief introduction to current equal protection doctrine. The purpose of this introduction is to lay the groundwork for later discussion of how restorative jurisprudence can address these two doctrinal barriers—prioritization of intent and decontextualization of facts—and, in turn, be used to combat structural racism.

1. State of the Doctrine

Equal protection doctrine has two threads—(1) cases challenging facially neutral policies that cause disparate harm to people of color, and (2) cases challenging policies designed to remediate the harms of discrimination against people of color, i.e. affirmative action cases (which might also be considered cases alleging discrimination against white people).

First, to have any real chance of success in a challenge of a facially neutral law or policy that creates a disparate discriminatory impact on people of color, plaintiffs must prove the law or policy was enacted out of malicious intent. Only once malicious intent is proven to a court’s satisfaction—a difficult feat—will the plaintiffs have any meaningful chance of reversing the law or policy. This is because only after a showing of malicious intent will strict scrutiny be applied, allowing the Court to examine closely the purpose and means of the law or government policy.

The Court took its first step toward this exclusive focus on intent in Washington v. Davis, where it required a showing of racially “discriminatory purpose” before strict scrutiny would apply, regardless of discriminatory effects. Later, the Court went on to clarify that the discriminatory purpose

98 To pass strict scrutiny, a government action must be necessary to achieve a compelling government interest. Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 286 (1979); Washington v. Davis, 426 U.S. 229, 242, 267 (1976); Keyes v. Sch. Distr., 413 U.S. 189, 205 (1973). In other words, there cannot be an alternative race-neutral means of achieving the government interest. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (Brennan, White, Marshall, & Blackmun, J., dissenting) (“Unquestionably we have held that a government practice or statute . . . which contains ‘suspect classification’ us to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”). Davis, 426 U.S. at 240 (rejecting the discrimination claim of black city employee applicants who were denied jobs because of failure to pass a test that whites passed at disproportionate rates).
100 Id. at 242 (“[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”). Although the Court left open the door that contextual evidence—the “totality of relevant acts”—disparate impact or unequal and invidious enforcement could trigger a heightened scrutiny, Davis has been described as “lay[ing] to final rest any hope that the Court would use intent doctrine to remedy structural disadvantages.” Ian F. Haney-López, Intentional Blindness, 87 N.Y.U.L. REV. 1779, 1802 (2012).
need not be solely race-based, but that race must be a “motivating factor” to trigger strict scrutiny.\textsuperscript{101} The intent doctrine was solidified in Personnel Administrator of Massachusetts v. Feeney,\textsuperscript{102} which erected the following definitional framework:

‘Discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.\textsuperscript{103}

As a result of this standard, which requires the plaintiff to identify a wrongdoer with discriminatory intent approaching malice, plaintiffs of color rarely obtain judicial relief from the discriminatory effects of facially neutral policies. In effect, the intent doctrine insulates structural racism from constitutional scrutiny. By failing to acknowledge the effects of race-neutral policies and take into account the racialized context from which the policies come, the Court allows the government to reinforce and maintain racial inequality.

Next, in the second doctrinal thread, the application of strict scrutiny to laws or policies that explicitly use racial classifications to remedy the effects of discrimination, i.e. affirmative action, similarly stifles efforts to address structural racism. Because laws that use a racial classification are subjected to strict scrutiny, people of color have an insurmountable barrier to overcome when trying to remedy racial inequality.\textsuperscript{104} That is, the Court has interpreted the Equal Protection Clause to require that race-based policies designed to help people of color be restored from racial discrimination be subject to the same standards as policies that hurt people of color because of their race.\textsuperscript{105}

\textsuperscript{101} Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action – whether it ‘bears more heavily on one race than another,’ – may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.” (internal citations omitted)).


\textsuperscript{103} Id. at 279.


\textsuperscript{105} Scholars like Reva B. Siegel argue this is a result of intentional maneuvering by the Court. Reva B. Siegel, The Supreme Court 2012: Foreward, 127 HARV. L. REV. 1, 5–6 (2013) (“Views about desegregation and affirmative action shaped the kinds of judicial review the Court required in discriminatory purpose and strict scrutiny doctrine. In its early decisions, the Court openly reflected on the relationship between racial conflict and its own judicial role. To limit the role of federal courts in the redress of
This so-called “colorblind” conception of the equal protection clause was foreshadowed in Justice Powell’s opinion in *Regents of Univ. of Cal. v. Bakke* and ultimately adopted by the Court’s majority in *City of Richmond v. J.A. Croson, Co.*: strict scrutiny applies whenever race is used on the face of a law or policy, regardless of which racial group is singled out or why. Notably, this line of cases announces that compelling state interests do not include an interest in remedying the effects of “societal discrimination,” deeming it too general and “an amorphous concept of injury that may be ageless in its reach into the past.” This move by the Supreme Court—the requirement that remedies be race-neutral—entrenches structural racism by ignoring the lived experiences of people of color and preventing the government from addressing root causes of racial inequality. By analyzing a policy designed to remedy the effects of racial discrimination apart from its societal and historical context, and without regard to the effect of the law, the Court creates an insurmountable barrier to dismantling structural racism.

As we will next discuss, the Court’s prioritization of intent and frequent decontextualization of facts affect both threads of the Court’s equal protection doctrine concerning race. These barriers serve to fundamentally mischaracterize how racism actually works today. In so doing, these attributes of current equal protection doctrine create an impervious barrier to the doctrine’s potential to interrupt structural racism.

2. Barrier 1: Centralizing Discriminatory Intent While Ignoring Discriminatory Effects

As noted above, existing equal protection doctrine is preoccupied with identifying the presence or absence of discriminatory intent. This
preoccupation creates a barrier to the doctrine’s ability to tackle structural racism because, even in cases with unequivocal proof that state action has created discriminatory effects, the doctrine offers no remedy. In other words, absent evidence of intentional discrimination by identifiable actors in a given local setting, the doctrine maintains that the Fourteenth Amendment’s strongest protection is not available to help remedy the effects of structural racism.\textsuperscript{110}

\begin{quote}
\textit{a. Defining the “intent vs. effect” phenomenon}
\end{quote}

Scholars, activists, and others with an anti-racist orientation have long noted that choices about whether to prioritize intent or effect have significant implications for progress toward an end to racial inequality.

One formulation of this tension was described by Kimberlé Williams Crenshaw when she identified what she called, respectively, the “expansive vision” and the “restrictive vision” of antidiscrimination law.\textsuperscript{111} In Crenshaw’s terms, the expansive vision focuses on discriminatory effects.\textsuperscript{112} It “stresses equality as a result. . . [and] interprets the objective of antidiscrimination law as the eradication of the substantive conditions of Black subordination.”\textsuperscript{113} In contrast, the restrictive vision “treats equality as a process, downplaying the significance of actual outcomes.”\textsuperscript{114} It focuses on wrongdoing, and conceives of such wrongdoing “primarily as isolated actions against individuals rather than as a societal policy against an entire group.”\textsuperscript{115} Furthermore, Crenshaw observed, the restrictive view concerns itself with balancing the interests of white people, who are presumed to be innocent, and weighs those interests “more heavily than . . . the past wrongs committed upon Blacks and the benefits that whites derived from those wrongs.”\textsuperscript{116}

In public discourse, those seeking to preserve the racial status quo often focus on intent, while the opposite is true of those seeking racial equality.\textsuperscript{117} For instance, in her works coining the term “white fragility” to help understand impediments to dialogue about racial inequality, Robin DiAngelo has

\textsuperscript{110} Id.
\textsuperscript{111} Id.\textsuperscript{110}
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 1342.
\textsuperscript{116} Id.
\textsuperscript{117} See, e.g., Jamie Utt, \textit{Intent vs. Impact: Why Your Intentions Don’t Really Matter}, EVERYDAY FEMINISM (Jul. 30, 2013), https://everydayfeminism.com/2013/07/intentions-dont-really-matter/ (asking rhetorically, for example, “what does the intent of our action really matter if our actions have the impact of furthering the marginalization or oppression of those around us?”).
observed that white people who are uncomfortable talking about race and racism often prefer that discussions remain focused on intent (namely, their own personal lack of racist intent) rather than effect (namely, the reality that, even absent racist intent, people of color suffer the effects of racial inequality). She notes that efforts to focus attention on effect frequently elicit from white people defensive behaviors such as argumentation, silence, or dialogue-ending expression of anger, fear or guilt.

The same theme has emerged in the analysis of national politics. One such analysis arose in the summer of 2019 when President Donald Trump engaged in a campaign against four Congresswomen of color, tweeting patently racist messages asserting “they should go back . . . [to] the totally broken and crime infested places from which they came.” The disparate reactions from Republican and Democratic lawmakers led one journalist to conclude that the “two sides, as you talk to them behind closed doors, they define racism differently. Republicans are using . . . an earlier definition of rac[ism], in which the intention of the person is what’s critical. Democrats are talking more and more about what the effect of racism is. Are people affected by it? Are their lives changed?”

b. Examples of the “intent vs. effect” barrier functioning in the doctrine

The Court has explicitly refused to take discriminatory effects into account where discriminatory intent is lacking, opining that “the Fourteenth Amendment guarantees equal laws, not equal results.” Perhaps nowhere is

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118 ROBIN DIANGEL, WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 119–21 (2018).
119 DiAngelo, supra note 34, at 64–65.
120 Donald J. Trump (@realDonaldTrump), TWITTER (Jul. 14, 2019, 8:27 AM), https://twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwsgr%5Eauthor.
123 Id. at 274.
this narrow focus on the limited conception of discriminatory intent starker than in *McCleskey v. Kemp*, where the Court’s fixation on individual intent spurred it to ignore empirical evidence of racial disparities in the application of Georgia’s death sentence.124 Warren McCleskey, an African American, was convicted of armed robbery of a furniture store and murder of a police officer.125 The police officer, Officer Frank Schlatt,126 was white.127 The jury in the case recommended Mr. McCleskey be sentenced to death and the trial court followed the jury’s recommendation.128 As relevant here, the case came before the Supreme Court on McCleskey’s claims that his death sentence violated the Eighth and Fourteenth Amendments.129

As evidence for his claims, McCleskey offered a statistical study, known as the Baldus study, which analyzed over 2,000 murder cases in Georgia during the 1970’s.130 The Baldus study employed “sophisticated statistical” methods using multiple regression analysis.131 It revealed disparities in the imposition of the death sentence correlating with the race of both defendants and victims.132 Among the study’s findings: defendants charged with killing white victims were 4.3 times more likely to be sentenced to death than those charged with killing black victims.133 And these were among the most conservative findings of the study, adjusted, as they were, for the presence of various mitigating and aggravating factors. Without such adjustment, the disparities were even more jarring. For example, the evidence showed that prosecutors pursued the death penalty for “70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims.”

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124 See McCleskey v. Kemp, 481 U.S. 279 (1987). Other examples abound. See, e.g., Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 278 (1979) (where the Court made clear it was not concerned with the inevitable, unequal effects of the law, no matter how obvious or predictable the discriminatory effects will be). For further discussion, see Ian F. Haney-López, *Intentional Blindness*, 81 N.Y.U.L. Rev. 1779, 1834 (2012) (stating that the Feeney majority “imposed an exacting definition of discriminatory purpose: [o]nly a conscious intent to harm, not simply an awareness of harmful consequences, would qualify. The immediate payoff of this definitional constriction was to exonerate Massachusetts. The long-term impact was a major step toward closing courthouse doors to contextual evidence of discrimination against vulnerable groups.”).

125 *Kemp*, 481 U.S. at 283.


127 *Kemp*, 481 U.S. at 283.

128 Id. at 284–85.

129 Id. at 29.

130 Id. at 286.

131 Id. at 286–94, 291 n.7.

132 Id. at 286.

133 Id. at 287.

134 Id. at 326–28 (Brennan, J., dissenting) (noting that, of the seven people Georgia had executed since the Court had upheld its capital sentencing system, six were Black and all seven were convicted of killing whites).
The Court assumed the study’s validity and its findings concerning the risks of racial disparities in sentencing. However, it ruled against McCleskey, finding, among other things, that his claim under the Fourteenth Amendment was insufficient for lack of proof that “decisionmakers in his case acted with discriminatory purpose.” McCleskey had “offered no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.” In so doing, the Court implicitly rejected the conclusion, urged by Justice Brennan in dissent, that the disparities the study revealed reflected a “categorical assessment of the worth of human beings according to color,” and, more specifically, “a devaluation of the lives of black persons.”

Nor could McCleskey prevail, the Court continued, on an argument “that the State ha[d] violated the Equal Protection Clause by adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application.” Quoting its formulation from Feeney, the Court explained that the discriminatory purpose standard “implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”

Since the Court found there to be no evidence of deliberate intent to discriminate on the part of the Georgia legislature—nor on the part of the prosecutor, jury, or judge in McCleskey’s prosecution—his equal protection claims were worthy of being rejected. Warren McCleskey died in Georgia’s electric chair on September 25, 1991.

The Court has imposed the intent-driven framework not only on facially race-neutral government action that disproportionately harms people of color, but also on action that grants people of color equal access to government programs and institutions, i.e. affirmative action cases. One example is Justice Powell’s opinion in Bakke, which exhibits a preoccupation with the experience of Mr. Bakke and his fellow white applicants. Bakke concerned a challenge by Allan Bakke, a white applicant who had been denied

135 Id. at 291 n.7 (majority opinion).
136 Id. at 298.
137 Id. at 292–93.
138 Id. at 336 (Brennan, J., dissenting).
139 Id. at 297–98.
140 Id. at 298 (quoting Pers. Adm’r of Mass. v. Feeney, 443 U.S. 256, 279 (1979)).
141 Id. at 298.
admission to the U.C. Davis Medical School. Mr. Bakke alleged that the school’s affirmative action policy discriminated against him in violation of the Equal Protection Clause.

Practically ignoring the effects of discrimination on the applicants of color who, but for the admissions policy, may have had no opportunity to enroll at U.C. Davis, Justice Powell seized on what he presumed to be a lack of malevolent intent harbored by Bakke and his fellow white applicants. “[T]here is a measure of inequity in forcing innocent persons in [Bakke]’s position to bear the burdens of redressing grievances not of their making.” Without evidence of wrongdoing that rose to a level of constitutional or statutory breach, Powell asserted, “it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another.” This rationale—that Davis’s affirmative action program was unconstitutional because none of the white people involved had committed any intentional wrong—shifts the focus of attention from whether discriminatory effects should be remedied to whether white actors possess blame-worthy bad intent.

c. The problems with prioritizing intent over effect

Criticisms of the Supreme Court’s laser-focus on discriminatory intent, and disregard for the discriminatory effects of government actions, are plentiful and varied. To begin, the intent doctrine as crafted by the Court in Davis and its progeny is accused of fundamentally misunderstanding how race and racism operate in the United States. As Ian F. Haney Lopez has observed, such rulings “misunderstand[] the nature of racism, at least insofar as the decision[s] imply[] that statutes or other government actions that do not evidence purposeful racism are consequently race-neutral.” In so doing, the doctrine ignores the complex and interlocking nature of structural racism, allowing seemingly neutral policies to maintain and entrench racial inequality.

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144 Id. at 276.
145 Id. at 278.
146 Id. at 298.
147 Id. at 308–09.
148 See Barnes, Chemerinsky & Jones, supra note 94 (“In three significant ways, the Supreme Court’s doctrinal approach to intentional discrimination cases already ignores how race operates. First, the cases that reject disparate impact theory for constitutional claims also require plaintiffs alleging intentional discrimination to prove that the government adopted a particular policy because of its negative racial effects, rather than in spite of these effects. Second, where there is no direct evidence of racial animus, even overwhelming statistics supporting differential racial outcomes are treated as correlative rather than causative. Finally, despite all of the scientific evidence that now exists to support the existence of unconscious bias, the Court has not explicitly recognized this phenomenon as shaping race relations.”).
149 Haney-Lopez, supra note 76, at 1834.
Because the Court mischaracterizes the problem as one of individual racism and ignores structural racism, the depth and breadth of the harm cannot be adequately addressed. As Charles R. Lawrence III states, “[b]y insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended. And by acting as if this imaginary world was real and insisting that we participate in this fantasy, the Court and the law it promulgates subtly shape our perceptions of society.”

As such, the constitutional “guarantee of ‘equal protection’ no longer promotes reform but rather protects the racial status quo.” Because the racial status quo is created and maintained by race-neutral policies and practices—structural racism—equal protection doctrine serves as a vehicle for maintaining white privilege and power.

In sum, because of its use of the intent doctrine, the Court can be credited with contributing to racial inequality, wishing away racial injustice, fostering resistance to affirmative remedies to the effects of racial discrimination, and maintaining racial oppression and structural inequalities.

3. Barrier 2: Decontextualization

The second barrier to equal protection’s interruption of structural racism is the Court’s fashioning of a decidedly acontextual doctrine. The Court routinely decontextualizes race discrimination claims, treating as inoperative the backdrop of governmental racial oppression, reinforced decade after decade.

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150 Lawrence III, supra note 18, at 324–25.
152 Flagg, supra note 97 (“The fundamental guarantee of racial equality, the Fourteenth Amendment’s Equal Protection Clause, has become through judicial interpretation a significant vehicle for the maintenance of white dignitary supremacy. But this legal regime is not justified as a matter of substantive law, nor by principles of judicial restraint.”).
153 Elosiebo, supra note 96, at 474 (“[T]he Supreme Court has contributed to inequality . . . by creating a legal standard that prevents racial minorities from obtaining equal treatment, despite recognizing that discrimination exists.”).
154 Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 350 (1997) (“The ultimate lesson of the Court’s discrimination doctrine is that the Court largely mirrored American society in its desire to wish away racial injustice. Since at least the 1960s, there has been a longing in America to get beyond race, and an impatience with the struggles of minorities, that have repeatedly manifested themselves as a general reluctance to disturb existing social institutions.”).
155 Lawrence III, supra note 18, at 325 (“[T]he intent doctrine's focus on the narrowest and most unrealistic understanding of individual fault has also engendered much of the resistance to and resentment of affirmative action programs and other race-conscious remedies for past and continuing discrimination.”).
156 See Flagg, supra note 97.
decade, against which all such claims arise. The doctrine also centralizes the narratives of white stakeholders while marginalizing those of people of color, another form of separating claims of racial inequality from their full context.

a. Defining Decontextualization

When we use the term “decontextualization,” we are referring to the act of artificially divorcing facts from the context in which they arose. Decontextualization is a process that distances facts from their true meaning and, in some instances, replaces that meaning with a different one that is actually inconsistent with the context.

The Court itself has held that context is essential to the process of determining meaning. The meaning of a given statutory provision, for example, must be construed not in isolation, but in context. Facts are also to be interpreted in context. For example, in Ornelus v. U.S., the Court detailed several examples of the role that context plays in determining meaning. For example:

A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.

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157 See, e.g., William M. Wiecek & Judy L. Hamilton, Beyond the Civil Rights Act of 1946: Confronting Structural Racism in the Workplace, 74 L.A. L. REV. 1095, 1101 (2014) (observing that the “Court approaches racial controversies in ways that remove them from their social and historical context . . . mandat[ing] instead an abstract and formalistic resolution of race-related issues”).


161 Id. at 699–700 (“For example, what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee. That city is unlikely to have been an overnight stop selected at the last minute by a traveler coming from California to points east. The 85–mile width of Lake Michigan blocks any further eastward progress. And while the city's salubrious summer climate and seasonal attractions bring many tourists at that time of year, the same is not true in December. Milwaukee’s average daily high temperature in that month is 31 degrees and its average daily low is 17 degrees; the percentage of possible sunshine is only 38 percent. It is a reasonable inference that a Californian stopping in Milwaukee in December is either there to transact business or to visit family or friends. The background facts, though rarely the subject of explicit findings, inform the judge's assessment of the historical facts.”).
Examples of the Court’s tendency to decontextualize race abound. Perhaps one of the most striking is City of Richmond v. J.A. Croson, the 1989 case in which the Court struck down a city ordinance designed to ameliorate the effects of race discrimination in the construction industry of Richmond, Virginia. The ordinance required each prime contractor receiving a city construction contract to ensure that at least thirty percent of the dollar amount of the contract be subcontracted to Minority Business Enterprises (“MBEs”).

The Court struck down the ordinance on the grounds that there was no evidence of unconstitutional race discrimination in Richmond’s construction industry and, therefore, the use of a racial classification was impermissible.

As it had in McCleskey, the Court framed the inquiry in Croson as a search for blameworthiness. Only if the city could “point[] to any identified discrimination in the Richmond construction industry” could it use a racial classification to ameliorate that discrimination. In other words, without evidence of discrimination by some identified person or group in Richmond or its construction industry, the city “failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.”

To understand why this holding was the product of decontextualization, we must turn to a review of the evidence in Croson. Before enacting the ordinance to ensure MBE participation in the construction industry, the City of Richmond concluded that the following evidence established the presence of unconstitutional discrimination:

- In the five-year period leading up to the ordinance’s adoption, less than 1% of the city’s prime construction contracts were awarded to MBEs. The exact percentage of contracts awarded to MBEs was
During this same time period, 50% of the people residing in Richmond were black.\textsuperscript{171}

- The local contractors’ associations in Richmond had “virtually no minority businesses within their membership.”\textsuperscript{172}

- Testimony from city officials indicated that race discrimination was commonplace in the construction industry.\textsuperscript{173}

- During the public hearing on the ordinance, “no one who testified challenged the depiction of widespread racial discrimination in area construction contracting,”\textsuperscript{174} and this despite the fact that multiple opponents of the measure spoke at the hearing.\textsuperscript{175}

- Numerous contemporaneous Congressional and federal administrative studies had “documented the powerful influence of racially exclusionary practices in the business world.”\textsuperscript{176}

In spite of this array of evidence, the Court determined that the facts supported no more than “a generalized assertion that there has been past discrimination in an entire industry,” and “nothing approaching a prima facie case of constitutional or statutory violation by anyone in the Richmond construction industry.”\textsuperscript{177} It was therefore insufficient to establish the requisite government interest in fashioning a race-based remedy.\textsuperscript{178}

\textit{Croson} is but one example of the Court’s use of decontextualization to deny remedies for discrimination against people of color. In his opinion in \textit{Bakke}, for example, Justice Powell used a decidedly acontextual characterization of racial inequality.\textsuperscript{179} The policy at issue provided for a special admissions program that effectively reserved sixteen of the one hundred seats in the entering medical school class for applicants who were members of economically and/or educationally disadvantaged groups.\textsuperscript{180} Over the five years before Bakke’s application, just one black applicant and six Mexican-

\textsuperscript{170} Id. at 479.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 480. Our fellow University of Richmonders will recognize the name of one of those city officials—then City Councilman Henry Marsh, who later served in the Virginia Senate from 1991 to 2014, and who is a frequent speaker at the University of Richmond School of Law.
\textsuperscript{174} Id. at 539 (Marshall, J., dissenting).
\textsuperscript{175} Id. at 479 (majority opinion).
\textsuperscript{176} Id. at 529 (Marshall, J., dissenting).
\textsuperscript{177} Id. at 500.
\textsuperscript{178} Id. at 498. The Court did pay brief lip-service to the context of racism and racial oppression, only to dismiss its relevance out-of-hand in the very same sentence: “While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.” Id.
\textsuperscript{180} Id. at 273.
American applicants had been admitted to the school through the regular, non-affirmative action admissions program.\textsuperscript{181}

In spite of these figures, Justice Powell was skeptical of the assertion that prospective medical school applicants of color had been disadvantaged by race discrimination. Such applicants, he opined, were merely members of “groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination.’”\textsuperscript{182} Through this characterization, Justice Powell made plain that he was ignoring both U.C. Davis’s past discrimination and the pervasive discrimination that were facts of life in the U.S.\textsuperscript{183} Indeed, that people of color were “victims of societal discrimination”\textsuperscript{184} was not merely the perception of the U.C. Davis faculty, it was a fact.

\textbf{C. The problems with decontextualization}

The Court’s refusal to acknowledge the actual meaning of facts, such as those upon which the Richmond City Council based its remedial ordinance, is possible only in a universe where facts are examined outside of their context. Indeed, there is a jarring quality to this refusal; some might even consider it a form of gaslighting.\textsuperscript{185} In case after case, the Court expresses certainty that remedy-worthy discrimination does not exist, all the while utterly ignoring the backdrop against which the matters before it have unfolded—a backdrop in which people of color in the United States continue to experience life chances inferior to those of people who are white. As Charles R. Lawrence, III has observed, the Court is “ask[ing] us to deny our knowledge of the real meaning of race and racism in America. . . . [and] to repress our knowledge of [400] years of slavery and segregation.”\textsuperscript{186}

Both dissenting justices and legal scholars have long criticized the Court for its refusal to acknowledge that facts relating to race have meanings that flow specifically from the nation’s history of race. Many have accused the Court of eschewing what “candor requires”\textsuperscript{187} by divorcing race

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{181} \textit{Id. at 273–75.}
\item \textsuperscript{182} \textit{Id. at 309 (emphasis added).}
\item \textsuperscript{183} \textit{See id. at 371–72.}
\item \textsuperscript{184} \textit{See id. at 310.}
\item \textsuperscript{185} The term gaslighting means “[t]o manipulate[ing] (a person) by psychological means into questioning his or her own sanity.” \textit{Gaslighting}, \textit{OXFORD ENGLISH DICTIONARY} (3d ed. 2004). Racial gaslighting has been defined as “the political, social, economic and cultural process that perpetuates and normalizes a white supremacist reality through pathologizing those who resist.” Angelique M. Davis & Rose Ernst, \textit{Racial Gaslighting, POL. GROUPS & IDENTITIES} (Nov. 23, 2017), https://doi.org/10.1080/21565503.2017.1403934.
\item \textsuperscript{186} Lawrence III, \textit{supra} note 86, at 955 (referring specifically to Chief Justice Roberts’ assertion in \textit{PICS} that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”).
\item \textsuperscript{187} Bakke, 438 U.S. at 326 (Brennan, J., dissenting).
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discrimination matters from the social and historical context in which they arose. Some have noted the conspicuous divergence between the world as the Court depicts it in its equal protection doctrine and “the world of ordinary experience, in which racial minorities remain conspicuously underrepresented in the allocation of societal resources.” Indeed, as Reva B. Siegel articulates, the colorblind conception of equal protection, wherein classifications by race are deemed suspect even when intended to remediate discrimination against people of color, is the product of a framework that ignores the actual meaning of race in the U.S. and “can both discredit and rationalize practices that perpetuate racial stratification.” When “race is divorced from all other social practices . . . . [and] lacks all social relevance,” the doctrine intended to prevent discrimination actually fosters its unimpeded continuation.

One of the most famous critiques of the Court’s decontextualization can be found in the seminal scholarship of Charles R. Lawrence, III. In a phrase that summarizes the critique vividly, he opined that the Court’s equal protection doctrine could exist “[o]nly in [an] Alice in Wonderland world, where racial classifications are devoid of meaning.” To bring an end to this injustice, Lawrence suggested that scrutiny should be applied to race discrimination questions under the Equal Protection Clause using a “cultural meaning test” that would assess the degree to which the facts of the matter have “racial significance.” Specifically, such a “test would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance.” Conduct which “a significant portion of the population thinks of . . . . in racial terms” would be subject to heightened scrutiny. Lawrence’s proposal, in other words, suggested that the Court accord

188 Wiecek & Hamilton, supra note 157.
189 Girardeau A. Spann, Affirmative Action and Discrimination, 39 How. L.J. 1, 91 (1999) (discussing Adarand and going on to observe: “In fact, the divergence is so palpable that one cannot help but wonder what could have motivated the Court to insist on such an artificial depiction of contemporary culture.”).
190 Reva B. Siegel, How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification, 88 Calif. L. Rev. 77, 106 (2000) (“This color blindness discourse cannot do, unless those employing formal-race talk overtly or covertly couple this mode of reasoning about race with modes of reasoning about race that are rooted in historical-race or cultural-race discourse.”).
191 Id.
192 Ian F. Haney-López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 Stan. L. Rev. 985, 1061–62 (2007) (critiquing the Court’s “colorblind” approach to affirmative action laws and explaining that, “by deploying a formal approach in which race is recognized as functioning only when explicitly invoked,” the Court has “invariably [struck] down efforts to respond to racial hierarchy while insulating from more than cursory review state policies that disproportionately harm minorities”).
194 Lawrence III, supra note 18, at 356.
195 Id.
196 Id.
meaning to facts in a manner more consistent with the meaning such facts hold for the general public.

Justice Marshall’s dissent in *Croson* is another detailed example of the decontextualization critique. In *Croson*, the Court dismissed the evidence of race discrimination, indicating that it amounted to nothing more than an “ill-defined wrong” for which no tailored remedy could be fashioned and, in the process, ignored the racial meaning of facts that emerged from centuries of slavery and Jim Crow in the one-time capital of the Confederacy.

In response, Justice Marshall admonished that the majority should have examined the evidence “against th[e] backdrop of documented national discrimination,” and observed that the “majority’s refusal to recognize that Richmond has proved itself no exception to the dismaying pattern of national exclusion which Congress so painstakingly identified infect[ed] its entire analysis of the case.” When the city passed its ordinance, he continued, “there was ‘abundant evidence’ in the public domain ‘that minority businesses ha[d] been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination.’” Taking “Richmond’s local evidence of discrimination against the backdrop of systematic nationwide racial discrimination,” Justice Marshall asserted, readily established a government interest in race-based remedial measures.

But, refusing to consider the local evidence in light of well-documented national evidence was just one of the majority’s decontextualizing moves. As Justice Marshall noted, the majority “also [took] the disingenuous approach of disaggregating Richmond’s local evidence, attacking it piece-meal, and thereby concluding that no single piece of evidence adduced by the city, ‘standing alone,’” was sufficient to prove the requisite discrimination. Calling the Court’s approach a “trivialization of the testimony of Richmond’s leaders,” “dismaying,” and “armchair cynicism,” Justice Marshall suggested the majority should have “paused for a moment on the facts of the

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198 Id. at 498 (majority opinion).
199 Id. at 530 (Marshall, J., dissenting).
200 Id. at 532.
201 Id. at 535.
202 Id. at 541.
203 Id.
204 Id.
205 Id. at 546.
Richmond experience," and, in so doing, could have “discovered that the city’s leadership [was] deeply familiar with what racial discrimination is.”

Justice Blackmun echoed the critique vividly:

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond’s efforts as though discrimination had never existed or was not demonstrated in this particular litigation.

In sum, by employing an intent-focused and decontextualized approach to equal protection analysis, the Court has both limited the vindication of rights for those on the receiving end of discrimination and imposed an insurmountable hurdle to addressing age-old patterns of discrimination. In sum, by forcing both laws that perpetuate inequality and laws that aim to rectify past discrimination to be analyzed with the same decontextualized and intent-focused approach, current equal protection doctrine has the effect of perpetuating structural racism, as well as the racial inequality it reinforces and reproduces.

D. Structural racism and the scope of the Fourteenth Amendment

According to current equal protection doctrine, intentional racial discrimination by a government actor (“state action”) is indisputably within the scope of the Equal Protection Clause. However, we also proceed from the premise that the Fourteenth Amendment has the potential to address structural racism, whether the government intentionally discriminates based on

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206 Id. at 544.
207 Id. at 561 (Blackmun, J., dissenting).
208 Haney-López, supra note 151, at 1784 (“In short, colorblindness applies to affirmative action; intent doctrine sweeps up allegations of discriminatory treatment against non-Whites. Colorblindness denies that the state’s purposes can be discerned; intent doctrine demands proof of malicious purpose. Colorblindness consistently imposes the most stringent form of scrutiny; intent cases always default to the most lenient form of constitutional review. Plaintiffs challenging affirmative action under colorblindness always win; parties challenging discrimination under intent doctrine almost invariably lose.”).
209 See, e.g., Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (citing Strauder v. West Virginia, 100 U.S. 303, 307–08, 310 (1880)) (“A core purpose of the Fourteenth Amendment was to do away with all governmental imposed discrimination based on race.”); Washington v. Davis, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”). The Fourteenth Amendment applies only to state action—as that term has been defined by the Court over the years—not to private conduct. Structural racism is a product and producer of discrimination in both public and private domains. The effects of structural racism that are manifest in state action are surely, therefore, a proper target of the Equal Protection Clause.
race or allows a racial hierarchy to be maintained through its seemingly race-neutral policies.

Although we do not delve into this bold and controversial claim fully—many scholars have already begun to do so—210 we draw from the anti-racist aspirations of the Fourteenth Amendment and subsequent statements by Supreme Court Justices regarding its purpose to form the presumption that the Equal Protection Clause is an appropriate vehicle for dismantling structural racism—at least the aspects of structural racism that originate from and are perpetuated by government action.211 We are not asserting that the doctrine, as it currently stands, contains mechanisms for addressing structural racism. As we explained above, it clearly does not. Rather, we are asserting that it could and, beyond that, should address structural racism by preventing the government from taking action that perpetuates structural racism and allowing race-based remedies.

Emerging, as it did, from a Civil War concerning slavery and the Reconstruction that followed, the Fourteenth Amendment has the potential to be an anti-racist Constitutional provision,212 despite failure of the Court to

210 As Charles Lawrence III described, “[w]e have the 14th Amendment only because we had slavery and a war that ended slavery. The origin is anti-racist, the Court's interpretation is not.” Lawrence III, supra note 86, at 955. The Amendment has also been described as “[a] sweeping guarantee of protection from stigmatization and oppression,” JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH 260 (1983), as well as “an early acknowledgement that merely eliminating legal approval and recognition of discrimination, in the form of slavery, would not lead to equality,” Bodensteiner, supra note 95, at 200. Ian F. Haney-López described the “emancipatory potential of the Fourteenth Amendment” which “promotes reform.” Haney-López, supra note 151, at 1781. And, lastly, Barbara J. Flagg criticizes the Court’s doctrine for not interpreting the Equal Protection Clause in a way that honors its “guarantee of racial equality.” Flagg, supra note 97.

211 The rationale of Carolene Products footnote four also supports the conclusion that structural racism is within the scope of the equal protection clause. See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”). One reading of footnote four suggests that some groups of individuals have endured generations of oppression—or are marginalized in certain ways from the political process—and, therefore, the political process cannot be trusted to remedy undesired legislation and intervention by the courts may be appropriate. See id. As John Hart Ely observed, one of the “two factors often mentioned to account for the special scrutiny accorded racial classifications [is] that racial minorities have been subjected to legal disadvantage throughout our history.” John Hart Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 730–31 (1974) (internal citations omitted). As evidenced by the long list of persistent inequalities earlier in this article, the political process is clearly not an effective avenue for people of color to protect themselves or vindicate their rights, as embedded practices and policies—structural racism—have created a continued barrier for people of color to achieve political power and effectuate large-scale legislative change. Therefore, the Court might have the authority to assess the cases and effects of structural racism with heightened skepticism under a rationale supported by Carolene Products.

212 See, e.g., Lawrence III, supra note 86, at 944, 955 (calling the amendment’s origin “anti-racist”).
ever construe it to its fullest potential. The Court itself—when composed of
Justices who had lived through the Civil War—initially construed the
Amendment in the *Slaughter-House Cases* as intended to accomplish “the
freedom of the slave race, the security and firm establishment of that free-
don, and the protection of the newly-made freeman and citizen from the op-
pressions of those who had formerly exercised unlimited dominion over
him.”213 In the same opinion, the Court also suggested the purpose of the
Fourteenth Amendment could be both “address[ing]” and “remed[ying]”
grievances of formerly enslaved African-Americans.214

Additionally, there are numerous examples of Justices interpreting the
Equal Protection Clause to reflect the aspiration of racial equality. For exam-
ple, Justices have interpreted the Clause to em body “the goal of a political
system in which race no longer matters”215 and “[t]he dream of a Nation of
equal citizens in a society where race is irrelevant to personal opportunity
and achievement.”216 The Clause has also been employed to ensure the
government does not institute a racial hierarchy.217

Because structural racism is a product and producer of racial discrimi-
nation—one cannot be separated from the other in origin and effect—we ar-

213 *Slaughterhouse Cases*, 83 U.S. 36, 71 (1872). *But see*, e.g., Regents of the Univ. of Cal. v. Bakke,
214 *Slaughter-House Cases*, 83 U.S. at 71–72. The fact that, as Justice Powell described in *Bakke*, “[t]he
Equal Protection Clause . . . was [virtually] strangled in infancy by post-civil-war judicial reactionism,”
does not diminish this reality. *Bakke*, 438 U.S. at 291 (Powell, J. concurring).
217 *See*, e.g., *Shaw*, 509 U.S. at 657 (“Racial classifications of any sort pose the risk of lasting harm to
our society. They reinforce the belief, held by too many for too much of our history, that individuals
Adm’t of Mass. v. Feeney, 442 U.S. 256, 272 (1979)) (“Classifying persons according to their race is
more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates
the category.”).
that the doctrine needs revision to account for racism as it actually is—is not new; numerous distinguished scholars have voiced this criticism and offered methodologies for conforming the doctrine to the realities of racism. Adding our voices to that choir, we offer an additional framework for refashioning the doctrine: a restorative jurisprudence of equal protection. We suggest that a jurist who adopts this jurisprudence is likely to both interpret evidence and formulate doctrine in a manner that overcomes existing barriers to combatting structural racism.

Specifically, the Court should prioritize for reformation the barriers to equal protection’s dismantling of structural racism discussed in the preceding section: (i) the Court’s prioritization of discriminatory intent over discriminatory effect, and (ii) the Court’s frequent tendency to decontextualize matters of racial inequality. These barriers find counterpoints in the value system of restorative justice. We suggest that, if adapted for use in equal protection jurisprudence, restorative values have the potential to restore the harms created and perpetuated by structural racism.

Jurists who choose to employ restorative jurisprudence, we suggest, would conceive of equal protection in a way that is different from the conception embodied by existing doctrine. A restorative jurisprudence offers a conception of equal protection that (i) looks forward rather than backward, prioritizing the effects of wrongdoing over questions about potential wrongdoers’ intent, and (ii) acknowledges the salience of context and the voices of those whose life chances are diminished by structural racism. Furthermore, these restorative values are not in any sense extra-legal. To the contrary, they have ample basis in Supreme Court precedent. Thus, what we are suggesting here is by no means a wholesale transformation, but rather a perspective-taking and a reprioritization for individual jurists engaging in equal protection analysis.

To lay the groundwork for this jurisprudential vision, we will begin this section with an orientation to restorative justice and its practical applications. Proceeding from that foundation, we will then envision the potential of restorative values to overcome the chief barriers and, ultimately, lead to a doctrine that counters and dismantles structural racism.

A. Restorative Justice Generally

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218 See generally, e.g., Haney-Lopez, supra note 76, at 1834; Lawrence III, supra note 18, at 318–19, 322, 324.

219 The term “restore” is used here both with its commonly understood meaning and with the broader meaning ascribed to it by restorative justice proponents. The latter will be discussed, infra, in section II(A).
Restorative justice is a term that defies simple definition. It has been described variously as a set of values for doing justice, a justice mechanism, and a theory of justice. Generally speaking, practitioners of restorative justice strive to respond to crime and conflict in a manner that involves all stakeholders and that strives to heal harm rather than merely punish rule-breaking. Practitioners of restorative justice use methodologies such as mediation, group conferencing, peacemaking circles, and impact panels in settings ranging from juvenile justice to adult criminal justice, and from school discipline to workplace conflict-resolution. Some also consider truth and reconciliation commissions a form of restorative justice.

What follows in this section is intended to provide a brief orientation for those unfamiliar with restorative justice theory, values, and practice.

1. Theories and Values

Restorative justice has been a topic of practice and study in the United States since the 1970s. For many practitioners and scholars of restorative justice, the journey into the field is motivated by a search for alternatives to existing justice systems. Some come to restorative justice, for example, because of grave concerns about what they consider to be excessively punitive approaches to criminal justice and school discipline that have predominated in the United States. Others are in search of ways of doing justice that do not reinforce the marginalization of communities of color. Still others are attracted to restorative justice out of a desire to intensify the focus on the rights and needs of crime victims.

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221 See John Braithwaite, Restorative Justice and De-Professionalization, 13 GOOD SOCIETY 28, 28 (2004).
223 See generally Ross London, A New Paradigm Arises, in A RESTORATIVE JUSTICE READER 5 (Gerry Johnstone ed., 2d ed. 2013) (arguing that the push towards restorative justice was motivated by “a pervasive sense that ‘nothing works’”).
224 See generally id. at 6 (noting that the restorative justice movement arose from a need to move from desire for punishment to “resolving genuine conflict and addressing underlying juvenile and interpersonal problems”).
There is no single definition of restorative justice. Rather, definitions range from a narrow “justice mechanism” conception to a very broad “way of life” conception, with various moderate conceptions in between. For example, Kathleen Daly has offered the following, very narrow procedural definition:

Restorative justice is a contemporary justice mechanism to address crime, disputes, and bounded community conflict. The mechanism is a meeting (or several meetings) of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process—prearrest, diversion from court, presentence, and postsentence—as well as for offending or conflicts not reported to the police. Specific practices will vary, depending on context, but are guided by rules and procedures that align with what is appropriate in the context of the crime, dispute, or bounded conflict.227

At the other extreme of the continuum is what some call a “transformative conception of restorative justice.” 228 It holds that the “goal of the restorative justice movement should be to transform the way in which we understand ourselves and relate to others in everyday lives . . . [This conception entails] a rejection of the assumption that we exist in some sort of hierarchical order with other people . . . and [are] instead . . . inextricably connected to and identifiable with other beings in the ‘external’ world.”229

In the middle of the road is a conception of restorative justice as an approach for responding to crime and conflict that views them as a “source of harm, not merely a transgression of law and, consequently, specifies the mission of . . . justice system[s] as the repair of harm instead of only the determination of guilt and imposition of punishment.”230 It entails processes that strive to involve “the victim, the offender, and the relevant community members to the fullest extent possible in voluntary negotiations to provide compensation for the victim and achieve social integration of the offender.”231

229 Id. at 19–20.
231 Id.
Some have suggested that restorative justice is fundamentally broad, and that its fluid contours are part of what makes it valuable. As Jennifer J. Llewellyn and Robert Howse observed in a slightly different context:

[T]he open nature of [restorative justice] description[s] holds important clues [about] the nature of a restorative justice theory [itself]. Restorative justice does not force situations to fit theory. Rather, as a theory, it is open and flexible enough to apply on a variety of levels and to different contextual imperatives.233

In spite of the definitional indeterminacy, however, what emerges quite decisively from the literature and public discussions of restorative justice is that it has, at its heart, a set of values about which nearly all commentators agree.234 These values provide a framework for addressing


233 Jennifer J. Llewellyn & Robert Howse, Restorative Justice: A Conceptual Framework, PREPARED FOR THE LAW COMMISSION OF CANADA 20 (1999), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2114291. Some argue that restorative justice is a term that has come to mean “all things to all people,” rendering it functionally devoid of any meaning. Indeed, its meaning is not only uncertain, but is in fact heavily contested. Gerry Johnstone & Daniel W. Van Ness, The Meaning of Restorative Justice, in A RESTORATIVE JUSTICE READER, supra note 228, at 12. Without a concrete definition that enjoys wide consensus among interested constituencies, some argue that empirical study of restorative practices and outcomes is impractical. Daly, supra note 227, at 11; Jennifer J. Llewellyn et al., Imaging Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation, 36 DALHOUSIE L.J. 281, 294 (2013). To the extent that this state of affairs persists, at least one distinguished scholar suggests, the future of restorative justice is in doubt. Daly, supra note 227, at 11. Furthermore, without a clear definition, others have cautioned that translating restorative justice from criminal and school discipline settings to other justice-seeking arenas might be fraught with risks. See, e.g., Kerry Clamp & Jonathan Doak, More than Words: Restorative Justice Concepts in Transitional Settings, 12 Int’l Crim. L. Rev. 339, 340 (2012) (arguing that the definitional ambiguities surrounding restorative justice make it premature to assess for restorativeness post-conflict transitional justice processes). Whatever else is true about the risk of a lack of definitional consensus, what is also true is that the values underlying restorative justice are, in fact, a shared framework, as will be discussed next.

234 See, e.g., George Pavlich, Ethics, Universal Principles and Restorative Justice, in HANDBOOK OF RESTORATIVE JUST. 613, 618 (Gerry Johnston & Daniel W. Van Ness eds., 2007) (noting that proponents “hold out underlying values and principles to serve as an anchor point, charged with framing specifically restorative practices”); HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 7 (2015) ("Although the term ‘restorative justice’ encompasses a variety of programs and practices, at its core it is a set of principles and values, a philosophy, an alternate set of guiding questions . . . [that] provide[] an alternative framework for thinking about wrongdoing.")
wrongdoing. We highlight here three of the values: healing harm, elevating stories of stakeholders, and creating long-lasting restoration.

First, restorative justice practitioners prioritize the healing of harms. When someone is harmed, disequilibrium is created—an inequality exists between “those implicated in the doing and the suffering of a wrong.” Restorative practitioners believe that merely assessing the intent of relevant actors and assigning blame for wrongs is insufficient. The healing to which they aspire is context-specific and effects-based. Only with context in mind can the disequilibrium created by wrongdoing or inequality be ameliorated. Second, stakeholders’ voices and narratives are central to restorative justice. Solutions are crafted with a respect for the experiences of those affected and an understanding of the context in which they arose. Lastly, restorative justice practitioners value healing harms in a way that creates lasting restoration and equilibrium in relationships. This requires a forward-looking perspective.

It bears noting that the term “restoration” is often misinterpreted by those new to the topic of restorative justice. This is understandable because, as used by proponents of restorative justice, restoration does not have

240 Llewellyn & Howse, supra note 235, at 3 (“[R]estorative justice begins from the disequilibrium of a relationship in society, but what is ultimately restored is not the facticity of the relationship before disruption but an ideal of a relationship of equality in society.”).
242 Llewellyn & Howse, supra note 235, at 3.
243 Id. at 1.
245 STRICKLAND, supra note 241, at 2.
246 See id. at 1; Ted Wachtel & Paul McCold, Restorative Justice in Everyday Life, in RESTORATIVE JUSTICE AND CIVIL SOCIETY, supra note 244; ZEHR, supra note 239, at 41; Howard Zehr, 10 WAYS TO LIVE RESTORATIVELY, ZEHR INST. FOR RESTORATIVE JUST. (Nov. 27, 2009), http://zehr-institute.org/resources/10-ways-to-live-restoratively/.
247 Id. at 22.
its common meaning, i.e. “a return to the status quo ante,” or “a return to the state of affairs that existed before the given wrong or inequality occurred.” Rather, restoration in this lexicon has a more flexible quality that is largely forward-looking and aspirational in nature. It means “making things right; achieving justice as judged by the outcome, not merely the process; or achieving “morally adequate relations.”

This broad conception allows for the reality that the status quo ante may well have been unjust, dangerous, or otherwise unacceptable. Thus, the literal meaning of restore is not essential to the term as used here, and may even be contradictory in some settings.

Ultimately, restorative justice is a values-based paradigm shift that rejects a narrow, blame- and punishment-oriented vision of justice in favor of a vision that prioritizes long-lasting, effects-conscious, and context-specific restoration of equilibrium in human relationships. We will elaborate on these values below, where we will suggest that if jurists adopt restorative values in their jurisprudence, applying such values to equal protection questions would lead to a doctrine that engages with and, ultimately, aids in dismantling structural racism. But first, to orient those unfamiliar with how these values are concretized in restorative practices, we offer a brief overview of what restorative justice looks like today in practice. The overview is followed by an exploration of retributive theory. The latter will not only help frame the meaning of restorative justice, but also offer an analogy to equal protection doctrine that may aid readers to envision the benefit of applying a restorative lens to that doctrine.

2. Present Applications

Restorative practices employ a dialogue-based encounter among affected parties to ascertain the truth of what occurred and determine how best to move forward. In this section, we highlight interpersonal restorative justice practices, as well as truth and reconciliation.


250 Id. at 34.


252 That said, “restoration” taken in its literal sense does offer an opportunity to reflect on aspects of the status quo ante that do not often come to mind in more traditional justice processes. As Fania Davis wrote to Howard Zehr, restorative justice can be thought of as being “about returning to one’s best self that’s always been there[,] … returning to the part of us that really wants to be connected to one another in a good way.” Zehr, supra note 239, at 14–15. So, for some, the nature of restorative justice’s goals can, indeed, be thought of as a return of sorts.

As of 2016, at least thirty-two states have enacted some form of legislation related to interpersonal restorative justice.\textsuperscript{254} Many employ restorative justice as part of diversionary approaches to criminal offenses, i.e. relocating alleged offenders from a judicial process likely to result in incarceration to a restorative process to decide how to respond to the crime.\textsuperscript{255} Most common among these practices are victim-offender mediation, group conferencing and peacemaking circles, as well as impact panels.\textsuperscript{256} School discipline involving restorative practices is also becoming increasingly common, with a few states going so far as to enact legislation to support it.\textsuperscript{257}

Perhaps most common among these is the practice known as victim-offender mediation (“VOM”). VOM is a process in which a mediator facilitates a dialogue between offender and victim.\textsuperscript{258} The aims of VOM are to use dialogue to understand the truth of what occurred, come to an agreement for reparation or restitution, and, in some instances, create a schedule to continue dialogue between the parties.\textsuperscript{259} Aided by the mediator, the parties have the opportunity to explore avenues for feelings-based restoration such as apology and remorse, as well as tangible restoration through restitution.\textsuperscript{260}

Like VOM, group conferencing and peacemaking circles bring victims and offenders together for dialogue, but also involve others from their families and communities. Impact panels, in contrast, are typically convened

\textsuperscript{254} Shannon M. Sliva & Carolyn G. Lambert, \textit{Restorative Justice Legislation in the American States}, 14 J. POL’Y PRACT. 77, 85 (2015). Among them are, for example, Colorado, Delaware, Florida, Maine, Minnesota, Missouri, Montana, South Carolina, Vermont, Virginia, and West Virginia. Sandra Pavelka, \textit{Restorative Justice in the States: An Analysis of Statutory Legislation and Policy}, 2 JUST. POL. J. 1, 17–23 (2016). Montana, for example, has made a particularly strong and permanent investment in restorative infrastructure through the creation of the Office of Restorative Justice, reinforced by statute. \textit{Id.} at 20. Other states such as Colorado, Maine, and Vermont have fashioned statutory schemes to provide funding and organization for more localized restorative structures such as community reparative and accountability boards. \textit{Me. STAT.} 17-A, \textsection 1204-A (1997); \textit{Vt. STAT. tit.} 28, \textsection 910 (1999) (amended in 2011); \textit{Colo. Rev. Stat.} \textsection 19-2-309.5 (2016). Fourteen states, ranging from politically liberal states such as California and Oregon to conservative strongholds such as Arkansas, Louisiana, and Georgia, subscribe to the infusion of quasi-restorative practices into their state law, including VOMs and avenues to facilitate dialogue between victim and offender. Sandra Pavelka, \textit{Restorative Justice in the States: An Analysis of Statutory Legislation and Policy}, 2 JUST. POL. J. 1, 7 (2016).


\textsuperscript{256} \textit{Id.}

\textsuperscript{257} \textit{See id.} at 89. States that use restorative justice as a disciplinary tactic within school systems include: Colorado, Florida, Louisiana, and Pennsylvania. Sandra Pavelka, \textit{Restorative Justice in the States: An Analysis of Statutory Legislation and Policy}, 2 JUST. POL. J. 1, 17–23 (2016). The statutory guidelines for restorative justice are further affirmed by some increased or prioritized funding for schools utilizing a restorative justice punishment framework. \textit{Id.}

\textsuperscript{258} \textit{Id.}

\textsuperscript{259} \textit{Id.} at 84.

\textsuperscript{260} \textit{Mark S. Umbreit et al., U.S. DEP’t of JUST., CTR. FOR RESTORATIVE JUST. & PEACEMAKING, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES} 11 (2000).
when a particular victim and/or offender cannot or will not meet.\(^{261}\) The panels consist of individuals who have experienced the same category of crime or relationship to the crime or wrongdoing in question, but are not directly related to one another through a particular crime or wrong.\(^{262}\) While these panels are, by definition, not able to facilitate healing of relationships between particular victims and offenders, their purpose is to give victims the opportunity to express their experiences and be heard by offenders who, in turn, might develop an understanding of the effects their negative actions created.\(^{263}\)

\[\text{b. Truth and Reconciliation}\]

Under the truth and reconciliation framework, a commission, often made up of civic and political leaders, provides a space for victims of what is typically state-sponsored or systemic violence or oppression to gather in a public setting.\(^{264}\) The commission process involves both victims and offenders in an attempt to best understand the truth surrounding the injustices that have occurred, especially in cases where the established authority rejects or refuses to support a search for truth.\(^{265}\) In many truth and reconciliation efforts, wrongdoers have had the opportunity to plead for amnesty, sometimes in exchange for their full, honest testimony.\(^{266}\)

One of the best known truth and reconciliation initiatives is the South African Truth and Reconciliation Commission (“SATRC”) convened in 1995 following the fall of the Apartheid system.\(^{267}\) The seventeen-member commission was led by Archbishop Desmond Tutu and was intended to investigate the Apartheid era’s gross violations of human rights.\(^{268}\) The SATRC further sought to grant amnesty to those who admitted their wrongdoing; give victims the opportunity to testify about their sufferings; take measures aimed at granting reparation, rehabilitation, and restoration to victims; and make recommendations for preventing such gross human rights violations in the future.\(^{269}\) While criticisms of the SATRC’s mandate and work abound, it is also credited by some with aiding in averting mass bloodshed across South


\(^{265}\) Id.


\(^{268}\) Promotion of National Unity and Reconciliation Act 34 of 1995, BSRSA (S. Afr.).

\(^{269}\) Id.
Africa and for bringing the concept of mass truth and reconciliation to the international stage.\footnote{270}{See TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? 4–5 (Audrey R. Chapman & Hugo van der Merwe eds., 2008).}

Truth and reconciliation processes, though not widely implemented in the U.S., have been considered and, in a couple of instances, actually employed to address racism.\footnote{271}{Two instances of Truth and Reconciliation Commissions have occurred in the United States. The first, in Greensboro, North Carolina is profiled further in this section. David K. Androff, Adaptations of Truth and Reconciliation Commissions in the North American Context: Local Examples of a Global Restorative Justice Intervention, 13 ADVANCES IN SOC. WORK 408, 412–13 (2012). The other TRC was held in Maine and concerned government abuses toward the Wabanaki Native American population in 2015 and was facilitated by both local government officials and concerned citizens. Dayton Martindale, The Stolen Children of Maine: Native Wabanaki Seek Truth, Reconciliation Amidst a Cultural Genocide, IN THESE TIMES: RURAL AMERICA (July 18, 2015), http://inthesetimes.com/rural-america/entry/18201/stolen-maine-native-wabanaki-truth-reconciliation-genocide. Truth-telling as a concept continues to receive national attention. For example, in a July 2019 primary debate, Democratic candidate for president and celebrity spiritual advisor, Marianne Williamson, responding to a question on the nation’s violent racial past, responded that the American people need “deep truth telling,” and then rejected the commission framework, calling for frank personal discussions about race. Nick Corasaniti, Watch: Marianne Williamson on Race, Reparations and Trump’s ‘Dark Psychic Forces’, N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/30/us/politics/marianne-williamson-debate-quotes.html. Other candidates such as Senator Kamala Harris and former Texas Congressman Beto O’Rourke have called for reparations and formalized opportunities to discuss the American racial past. Rachel Frazin, O’Rourke: Cash Reparations Policy ‘Stops the Conversation’ on the Issue, HILL (June 25, 2019), https://thehill.com/homenews/campaign/450226-orrourke-cash-reparations-policy-stops-the-conversation-on-the-issue; Eric Lach, Kamala Harris at the Democratic Debate: “I Would Like to Speak on the Issue of Race” NEWYORKER (June 27, 2019), https://www.newyorker.com/news/current/kamala-harris-i-would-like-to-speak-on-the-issue-of-race. Additionally, in recent months, Congressional committees, led by figures such as Congresswoman Sheila Jackson-Lee (D-TX) have summoned experts to Capitol Hill to discuss the potential distribution of reparations for African Americans whose ancestors suffered under the ‘peculiar institution’ of slavery. Richard Gonzales, Congressional Hearing on Slavery Reparations Set for Wednesday, NPR (June 18, 2019), https://www.npr.org/2019/06/18/733880321/congressional-hearing-on-slavery-reparations-set-for-wednesday.}}

\footnote{272}{GREENSBORO TRUTH & RECONCILIATION COMMISSION REPORT 3 (2004), http://www.greensboro-trc.org/exec_summary.pdf.}

Greensboro was the scene of a 1979 clash between Ku Klux Klan members and anti-Klan protestors resulting in the death of five people.\footnote{273}{Id. at 2.} Citizen efforts in the early-2000’s spawned a truth and reconciliation commission in an attempt to set the record straight on the events of the day and provide momentum for community healing.\footnote{274}{Id. at 3.} The Commission heard testimony from those who participated in the event, from Klan members, anti-Klan demonstrators, and former Greensboro police officers, and presented solutions aimed at reckoning with the past while preventing future harm by the city council, police department, and county government.\footnote{275}{Id. at 31–36.}
In sum, while their character varies widely, restorative practices are united not only by the values discussed above, but also by the aspiration to transcend the inadequacies that restorative justice proponents perceive in more traditional approaches to crime and conflict-resolution. It is to one example of such constraints—retributivism—to which we now turn.

3. Retributive Justice Analogy

To help readers develop their understanding of restorative justice, it is often helpful to explore what restorative justice is not. For example, restorative justice is not a purely retributive approach to justice. While restorative concepts and retributive ones are not mutually exclusive, it is nevertheless true that many who practice, study, and write about restorative justice orient their work around expanding beyond the narrow frame of retributivism.

Furthermore, and quite interestingly in our view, existing equal protection doctrine is actually similar in some important ways to the retributive theory of justice. Thus, we offer this subsection to flesh out an analogy. The purpose of the analogy is to demonstrate that, just as restorative justice can help overcome the barriers of retributivism, so, too, can restorative values overcome the barriers of equal protection doctrine. While retributivism is not an exact analog to equal protection doctrine, exploring the similarities between the two—even if only as a thought experiment—does create useful analytical opportunities. This is because the retributive-like features of equal protection doctrine are among the barriers preventing the doctrine from combating structural racism. Thus, just as restorative justice is a useful response to retributive justice, restorative values are a useful response to existing doctrine.

a. Retributivism Defined

Retributivism is the predominant theory undergirding punishment practices in the contemporary U.S. criminal legal system. It holds that, when wrongdoing occurs, the wrongdoer should be punished in a manner that is proportional to the wrongdoing itself. That is, wrongdoers should receive their “just deserts.” Retributivism is heavily concerned with

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276 ZEHR, supra note 239, at 59–60.
277 E.g., id.
280 Materni, supra note 278, at 278.
The proportionality value acts as both a justification for punishment and a check on impulses toward cruelty—wrongdoers should receive all of the punishment they deserve, but no more than they deserve.

Retributivism is unconcerned with utilitarian outcomes such as rehabilitation of wrongdoers, deterrence of future wrongs, or restitution to harmed parties. While retributivists do not object to such outcomes, they believe that decisions about how to treat wrongdoers should be driven primarily by the goal of imposing proportionate suffering. Indeed, they contend, justice can be served only by punishing guilty wrongdoers, and “[m]aking victims feel good is no part of retributive justice.”

Retributive justice is not the “opposite” of restorative justice in every sense. However, where retributive justice processes are backward-looking, i.e. focusing only on the wrongdoing and what just deserts flow therefrom, restorative justice processes focus primarily on the future, i.e. what steps should be taken to heal the harms created by the wrongdoing.

b. Analogizing Retributivism and Existing Equal Protection Doctrine

Retributivism and existing equal protection doctrine are similar in important ways. Both have a laser focus on the search for culpable wrongdoers. Similar to equal protection doctrine’s preoccupation with discriminatory intent, retributivism asks only: What act did the wrongdoer commit, with what intent, and what imposition of pain will be proportional? Also like the doctrine, this approach is heavily occupied with just one subset of the context within which wrongdoing occurs. It does not, for example, concern itself with the going-forward needs of those harmed by the wrongdoing. Furthermore, should the context surrounding the wrongdoer signal the need for particular forms of rehabilitation to enable the wrongdoer to participate peacefully in society, a retributivist approach is incapable of taking that context into account to fashion a response.

Interestingly, existing equal protection doctrine concerning race discrimination is limited in ways that are very comparable to retributivism’s limitations, and this creates fertile ground for analogizing. Like retributivism,
equal protection doctrine is preoccupied with a search for wrongdoers and their intent. This cuts off the potential to actually remedy the effects (i.e. the harms) of racism. The calculus of blame and proportionality are, as is the case with retributivism, a central feature of decision-making about remedies. That is, where white wrongdoers exist, so will a remedy—but that remedy will be, in a real sense, no more than those white people deserve. Furthermore, the acontextual analytical approach the doctrine shares with retributivism disables it from remedying racial inequality in the same way that retributivism’s acontextual style hampers its ability to heal the harms of wrongdoing.

What is the utility of this analogy? Those familiar with scholarly literature about restorative justice will be well aware of the risks of an overly simplistic binary pitting restorative and retributive justice against each other as though they were opposites. Sensitive to those risks, we offer this analogy with one limited purpose: We suggest that jurists who adopt restorative values in their jurisprudence will begin to make changes to their decision-making process and, ultimately, the doctrine in such a way that prevents the doctrine from serving as a safe harbor for structural racism. Just as proponents of restorative justice have found value in contrasting their goals with the goals of retributivism, so, too, can jurists gain valuable insight by contrasting their own jurisprudence with a restorative jurisprudence.

While the restorative jurisprudence we propose in the following subsections flows from the restorative values detailed above, it is not, in and of itself, a restorative justice “methodology” such as victim-offender mediation or community group conferencing. Rather, we are suggesting that, just as restorative methodologies are informed by certain values, so, too, can these values inform a jurist’s approach to decision-making in equal protection matters. Even though restorative justice has most commonly been associated with instances of harm whose origin can be traced to a singular perpetrator or group of perpetrators, the values underlying restorative justice have a much broader potential. With that potential in mind, let us turn now to the specific attributes of this jurisprudence.

B. Intent vs. Effect

In Part I(B)(2), we described the Court’s centralization of discriminatory intent instead of discriminatory effects, and how this doctrinal choice is a barrier to the dismantling of structural racism. We turn now to the restorative value that could counteract this existing approach and what it would look like to adopt a restorative alternative.
The Barrier: Existing equal protection doctrine is preoccupied with intent and cares little about effect. It presupposes that the only harms that offend the Equal Protection Clause are those that involve intentional discrimination by identifiable actors in a given local setting. In so doing, the doctrine enables the persistence of harms created by all but individual racism, including the harms of structural racism.

The Restorative Alternative: Restorative justice prioritizes healing harms. To accomplish this goal, a forward-looking focus on the effect of wrongdoing is essential. Merely assessing the intent of relevant actors and assigning blame for wrongs is insufficient. We must respond to harm by creating remedies that bring about restoration.

1. The restorative value that overcomes this barrier

Unlike the Court’s preoccupation with finding wrongdoers’ malicious intent, proponents of restorative justice are primarily concerned with the effects of wrongs on people and communities. At its most fundamental, restorative justice seeks to heal the harms created by wrongs; its preoccupation is with achieving a state of the world as it should be. In this sense, it is largely forward-looking in its orientation.

This forward-looking orientation of restorative justice is a direct response to the backward-looking orientation of the largely retributive criminal legal procedures that have predominated in the United States for decades. Put simply, rather than respond to a wrong by asking what laws have been broken and what punishment is deserved, proponents of restorative justice respond by asking what harm has been done and what steps should be taken to repair that harm. In other words, restorative justice processes concern themselves primarily with the effects of wrongs—harm done, healing needed as a result—much more than the intent underlying those wrongs.

Restorative justice practices center the goal of “making things right” such that, framed restoratively, justice is about much more than blame and punishment; it is about restoring “wholeness” to all those with a stake in the given wrongdoing or inequality. This is not to say that practitioners of restorative justice are unconcerned with the concept of blame. Indeed, among

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289 See id. at 24–25, 32.
290 Id. at 30–31.
291 See, e.g., Ross London, A new paradigm arises, in A RESTORATIVE JUSTICE READER, supra note 223, at 6; see also id. at 31.
the essential practices of restorative justice is fashioning a response to harm that emphasizes accountability and responsibility for the offender.294 And this view is shared widely.295

However, advocates of restorative justice have been largely unified by the belief that responding to wrongdoing with mere assignment of blame and desert-based punishment is always insufficient.296 They share “a common commitment to restoration over retribution . . . ; a commitment to be forward-looking, to look at the outcome or implications of a wrong for the future; and a commitment to bring together all those with a stake in the development of that future.”297 Restorative practices are “designed to give peace and healing to persons harmed, reintegrate responsible persons back into the community and, ultimately, to construct community capacity to manage crime and other harm.”298 As such, restorative processes might include assessments of intent, but intent is never the end of the story; it is never dispositive. Rather, restorative justice is achieved only when the harms at issue—regardless of their origins in sources other than intentional behavior—are healed.

2. The restorative vision – what it means to focus on effects

A restorative jurisprudence, applied to equal protection analysis, would reprioritize the Supreme Court’s analytical approach in race discrimination cases. Rather than a search for blameworthy bad actors, a restorative jurisprudence would prompt jurists to acknowledge the need for a search for discriminatory effects and remedies. This shift in attention will lead inevitably to a reckoning with structural racism.

The Supreme Court’s preoccupation with discriminatory intent is comparable to the preoccupation with blame-assignment in procedures that rely primarily on retributive notions of justice.299 Both are backward-looking, asking only what has occurred, not what conditions in the world require repair.300

294 ZEHR & GOHAR, supra note 292, at 22.
295 See, e.g., Fania E. Davis et al., Restoring Racial Justice, in EMERGING TRENDS IN SOCIAL AND BEHAVIORAL SCIENCES 1, 4 (2015) (explaining that restorative justice processes “aim to build the capacity of the responsible person who make positive contributions to and improves relations with the community . . . [so he or she] can rejoin the community by earning redemption”); Gerry Johnstone & Daniel W. Van Ness, The Meaning of Restorative Justice, in A RESTORATIVE JUSTICE READER, supra note 228, at 17 (noting there is a “wide range of things an offender might do to repair the material and symbolic harm he or she has caused to his or her victim(s)
296 See Llewellyn & Howse, supra note 235, at 37–38.
297 Id. at 43.
298 Fania E. Davis et al., Restoring Racial Justice, in EMERGING TRENDS IN SOCIAL AND BEHAVIORAL SCIENCES 1, 2 (2015).
299 Dorosin, supra note 109, at 37–38, 80.
300 Id. at 80–81.
Both center the experience of the alleged harm-doer and relegate to the periphery the experience of the people harmed.301

The restorative jurisprudence of equal protection we propose would reverse this anemic misapplication of the Equal Protection Clause by focusing the legal inquiry on a question whose answer has the potential to bring about racial equality: What harm exists, and what remedy will bring about a future in which the harm is eliminated? It concerns itself with eliminating the deprivation of equal protection against which the Fourteenth Amendment purports to protect. More specifically, this jurisprudence would prompt jurists to (i) recognize that achieving equal protection based on race will be impossible if remedies are available only in the presence of evidence proving individual racism; (ii) prioritize remedying inequality even when not caused by discriminatory intent; and (iii) center the experience of people of color rather than people who are white.

The first two features of a restorative jurisprudence are both about prioritizing a remedy. Like restorative justice, whose central mandate is to bring about restoration of harm, this jurisprudence would allow jurists to acknowledge that the harm at issue in cases like Davis, McCleskey, and Bakke is racial inequality and, specifically, the unequal life chances and skewed access to opportunities of people of color.302 It would then ask what steps can be taken to repair the harm, i.e. to eradicate this inequality.

A jurist employing a restorative jurisprudence would understand that the search for people with intent to create inequality is not the whole inquiry, as "the injury of racial inequality exists irrespective of [any] decisionmakers’ motives."303 Further, they would acknowledge that the search for discriminatory intent is an increasingly disingenuous undertaking since, in an era where explicit racial discrimination is generally disfavored in mainstream society, it is well-known that litigants can rarely adduce smoking-gun evidence of intentional discrimination.304

301 Id. at 80.
303 Lawrence III, supra note 18, at 319.
304 See Darren L. Hutchinson, “Unexplainable on Grounds Other Than Race”: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence, 2003 U. ILL. L. REV. 615, 683 (2003) (“Because discrimination has mutated into subtle forms, a rule requiring that plaintiffs possess “smoking gun” evidence to prove an equal protection claim will place insurmountable barriers to the litigation of such claims, permit pervasive subjugation to escape a judicial remedy, and provide absolutely no incentives for governments to take care that their own policies do not exacerbate and replicate historical forms of injustice.”); id. (“A motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden or persuasion on the wrong side of the dispute.”).
In so doing, this restorative jurisprudence, applied in the equal protection context, could also find its way to centering the experiences of those harmed—people of color. When framed from a point-of-view that centers the interests of Mr. Bakke, the white plaintiff who sued U.C. Davis Medical School to challenge its affirmative action policy, for example, U.C. Davis’s policy had the effect of reducing his access from one hundred seats to eighty-four seats. On the other hand, when framed from the point-of-view of the people of color who applied to Davis that year, the policy had the effect of making available sixteen seats where, before the policy, effectively none of the seats were available. The people of color were receiving something approaching equal protection, while the white people were merely losing the unearned privilege of 100% access and being restored to a degree of access more in line with their presence in the population. Unobscured by a non-restorative preoccupation with intent, Justices applying this jurisprudence would be free to “give peace and healing to those harmed” by racial inequality.

This style of jurisprudence is illustrated in Justice Brennan’s dissent in McCleskey, the Georgia death penalty case in which the majority refused to accept statistical evidence of race-based disparities in death penalty sentencing as proof of an equal protection violation. Unlike the majority, he framed that case in restorative terms when he acknowledged: “there was a significant chance that race would play a prominent role in determining if [McCleskey] lived or died.” In other words, Justice Brennan contended,

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306 Sixteen was much better than zero, though it was still less than equal because people of color composed over 30% of the K-12 student population of California at the time. Bakke, 438 U.S. 265, 289; Patricia A. Pelfrey, Chapter 25: Bakke v. The Regents of the University of California, BRIEF HIST. UNIV. CALIFORNIA, http://www.lib.berkeley.edu/uchistory/pubs_resources/papers_books/ucbriefhistory/chapter25.html#22 (last viewed Sept. 7, 2019).

307 For examples of discussions concerning such unearned benefits, see City of Richmond v. J.A. Croson, 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting) (“History is irrefutable, even though one might sympathize with those who—though possibly innocent in themselves—benefit—from the wrongs of past decades.”); Bakke, 438 U.S. at 365–66 (Brennan, J., concurring in part, dissenting in part) (“[S]ince it was reasonable to conclude . . . that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, [Bakke] would have failed to qualify for admission even in the absence of Davis’ special admissions program.”).”


310 Id. For another example of this style of jurisprudence in action, see Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015), and discussion thereof in Holning Lau, From Loving to Obergefell: Elevating the Significance of Discriminatory Effects, 25 VA. J. SOC. POL’Y & L. 317, 327–28 (2019) (observing that, while Loving used a Davis-style intent analysis to invalidate laws against marriage between people of
the discriminatory effects of which McCleskey complained should drive the inquiry. Furthermore, and quite notably, when he commenced his analysis by painting a picture of the harmful effects the Baldus Study documented, Justice Brennan chose to imagine the experience from Mr. McCleskey’s point of view. In so doing, he reinforced the restorativeness of his approach.

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey’s past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey’s victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey’s, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.

In practical terms, how might jurists today adopt the sort of restorativeness Justice Brennan employed? A restorative jurisprudence of equal protection does not mandate any single doctrinal approach to equal protection claims concerning race. What it would do, however, is recalibrate the analytical focus on discriminatory intent and introduce a heightened imperative to
remedy discriminatory effects. In other words, jurists applying a restorative jurisprudence would deprioritize the search for wrongdoers in favor of a search for remedies for the effects of structural racism, like inequality—replacing a doctrine of blame with one of restoration.

One option available under this framework is to modify the standard for when a racial classification disadvantaging people of color becomes constitutionally suspect. Under *Davis*, *Feeny*, and similar cases, such classifications are suspect only when those who challenge them can prove they were motivated at least in part by malicious discriminatory intent.314 In contrast, a restorative doctrine would prioritize restoration over blame and, thus, weaken the tolerance for race-based classifications that enshrine structural inequalities. For example, the Court could consider suspect any classification that disparate impacts people of color, especially where the disparate impact is consistent with historical impacts of race discrimination upon people of color315 or meets Charles Lawrence’s cultural meaning test.316

Furthermore, a restorative jurisprudence could enable Justices to recalibrate the doctrine to, quite simply, acknowledge that remedying “societal discrimination” is a compelling government interest, and that using race-based measures to do so might be essential to achieving that interest. A restorative focus on effects would lay bare the reality that what the Court has called “societal discrimination” is more aptly described as structural racism, and that the Fourteenth Amendment’s first century-and-a-half has done little to curtail its existence. Relatedly, shifting away from the preoccupation with intent would make space to rethink the forgone conclusion that whites are “blameless,” or that blame is what matters. While many white people may well be largely blameless of harboring and acting upon malicious discriminatory intent, they nevertheless do benefit from unearned opportunities flowing from the history of discrimination. When the question shifts to one of restoration, blamelessness becomes non-dispositive. Instead, what matters is achieving equality. And, in a restorative sense, this justifies both the disgorgement of unearned privilege on the part of white people and the access to equal opportunity for people of color.

While the jurisprudential shift we advocate is, indeed, a good faith call for modifications to how jurists approach existing doctrine, the values and

316 Lawrence III, *supra* note 18, at 356.
rationales underlying this call find support in other facets of existing Supreme Court doctrine. Nothing advocated here is without precedent.

For example, in its Title VII employment discrimination doctrine, the Court has long recognized that requiring smoking-gun evidence of individual acts of race discrimination risks closing the courthouse doors to those harmed by discrimination.\(^{317}\) And, of course, remedies for disparate impact discrimination have been approved for those harmed by employment discrimination as well as housing discrimination.\(^{318}\) Further, when striking down the ban on same-sex marriage that both discriminated against same-sex couples and implicated the right to marry, the Court’s analysis in Obergefell v. Hodges focused on discriminatory effects to the exclusion of intent doctrine.\(^{319}\) Finally, the Court has established the relevance of centering the experience of people of color, doing so perhaps most famously in Brown v. Board of Education.\(^{320}\)

In support of its decision to overturn Plessy v. Ferguson\(^{321}\) and rule that “[s]eparate educational facilities are inherently unequal,”\(^{322}\) the Court fixed its gaze on the experience of the Black students affected by segregationist policies: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”\(^{323}\)

By thus centering the experiences of people of color and acknowledging the remedy-blocking reality of the search for malicious discriminatory intent, jurists who adopt the restorative focus on effects will be equipped to fashion a doctrine that interrupts structural racism. In Part III, we will elaborate on how, precisely, the jurisprudence can help accomplish this goal. But,

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\(^{317}\) Numerous Supreme Court opinions have addressed concerns about Title VII’s burden-shifting mechanism for reckoning with the difficulty of adducing direct evidence of discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that shifting the burden requires plaintiff to show direct evidence of negative reliance on illegitimate criteria); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding the burden is on the employer to show that requirements have a “manifest relationship to the employment in question”). While, in Washington v. Davis, 426 U.S. 288 (1976), the Court ruled that this sort of inquiry was not applicable for use in equal protection analysis, it “has not since expended much effort in explaining precisely why this should be so, but rather treats the matter as settled.” Cheryl I. Harris, Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection, 2014 U. CHI. LEGAL F. 95, 103 (2014).


\(^{321}\) Plessy v. Ferguson, 163 U.S. 537 (1896).

\(^{322}\) Brown, 347 U.S. at 485.

\(^{323}\) Id. at 494.
first, let us build a vision regarding the second key barrier, decontextualization.

C. Decontextualization

In Part I(C), we described the Court’s tendency to decontextualize equal protection claims, and how this tendency impedes the dismantling of structural racism. As we did in the preceding section with respect to intent doctrine, we offer here a description of the restorative value that could counteract this existing approach, followed by a discussion of what it would look like to adopt a restorative alternative.

The Barrier: Existing equal protection doctrine gives no more than lip service to the history of racial oppression in the United States. What’s more, it utterly refuses to acknowledge the present-day existence of structural racism. In so doing, it decontextualizes equal protection claims, creating a jarring mismatch between the harm at issue—racial inequality—and the available remedies.

The Restorative Alternative: Restorative justice recognizes that all harm occurs as a result of disequilibrium that arises from a particular context. The proper response to harm is restoration, and accomplishing restoration requires consideration of both past and present context. Stakeholders’ voices and narratives are essential components of context-setting, and thus are a central pillar of restorative justice. Only with context in mind can the disequilibrium created by wrongdoing or inequality be ameliorated.

1. The restorative value that overcomes this barrier

Restorative justice is fundamentally concerned with the context in which wrongdoing occurs, and, more broadly, the contextual realities that create harm. Proponents of restorative justice believe it is impossible to achieve justice without taking into account the backdrop against which social relations occur, as well as the causes of any particular wrong, such as inequality. This is because the ultimate goal of restorative justice is to bring about restoration of people and relationships, and this goal cannot be accomplished in an acontextual process.

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324 Llewellyn & Howse, supra note 235, at 40.
325 See id. at 1.
326 Id. at 3 (“As it is concerned with social equality, restorative justice inherently demands one attend to the nature of relationships between individuals, groups and communities. Thus, in order to achieve
To understand why context is essential in restorative justice, it is helpful to remember that “restoration” means “making things right” or “achieving morally just relations.” To implement these notions of restoration, many have concretized the goals of restorative justice in terms of relationship. Using this relational framework, restorative justice is a way of responding to the disequilibrium brought on by wrongdoing or inequality. In this view, the goal of restorative justice is to accomplish a state of affairs in which people live in social relationships marked by “equal respect, concern, and dignity.” Another way to think of this goal is a state of affairs in which people experience not just an abstract notion of formal or procedural equality, but a lived experience of equality. That lived experience of equality is one where the circumstances of people’s lives demonstrate that society accords them no less dignity, concern, or respect than any other member of society. With this restorative goal in mind, it is clear that context is essential. After all, it is impossible to achieve lived equality using a process that ignores the context in which the disequilibrium at issue arose, i.e. the past and present context.

Additionally, the participation and collaboration of stakeholders is also essential to contextualizing a given harm. Indeed, regardless of how expansively or narrowly they define restorative justice, all or nearly all proponents of restorative justice agree that dialogue and collaboration among stakeholders are among its essential pillars. For example, Howard Zehr explains that “[r]estorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible.” Daniel W. Van Ness and Karen Heetdersk Strong believe that, among the “elements that contribute to a process of restoration” is that affected parties be given the opportunity to speak personally, tell stories from their own perspectives using a narrative approach, and express emotion if

restoration of relationships restorative justice must be concerned both with the discrete wrong and its relevant context and causes. What practices are required to restore the relationship at issue will, then, be context-dependent and judged against this standard of restoration.”).
they desire.334 Even Kathleen Daly, who advocates that restorative justice be conceptualized in a more limited fashion—as a justice mechanism—involves this value in her definition, indicating that “[t]he mechanism is a meeting (or several meetings) of affected individuals,” where, presumably, those individuals all have the opportunity to speak.335

This consensus among restorative justice proponents reflects the centrality of dialogue to the restorative endeavor. It is essential that “those primarily affected by an incident of wrong-doing come together to share their feelings, describe how they were affected” so that they may together “develop a plan to repair the harm done or prevent a recurrence.”336 Once again, the acknowledgement here is that one must be aware of context, from the perspective of those impacted, before one can do the work of repair or prevention.

More broadly, one of the ways restorative justice differs from other theories or mechanisms of justice is that it is needs-based (rather than strictly rights- or deserts-based), i.e. it prioritizes responding to “the unique needs of each person, and thereby achiev[ing] ‘equal well-being.’”337 This is another example of why context is essential—needs are understood to be unique to the particular stakeholders, thus those stakeholders and their needs are essential backdrop against which responses must be designed.

This contextual, needs-based conception of justice is especially important where those experiencing harm are members of historically oppressed or disempowered identity groups.338 This is because it is common for other modes of justice to “suppress the voice[s] of . . . outsider[s]” and exclude them from the “constituency of justice,”339 requiring that, to be cognizable, harms must be described in terms that reflect the experience of the dominant group.340 In contrast, restorative justice practices, precisely by virtue of being discursive and dialogical, are designed to bring those who are typically outside of the “discursive circle of justice” into that circle, and permit them to

335 Daly, supra note 227, at 21–22.
337 Dennis Sullivan & Larry Tifft, Needs-Based Justice as Restorative, in A RESTORATIVE JUSTICE READER 213 (Gerry Johnstone ed., 2d ed., 2013) (citing PETER KROPOTKIN, ETHICS: ORIGIN AND DEVELOPMENT (1924); Marge Piercy, WOMAN ON THE EDGE OF TIME (1976)).
338 Barbara Hudson, Beyond White Man’s Justice: Race, Gender and Justice in Late Modernity, 10 THEORETICAL CRIMINOLOGY 29, 31 (2006).
339 Id. at 33–34.
340 Id. at 34.
express claims “in [their] own terms, not have to accommodate to the dominant modes of legal/political discourse.”

Assessing harm and determining what restoration looks like are both intensely context-driven processes. A justice process that ignores the backdrop against which wrongs or inequality occur consigns itself to an irretrievable disconnect between wrong and right, between disequilibrium and equilibrium, between equality and inequality.

2. The restorative vision – what it looks like to contextualize

The restorative jurisprudence of equal protection we propose considers all evidence of race discrimination in the context of the United States’ history concerning race, racism, and white supremacy. More specifically, this jurisprudence (i) ascribes to facts such meanings as are consistent with the nation’s racial context; (ii) considers facts in concert with one another to derive an understanding that is a coherent whole; and (iii) accords appropriate respect and deference to the accounts of those harmed by racism.

Indeed, in Croson—where the majority struck down the Richmond ordinance that required city contractors to subcontract 30% of their business to minority enterprises—Justice Marshall’s account of what the Court should and could rightly have done is an example of restorative jurisprudence. He advocated the following: (i) The Court should have used the well-documented backdrop of national discrimination to understand the meaning of Richmond’s local evidence; (ii) it should have considered the local evidence as a whole, according it the contextual meaning it inherently conveyed rather than disaggregating it and attacking it one-fact-at-a-time; and, finally, (iii) the Court should not have trivialized the testimony of Richmond officials, but instead recognized that “[a]s much as any municipality in the United States, Richmond knows what racial discrimination is” having “spent long years witnessing multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents’ voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination.”

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341 Id. at 34.
343 Id. at 530.
344 Id. at 541.
345 Id. at 529.
346 Id. at 544.
Similarly, in *McCleskey*, Justice Brennan dissented restoratively, arguing that it was both unconstitutional and wrong to execute Mr. McCleskey due to the demonstrable bias toward black citizens in capital charging and sentencing. To echo the words of his dissent, a restorative jurisprudence of equal protection would ask whether the conclusions we draw from facts that are alleged to establish race discrimination “are consonant with our understanding of history and human experience.” Warren McCleskey’s claim, for example, that “there was a significant chance that race . . . play[ed] a prominent role in determining if he lived or died” was not “a fanciful product of mere statistical artifice,” but rather wholly consistent with “Georgia’s legacy of race-conscious criminal justice system, as well as the Court’s own recognition of persistent danger that racial attitudes may affect criminal proceedings.” While evidence of past discrimination is not enough to automatically condemn as unconstitutional current practices, Justice Brennan continued, “it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey’s evidence.” Indeed, “[h]istory and its continuing legacy thus buttress[ed] the probative force of McCleskey’s statistics.” The conclusions drawn from McCleskey’s statistical evidence [were] therefore consistent with the lessons of social experience.

It is this recognition that the meaning of facts can be ascertained only in context—the awareness that the conclusions we draw from such facts must be consistent with the lessons of social experience—this is what it is to engage in a restorative jurisprudence of equal protection. Adopting this value would permit jurists to assess both the existence of a compelling government interest and the appropriateness of a given remedy with greater particularity and understanding. In cases such as *McCleskey* and *Croson*, for example, facts considered in isolation failed to elicit from the Court a finding of harm whose remediation amounted to a compelling government interest. In contrast, a restorative doctrine would never look at facts relevant to race discrimination as though they “stand alone.” Were Justices to adopt a restorative
jurisprudence, they would be able to acknowledge that facts such as the over-
whelming whiteness of Richmond’s construction trade associations never
“stand alone.” Rather, they are the products of centuries of de jure and de
facto race discrimination (including continuing de facto discrimination)
which have culminated in structural racism.

As noted above concerning the restorative value of prioritizing effect
over intent, the rationales underlying the recommendation we offer here find
precedent in existing doctrine outside the equal protection realm. These are
not new ideas. We are simply suggesting that they be given primacy when
Justices engage with equal protection questions involving race. For example,
as described above, and illustrated in realms such as statutory interpretation,
there is nothing unprecedented about the logic of using context to ascertain
meaning. Indeed, law students in their very first year of study are taught to
use context when construing statutes and interpreting facts. Applying these
foundational analytical skills to equal protection analysis has the potential to
finally begin to address today’s structural racism.

III. How a Restorative Jurisprudence of Equal Protection will Help
Dismantle Structural Racism

What we have offered here is a restorative jurisprudence of equal pro-
tection which, if adopted by jurists, has the potential to result in decision-
making that contributes to the dismantling of structural racism. Were a ma-
jority of Supreme Court Justices to employ restorative values, and thus pri-
oritize effect over intent and consider matters in context, the Court would
soon develop a doctrine capable of addressing this pervasive form of racism
because this jurisprudence: (1) reveals both the existence of structural racism
and the existing doctrine’s inadequacy; (2) equips jurists to engage with the
complexity of structural racism; and (3) opens the doctrine to remedies capa-
bale of interrupting it.

A. “Revealing” structural racism’s existence and the impotence of
existing doctrine

A restorative jurisprudence prompts jurists to ask what conditions in
the world require repair. In so doing, its first and, perhaps, most self-evident
impact concerning structural racism will be to simply “reveal” its existence.

Justice Marshall noted, but it went on to make this curious assertion about one of them: “The mere fact
that black membership in [local] trade organizations is low, standing alone, cannot establish a prima fa-
cie case of discrimination.” Id. Setting aside that the question in the case was not whether the absence
of black membership in trade associations was sufficient by itself to support the remedial ordinance, thus
rendering the Court’s pronouncement inapposite, the pronouncement is problematic for another rea-
son—it is an explicit act of decontextualization.
The word “reveal” is problematic, of course, because structural racism is not hiding; it is in plain view. However, the Court, through its backward-looking, decontextualized approach, has chosen to create an artificial screen that obscures from jurisprudential view the very existence of this form of racism. In contrast, a jurist employing a restorative approach in adjudicating a claim of race discrimination would aspire to look at the past, present, and future, in all of their complexity.

Adopting a restorative jurisprudence will not lead inevitably to a structural racism-combatting equal protection doctrine. For one thing, the barriers we have described here are unlikely to be the sole barriers at play in the conscious or subconscious mind of any given jurist. As noted above, many judges are no doubt affected to varying degrees by impediments such as implicit bias, insufficient empathy, and white fragility. They also may harbor unexamined explicit biases, racist attitudes, and, in some instances, resistance to giving up their own privilege. A contextualized approach that prioritizes remedying harms may well aid in overcoming such impediments, but, to fashion doctrine that effectively combats structural racism, individual jurists will surely benefit from additional perspective-taking and skill-building.

Employing a forward-looking, contextual approach, the restorative jurist will have the opportunity to acknowledge that existing equal protection doctrine acts to harbor structural racism and not to erect remedies against it. As such, the doctrine cannot be justified by existing facts and conditions and is, therefore, ripe for revision.

These observations about the truth-“revealing” potential of restorative jurisprudence may seem exceedingly self-evident, even a bit circular. However, for a Supreme Court that has declared explicitly that discriminatory effects are not its province, and steadfastly refused to acknowledge that structural racism even exists, this potential bears explicit description. Indeed, no step in the decision-making process could be more important than

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356 See Jonathan K. Stubbs’s insightful discussion on the impact of personal experiences and identities on judicial decision-making for more information on the topic. Stubbs, supra note 31.
357 See Robin DiAngelo, supra note 34, at 54; see also Negowetti, supra note 33, at 714, 726–27.
358 Lawrence III, supra note 18, at 322–23. Furthermore, it is no doubt true that some judges hold explicitly racist beliefs and/or consciously harbor white supremacist attitudes. Jurists who hold these unconscionable attitudes are, we imagine, unlikely to be receptive to any aspect of this piece, nor have we designed it for them. Our focus here is on jurists who, in spite of their own fragility, biases, and/or privilege-protecting instincts, possess a conscious intention to take part in realizing the anti-racist potential of the Equal Protection Clause.
361 See Wiecek & Hamilton, supra note 157, at 1134 (noting that the Supreme Court has never used the term “structural racism” nor any synonym).
the step of identifying the problem that is at stake.\textsuperscript{362} To date, driven by its focus on intent, the Court’s existing equal protection doctrine has presumed that the problem is intentional discrimination of the “individual racism” sort.\textsuperscript{363} When shifted into a restorative posture, Justices will be freed to acknowledge that structural racism is also at play in contemporary racial inequality, and that existing doctrine has left that problem largely untouched.

\textbf{B. Employing an analytical framework capable of taking into account the complexity of structural racism}

The Court’s current view of racial discrimination and inequality is backward-looking and unrealistically simplistic. This is evident in both the adherence to outdated notions that individual racism is the sole driver of racial discrimination, as well as an unwillingness to consider facts in context. Existing doctrine treats race discrimination as though it has a linear, ahistorical quality, i.e. bad actors with malicious intent make decisions that cause direct, immediate harm, and it is those decisions which must be rooted out.

Adopting a restorative jurisprudence would equip jurists to shift away from this simplistic, bad-act-oriented view of race-related facts. Instead, this approach to jurisprudence rests on the fundamental premise that facts have an interlocking nature and that adequate solutions take into account the needs of all those harmed. A restorative jurist strives to hear the accounts of people of color, sees the world as it actually is, and brings about the world as it should be. As such, a restorative jurist embraces complexity rather than artificially rejecting it. Like a restorative process arising out of a crime—where collaboration and dialogue among all stakeholders is the objective—a restorative jurisprudence allows jurists to bring into the jurisprudential process a metaphorical dialogue among all of the facts that matter. Furthermore, this approach places explicit emphasis on the voices of those actually harmed by the race discrimination endemic to the United States since before its founding.

\textbf{C. Opening the doctrine to remedies capable of interrupting structural racism}

\textsuperscript{362} See, e.g., Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 473–74 (2001) (noting that, depending on the context, discrimination may violate any number of anti-discrimination norms, e.g. norms against unintentionally disparate outcomes, norms requiring equal access, norms against stereotyping, etc., and that defining the wrong is “integrally linked to the remediation of the underlying problem”).

\textsuperscript{363} Selmi, supra note 154, at 286 (noting that the Supreme Court’s limiting of Fourteenth Amendment protections to intentional discrimination limits the “effectiveness if the Constitution’s role in eradicating discrimination”).
Because, as we assert, a jurist who adopts restorative values is likely to elevate the importance of discriminatory effects and interpret evidence in light of context, structural racism can be both acknowledged and recognized for its complexity. In turn, this acknowledgment and recognition create the potential for the Court to circumscribe race-neutral laws that perpetuate structural racism, as well as decrease the mortal threat that strict scrutiny usually presents for remedies designed to accomplish restoration for people of color.

First, this jurisprudence allows jurists to acknowledge that government actions that disproportionately affect people of color or otherwise reinforce existing race-based inequality are equally as offensive to the Equal Protection Clause as those that employ race with malicious intent. Elevating the scrutiny employed by courts when reviewing laws that are facially race-neutral will begin to interrupt structural racism by eliminating government policies and practices that reinforce and maintain structural racism.

Second, restorative jurisprudence allows the Court to understand that structural racism is contemporary and ongoing, its effects are measurable, and it—as much as or more than intentional individual racism—is a key component of modern race discrimination. It provides a framework for correcting the Court’s mischaracterizations of such discrimination as an “amorphous concept of injury that may be ageless in its reach into the past,” or “inherently unmeasurable claims of past wrongs.” As a result, the restorative jurist will have a basis for concluding that the harm of structural racism is an identifiable form of discrimination and, as a result, that remedying structural racism is a compelling government interest.

Furthermore, the remedies necessary for achieving this government interest will be more robust than any the Court has contemplated. Because structural racism spans domains and flows from interlocking systems and activities, i.e. it is a phenomenon of considerable breadth, remedies of similar breadth will nevertheless be able to satisfy the requirement that they be narrowly tailored to the interest at stake. Employing a restorative jurisprudence, courts will be able to acknowledge that a race-neutral alternative would not be sufficient, given the race-based nature of the problem. Courts would also be able to analyze racial inequalities in their given context and acknowledge disparities are likely a result of structural racism rather than individual choice or inability, as was assumed in Croson.

366 Id. at 501–02 (“[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.”).
Some might ask: What does a restorative jurisprudence of equal protection achieve that simply adding a disparate impact cause of action would not? Our answer: The jurisprudential vision we have offered here goes beyond what a disparate impact theory would do because, more than just suggesting the focus on intent be de-emphasized (as a disparate impact theory would do), it provides a fulsome, values-based framework for striving toward equality. This framework extends to the way jurists think about evidence, including, without limitation, the degree to which their ears are attuned to the voices of people of color. Furthermore, the framework creates the possibility that, informed by the forward-looking values of restoration, a jurist might, for example, see the need for equal protection remedies even when people of color are not being treated differently from white people by a given policy. Many policies that do, in fact, treat people of color and white people the same nevertheless serve the purpose of maintaining a still-unequal status quo. A remedy-driven (i.e. equality-driven) focus on restoration has greater potential to actually close the locked-in gaps.

What’s more, a restorative jurist need not be predominantly concerned with the impact of a particular remedy on blameless white people or undeserving people of color because context will show that, in general, white people have been advantaged by structural racism through no accomplishment of their own, and people of color disadvantaged through no fault of their own. Indeed, the shift to a restorative approach makes plain that, in challenges to affirmative action, the alleged harm to white people is typically the mere disgorging of an unearned benefit. Contextualized thusly, the alleged blamelessness of white people becomes, at the very least, a more complex

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368 See, e.g., Croson, 488 U.S. at 529–30, 540, 544 (Marshall, J., dissenting) (describing how the jury in Croson, and later the justices, should have approached the evidence and the impact on racial minorities in the case).

369 Llewellyn & Howse, supra note 235, at 36.

370 Haney-López, supra note 151, at 1784.

371 Rothmayr, supra note 54, at 4–5.

372 See Juan Perea, Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court’s Affirmative Action Jurisprudence, 75 U. PITT. L. REV. 583, 622 (2014) (observing that white people are beneficiaries of unjust enrichment and, much like people who possess stolen property, “have no valid entitlement to the fruits of racism”).
question, and certainly bears no meritorious comparison to the vast and complex harm of structural racism.

Conclusion

By setting down the search for wrongdoers and eschewing the premise that facts relating to race ever “stand alone,” jurists applying a restorative jurisprudence of equal protection will overcome key barriers to counteracting structural racism, and, in turn, enable the Fourteenth Amendment to realize its potential as a potent force in combatting contemporary racial inequality. Employing the jurisprudence we have offered would not only equip jurists to consider the discriminatory effects—rather than merely the intent—of government action, but also equip them to analyze both harms and remedies within their given social and historical context. This jurisprudence is both a mechanism for understanding the entrenched patterns of structural racism, and an analytical framework for accounting for structural racism.

We are not naïve. Had a critical mass of jurists actually possessed an intention to carry out the anti-racist potential of the Equal Protection Clause, the doctrine we have criticized here would look very different. With this reality in mind, we address this work both to today’s jurists and to the next generation of jurists—all who are willing to engage honestly with the scourge of racial inequality in the United States. We invite those jurists to adopt the restorative values offered here and, in turn, implement a jurisprudence that overcomes the racism-harboring inadequacies of today’s doctrine.

In concluding, we offer two final thoughts. First, it goes without stating, a restorative jurisprudence of equal protection will not single-handedly bring an end to structural racism. Given the domain-spanning and self-reinforcing nature of structural racism, and the inherent limits of the judiciary in effectuating social change, other parties within the government will need to take action. The legislative branch has had glimpses of success in addressing structural racism, for example, through the Civil Rights Act of 1964 and the Fair Housing Act of 1968.\footnote{Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 (1968); Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (1964).} However, legislators can only get as far in affirmatively addressing structural racism as the courts allow. Beyond providing jurists a lens and tools to invalidate policies that further enshrine structural racism, our proposal provides a way for the judicial branch to get out of the way of political actors who want to remedy the effects of structural racism.
Second, and finally, governmental policies alone will not dismantle structural racism. Local, state, and federal governments are not the only creators and sustainers of structural racism. To effectively undergo the long and intensive process of dismantling structural racism, private individuals and non-governmental entities must also take action. Restorative values can serve as useful guideposts for legislators, corporate executives, and private individuals alike who desire to reckon with structural racism. Only once individuals and entities both within and outside the government truly reckon with structural racism will it be possible to meaningfully reduce racial inequality in the United States.
UNITIVE JUSTICE AND RE-ENTRY CULTURE CHANGE

Sylvia Clute, Paul Taylor, and Weldon Bunn*

*Sylvia Clute is a former civil trial attorney who developed the theory and pedagogy for Unitive Justice, and a specialized application for re-entry being created with Paul Taylor and Weldon Bunn. She is the author of "Beyond Vengeance, Beyond Duality: A Call for a Compassionate Revolution" and the novel, "Destiny Unveiled." She holds graduate degrees from Harvard Kennedy School of Government (MPA), Boston University School of Law (JD) and the Univ. of California at Berkeley (MPA). She is co-founder and president of the non-profit, the Alliance for Unitive Justice. Paul Taylor was sent to detention at 16 or 17, followed by other offenses and convictions before he "graduated" to a life sentence plus 26 in 1994. While in prison he transformed himself and then the prison culture, as described in this article. He was paroled in 2017 and now runs programs for troubled youth and works to transform the re-entry culture using the pedagogy of Unitive Justice. Weldon "Prince" Bunn first experienced detention at 14 or 15, followed by additional convictions and then a sentence of life plus 80 in 1994. His personal transformation and his work with Taylor in transforming the prison culture are described in this article. Paroled in 2019 he now works with Taylor on programs for troubled youth and transforming the re-entry culture using Unitive Justice.
ABSTRACT

Our traditional criminal justice system is grounded on the moral principle of proportional revenge, i.e., answering harm with harm. Evidence shows that this system often fails to achieve desired results but we may see no other option. The authors propose an alternative justice model called “Unitive Justice” that has no punitive elements. It has a specific theoretical basis and two of the authors successfully implemented a system of this type in the prison setting while they served life sentences. This article describes some of the differences between punitive justice and Unitive Justice, and explains how the non-punitive system was implemented in the prison setting to change the prison culture. Unitive Justice may also be called justice as Love.

INTRODUCTION

The United States criminal justice system has a dismally high rate of failure when it comes to reincarceration.¹ According to the Bureau of Justice Statistics, 2.2 million Americans were in prisons or jails in 2016,² and at least 95 percent of all prisoners are released back into their communities.³ However, “[a]n estimated 68% of released prisoners were arrested within 3 years, 79% within 6 years, and 83% within 9 years.”⁴ In addition to increasing the number of incarcerated persons in the United States, this is costly—for instance, the average cost of incarceration in 2017 for federal inmates was $36,299.25 per year; and, for those in a re-entry center, it was $29,166.54 per year.⁵ We need a fresh look at how we support returning citizens with re-entry into their communities.

This article proposes using the processes and theory of Unitive Justice to create a re-entry program that produces actual culture change. It trains former inmates who achieved a life transformation while incarcerated to be leaders of social justice change when they return to the community. Their prison experience, combined with knowledge of unitive processes, gives them unique leadership skills for addressing the problems they once

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¹ See Bill Keller, Seven Things to Know About Repeat Offenders, MARSHALL PROJECT (Mar. 3, 2016), https://www.themarshallproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders.
contributed to. Unitive Justice, a model that has no punitive elements, can function parallel to the punitive justice system as a local, grassroots initiative. Fundamentally, one is justice as revenge; the other is justice as Love.

Unitive Justice includes circle processes that provide a means for those in conflict to discover the underlying conflict dynamic from which the harm arose, thus increasing the likelihood of a lasting resolution. It also provides a map for creating culture change—not a difference in degree, but a difference in kind; a path to transformative action that fosters increased social safety and collective well-being. In the new culture, conflict occurs less often. When people choose to use the Unitive Justice model, the punitive system is used less frequently. Conflicts are addressed before the court system becomes involved and before criminal records are imposed. Unitive Justice falls within the broad umbrella of Restorative Justice. Restorative Justice is a worldwide movement that is being incorporated, in some form, into criminal justice systems in many countries. It is also used in many schools as an antidote to zero tolerance discipline policies that fueled the “school-to-prison pipeline.”

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It is generally recognized that Restorative Justice includes at least four basic forms: victim-offender conferencing, community reparative boards, family group conferencing, and healing circles. However, Restorative Justice can be much more if it has a coherent and consistent theory to

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7 Alliance for Unitive Justice, Unitive Justice: From a System Based on Punishment to a System Based on Loving-kindness, https://www.a4uj.org/unitive-justice (last visited Feb. 1, 2020). “Love” is capitalized in this article to indicate a higher form of this emotion, and to differentiate it from how the term is often used to mean intimacy, sexual relations or affection.
9 See Email from Dominic Barter to Sylvia Clute (Nov. 1, 2017) (on file with author).
11 Clute, supra note 8.
12 Id.
15 ADVANCED PROJECT, ET AL., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK, ADVANCEMENT PROJECT 7, 11 (2005) (“Zero tolerance, a term taken from the war on drugs (where law enforcement agencies swiftly and harshly responded to drug offenders), was initiated in school districts in numerous states during a juvenile crime wave in the late 1980’s.”).
16 Van Wormer, supra note 13, at 62-65.
guide its implementation and to serve as a measure of its success or its failure. Unitive Justice theory provides a measure for how restorative a system has become, or to what degree it remains punitive.\(^\text{17}\) For instance, when measured against Unitive Justice theory, if a program is little more than a band-aid on a broken retributive system of criminal justice or school discipline, that becomes clear.\(^\text{18}\) Unitive Justice therefore provides the coherent and consistent theory often lacking in the field of Restorative Justice.

Unitive justice lies at the “best practices” end of the Restorative Justice spectrum because it has no punitive elements—it is non-hierarchical, non-judgmental, and creates lasting solutions to underlying causes of harm.\(^\text{19}\)

While Unitive Justice was first seen as applicable only to the justice system, it soon became clear to those studying and implementing it that it is relevant to system change in many contexts.\(^\text{20}\)

This article provides a brief overview of Unitive Justice theory and considers the application of Unitive Justice in creating culture change among citizens who are leading the charge upon return to their communities after a period of incarceration—a program called “Unitive Re-Entry.” The initial Unitive Re-Entry program is being implemented in Richmond, Virginia, in a collaborative effort among Sylvia Clute, a former civil trial attorney who has developed Unitive Justice theory over a period of more than 30 years, and Paul Taylor and Weldon “Prince” Bunn, both of whom were incarcerated for more than twenty years after they were each convicted of murder in their early 20s.\(^\text{21}\) Taylor and Bunn worked to transform their lives during their period of incarceration and, as described below, became leaders in changing the culture among inmates in prison. This article compares the approach Taylor and Bunn used in prison to achieve culture change to the way Unitive Justice theory guides such change, and both are surprisingly similar to one another. This discovery led to their collaboration on the Unitive Re-Entry program.

Like Taylor and Bunn, those selected for the Unitive Re-Entry training are returning citizens who turned their lives around during their period of incarceration.\(^\text{22}\) They are trained to take the Unitive Justice theory and


\(^{18}\) See ADVANCED PROJECT, ET AL., supra note 15.

\(^{19}\) About Unitive Justice, supra note 6.


\(^{21}\) Sylvia Clute, Paul Taylor, and Weldon “Prince” Bunn wrote this article. Therefore, much of this article is based on their personal experiences and thoughts.

\(^{22}\) SYLVIA CLUTE, BEYOND VENGEANCE, BEYOND DUALITY: A CALL FOR A COMPASSIONATE REVOLUTION 124 (2010).
processes to the communities to which they are returning. The goal is a re-entry model that achieves the degree of success Taylor and Bunn achieved in prison, but using a format that is replicable, sustainable, and based on the defined theory of Unitive Justice.

I. The Journey from Punitive Justice to Unitive Justice

Some conditions are so pervasive that we do not realize they even exist. It is said that fish, for example, do not know that they live in water. They have no concept of what it is like to not be in water, so they have nothing with which water can be compared. For many of us, the punitive model of justice is like water—is to fish—pervasive and unquestioned. Where it begins and where it ends is unclear. It is, of course, the fabric of the criminal court system, but it is also the substance of many school disciplinary rules and corporate personnel policies. The punitive system can be found in some religious institutions, and it has been practiced in many households for generations. Why do we so often not see the hierarchical, judgmental, and punitive structures all around us?

Our understanding of justice is based largely on past experience, and retributive justice is the primary type of justice that many of us experience. Textbooks and media sources explicitly and implicitly teach us the punitive model is how justice operates, suggesting other choices are not available. For example, many Americans supported the wave of “tough on crime” policies that led to mass incarceration in the later decades of the twentieth century. By 2008, the criminal justice system incarcerated one out of every 100 adults in the U.S. Figure 1 demonstrates the startling increase in incarceration rates that began in the 1980s. As described below, Taylor and Bunn were part of this wave.

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23 Id. at 125, 127.
24 Id. at 175.
27 See, e.g., Joseph O. Baker & Alexis L. Booth, Hell to Pay: Religion and Punitive Ideology Among the American Public, 18 PUNISHMENT & SOCY 151, 152, 155 (2016) [discussing the role of religion in creating punitive ideologies]; Joe Pinsker, What ‘Go to Your Room’ Teaches Kids About Dealing With Emotions, ATLANTIC (Oct. 12, 2018), https://www.theatlantic.com/family/archive/2018/10/time-out-grounding-go-to-your-room/572779/ [acknowledging the pervasiveness of parents sending children to their room and taking away their phone, both examples of punitive punishment in everyday households].
28 Monterosso, supra note 25, at 13–14.
Even when punitive justice consistently fails to produce desirable results, we blindly continue on. For example, the goal of the criminal justice system is to achieve compliance with the law, but as stated at the beginning of this article, compliance too often fails after release. Re-incarceration is the norm.  

How does such a failed system persist? A widespread condition of system blindness—an inability to recognize the system that one is immersed in—is necessary for it to do so. System blindness keeps us from seeing that we are embedded in a punitive system and from understanding how it operates.  


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operates in one way when, in fact, it operates in another—perhaps quite differently from what we assume or are led to believe.\textsuperscript{33} How it should work, not how it actually works, is most often taught in law school.

Our system blindness can cause us to believe that practicing punitive justice—answering one harm with another harm—is a good way to maintain order, without realizing the enormous cost that repeatedly inflicting harm has on the population as a whole, or the damage it does to individuals.\textsuperscript{34} To the extent the actual structure of retributive justice remains invisible and we unknowingly continue to act within its parameters, we may unwittingly perpetuate its negative cycles. Invariably, harm begets harm. How do we escape our system blindness? One way is to carefully identify how the system is constructed and to analyze its parts, identifying the role each part plays in maintaining the system as a whole. Unitive Justice theory analyzes fourteen structures that support and maintain our punitive justice system and compares them with fourteen structures that can be implemented in a parallel model of justice that has no punitive elements—the Unitive Justice system.\textsuperscript{35}

In this article, we consider how five of the fourteen structures of Unitive Justice were actualized by Taylor and Bunn during and after their years of incarceration, before they ever heard of Unitive Justice. It was surprisingly easy to align the work that they did in prison with the theory of Unitive Justice—they seem to have come from a common source, and that may be our inherent, shared humanity.

Looking at Unitive Justice, structure by structure and as a whole, helps us imagine how to create a viable, parallel model of justice with no punitive elements. When Taylor and Bunn learned Unitive Justice theory, they recognized the power of having a pedagogical theory to implement the

\textsuperscript{33} See, e.g., William W. Berry III, Implementing Just Mercy: Just Mercy: A Story of Justice and Redemption, 94 Tex. L. Rev. 331, 343–44 (2015) (book review) (“Blindness results from this stigmatization of indicted or accused individuals. The mark of justice ought to be blindness toward bias, not blindness toward truth. As actors in the criminal justice system buy more deeply into this narrative, as is certainly likely with its constant reinforcement in personal experiences, the blindness can become almost willful, with certain criminal justice actors being unable to see the truth of the situation before them.”).

\textsuperscript{34} Compare Jon Hurwitz & Mark Peffley, And Justice for Some: Race, Crime, and Punishment in the US Criminal Justice System, 43 Canad. J. Pol. Sci. 457, 457 (2010) (discussing that many people believe the system is fair), with Lindsay Goldbrum, Suspended Sentence Contingent Upon Participation in Victim Offender Mediation for Juveniles Who Commit Violent Crimes, 18 Cardozo J. Conflict Resol. 391, 394 (2017) (“One goal of the criminal justice system should be to maintain membership within the community, as opposed to removing members in a punitive justice system. Crime is more than just breaking the law, and damage is done to society, victims, and the offenders themselves. The idea of restorative justice is to restore the community and victims to their state before the crime by repairing the harm.”).

\textsuperscript{35} See, e.g., Alliance for Unitive Justice, supra note 10.
change they achieved without actually knowing the theory. The theory is an aid in achieving a program that is replicable and sustainable.\textsuperscript{36} Unitive Re-Entry takes culture change among returning citizens to a new level.

The system change that Unitive Justice seeks to achieve is a community that embodies “compassion, sharing, reciprocity, upholding the dignity of personhood, individual responsibility to others, and interdependence by recognising a common and shared humanity,” a quote from J. A. Faris, who is a South African lawyer and scholar.\textsuperscript{37} That is the goal of Unitive Justice, and this is the system taught in Unitive Re-Entry to a unique population of citizens who have a deep and personal understanding of punitive justice from their periods of incarceration. These citizens also have a unique understanding of justice as Love, which inevitably became an aspect of their journey to transformation. Thus, these citizens are especially credible voices to carry the message of Unitive Justice to the communities where they return. Each trainee has an opportunity to impact the lives of many others.

II. Their Extensive Punitive Justice Experience Led Taylor, Bunn, and Clute to Unitive Re-Entry

Paul Taylor first encountered the criminal justice system in the 1980s when he was sixteen or seventeen.\textsuperscript{38} An assault and battery charge led to his first experience in a local juvenile detention center, and then in the state Beaumont Learning Center. At that time, the “learning” center was, in his opinion, a “gladiator” school, preparing youth to advance in the system, which he did. Drug possession with intent to distribute landed him in jail. He did a few stints in jail and then, in 1994, was convicted of first-degree murder and sentenced to life plus twenty-three years.

After a few years in prison, Taylor realized he was capable of far more than the cycle of inter-generational incarceration. His father went to prison in the 1990s, his brothers and his uncles were in prison, and now his three sons are in prison. He was no better a role model for his sons than others had been for him. He “woke up,” and decided to change his life. He found his path to change in teaching others how to change their lives.


\textsuperscript{37}J. A. Faris, Professor, African Dispute Resolution: Reclaiming the Commons for a Culture of Harmony, Address at the Lawyers as Peacemakers and Healers: Cutting Edge Law Conference at the Phoenix School of Law (Feb. 23, 2013).

\textsuperscript{38}As stated above, Paul Taylor is an author of this article, and his personal experience is extensively discussed throughout the article.
Taylor’s accomplishments during his later years in prison are impressive. Between 2012 and 2017, while still serving a life sentence, he co-facilitated all of the Virginia Department of Corrections state mandated programs for re-entry in the Greensville Correctional Center—a level three prison with over 3,000 inmates. These programs include Thinking for Change, Victim Impact, Resources for Successful Living and PREPS (Preventing Recidivism by Educating for Parole Success). He also created his own programs—one called the S.A.N.I.T.Y Project (Standing Against Negligent Influence Toward Youth), a program on the inside to prepare men to be fathers when they returned to the outside.\footnote{Paul Taylor, \textit{Paul Taylor Column: Preparing for Life After Prison in Virginia}, \textit{Rich Times-Dispatch} (June 2, 2018), https://www.richmond.com/opinion/columnists/paul-taylor-column-preparing-for-life-after-prison-in-virginia/article_0461a520-22da-5cf8-a71c-1b2b0480acdf.html.}

While still incarcerated, Taylor and inmate Jawad Abdu began planning a program that was to be implemented on the outside called RVA League for Safer Streets. Abdu was released first and began setting up the program in 2015. Upon Taylor’s grant of parole in 2017, Abdu and Taylor implemented a program that now brings about 200 youth from various Richmond projects together to play basketball two nights a week. After only two years, this program is credited with reducing violence in public housing communities that have been fighting for generations.\footnote{Kelly Avellino, \textit{Retiring RPD Chief Alfred Durham Reflects on 31-Year Career in Law Enforcement}, NBC 12 (Dec. 20, 2018), https://www.nbc12.com/2018/12/20/this-has-been-remarkable-journey-me-retiring-rpd-chief-alfred-durham-reflects-year-career-serving-law-enforcement/.} Taylor asserts, “unconventional behavior calls for unconventional strategies.”

On the outside, Taylor now focuses on programs aimed at changing the re-entry culture. He is active in the MAYA Foundation, which helped him with his re-entry and provides support for at-risk youth and returning citizens. Two times a month, he does a program called We ARE (Arts, Rethinking and Economics) in Hampton, Virginia. In addition, Taylor spends countless hours on the phone with men and women on the inside, giving them encouragement and hope that they, too, can achieve freedom of body and mind. He is especially committed to youth who are similar to him when he was young. He models radical tenderness as an antidote to mindless macho. As he helps shape Unitive Re-Entry, it will bear his unique mark.

Weldon “Prince” Bunn\footnote{Bunn is also an author of this article, and his personal experience is extensively discussed throughout the article.} also grew up in Virginia’s tidewater area. At age thirteen or fourteen, he was arrested for trespassing on church property. He did not tell his father and missed his court date, which resulted in his arrest and his first time in detention. This experience began a path to more serious crimes—in fact, it was in detention that he first learned “best
practices” for successfully committing crime. Bunn was then sentenced to a juvenile detention center at age fourteen or fifteen for auto theft. His first prison sentence was in 1990—a two-year sentence for possession with intent to distribute cocaine. Six months after his release, he was convicted of first-degree murder and sentenced to life plus 80 years.

Bunn was on the prison treadmill until two events “woke” him up. First, his grandmother, the woman who raised him, died on February 13, 2000, and he could not attend her funeral. Second, his daughter’s mother wrote him on July 20, 2000, stating that “he had cheated his daughter out of her father.” He lost what he most cared about. Those dates are seared in his mind because they changed the course of his life.

On a new path, Bunn read books and took classes, and he avoided other inmates who were a bad influence. He began to support other inmates in turning their lives around. He slowly built a support system that would eventually help him earn parole. After serving 25 years of what he expected to be a life sentence, he was granted parole, and released in October 2019.

Bunn joined Taylor and Abdu in the RVA League for Safer Street’s program. Before each game, the young players are required to attend a workshop Bunn teaches to discuss topics such as conflict resolution, problem solving, and critical thinking—lessons designed to give participants options that do not involve violence. According to a VCU Health Report, between 2003 and 2015, Richmond saw a significant drop in homicide rates among youth aged 10 to 24, but nearly all of the homicide victims in that age group were black. This is the RVA League’s target group. The RVA League feels certain this program can further help reduce the number of teenage murders in Richmond’s projects.

Bunn is also active in three other programs: Taylor’s fatherhood program called the S.A.N.I.T.Y. Project, the MAYA Foundation that provides support for at-risk youth and the re-entry population, and We ARE—Arts, Rethinking and Economics. Like Taylor, he provides mentoring for men and women in prison who are turning their lives around to earn parole, and for those who are recently released from prison. Equally important are the

42 Facts and Statistics on Youth Violence, VCU HEALTH [May 31, 2019], https://www.vcuhealth.org/services/injury-and-violence-prevention/bridging-the-gap/facts-statistics-on-youth-violence (“In Richmond, we have seen a significant drop in homicide rates among youth aged 10 to 24. We have decreased from a high of 120.74 per 100,000 in 2003 to 34.79 per 100,000 in 2015.”).

speaking engagements that he and Taylor frequently do together in jails, prisons, detention centers, in schools, and for organizations for people who have no prison experience. As Bunn honestly shares about his journey, he demonstrates the power and dignity of the human spirit. “You can’t help but love Prince,” has become a common response from those who meet him.

Sylvia Clute, 44 in her role as a civil trial attorney, was part of the punitive justice system for twenty-eight years. About a decade into her career as an attorney, she realized there are two basic models of justice, vengeance and Love, a concept she had never before considered. She understood justice as revenge—that was her job as a trial attorney. She had no idea what justice as Love would look like, and definitely no understanding of how we could create a justice system based on the moral principle of lovingkindness. She immediately made a commitment to figure out how such a system would work, not realizing that would take decades to accomplish.

At first, Clute sought clues only to understanding justice as Love as it applies in the justice system. She compared what she was discovering about this new system to what she was doing in the courtroom, trying to figure out how this transformation could unfold. As her journey continued, there were moments when a new insight emerged—when a deeper understanding of the new system she was coming to understand opened up. She began to call the new system “Unitive Justice.” As justice as Love became more real, it became harder to walk into a courtroom. Clute stopped practicing law in 2003 and returned to school. 45

Clute’s first opportunity to apply Unitive Justice theory was in a troubled high school in 2011 to 2013. It was easy to see how much of what applies to the punitive justice system is also true for our schools. As the implementation of zero tolerance policies made school discipline harsher, schools came to reflect many of the punitive aspects of the criminal justice system. 46 As zero tolerance—a trend that began in the 1980s—took hold, schools fed the escalating rate of incarceration through what became known as the “school-to-prison pipeline, which continues in some places. 47

44 Sylvia Clute is an author of this article, and her personal experiences are discussed throughout the article.
45 Clute holds graduate degrees from the University of California at Berkeley (MPA), Boston University School of Law (JD), and the Harvard Kennedy School of Government, (MPA).
47 Id. at 291–92.
In that first school, by staying as true as possible to the unitive principles as she understood them, she saw the culture change that those principles can create. That change is reflected in the peer-reviewed research completed on the school program. This gave rise to the application of Unitive Justice theory to education, called Unitive Education or UJEd.

When Clute met Taylor and Bunn, “Unitive Re-Entry” naturally emerged. They first met at Richmond City Hall, at a meeting convened by Councilwoman Ellen Robertson, in December 2018. When Clute decided that her Restorative Justice class at Virginia Union University would improve if she gained access to challenged communities, she invited Taylor and Bunn to join her class as “Community Liaisons.” By the summer of 2019, Unitive Re-Entry was in the planning stages.

III. The 14 Arcs to Unitive Justice

The process Unitive Justice uses to achieve system change is outlined in the comparisons set forth in the fourteen Arcs to Unitive Justice. Clute believes that the fourteen Arcs are relevant to any culture as they are grounded in basic human nature—how we behave when we are in a dualistic mindset and how we show up when our actions are not distorted by dualistic thinking.

To some, it may seem that the Unitive Justice structures are unrealistic in practice. That perception dissipates when the Unitive Justice structures are experienced in a successful circle process designed as non-hierarchical, non-judgmental, and non-punitive. This system is, indeed, attainable when we set aside our punitive system, as this circle process does. However, it doesn’t stop there because the communication techniques learned in the circle can be used in any setting to continue the process after the circle ends. The goal of Unitive Re-Entry is to build on formerly incarcerated citizens’

48 See Lilyana Ortega, Examining Restorative Circles in a School Setting: Towards an Understanding of Participant Experiences and Perceptions (Aug. 16, 2014) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with the Illinois Digital Environment for Access to Learning and Scholarship, University of Illinois) (reporting on the results of the study, which can also be found in other journal articles of the same title).

49 The fourteen Arcs are: (1) From Proportional Revenge/Harm Answers Harm to Lovingkindness/Heal, Do No Harm; (2) From Rules to Values; (3) From Compliance to Mutually Beneficial Action/Whole-ness; (4) From Punishment to Connection; (5) From Judgement to Insight; (6) From Event to Context (7) From Control to Self-Governance; (8) From Self-Interest to Community; (9) From Hierarchy/Top Down to Equality/Inclusion; (1) From Deception to Honesty; (11) From Distrust to Trust; (12) From Opposition/Confrontation to Synergy; (13) From Fear to Love; and (14) From Duality/Us Versus Them to Unity/Oneness. For a description of each Arc, see Arcs to Unity – Short Version, supra note 17.

50 See Lilyana Ortega et al., Outcomes of a Restorative Circles Program in a High School Setting, 6 PSYCHOL. VIOLENCE 459, 664–66 (2016). This article is based on research done on Clute’s first school program.
unique gifts and to teach them to take Unitive Justice theory and processes to the communities where they return, in order to empower them.\textsuperscript{51}

In this article we consider only the first five of the fourteen Arcs to Unitive Justice and compare those arcs to the transformative work Taylor and Bunn did in prison, which was surprisingly similar to Unitive Justice theory. In these five Arcs, we look at their experience with the moral measure of lovingkindness as a replacement for proportional revenge (Arc 1); how they achieved governance using values instead of rules (Arc 2); their success at achieving the goal of mutually beneficial action/wholeness in their prison pods—this being far beyond mere compliance (Arc 3); how they discovered that building connection among inmates could achieve harmony in the pod, a powerful substitute for the punishment that the punitive system relies on to achieve mere compliance (Arc 4); and their recognition that insight is more dependably accurate than judgment, which is often flawed (Arc 5).\textsuperscript{52}

Taylor’s and Bunn’s prison experiences shape the plans for applying the Arcs in the re-entry setting, in order to change the re-entry culture and the culture of communities where recipients of the training will return.

\textit{A. Arc 1: The Guiding Moral Principle: From Proportional Revenge/Harm Answers Harm to Lovingkindness/Heal, Do No Harm}

\textbf{Proportional revenge:} The level of punishment is scaled relative to the severity of the crime or harm for which punishment is being inflicted.\textsuperscript{53} It used to be literal: an eye for an eye, a tooth for a tooth.\textsuperscript{54} Now, those writing the law determine what degree of punishment is proportional to a particular violation.\textsuperscript{55}

\textbf{Lovingkindness:} The extension of kindness and compassion toward all living beings based on one’s moral duty as a human to do so.\textsuperscript{56} This moral standard applies equally to everyone, without exception.\textsuperscript{57}

\textsuperscript{51} Clute, \textit{supra} note 22.
\textsuperscript{52} See Alliance for Unitive Justice, \textit{supra} note 10.
\textsuperscript{53} Magali Barnoux & Theresa A. Gannon, \textit{A New Conceptual Framework for Revenge Firesetting}, 20 PSYCHOL., CRIME & L. 1, 3 (2013).
\textsuperscript{54} Morris J. Fish, \textit{An Eye for an Eye: Proportionality as a Moral Principle of Punishment}, 28 OXFORD J. LEGAL STUD. 57, 58 (2008).
\textsuperscript{56} Alliance for Unitive Justice, \textit{supra} note 7.
\textsuperscript{57} Id.
circumstances, harm to another is not condoned as moral. We address harm, but not with more harm; we respond to harm as a call for Love.

We do not often describe our criminal justice system as a system of proportional revenge, but this is an accurate description. While many fail to recognize it, common phrases, like “spare the rod, spoil the child,” “the punishment fits the crime,” “get even,” “tit for tat,” and “just desserts” refer to the moral principle of proportional revenge. The “justice” in proportional revenge lies in balancing one harm against another, as in “an eye for an eye, a tooth for a tooth.”

When a harm of equal measure is done in response to a prior harm, the latter harm is deemed to be moral. Lady Justice holding a set of scales is an appropriate symbol for this retributive model of justice, as one harm is to be equal in measure to the harm being answered—this is deemed “justice.” She is blindfolded to indicate that everyone is treated equally—that punitive justice is meted out without regard to status, wealth, race, culture or connection. However, anyone with experience with the punitive justice system knows that this is often not the case.

Our system blindness may keep us from recognizing a common example of proportional revenge: when a parent (or a principal) spanks a child for breaking a rule. The parent may feel it is justified or necessary, but it is proportional revenge. When students get into a fight in order to “get even,” they are following the example of the parent who spanked them. The school yard fight operates on the same moral principle that a nation relies on when it goes to war—another example of proportional revenge. After conflict erupts, the punishment-and-revenge approach may result in periods of enforced compliance; but this is not peace, and perpetually enforcing compliance consumes a large share of our resources.

As we model proportional revenge in our courts, proportional revenge is repeated farther down the “food chain.” For example, hurting those who “snitch” on you is a system of proportional revenge (although the

58 Id.
59 JOCelyn M. Pollock, Ethical Dilemmas and Decisions in Criminal Justice 59 (2010).
60 Id.
62 See e.g., Seth Ferranti, Convicts, Prisoners and Inmates, HUFF. POST (Dec. 6, 2017), https://www.huffpost.com/entry/convicts-prisoners-and-in_b_8965076 (identifying court punishments as the original creator of violent proportional revenge).
“snitching” is not always truthful). When a church excommunicates a member for disobeying church rules, it is proportional revenge.

An inherent weakness in a system of proportional revenge is that it requires two moral standards—one for “us” and one for “them,” as in, “our killing is moral, theirs is not.” When both sides view the other as evil, they both apply this moral double standard, and the harm answering harm becomes endless. Each side justifies their attacks and counterattacks as self-defense, while claiming innocence. This permits them to deny responsibility, even for intentional acts, by seeing those they harm as responsible for causing them to inflict the harm.

It also means that the moral standard that measures proportional revenge is always relative—our morality is measured by the immorality of our enemies. This double moral standard shows up as hypocrisy. When we choose proportional revenge as our model for justice, we have a flawed measure of justice. Self-interest, greed, privilege, and other negative forces easily take over.

The high rates of recidivism and re-incarceration cited above are evidence that proportional revenge does not work. Instead of proportional revenge, we can choose lovingkindness as our moral guide for justice. One standard of morality then applies regardless of the circumstances, a standard that says inflicting harm is not moral. We address harm, but not in ways that compound the harm. The moral measure of lovingkindness is at least as ancient as proportional revenge and is found in all major sacred texts and philosophies. What is sometimes called the “Golden Rule” is essentially the moral standard of lovingkindness.

1. Taylor Extends the Moral Principle of Lovingkindness to the Man Who Murdered His Brother

As a young man, Taylor lived in the world of punitive justice—proportional revenge, getting even, not letting a slight go unanswered. However, when he was in jail, he remembers receiving a letter from Bunn in which Bunn described a harvest and wrote of “the season the harvest is brought in.”

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He still remembers this letter because it planted a seed—that everything has its season.

The first significant crack in Taylor’s punitive justice worldview came during his trial for murder in 1994. Normally, the family of the victim sits behind the prosecutor, but at his trial, they sat directly behind him. As he heard the mother of the man who was murdered cry, and at the same time, heard his own mother cry, his allegiance to retributive justice began to crack. “If you have any humanity, this does something to you.” He says this was the first step on his journey of transformation.

In 2002, Taylor was confronted with the opportunity to personally walk across the bridge from punitive justice to lovingkindness. Taylor received a letter from the man who murdered his brother; he was asking Taylor for forgiveness. Taylor sought advice from Bunn, who advised him to think about his own crime and respond with the most kindness possible. Taylor thought about the fact that one day he, too, would want someone to forgive him. If he wanted to receive forgiveness for a murder, he knew he had to extend forgiveness for a murder.

Not only did Taylor extend forgiveness, but he also advised his father and other family members to do the same. He asked them to write letters to the Parole Board stating that the man who killed his brother was young at the time, immature, and not able to fully understand what he did. They urged the Parole Board to grant him parole, and the man was released.

These experiences made recognizing the need for system change unavoidable. Taylor knew the current system did not work. At the time, he did not have the precise language of “going from punitive justice to Unitive Justice.” Eventually, Taylor recognized that the punitive system was the problem, which he called “anti-social behavior.” It includes hierarchy, a sense of privilege, entitlement, retribution, revenge—those are all emblematic of the punitive system.68 He and the men with whom he was incarcerated were in a system of punitive justice that trapped them in mental bondage, just as surely as the bars on their cells kept them in physical bondage. But how do you escape a system that is all-pervasive?

Taylor knew he first had to change the narrative; he had to bring out more “pro-social” thoughts and attitudes. Being in an environment that provided no privacy—where who one was could not be hidden—he knew he had

to begin with authenticity and consistency. He also had to be alert enough to
distinguish “gold from fool’s gold”; he had to know when a person was au-
thentic and when he was not. He intuitively knew he had to approach men
who lived violent lives with what he calls “radical tenderness.” He had to
show them he saw their humanity, so they, too, could see their humanity.

Because Taylor and Bunn had themselves experienced what these
violent men were experiencing, they were able to speak in terms they under-
stood, and, most importantly, they were in the same prison environment. The
only difference was that Taylor and Bunn achieved a different worldview.
They saw how destructive punitive justice was to them as individuals and to
their communities. They knew there had to be a sharp break with that system
if they were to survive and be free and help free others, mentally and physi-
cally.

They walked their talk and the other men paid attention. When other
inmates tested them, they passed the test. Taylor now knows that he and Bunn
sought to achieve justice as Love. They know that the Unitive Justice arcs
provide a map for going from proportional revenge to the moral principle of
lovingkindness, because they crossed that bridge. They now say that another
word for radical tenderness is lovingkindness. That they were successful is
an understatement—Taylor and Bunn report that, in the pod where they
taught, violence virtually stopped.

Now, Taylor says that justice as Love is simple. One first begins by
seeing that the act that he committed does not define him and forgives him-
self—but self-forgiveness is a big step. Just as the man who killed his brother
was in a different mindset when he committed that act, Taylor knew he was
far from the mindset he was in when his crime occurred. His old mindset
reflected fear, anger, and hopelessness. Justice as Love means “falling in love
with Love; it means learning to love Love.”

This insight changed Taylor. Embracing what he now recognizes as
tantamount to Unitive Justice enabled him to stand as a leader of men, even
in the darkness of prison. He recognized his power to change that culture,
touching one, and then another, with lovingkindness as he helped them dispel
their belief in separation. He modeled how to escape judgment, and the desire
for retribution and revenge, that brought many of them to prison in the first
place. He began, instead, to model authenticity, consistency and radical ten-
derness.

B. Arc 2: Governance: From Rules to Values
Rules: Laws, requirements, or guidelines intended to govern conduct within a particular activity or jurisdiction, and generally written and enforced by those who control that activity or jurisdiction.\(^{69}\) Regulations, statutes, tenets.

Values: Internal moral guidance reflected in shared positive community norms that are modeled by and maintained within the community.\(^{70}\) The term “values” refers only to positive values such as honesty, integrity, kindness, generosity (not negative beliefs). It is our values, not our rules, that will spare us from self-destruction.

In a punitive system, those in control write the rules, and the rules are top-down, i.e., the parents, the principal, the CEO, the legislators, the dictator.\(^{71}\) Rules generally tell us what we are not to do.\(^{72}\) For example, rules tell us to not talk back, to not go over the speed limit, to not commit robbery, to not lie under oath. Each time a new harm is invented, the list of rules expands to specifically prohibit the new offense. Thus, the code books and school disciplinary codes, even prison disciplinary rules become more voluminous.

Rules are enforced using punishment for rule violations.\(^{73}\) This is because the punitive system undermines connection and trust, leaving only force to enforce compliance.\(^{74}\) Structurally, punishment is directed from the top, identifying a hierarchy that further increases the sense of separation and exclusion, which results in a diminished sense of connection and a weak system of values.\(^{75}\) Rules and punishment are mutually supportive. In turn, a complex system of rules is required for administering punishment; the complexity therefore grows, further justifying the existence of the hierarchy needed to maintain control.


\(^{71}\) See Kate Eby, Which Management Style is Right for You: Top-Down or Bottom-Up Approach, Smartsheet (Jun. 28, 2018), smartsheet.com/top-down-bottom-up-approach.


\(^{73}\) Id. at 87–88.


Rules may be written to legalize anything, whether moral or not, if those responsible for writing the rules so choose. Colonialization was legal. Slavery was legal. Apartheid was legal. While it is possible for rules to be based on values, in a punitive system, rules are instead often self-serving for those in control.

There is an interesting interplay between rules and values. For example, honesty is a value, and rules against lying are designed to achieve a similar outcome as honesty. However, telling the truth to be honest is different from telling the truth because of the consequences for not doing so. One is the result of an internal moral compass, while the other is compliance with a rule to avoid punishment. Moreover, witnesses in the courtroom must swear to tell the truth. Yet lying is accepted in our punitive system under certain circumstances, for example, when a defendant pleads “not guilty” even when he is guilty in order to force the state to carry the burden of proof. Defense attorneys work to achieve “not guilty” verdicts even for their guilty clients.

Those familiar with the court process know that witnesses lying is a persistent problem, but we do not often discuss why. Punitive justice is a win-lose system where it is often not safe to be honest—sometimes the stakes are so high one can lose his livelihood, and even one’s life. When it is safe to be honest, people are generally very honest. For instance, Clute frequently observed students tell their principal they did not do something of which they were accused, but then readily admit to their involvement in what happened while participating in the safety of a circle. The Unitive Justice system depends on honesty, and because this system makes it safe to be honest, honesty is the norm.

We assume that our safety depends on obeying the rules, and it is true that some rules are essential to our safety. All new drivers, for example, must learn the same rules for driving safely on public roads. This is a good example of rules that benefit the community instead of serving the self-

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interest of those in control. Rules relating to safe driving also comport with our values of respect for one another, but sometimes, rules proclaimed as necessary for public safety are actually self-serving. For example, political slogans, such as “three strikes, you’re out,” “abolish parole,” and “truth in sentencing” spurred mass incarceration. When these slogans became law, they produced some harsh and unfair results, but they served politicians’ interests in getting themselves elected.

Among incarcerated individuals who are not a threat to public safety are those locked up for non-violent drug offenses, for “technical violations” of probation or parole, and for the immigration offense of “illegal entry,” and many are in jail for their inability to post bail. We have youth who are locked up for “status offenses,” which are not even crimes. The punitive system has one tool in the toolbox: punishment. It is used even when it is not appropriate to do so.

Those policing the top of the punitive system cause another problem, because when those in control lack an internal moral compass, there is no one

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80 Policies and Practices Contributing to High Rates of Incarceration, in THE GROWTH OF INCARCERATION IN THE UNITED STATES 70 (Jeremy Travis, Bruce Western, & Steve Redburn, eds., 2014); see also AM. CIVIL LIBERTIES UNION, OVERCROWDING AND OVERUSE OF IMPRISONMENT IN THE UNITED STATES 6 (2015) (describing the “truth-in-sentencing laws and abolishing parole as policies that fuel excessive sentences that contribute to mass incarceration); see also Figure 1, supra Part I.
81 Policies and Practices Contributing to High Rates of Incarceration, in THE GROWTH OF INCARCERATION IN THE UNITED STATES 70 (Jeremy Travis, Bruce Western, & Steve Redburn, eds., 2014); see also AM. CIVIL LIBERTIES UNION, OVERCROWDING AND OVERUSE OF IMPRISONMENT IN THE UNITED STATES 6 (2015) (describing the “truth-in-sentencing laws and abolishing parole as policies that fuel excessive sentences that contribute to mass incarceration).
87 Sawyer & Wagner, supra note 85.
controlling them in the hierarchy.\textsuperscript{88} They can do whatever they want, with or without rules. Hierarchy comes with entitlement and privilege—some in the punitive system’s hierarchy believe they are entitled to be above the law, while they subject others to strict enforcement.\textsuperscript{89} Why do rules have to be imposed by our legislators and others who are in control? Instead, might the guidelines for how we conduct ourselves be values—positive community-based norms that are generally accepted and maintained by those who live in a community? At a minimum, should not the rules that we are expected to obey reflect our shared values?

Unlike rules, values are internal and depend on self-governance, they are taught by example, and are recognized only by their results.\textsuperscript{90} The work that values accomplish clearly transcends rules. Values inform others about who the people in the community inherently are, and of the level of humanity at which they choose to live.\textsuperscript{91} Transitioning from rules to values is system change at a deep level.

Values are a powerful means of bringing peace and security to a community, especially the value of lovingkindness, which demonstrates that harming others is neither moral nor condoned. Because harm will occur, a values-based system includes processes for course adjustments when the community’s values are violated. Circles are often used for this purpose—as a means of safely walking into the conflict to discover the underlying brokenness and repairing the harm at its source. This begins with a willingness and progresses to more complex issues as the system grows.

As Taylor and Bunn demonstrated in their prison pod, strengthening the community’s shared values will result in the need for fewer rules and less enforced compliance. When that happens in our communities and schools, we need fewer suspensions, expulsions, and jails or prisons for those who violate the rules.

1. Bunn and Taylor Modeled How to Emphasize Values Over Rules

Taylor began his efforts to change the prison culture around 2002.


\textsuperscript{90} See Jenny Yeo, \textit{Are Values Taught or Caught?}, STRAITSTIMES [Apr. 18, 2016], https://www.straitstimes.com/singapore/education/are-values-taught-or-caught.

\textsuperscript{91} Arcs to Unity – Short Version, supra note 17.
Over time, his efforts were noticed. In 2012, Taylor was asked to co-teach all of the state’s re-entry programs in the Greenville Correctional Center, and he enlisted Bunn to help. While still serving a life sentences, they were tasked with preparing men who were incarcerated (some for decades) to return to society as functional men and to do it in six to twelve months. The pod where the re-entry programs were taught was called a “cognitive community.”

Without realizing it, Taylor and Bunn began teaching the men how to move from complying with rules to implementing values. Correctional officers enforced the prison rules, and harassed inmates when the rules were violated, thus angering the inmates. Thinking they might spark the men’s curiosity and consequently help them see this problem in a new light, Taylor posted a sign on the wall where everyone could see that simply said, “SELF GOVERN.” In casual conversations that followed, Taylor and Bunn suggested that if the inmates do what they are supposed to based on their own choices, the correctional officers will have no need to say anything to them. They used self-governance as a form of defiance. It was ingenious and immediately started to pay off. The men started following their own internal moral compasses.

Taylor and Bunn found additional ways to exhibit the new culture they were working to create. For example, there was a type of extortion that occurred among the inmates. If one borrowed two sodas from an inmate, he had to repay with three, or there would be punitive consequences. To circumvent this type of abuse, Taylor and Bunn had a “charity box,” in which they placed extra toothpaste, toothbrushes, soap, sodas, etc. When one inmate needed something, he could obtain it from the charity box and did not have to borrow from another inmate. Repayment was optional.

One day, it occurred to Bunn that everyone assumed the re-entry program participants could read, and that they understood the documents they had to sign; but that was not always the case. To show them that he cared about them, Bunn asked how many of them could read and who needed help, and those who needed help received it. Therefore, Bunn modeled the values of generosity and care. “You have to find out what the person’s needs are. If you don’t, it’s like giving him a prescription without a diagnosis,” Bunn explained.

One inmate who wanted to share his thoughts about returning home with his daughter needed help writing letters, so Bunn helped him write to his kids about how much he wanted to return home. Bunn saw that caring
about other inmates as people builds trust, which is an essential structure in a unitive system.92

Bunn says this resulted in his most profound insight: this was much bigger than him or Taylor, and that is the most important part—a unitive system is bigger than the individuals in it. It is not important what one does alone; it is sharing values like kindness, generosity and honesty in community that matters. When these values are shared, the community that J.A. Faris described manifests: a community that embodies “compassion, sharing, reciprocity, upholding the dignity of personhood, individual responsibility to others, and interdependence by recognising a common and shared humanity.”93 Bunn and Taylor were creating a Unitive Community.

However, moving from the punitive system to unitive ways of existing is not always easy. It takes work and persistence. The first time Bunn helped Taylor in the re-entry pod, he did not yet understand this. Still facing a life sentence, he gave up and left that pod, only to be sent back to a pod where the gang culture—violence, stealing, assaults, disrespect—was the way of life. Bunn began teaching the things that were taught in the re-entry pod. Bunn said, “In 8 building [the ‘gangland’ pod], in order to keep the violence down we had to keep the respect up.” They discovered that punishment is not necessary when connection holds the community together, even when the community is composed of men convicted of violent crimes.

C. Arc 3: Goal: From Compliance to Mutually Beneficial Action

Compliance: The act of obeying an order, rule, or request; obedience to those in control; acquiescence, deference, resignation, submission, yielding.94

Mutually Beneficial Action: Transformative action that seeds increased social safety and collective well-being;95 mutually beneficial action means going forward together, so no one has to lose.

Wholeness: The state of being unbroken, complete, a harmonious whole, unity.96

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92 All of the punitive system structures undermine trust; all unitive system structures build trust. Id.
93 Faris, supra note 37.
94 Arcs to Unity – Short Version, supra note 17.
95 See Email from Dominic Barter, supra note 9; see also id.
Compliance describes the process of yielding to others. Compliance requires compliance with rules that those superior in rank or influence generally set, which may reflect self-interest. Compliance is required, even with rules that may not serve the larger community. Absent connection and shared values, tactics that include some form of attack, might, force, coercion, violence, pressure, or punishment must be used to achieve compliance.

Punishment, often in the form of criminal or civil penalties, may seem like a necessary means of maintaining order in society; and punishment is, in fact, often necessary when connection has been undermined or weakened by the very nature of the punitive system. When connection and shared values are absent, distrust, dishonesty, and a widespread sense of separation undermine the internal moral compass fostered in a unitive system. This leaves punishment as the only available tool to enforce compliance. Forced compliance can give rise to resistance or incite defiance. Resistance to compliance may arise from resentment toward various attributes of the punitive system. Because control depends on (and collapses without) compliance, people who overcome the fear of consequences have the power to disarm those in control through noncompliance. Resisters can cause dysfunction.

This, in turn, may help unravel part of the school-to-prison pipeline problem. Resistant student behavior is often explained as the youth being “at-risk,” “damaged,” or “emotionally and behaviorally disordered.” This behavior may instead be a reaction to feeling disrespected by authorities’ use of demeaning tactics to force students to comply. Are the youth responding to feeling marginalized when they arrive at the school-house door because school personnel treat them like emotionally and behaviorally disordered juveniles? Since the punitive system has only one tool to achieve compliance, resistive behavior is matched with punishment, suspensions, and expulsions.

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99 Id.
100 Arcs to Unity – Short Version, supra note 17.
101 Id.
102 The Experience of Imprisonment, in THE GROWTH OF INCARCERATION IN THE UNITED STATES 194 (Jeremy Travis, Bruce Western, & Steve Redburn, eds., 2014).
103 Arcs to Unity – Short Version, supra note 17.
104 Tracey Pyscher & Brian Lozenski, Throwaway Youth: The Sociocultural Location of Resistance to Schooling, 47 EQUITY & EXCELLENCE IN EDUC. 531, 533 (2014).
thus fueling the school-to-prison pipeline.\textsuperscript{106} Instead of dishonoring them, Taylor and Bunn provide guidance on how school staff can show these students that they see the students’ humanity, so the students can see it themselves.

Despite positive results, some people might object on the basis that fostering shared values, strengthening connection, and building trust take too long to achieve.\textsuperscript{107} However, this argument overlooks the fact that the quick compliance punishment and revenge may achieve comes at the cost of further wounding and conflict due to a retributive response.\textsuperscript{108} After conflict erupts, the punishment-and-revenge approach may result in quickly achieving enforced compliance; but this is not peace, and perpetually enforcing compliance consumes valuable resources.\textsuperscript{109}

In a culture steeped in punitive justice, moving from punishment to connection that leads to mutually beneficial action involves a new understanding of how we approach justice. Conflict is seen as a natural part of human activity, and as an opportunity to learn, grow, heal, and to strengthen relationships and communities. This sets the goal of punishment aside. Instead of fearing or trying to control conflict, the unitive approach is to walk toward the conflict to engage with it and learn from it. Dominic Barter, the mastermind of Restorative Circles, describes human conflict as feedback that gives us information about what has gone awry and calls for our attention.\textsuperscript{110}

It is unitive principles, like lovingkindness, honesty, community, insight, and equality, that tend to support the natural flow of conflict toward a mutually beneficial resolution in which no one has to lose.\textsuperscript{111} This transformation is not as daunting as it may seem, and can begin by harnessing the energy that exists in conflict to achieve transformation.

John Lash, the Executive Director of the Georgia Conflict Center, describes his experience of engaging conflict in this way:

First, it depersonalizes whatever unpleasantness I am experiencing. I can view conflict as not so much about me as

\begin{footnotesize}
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\item \textsuperscript{106} See Tim Walker, \textit{How Engaging Student Resistance Works Better Than Punishment}, \textit{NEATODAY} (Mar. 2015), http://neatoday.org/2015/03/03/engaging-student-resistance-works-better-punishment/.
\item \textsuperscript{107} Orpinas et al., \textit{supra} note 106, at 31.
\item \textsuperscript{108} See Walker, \textit{supra} note 107.
\item \textsuperscript{110} Femke Widjekop, \textit{Interview with Dominic Barter}, \textit{in ENVIRONMENTAL JUSTICE: RESTORING THE FUTURE} 55–56 (European Forum for Restorative Justice 2019).
\item \textsuperscript{111} \textit{Arcs to Unity – Short Version}, \textit{supra} note 17.
\end{itemize}
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about the way that I am in relation to the rest of the system. I can try to discern what the feedback is telling me and make an appropriate adjustment or series of adjustments . . . [Sec-
ond], [i]t enables me to approach the conflict with curiosity instead of anger or fear. This is known in academic circles as a “positive orientation to conflict” and points to the idea that conflicts are actually opportunities.112

Mutually beneficial action is achieved through honest communication and courageous vulnerability, leading those involved in conflict to discover the unmet needs, the unhealed wounds, and/or the societal/institutional conditions reflected in the underlying dynamics of their conflict.113 Insight regarding where the consciousness of each individual is when conflict arises tends to lead to insight about how each of them can now choose differently. This creates a path to move forward in mutually beneficial action, so no one has to lose.

As more communities implement Unitive Justice, a parallel model of justice free of punitive elements emerges. Instead of mere compliance, people understand that mutually beneficial action is the logical goal of justice.

1. Moving from Compliance to Mutually Beneficial Action in Prison: Challenging but Doable

The group of inmates living in close proximity in a prison pod gave rise to a unique environment; Taylor believes this closeness was a factor in their success. As described above, listening without judgment and extending radical tenderness in an environment where violence was common opened the door to the inmates recognizing their shared humanity—an aspect of themselves the punitive system too often repudiates. Seeing each other’s humanity built trust, which led them to work together but there were some obstacles.

An insidious practice of some prison guards and cognitive counselors involved using small incidents to drive wedges among inmates. The inmates created a different, gentler culture resisting this practice, beginning with the sign, “SELF GOVERN.” Their choice to do everything the rules and regulations required of them was mutually beneficial action which eliminated one of the excuses to harass inmates. However, that led some of those in control

113 Arcs to Unity – Short Version, supra note 17.
to engage in a different kind of bullying.

While some guards cultivate good relationships with inmates, there are a few guards and counselors who find ways to characterize inmates’ good deeds as bad. In this instance, the inmates’ solidarity was characterized as “getting ready for a riot.” When inmates stick together, some prison guards fear (or pretend to fear) that the inmates are preparing to incite a riot, which can lead to sending inmates to isolation for months. “Next thing that happens, you are in a different prison, among a different group of inmates,” Taylor explains.

To hold a space for mutually beneficial action among the inmates, Taylor and Bunn had to outthink those in control. When Taylor embraced the job of teaching the re-entry material, he learned the material so well he could facilitate it better than anyone else, thus making himself irreplaceable to those at the top. He knew that some staff had cliques that schemed against inmates, but every time the staff decided to remove Taylor or Bunn, Taylor relied on his alliance with those at the top of the hierarchy who understood their effectiveness to block their removal. It worked because they were doing such a good job. “That’s another way we combatted the foot of the staff on our necks,” Taylor says.

From prior experience, they knew that some of the staff, who were obsessed with keeping inmates down, would try to get rid of mentors or elders in the community who positively influenced other inmates. Taylor contends that some of the cognitive counselors resented an inmate who the other inmates loved and sought advice from, which the cognitive counselors viewed as an excuse to get rid of that inmate. According to Taylor, “It was punitive on steroids. It was an us-versus-them environment where someone always had their foot on our necks.”

Taylor found himself defending inmates who had a positive impact on other inmates. When particular guards or counselors wanted to punish them, take away their privileges, or send them to isolation, Taylor argued for a different process, such as an intervention, which they later recognized was a type of circle process.

Achieving mutually beneficial action requires that those involved are able to recognize others’ humanity. Bunn and Taylor achieved this with inmates in their pod, and even with some of the guards and counselors. However, some guards and cognitive counselors were so immersed in the punitive mentality that they could only see inmates as prisoners, causing mutually beneficial action to be out of reach.
In Bunn’s words:
To get to mutual beneficial action, we have to see each other through the prism of humanity. I don’t have all the answers and you don’t have all the answers. Mutually beneficial action is where we get together and get some things done. In the end, the success of the system depends on the people in the system. It’s got to come from your heart. Like us, we’re starting to educate people about this different way; we would have never known that if we didn’t have an understanding of humanity.

D. Arc 4: Means: From Punishment to Connection

**Punishment:** Suffering, pain, or loss that serves as retribution. Other terms for punishment: discipline, retribution, revenge, and “getting even”.

**Connection:** The joining that is without limit, recognizing the whole is undivided and all minds are joined.

The immediate goal of punitive justice is to punish offenders to enforce compliance with rules and/or achieve atonement for the harm done. An indirect goal is to make the consequence of wrongdoing painful and/or costly in order to deter would-be wrongdoers. It is not so obvious that state-imposed punishment in the criminal justice system might be self-serving political acts. For instance, it might be used against political enemies, used to affirm the authority of those in control, or used to reflect how the state assesses the value of certain groups. Additionally, in schools, punishment might be used to remove students who are likely to do poorly on standardized tests, or whose “deviant or disordered” behavior negatively impacts the statistics required to be reported in disciplinary incident reports.

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115 Arcs to Unity – Short Version, supra note 17.
116 Id.
117 Id.
118 Id.
119 See generally Hechinger Report, Does Using High-Stakes Tests to Fire Teachers Improve Student Outcomes?, U.S. NEWS & WORLD REP. (Feb. 8, 2016), https://www.usnews.com/news/articles/2016-02-08/does-using-high-stakes-tests-to-fire-teachers-improve-student-outcomes (stating that teachers are often fired if their students do not meet the required standards of academic performance); School Discipline, EDUC. TRUST, https://edtrust.org/students-cant-wait/school-discipline/ (last visited Feb. 14, 2020) (stating because schools know their ratings depend on their discipline ratings, they may be incentivized to alter data on disciplinary actions); Andre M. Perry, Shaming Students is Keeping Schools from Teaching Them, BROOKINGS (Jan. 17, 2019), https://www.brookings.edu/blog/brown-center-
We are told that punishment is fair because it includes the assurance that, because “justice is blind,” punishment is allocated equally, without regard to class, race or connection. A blind-folded Lady Justice assures us this is so, but it is not. Making exceptions for the “good people,” so they avoid the prescribed punishment, has long been an integral part of a punitive system. Deciding who benefits from exceptions to otherwise strictly-enforced rules and punishment is one of the privileges afforded to those in control.

Punishment is an expeditious, quick fix, but often fails as a long-term solution. It excludes consideration of the whole by narrowly defining the goal as compliance and the means as punishment, leaving unaddressed the institutional or societal conditions that fuel conflict. Achieving punishment’s goals has additional consequences—these can include exorbitant costs that diminish other budgets, a disparate impact on marginalized people, and sometimes even the conviction of innocent people.

Another disturbing side effect is that punishment can be used in abusive ways and taken to the extreme at the option of those in control. As stated above, an example of this in the U.S. resulted in one out of every 100 adults being incarcerated in 2008. This system of mass incarceration has, in part, replaced racial segregation. In 2006, while one out of thirty men between ages twenty and thirty-four were behind bars, the ratio for black males in that age group was one out of nine. The Civil Rights Act of 1964 may have...
banned legalized segregation, but the criminal code generated a similar impact.\footnote{ALEXANDER, supra note 127, at 43.} Mass incarceration is thus sometimes called “the new Jim Crow.”\footnote{Id. at 22.}

If retributive justice was truly effective, its escalated use should have resulted in lower rates of crime. Instead, U.S. crime rates exceed those of most developed nations.\footnote{See Intentional Homicide Victims, Counts and Rates Per 100,000 Population, UNITED NATIONS OFF. ON DRUGS & CRIME, https://dataunodc.un.org/crime/intentional-homicide-victims (last visited Jan. 19, 2020) [demonstrating that in 2016, America’s rate per 100,000 people was 5.35, compared to 1.22 for England and Wales combined, 1.18 for Germany, and 1.35 for France].}

Unitive Justice depends on connection to provide safety. Unitive Justice works within the reality of connection.\footnote{Physicist, David Bohm, describes the reality of connection and cites many examples in his book, Wholeness and the Implicate Order. The new science of quantum physics affirms our interconnectedness. We now know that, while the Newtonian laws of matter apply at the gross physical level, a more fundamental reality exists beyond matter—an all-encompassing field of energy in which separation does not exist. When science redefines our reality, as quantum physics is doing, we must create new institutions that reflect our new understanding of reality. See generally DAVID BOHM, WHOLENESS AND THE IMPLICATE ORDER (2002).} The structures of Unitive Justice—values, self-governance, equality, trust, honesty, mutually beneficial action, lovingkindness—strengthen connection. The connection that binds us to one another is what a unitive system uses to maintain order and achieve peace. We are unlikely to harm those with whom we have a sense of connection. In fact, it may be that connection is the only means to achieve actual peace and sustained order.

Our choices give rise to a context that impacts other people’s choices since we are inextricably connected. As Dr. Martin Luther King recognized, “For some strange reason I can never be what I ought to be until you are what you ought to be, and you can never be what you ought to be until I am what I ought to be.”\footnote{Rev. Dr. Martin Luther King, Jr., Speech at Drew University: The American Dream (Feb. 5, 1964).}

1. Bunn and Taylor Created Connection Within the Prison Community

Punishment is the norm in the prison environment, not only among guards but also among inmates.\footnote{Martin Garbus, Op-Ed: Cruel and Usual Punishment in Jails and Prisons, L.A. TIMES (Sept. 29, 2014), https://www.latimes.com/opinion/op-ed/la-oe-garbus-prison-cruel-and-unnusual-20140930-story.html.} When they worked to change the prison culture, Taylor and Bunn dealt with a variety of gangs that lived by retribution to maintain their dominance—the Aryan Brotherhood, Bloods, Crips, Folks, Gangster Disciples, MS 13, all types.
“We can’t punish our way out of violence and conflict,” Bunn asserts, adding, “the insanity of the punitive system is apparent everywhere.” For example, in Virginia, two different mandatory minimum sentencing guidelines trouble inmates. There is one mandatory punishment for those sentenced before January 1, 1995, that requires them to serve at least 65 percent of their sentence; but a different mandatory punishment exists for those sentenced after that date. The individuals in the latter category, who committed the same crimes as those in the former, must serve a minimum of 85 percent of their sentence. The longer sentences grew out of “tough on crime” political messages that became the law. “That makes no sense, so it causes all kinds of confusion,” Taylor says.

In the re-entry pod, it seemed logical to Taylor and Bunn that creating connection among these diverse groups was the only way to overcome violence and conflict. The inmates had to see themselves as connected with shared humanity, and Taylor and Bunn had a strategy. First, they modeled good character and set the example. Next, they chose their words carefully. They never wasted words, avoided word-play, and only used language that the inmates understood. Also, Bunn ordered the book, The 7 Habits of Highly Effective People by Stephen Covey. Covey advised to first try to understand before being understood. Taylor and Bunn practiced this and the results astonished them. In their first efforts to understand, Taylor and Bunn developed compassion for their cellmates, regardless of what they did. This, in turn, empowered inmates who connected with them. Now that they understand the Unitive Justice Circle process, Taylor and Bunn say that they were doing circles without realizing it and they achieved similar results.

To build connection, they instinctively knew the labels that created separation had to stop—labels like “gang,” “thug,” “hoodlum,” or using gang names. They understood that these labels emphasized separation, labels are dehumanizing and cause desensitization. Taylor explains that, “Labels dehumanize those who are labeled, so they more easily bear their label and it

136 Id. at 20–21.
desensitizes those using the labels to the humanity of the individuals they are labeling—they all buy into the image the label signifies.” Therefore, Taylor and Bunn stopped seeing the inmates as gang members and were determined to see them as family members.

Bunn is from Newport News, Virginia. One day he asked everyone in the re-entry pod if anyone was from Newport News. Close to one-third of the 85 men stood up. Then, he asked them, “What does this mean, why has our community been robbed of these fathers, sons, brothers, uncles, nephews?” Looking at it like that had a profound impact on the inmates—they more clearly saw their humanity and how it deserved their attention.

Bunn describes going from punishment to connection:
When you have done a terrible thing, you have to get outside of yourself and think about what you did. Those who caused the harm have to first forgive themselves, to find forgiveness within themselves before they can connect with others. That's not saying that you're not going to be accountable for your actions, but you realize you were operating from a different mindset. That’s not who I am. That was conditioning, hopelessness, fear, anger. When you get to that point, what you need is connection, not punishment.

As their programs took hold, the inmates started saying things like, “You two are the only reason we are in the re-entry pod”; “This is the best pod we have ever been in”; “This is the best prison environment I have ever been in.” Bunn and Taylor created connection among the inmates, and they learned to respect one another.

E. ARC 5: Assessment: From Judgment to Insight

Judgment: Considered decisions intended to result in sensible conclusions, but often tainted by preconceived perceptions believed to be real when they are not.139 An expectation, evaluation, finding, ruling, sentence, verdict, declaration, determination, opinion, discipline or penalty.

Insight: A discovery of new information about the inner nature of an act or events; an act of discerning deeply that reveals new information and new possibilities that were not previously seen.140

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139 Arcs to Unity – Short Version, supra note 17.
140 Id.
A punitive system relies on judgment—judging the divide between who is guilty or innocent, who is good or bad, who is with us and who is against us.\textsuperscript{141} We often judge another as guilty, lazy, or undesirable without realizing that what we project onto others taints our judgment, and we might be seeing the speck in another’s eye while being blind to the log in our own. As judgment proliferates, separation deepens, and human relations deteriorate. Our bonds of connection are severed.

Those in control sometimes use judgment to justify their use of force or abuse as they impose control, while at the same time, judging those being controlled as deserving of the abuse.\textsuperscript{142} Many wrong decisions are made by judges and juries every day in courtrooms in the United States. About 150 death sentences in the United States have been commuted since 1973 because evidence later proved these people were innocent—i.e., these people were wrongly found guilty and sentenced to die.\textsuperscript{143}

In the justice system, there is a growing awareness that using an adversarial process to address conflict can have a negative impact on mental and cognitive resources, triggering a fight, flight, freeze or appease response in those engaged/caught in the process.\textsuperscript{144} If, instead, we suspend our preconceived judgments and create an environment that supports thinking and reasoning instead of the fight or flight emotions, the people involved in the conflict are often able to amicably resolve their conflict themselves.\textsuperscript{145}

The Unitive Justice Circle process provides an environment that supports thinking and reasoning, and even insight and connection, often leading to mutually beneficial action. Insight is a mental portal that suddenly leads to inner sight. This inner sight accesses knowledge and understanding that was previously inaccessible. Insight paves the way for qualitatively different thinking or actions. Insight is forward looking, while judgment keeps the focus on the past.

\textsuperscript{141} Id.
\textsuperscript{142} Whitley R. P. Kaufman, Revenge as the Dark Double of Retributive Punishment, 44 PHILOSOPHIA 317, 324 (2016).
\textsuperscript{143} The death penalty carries the inherent risk of executing an innocent person. Since 1973, more than 165 people who had been wrongly convicted and sentenced to death in the U.S. have been exonerated. Innocence, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence (last visited Feb. 14, 2020).
\textsuperscript{145} See id. at 652–53.
Insight is achieved through discernment or “mindful presence.” This leads to understanding people, issues, and contexts free of the projection of one’s own judgment. Insight leads to understanding the cause of one’s own pain and the pain of others, letting it be acknowledged, and perhaps seen in a new way. Achieving insight requires peeling off layers of judgment. Because it incorporates Unitive Justice structures, the Unitive Justice Circle supports us in using conflict to access insight and see possibilities that cannot be seen when we project our judgment on another.

With insight, circle participants might see how they meet their needs (perhaps indirectly or unconsciously) in ways that may contribute to the conflict dynamics and/or systemic patterns that fueled the conflict. This insight might lead them to make different choices, change how they show up in the world, to use their power differently as they go forward.

1. Taylor and Bunn Discover Insight as the Key to Moving Beyond Judgment

When Bunn and Taylor were in Clute’s class a week or two, they declared that they were engaging Unitive Justice in prison—they just did not know it. Now that they have studied Unitive Justice theory, they can explain how some of the insights they gained as they let go of judgment made it possible for them to create system change in the prison.

Taylor says that one of the first insights into the punitive system that he had in Clute’s class was the central role that hierarchy plays in supporting the other punitive structures, especially how hierarchy supports judgment and judgment is needed to justify punishment. Taylor says:

Hierarchy keeps us stuck in judgment and unable to get to insight. That still sticks with me. Think about how hierarchy keeps us in conflict. It means I have to look at you and say, you know what, Ms. Clute is better than you. You have to look at me and say, no, I’m better than you. And that keeps the conflict going—as long as we embrace this mentality we will never be able to resolve the issues. Judgment keeps us from seeing the truth.

146 GREGORY KRAMER, INSIGHT DIALOGUE: THE INTERPERSONAL PATH TO FREEDOM 165 (2007).
In Clute’s class, Taylor also saw how giving up the judgment that is integral to hierarchy is required to move from retribution to Love. This helped him understand more deeply what he already knew, for in prison they knew that Love had to replace the punitive system. Taylor says that every school of thought that he has ever been exposed to, whether he agrees with the rest of its teachings or not, the one common thread that runs through all of them is Love. The fact that going from proportional revenge to Love is a foundational principle of Unitive Justice (Arc 1) was consistent with these other teachings.

“I’ve been experiencing Love and to experience Love you have to give up judgment—Love and judgment are mutually exclusive.” Taylor reflects. “Giving up judgment opens space for insight to emerge so you can see how to do something different. It all fits together. That’s what we did.”

Some might find it difficult to grasp the notion that two men convicted of murder changed the prison culture with Love, but Love was central to their success and they openly talk about it. Bunn noted how Taylor says that:

Love is a verb, but it’s also part of his life and like a part of his DNA, so it is also a noun. Love is a noun but it’s also a thing that requires action. Justice as Love is understanding how I can take this thing, Love, and turn it into action so the noun becomes the verb.

They agree that justice as Love is learning to forgive and “learning how to fall in love with Love,” and that sometimes Love makes you vulnerable.

At a recent meeting with Taylor and Clute, Bunn said he was experiencing justice as Love then and there:

A year ago, at this time, I was still in prison. Now, I'm sitting in a booth at Elwood Thompsons drinking a green dragon smoothie, talking about Love and how we can help other people come into the understanding of this whole process. Yeah, I love the whole process. But I don't want to separate myself from my past because, in a way, it's my greatest asset. I have to draw from my past. I experience some emotional challenging situations, but I also know that just because you get on the right path, that doesn't mean that you're not going to be exposed to trials and tribulations. The Love is what's going to get you through—my love for freedom . . . I’m not going back into fear. And then what the universe brings into
my life is the people, the instruments of life, like Clute showing up, all of that. So what looks complicated about this thing is real simple: you just have to get to the insight that Love is what it’s all about.”

Looking back on their work in prison, one measure of their success is the data on recidivism. Taylor proudly reported:

Oklahoma had been number one in reducing recidivism, and we took offense to that because we wanted to be number one in the country. So, we really put an effort and our time into trying to make sure this happened. So, when they came in, when Virginia became number one in reducing recidivism, we took some pride in it.

Figure 2

Figure 2 shows that in 2016, compared to 2013 recidivism rates, Virginia had the lowest recidivism rate of all 45 states that report three-year re-


Figure 2 shows that in 2016, compared to 2013 recidivism rates, Virginia had the lowest recidivism rate of all 45 states that report three-year re-
incarceration rates for felons. This is the distinction that determined inmates were able to help bring to Virginia’s Department of Corrections, despite an on-going effort on the part of some of the staff to stop it. Imagine what could be achieved if values, mutually beneficial action, connection, insight, and justice as Love were possible among inmates and prison staff. Everyone would win.

It is worth noting that, when Clute was part of a Restorative Justice program based on Unitive Justice principles at Richmond’s Armstrong High School (2011-2013), in the second year of that two-year program there were only 185 student offenders, the lowest number reported in any year between 2009 (the earliest year for which she has records) and 2018. In 2018, there were 461 student offenders—a more typical number. The similarity in reduced negative outcomes in Taylor’s and Bunn’s work, and in Clute’s work, may perhaps be explained by the new principles both efforts applied.

Taylor and Bunn hear reports from returning citizens that Virginia’s prisons are not the same as they once were when Taylor and Bunn worked on the inside. “They still see us all around the pod because the pictures of us are there and our work is still remembered. So, we need to get back,” Taylor laments. Perhaps the takeaway from developing Unitive Re-Entry will result in a training program that provides a replicable and sustainable way to create system change—a program that works on the outside and on the inside.

Conclusion

Skeptics might ask how to extend lovingkindness to unrestrained, threatening individuals. While we are deeply immersed in the punitive system, we are taught that retribution and punishment constitute justice, so it is understandable that confusion or doubt exists about how lovingkindness might apply in the face of conflict or violence. Violence begets violence.

During the early years of developing Unitive Justice theory, Clute began seeing the new structures but could not imagine how to implement justice as Love. This changed in 2010 when she learned Dominic Barter’s Restorative Circle process that has no punitive elements. The experiential

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150 Va. Dep’t of Educ., Offense Frequency Report,SAFE SCH. INFO. RESOURCE [inputting “2017-18” into “School Year,” “Richmond City” into “Division Name,” “Armstrong High” into “School Name,” “All” for each other section, selecting “Student Offender,” and running the report] (report printed on Jan. 17, 2020).
151 For more information on Barter’s work, see RestorativeCircles.org.
learning she gained from doing this circle process deepened her understanding of justice as Love, enabling her to further develop Unitive Justice theory. Unitive Justice Circles are a combination of Barter’s circle process and Unitive Justice theory. Combined, the unitive theory and circle process dispel the mystery of how justice as Love works.

As we begin to create Unitive Justice systems that address conflict early on and as we address the root causes, we are changing the societal conditions out of which acts, be they good or bad, arise. As we create societal conditions that support mutual understanding and honesty, acts of kindness will proliferate and fewer violent acts will occur. Lovingkindness begets lovingkindness.

Martin Luther King, Jr. explained that the nonviolent approach of Love first changes the hearts of those committed to it. “It gives them new self-respect; it calls up resources of strength and courage they did not know they had.” Some of King’s contemporaries argued against his nonviolent approach, saying that violence (proportional revenge) was more expedient. Similarly, some people object that the positive results of Unitive Justice take too long to produce. These people prefer the quick compliance that punishment and revenge aim to achieve without considering the time it takes to repair the wounding and conflict that comes with a retributive response. Once they experience justice as Love, Clute is confident these skeptics will see the investment Unitive Justice takes is worthwhile.

Unitive Justice will not immediately reverse everything in the larger context, but it also is not inaction or passivity. It is a place to begin to restore positive connection and balance, even in difficult cases. One circle at a time. One home at a time. One school at a time. One community at a time. Even one prison at a time.

In the description of Clute’s work above, there is a graph of the sharp increase in the rate of incarceration in the U.S. called “The Punishing Decade.” Paying attention to the small one circle at a time enables creating the Healing Decades, turning that graph upside down. It might look like this:

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We can create communities where using Unitive Justice Circles address conflicts is the norm and the punitive justice system is needed less often. The courts are the doorway to jails and prisons. As we go to court less frequently because we are resolving our conflicts with lovingkindness instead of proportional revenge, we will empty jail cells. As schools vanquish “zero tolerance” discipline and instead model radical tenderness, the school-to-prison pipeline will dry up.

Now Taylor and Bunn focus on changing the re-entry culture using the pedagogy of Unitive Justice. They work with formerly incarcerated men and women, with currently incarcerated youth, and they often speak in schools to at risk students. The years of work that Taylor and Bunn did in prison, and the Unitive Justice theory that Clute developed over decades, are aligned. Both seem to work based on an innate understanding of human nature.
Perhaps the unitive structures reflect the basic nature of our common and shared humanity. This possibility is a compelling reason to do a Unitive Re-Entry program that seeks to build on the unique experience of returning citizens who demonstrate an innate understanding of justice as Love.
“DISCIPLINE DOES NOT MAKE AN ILL LAWYER WELL,” … BUT CAN IT?: CREATING EFFECTIVE, CONSUMER FRIENDLY AND HUMANE LAWYER DISCIPLINE SYSTEMS BY ADOPTING PRINCIPLES, VALUES AND PROCESSES ROOTED IN RESTORATIVE JUSTICE

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ABSTRACT

[He] lived in a state of heavy stress. He obsessed about the competition, about his compensation, about the clients, their demands and his fear of losing them. He loved the intellectual challenge of his work but hated the combative nature of the profession, because it was at odds with his own nature.
- Eileen Zimmerman

INTRODUCTION

Recently, lawyers, firms, and bar associations have gained awareness of a crisis with lawyer dissatisfaction and a lack of well-being in the legal profession. Expanding resources on lawyer wellness often focuses on meditation, encouraging counseling, or finding a work-life balance. These steps often manage hardships the legal profession poses; however, a meaningful and sustainable reform requires broader, proactive, and institutional change. That change mandates a new approach to lawyer discipline. The current system—like our criminal judicial system—employs a punitive, sanction-driven process that fails lawyers and clients. Restorative justice potentially provides an alternative framework for a healthy, consumer-friendly way to

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   In July 2015, something was very wrong with . . . Peter. His behavior over the preceding 18 months had been erratic and odd . . . I thought maybe the stress of his job as a lawyer had finally gotten to him, or that he was bipolar. He had been working more than 60 hours a week for 20 years, ever since he started law school and worked his way into a partnership in the intellectual property practice of Wilson Sonsini Goodrich & Rosati, a prominent law firm based in Silicon Valley. Human beings are physically and emotionally complex, so there is no simple answer as to why Peter began abusing drugs. But as a picture of his struggle took shape before my eyes, so did another one: The further I probed, the more apparent it became that drug abuse among America’s lawyers is on the rise and deeply hidden.

Id.

2 See generally THE NAT'L TASK FORCE ON LAWYER WELL-BEING, CREATING A MOVEMENT TO IMPROVE WELL-BEING IN THE LEGAL PROFESSION (2017) (revealing that that many lawyers and law students experience chronic stress and high rates of depression and substance abuse).

3 Id. at 53, 55.

4 MODEL RULES FOR LAWYER DISCIPLINARY ENF’T r. 10 (AM. BAR ASS’N 2017) (listing the types of sanctions for lawyer misconduct).
approach lawyer discipline. This article proposes a restorative approach to lawyer discipline that removes the focus on sanctions for malfeasance, and replaces it with an inclusive, collaborative culture to promote wellness, distributing responsibility to lawyers, firms, and our organizations.

I. The legal community is accepting challenges posed by revelations that our professional community consistently fails to produce and sustain healthy, satisfied lawyers.

Since the late 1990s, we have witnessed a growing concern about lawyer dissatisfaction that conditions, such as unrealistic work expectations, vicarious trauma, and unreasonable work hours, cause. Attorneys suffer higher than average reports of depression, anxiety, alcoholism, and other psychological problems. A 2016 American Bar Association (ABA) study, in conjunction with the Hazelden Betty Ford Foundation, surveyed 12,825 lawyers in the United States and found that 28%, 19%, and 23% of attorneys surveyed experienced mild or higher levels of depression, anxiety, and stress, respectively. The survey revealed that 20.6% of attorneys reported problematic alcohol use.

Firms, state bar associations, and law schools now engage in a broad spectrum of activities addressing lawyer wellness, including evaluations like the ABA Report from the National Task Force on

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6 SUSAN DACOFF, AM. PSYCH. ASS’N, LAWYER, KNOW THYSELF 6–7 (2006) (summarizing this issue by claiming “[l]awyer dissatisfaction data are grim” and concludes that “about one in five lawyers is somewhat or very dissatisfied with his or her job,” citing several studies from the Young Lawyers Division of the ABA); Martin E.P. Seligman, et al., Why Lawyers Are Unhappy, 10 Deakin L. Rev. 1, 49 (2005).


8 Lawyers experience depression, alcoholism, and substance abuse at a rate that is reported to be double that of the general population. SUSAN DACOFF, AM. PSYCH. ASS’N, LAWYER, KNOW THYSELF 8 (2006) (citing Patrick R. Krill, et al., The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, 10 J. Addiction Med. 46, 46 (2016) stating that 20.6 percent of lawyers screened positive for hazardous, harmful, and potentially alcohol-dependent drinking).


10 Id.
Lawyer Well-Being.11 The report identifies expanding evidence of a significant and growing problem.12

Although the legal profession has known for years that many of its students and practitioners are languishing, far too little has been done to address it . . . The parade of difficulties also includes suicide, social alienation, work addiction, sleep deprivation, job dissatisfaction, a “diversity crisis,” complaints of work-life conflict, incivility, a narrowing of values so that profit predominates, and negative public perception.13

In 2018, Virginia Bar President Len Heath promised to bring lawyer wellness to the forefront.14 The Bar now actively promotes lawyer wellness, recently prompting Virginia Supreme Court Chief Justice, Donald W. Lemons, to report that a culture of lawyer wellness has taken hold in Virginia.15 Part of the initiative includes the Report of the Committee on Lawyer Well-Being of the Supreme Court of Virginia.16 This article explores the implementation of the one factor: how the practice of law is regulated to increase lawyer well-being.17

II. The mission of the Virginia State Bar, to protect the public and improve the legal systems, requires lawyers and judges to systemically promote lawyer well-being.

The Virginia State Bar should engage in promoting lawyer wellness to meet our well-established mission. Since the first meeting

11 THE NAT’L TASK FORCE ON LAWYER WELL-BEING, supra note 2.
12 Id. at 7.
13 Id.
17 The Committee, charged by Justice William Mims, outlined areas for further investigation. Id. at 3. The other factors include:
(1) identifying stakeholders and the role each can play in reducing toxicity in the legal profession, (2) eliminating the stigma associated with help-seeking behaviors, (3) emphasizing that well-being is an indispensable part of a lawyer’s duty of competence, (4) educating lawyers, judges, and law students on well-being issues, and (5) taking incremental steps to change how law is practiced and how law is regulated to increase well-being in the profession.

Id.
of Virginia’s lawyers in July 1888, and continuing through the formation of the Virginia Bar Association in 1938, the mission remains unchanged: “The Virginia State Bar is to protect the public; regulate the legal profession of Virginia; advance access to legal services; and assist in improving the legal profession and the judicial system.” The Virginia State Bar’s plan for 2019-2024 details specific strategies to promote lawyer well-being in order to fulfill that mission.

The plan requires that lawyers be assisted in the ethical and competent practice of law, and provides early intervention for substance abuse, access to mental health services, and resource for other difficulties. The plan recommends improvements to the profession, such as inculcating civility among our members, promoting diversity, and improved communications. The National Task Force identified the relationship between promoting competency in our profession and wellness.

To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being . . . Too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers’ basic competence.

The profession falls short when disciplinary processes fail to establish a healthy environment and employ enforcement procedures that do not increase the potential for wellness or further the public interest.

III. The self-regulating bar disciplinary process creates potential for lawyers and the judiciary to promote lawyer wellness and satisfaction, effectuating the articulated mission of
the bar.

In the August 2019 edition of the Virginia Lawyer, Virginia State Bar President, Marni E. Byrum, recognized that “[w]e are the only profession that retains the privilege of self-regulation.” Since the early twentieth century, lawyers have regulated the practice of law, with increasing reliance on standards that the ABA developed. On August 27, 1908, the ABA adopted the original canon of Professional Ethics. Subsequent revisions include the first Model Code in 1969, and substantial revisions in 1983 and 2000. Today, most states have adopted Rules consistent with the Model Rules, and have developed processes to enforce the Rules.

A. The self-regulating lawyer disciplinary process begins with filing a complaint, and proceeds through a primarily confidential, adversarial process that provides limited opportunities for collaboration with clients, bar members, or other community members.

Virginia’s disciplinary process, in enforcing the Model Rules, begins when a client, bar member, or other community member files a

complaint with the Virginia Committee on Lawyer Discipline. Staff disposes of it without investigation when the alleged misconduct does not violate the Virginia Rules of Professional Conduct. When the complaint qualifies for processing, the staff opens an investigative file and categorizes the complaint based on seriousness. The sixty-day investigation begins when Committee mails a notice of the complaint to the attorney, who must respond within twenty-one days. The committee retains the ability to dismiss the complaint upon finding no probable cause to initiate a formal charge.

At the end of the investigation, a subcommittee reviews it, deciding whether to dismiss the complaint, impose limited discipline, conduct an adjudicatory hearing or certify the complaint to the Virginia State Bar Disciplinary Board, for final adjudication. When the board finds, by clear and convincing evidence, that the wrongdoing necessitates a sanction, they approve the action. The comprehensive but time-consuming process may fail to protect the public interest.

B. Our sanction-driven, adversarial system of lawyer discipline does not promote lawyer competence when it fails to

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32 DAVID ROSS ROSENFIELD, LAWYER DISCIPLINE IN VIRGINIA 24–25 (2000). Staff may contact the complainant for more information, but the respondent attorney is only contacted “[o]n rare occasions.” Id.
33 Id. at 26. “Priority One” is categorized as the most serious, and “Category Four” is categorized as being the least serious. See id. The order in which complaints are reviewed is in large part attributed to its seriousness. Id.
34 Id. at 28.
36 Id.
37 Id. The process itself is split into two parts, one being less formal with limited repercussions and the other more formal for more serious misconduct and for attorneys who do not accept initial sanctions imposed by the subcommittee.
39 One example of the lengthy process to address one lawyer’s wrongdoing is the twenty-five years of reported actions involving attorney Joseph Morrisey. In 1994, a court found that Morrisey, who served as a Commonwealth Attorney, violated disciplinary rules and ordered that Morrisey’s license to practice law be suspended for six months. Morrisey v. Va. State Bar, 248 Va. 334, 336 (1994). Subsequently, Morrisey was cited for other infractions, including failing to timely file documents and fist-fing in court. Morrisey v. Va. State Bar ex rel. Third Dist. Comm., 260 Va. 472, 477–78 (2000). In 2014, prosecutors filed criminal charges against Morrisey for “possession of child pornography, distribution of child pornography, taking indecent liberties with a child by a person in a supervisory role, contributing to the delinquency of a minor, and use of a communications system to solicit certain offenses involving children.” Morrisey v. Va. State Bar, 829 S.E.2d 738, 741 (2019). The Supreme Court upheld Morrisey’s permanent revocation in July 2019, twenty-four years after the committee first became aware of Morrisey’s deficiencies. Id. at 739. This public record of the actions against this attorney demonstrates the difficulty to rehabilitate or sufficiently monitor an attorney and assure the public of competent legal services with the current disciplinary process.
promote lawyer well-being.

The disciplinary processes enforcing the ABA Model Rules may fail to promote wellness. The ABA does not mince words. “Discipline does not make an ill lawyer well.” In changing the role of the regulators of the legal profession, the ABA report observes that regulators are not involved with practitioners until a problem arises. The ABA suggests that “[r]egulators can transform this perception by building their identity as partners with the rest of the legal community rather than being viewed only as its ‘police.’” The report encourages a prioritization of lawyer well-being and adoption of proactive management-based programs. States are encouraged to create better-informed ways of addressing mental health treatment, such as diversion programs.

In the 2017 report of the Committee on Lawyer Well-Being of the Supreme Court of Virginia, “A Profession at Risk,” the committee articulates a “profound conviction that the personal health and wellness of legal professionals are inseparable from the duty of such professionals to provide competent services to the public and ensure its protection.” The Private Sector Task Group (PSTG), contributing to the report, advocates changes to the disciplinary scheme, such as strengthening the relationship with Lawyers Helping Lawyers (LHL), and amending the Rules of Professional Conduct to “acknowledge and incorporate rehabilitative-focused practices and procedures in cases of mental health and/or substance abuse issues.” The PSTG recommended that the Bar “adopt[] regulatory objectives that prioritize the well-being of legal professionals.”

40 THE NAT’L TASK FORCE ON LAWYER WELL-BEING, supra note 2, at 29.
41 Id. at 25.
42 Id. at 28.
43 Id. at 29. The recommendations also included those in the area of improving wellbeing through education of law students, continuing education programs, changes in the admission requirements, and exam requirements.
44 COMM. ON LAWYER WELL-BEING OF THE SUPREME COURT OF VA., supra note 16, at 1. Recently, Comment 7 was added to Rule 1.1 of the RPC stating that [m]aintaining the mental, emotional and physical necessary for client representation is an important aspect of maintaining competence to practice law.” Professional Guidelines, supra note 38.
45 COMM. ON LAWYER WELL-BEING OF THE SUPREME COURT OF VA., supra note 16, at 22. The Virginia report also includes a white paper as an attachment that is titled “The Intersection Between Lawyer Wellness and The Disciplinary Process.”
46 Id. at 28. The PSTG supported the work of the Committee on Lawyer Discipline (COLD)’s efforts.
The Virginia Report on Wellness recommends locating sources and reducing toxicity of the profession.\(^47\) A wholesale revision of the disciplinary process replacing the punitive-adversarial design with a rehabilitative, restorative, and collaborative process, creating an environment less conducive of infractions, may supersede the toxins within our current legal practices culture.\(^48\) Positive mechanisms to deter lawyer wrongdoing, instead of motivations rooted in fear and shame, could establish educational programs promoting compliance with the rules.\(^49\) A new paradigm may create a positive trajectory for attorney discipline from the time a law school exposes a new student to the Model Rules through the imposition of any intervention.\(^50\) One such positive approach replaces stigmatizing with a more rehabilitative method, such as reintegrative shaming.\(^51\)

Lawyer well-being may be promoted concurrent with lawyer discipline by substituting a needs-based, rehabilitative model for the sanction-oriented, punitive approach. The ABA Standards for Imposing Lawyer Sanctions lists sanctions, including “admonition,” “probation,” “reprimand,” “interim suspension,” “suspension,” and “disbarment.”\(^52\) Complaints that result in a public charge in Virginia often

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\(^{47}\) Id. at 3. The other factors include:
(1) [i]dentifying stakeholders and the role each can play in reducing toxicity in the legal profession, (2) eliminating the stigma associated with help-seeking behaviors, (3) emphasizing that well-being is an indispensable part of a lawyer’s duty of competence, (4) educating lawyers, judges, and law students on well-being issues, and (5) taking incremental steps to change how law is practiced and how lawyers are regulated to increase well-being in the profession.

\(^{48}\) Id. at 8.

\(^{49}\) Id.

\(^{50}\) See id. at 13.

\(^{51}\) JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 102 (1989). It is beyond the scope of this article to delve deeply into the issue reintegrative shaming and restorative justice or the shame attached to lawyer discipline. “In the case of attorney discipline, a professional error is treated as a shameful secret rather than a fact of practicing law.” Jennifer G. Brown & Liana G.T. Wolf, The Paradox and Promise of Restorative Attorney Discipline, 12 NEV. L.J. 253, 282 (2012). “Currently, attorney discipline is not structured to facilitate this cycle from guilt to apology, reparation, and penance.” Id. at 275. Litt discussed the shame her husband felt in failing to meet impossible expectations. “Gabe lived his life with integrity and treated those around him with sincerity, kindness, and a genuine sense of presence. Unfortunately, I know my husband died not knowing the impact he had on so many people. I believe he died feeling overworked, inferior and undervalued. And I know he died with a lot of shame.” Joanna Litt, ‘Big Law Killed my Husband’: An Open Letter From a Sidley Partner’s Widow, LAW.COM (Nov. 12, 2018), https://www.law.com/americanlawyer/2018/11/12/big-law-killed-my-husband-an-open-letter-from-a-sidley-partners-widow/?slreturn=20200005233013.

\(^{52}\) STANDARDS FOR IMPOSING LAWYER SANCTIONS § 2.2–2.7 (AM. BAR ASS’N 1992).
sanction the attorney with a public reprimand or admonition. This limited repertoire of sanctions may dissuade lawyers from seeking resources for themselves or their colleagues through institutional resources.

The time-consuming, adversarial process limits participants to the investigative staff, the subcommittee, and the offending lawyer, and excludes a wealth of resources that a collaborative process generates. Including the complainant, the attorney, members of the legal community, and family members increases the potential for a superior outcome in the process.

These alternatives broaden the burdens of compliance with the rules, both increasing the potential for attorney success and strengthening the legal community. “By strengthening the community, a more restorative disciplinary process can, in turn, improve the morale of practicing lawyers, prevent ethical misconduct, and protect the public.”

C. The processes of lawyer discipline should better protect the public and create public confidence in the legal profession.

The Virginia State Bar’s mission includes a duty to protect the public. The 1983 revisions of the ABA Model Rules were designed to improve public confidence. Yet, an August 2018 Rasmussen Report described 43% of likely voters “as not trusting–lawyers”, 29% trusting, and the other 28% as not sure. Since 1976, Gallup has rated professions on honesty and ethics. In the last decade, ratings of attorneys—which were previously “very high” and “high”—have declined.

53 Am. Bar Ass’n, CTR. FOR PROF’L DISCIPLINE, 2003 SURVEY ON LAWYER DISCIPLINE SYSTEMS 44 (2003). For instance, California had 145,713 licensed attorneys in 2003, 13,522 complaints filed, and of those complaints, only 547 resulted in a formal charge. Id. at 13.


55 Id. at 303–05.

56 Id. at 255.

57 About the Bar, supra note 19.


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while “low” ratings of attorneys has increased. A recent Pew Research’s poll reported that thirty-four percent of respondents said that lawyers contribute “not much” or “nothing at all” to society.

While members of the public are included in the formal disciplinary process, complainants receive no information after filing a complaint until the Board reaches a disposition. The time from a complainant to file a formal charge is 361 days. When complaints are filed in excess of 361 days, sanctions often follow a year after the charge. Critics also find that disciplinary systems are too secretive, creating a public distrust of the profession. Most proceedings are confidential, and potential clients’ ability to access a lawyer’s prior disciplinary record is often exclusively limited to contacting the court. In Virginia, the complainant only receives outcomes to charges and sanctions if the attorney receives public discipline. The private nature of the system may provide protection of the attorney’s reputation for unsubstantiated complaints, and may encourage self-reporting. However, complainants and colleagues remain unaware of most actions, thus decreasing confidence in investigations. This exclusive, secretive process that narrowly construes lawyer discipline as a punitive response to wrongdoing, fails to meet our articulated mission as a Bar organization. Restorative justice may provide a better paradigm and superior foundation to promote lawyer well-being.

62 See Leslie C. Levin, The Case for Less Secrecy in Lawyer Discipline, 20 GEO. J. LEGAL ETHICS 1, 9 (2007) (discussing how lawyer discipline and other factors surrounding complainants and cases can affect a complainant’s views of fairness and the processes).
64 Id.
65 See, e.g., Levin, supra note 62, at 20–21.
66 Id. at 21–22. It must be noted that, in most cases, the records will only become public once a sanction is imposed. Id. at 21.
69 Id. at 29–30.
IV. Restorative justice, as set of principles and values, provides a suitable framework to replace the adversarial lawyer discipline processes by focusing on the harm and consequential needs over the violation of rule and imposition of sanction.

Restorative justice does not mandate a specific program; rather, it respects certain principles and values, including:

1. Focusing on the harms and needs (of the victims, communities, and offenders);
2. Addressing obligations resulting from those harms;  
3. Using inclusive, collaborative processes;
4. Involving those with a stake in the situation (i.e., victims, offenders, community members, and society at large); and
5. Seeking to put right the wrongs.

A working definition of restorative justice informing a lawyer disciplinary process acknowledges that lawyers face hardship while working within a system that often creates a cycle of harm. Founder of Restorative Justice of Oakland Youth ("RJOY"), Fania Davis, describes restorative justice:

Restorative justice is a justice that heals. You could say that our justice system harms people who harm people to show that harming people is wrong. And what happens? What happens is that harm replicates, it reproduces, it metastasizes, and it begins to saturate our

70 This includes obligations of the offender, but also the community’s and society’s obligations. See, e.g., Jung Choi, et al., Review of Research on Victims’ Experiences in Restorative Justice: Implications for Youth Justice, 34 CHILD. & YOUTH SERVICES REV. 35, 35 (2012) (discussing the increased likelihood that an offender will pay restitution when involved in restorative practices); HOWARD ZEHR & ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 33 (2002) (detailing restorative principles to include an emphasis on strained relationships rather than the wrong committed, providing conflicting parties with an opportunity to voice their frustrations, expanding stakeholders to include all those affected, meeting the needs of the victim rather than punishing the offender, and allowing the offender claim responsibility for repairing the harm).


72 Levin, supra note 62, at 2–3.
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existence . . . But we know that harmed people go on to harm other people.73

Effective, collaborative, and supportive lawyer disciplinary processes create ways to move our professional members out of that cycle of harm, even while working within it.

A. In the later part of the Twentieth Century, when the conventional judicial processes appeared to fail a community, leaders turned to restorative justice to inform changes to promote the protracted well-being of the community, the victim, and the offenders.

The 1970s ushered in an evaluation of the legal systems in the United States.74 Critics of the U.S. criminal justice system grew skeptical of whether our punitive model effectively controlled crime or maximized the potential for rehabilitation.75 Frustrated with complicated and time-consuming processes, innovators in civil law welcomed mediation and arbitration as less formal alternatives.76 People working in criminal justice looked for new ways to resolve wrongdoing.77

Ontario probation officer, Mark Yantzi, decided that a group of youthful offenders that vandalized twenty-two community members’ homes might benefit from meeting their victims.78 After securing the victims’ agreement, he arranged for meetings, resulting in an apology with full restitution, initiating a new process: the Victim Offender Reconciliation Process.79 Howard Zehr directed the first U.S victim-offender program was in Elkhart County, known as Prisoners and

75 ZEHR & GOHAR, supra note 71, at 2.
77 ZEHR & GOHAR, supra note 71, at 2.
79 For more detail on the history and development of restorative justice, see Mark Umbreit, Betty Vos, Robert Coates, & Elizabeth Lightfoot, Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls, 89 MARQ. L. REV. 251 (2005).
Community Together (PACT). In *Changing Lenses*, Zehr called the new approach, “restorative justice.” Restorative justice is an alternative perspective to view wrongdoing. The questions move from what statute was violated and what sanction should attach to an inquiry, into what harm has occurred and what can be done to make right the wrongs. Today, Victim Offender Meetings or Dialogs are included in restorative justice programs throughout Canada and the United States.

Another process associated with restorative justice, the talking circle, first emerged in western jurisprudence when Judge Barry Stuart, former Chief Judge of the Territorial Court of Yukon, grew frustrated as he prepared to sentence a repeat offender. Opting to rely on a process traditionally used for conflict resolution by the indigenous people of that community, Judge Stuart convened a talking circle. Community members, family members, and professionals assembled to discuss the harm, detailing obligations they agreed to assume to promote the rehabilitation of the offender.

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87 Id.
In *State v. Pearson*, a United States appellate court upheld the use of the talking circle and describes the process:

While the restorative justice statute is written broadly to encompass a wide range of processes, it specifically allows a restorative justice program to “assign an appropriate sanction to the offender.” Minn. Stat. § 611A.775. Each sentencing circle involves the participation of community members who voluntarily come together to reach a consensus on how a case can best be resolved with the goal of supporting the victim and re-integrating the victim and offender into community life.89

Another community looked outside of conventional judicial processes when Charles Taylor, a convicted child sex offender, and resident of Hamilton, Ontario, was scheduled for release.90 A Mennonite church congregation, led by Reverend Harry Nigh, formed a committee to maintain daily contact with Taylor and verify compliance with the re-entry plan.91 He remained in the community with no new reported incidents through his death in 2011.92 The model, Circles of Accountability and Support (“COSA”), now extends to programs in Canada, United Kingdom, the Netherlands, and the United States.93

A successful program in Hawaii employs re-entry circles before the release of an incarcerated individual and includes family, friends, and institutional support from social workers or prison officials.94 The participants create a written transition plan to reintegrate the offender into the community.95

91 Id. at 157–58.
95 Id.
When the New Zealand government observed that the incarceration rate for indigenous Maori youth was six times the rate of juveniles, their legislature passed Children’s and Young People’s Well-Being Act in 1989.\(^{96}\) The charging officer provides the offender with the option of participating in a restorative justice process.\(^{97}\) When the victim and offender agree, the state organizes a Family Group Conference to address the wrongdoing and to create a program to meet the needs of the victim, offender, and community.\(^{98}\)

In the United States, juvenile justice programs adopt similar restorative practices and find that the flexible, informal processes promote goals of prevention and early intervention.\(^{99}\) Changing the focus from harm and towards the resulting needs, restorative alternatives increases the potential for rehabilitation while promoting public safety.\(^{100}\) At least two counties in Virginia adopt restorative justice-based programs for juvenile offenders.\(^{101}\) First, Judges and police officers may divert youths to the Prince William County Restorative Justice Program (PWCRJP).\(^{102}\) With 250 annual referrals, they report a 10% decrease in recidivism among juveniles completing the program.\(^{103}\) Second, Loudoun County integrates restorative-based alternatives to traditional disciplinary processes in courts with school discipline.\(^{104}\)

B. Educators who found the conventional disciplinary practices failed their school system turned to restorative justice to inform changes to promote the protracted well-being of the community with student victims and offenders.


\(^{98}\) Id. at 12; MARK S. UMBREIT, OFFICE FOR VICTIMS OF CRIME, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS I (2000).


\(^{101}\) VA. STATE CRIME COMM’N, RESTORATIVE JUSTICE 8 (2010).


\(^{103}\) Id.

\(^{104}\) Restorative Justice, supra note 100.
Restorative practices in schools began in 1994 when a Queensland, Australia high school convened a school-based victim offender conference to address sanctions following an assault between students. Today, it creates a learning environment that incorporates and employs restorative principles to create responses to wrongdoing, dissuading conflict among students, increasing collaboration among educators, and improving teacher-student relationships. Restorative practices change the environmental conditions of the classroom while effectively addressing conflict through restorative-based practice or rituals for disciplinary action. In the United States, these alternatives to suspension and expulsion have been credited with interrupting the “School to Prison Pipeline,” that funnels youth into the juvenile justice system through exclusionary educational discipline processes.

C. The quantitative and qualitative research demonstrates the popularity and effectiveness in restorative practices in many applications throughout the United States, Canada, and world-wide.

Contemporary restorative justice practices now shape judicial processes and educational settings world-wide in a variety of practices and forums. In criminal wrongdoing, restorative practices include Victim-Offender Dialogs, Circles of Support and Accountability, Sentencing Circles and Re-Entry Circles. Juvenile proceedings often incorporate Victim-Offender Dialogs and Family Group Conferencing.

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106 OPPORTUNITY TO LEARN NETWORK, RESTORATIVE PRACTICES 2 (2014).
107 Id.; ZEHR & GOHAR, supra note 71, at 52. Negotiation corners and systemic use of talking circles provide opportunities to address infractions in a restorative educational community. See Lilles, supra note 86.
108 See School-to-Prison Pipeline, AM. CIVIL LIB. UNION, https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline (last visited Jan. 26, 2020). The use of “zero-tolerance policies” makes it more likely that minor offenses are handled outside of the educational institution, usually involving the government. JENNI OWEN ET AL., DUKE CTR. FOR CHILD & FAMILY POLICY, INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE SCHOOL DISCIPLINE 6 (2015). Restorative Justice may provide a means to interrupt the deterrents that follow the introduction of a youth to the juvenile justice system. Id. at 27–28 (proposing three categories of restorative intervention to target multiple needs and misconduct situations).
109 ZEHR & GOHAR, supra note 71, at 52, 55.
Child dependency matters may rely on the collaborative process of Family Group Decision Making. Educational systems adopt restorative practices in creating a superior educational environment and remedial action following a harm.

Throughout the development of these forms of restorative justice, researchers have attempted to measure the effectiveness of restorative justice, often in three areas: recidivism rates, victim and offender reports on satisfaction, and payment of restitution. Restorative processes, such as face-to-face meetings in victim-offender conferences and family group conferences, produce the same or better outcomes than conventional processes. In 2017, researchers David B. Wilson, Ajima Olagher, and Catherine S. Kimbrell found fault in data collection, but nonetheless found promising results in terms of delinquency outcomes for the youth through victim-offender conferencing, family group conferencing, arbitration/mediation programs, and circle sentencing programs. While research on restorative justice in educational settings is ongoing, most conclude that restorative practices are beneficial and reduces suspensions.

111 Defining Restorative 5.3. Family Group Conference (FGC) or Family Group Decision Making (FGDM), INT. INST. RESTORATIVE PRACTICES (2019), https://www.iirp.edu/defining-restorative/5-3-family-group-conference-fgc-or-family-group-decision-making-fgdm.
113 See generally Torna Hansen & Mark Umbreit, The State of Knowledge After Four Decades of Victim Offender Mediation Research & Practice, 36 WILEY ASS’N CONFLICT RESOL. 99, 99 (2018) (finding that an overview of forty years of victim-offender mediation demonstrates that those participating in a dialog were more satisfied than with court outcomes, experience psychosocial benefits, and lower rates of recidivism when accompanied by an apology); see also Heather Strang et. al., Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review, 12 CAMPBELL SYSTEMATIC REVIEWS 2, 2 (2013) (finding a lower level of recidivism and higher level of victim satisfaction following participation in face to face victim-offender conferences).
117 For a full review of the literature on this topic, see generally TREvor FRONiUS ET AL., WESTED. JUSTICE & PREVENTION RESEARCH CTR., RESTORATIVE JUSTICE IN U.S. SCHOOLS: AN UPDATED RESEARCH REVIEW (2019) (fully reviewing literature on this topic).
V. Restorative justice, by increasing participation of stakeholders, attention to meeting needs, and addressing harm, provides a superior framework upon which to build a new approach to disciplinary action.

Like the pioneers in the restorative justice movement who found conventional disciplinary process inadequate and created a new process to meet the needs of the victim, offender, and community, the legal community has an opportunity to recreate the lawyer disciplinary processes to meet the needs of our communities. The foundation, like that of the restorative discipline process in educational systems, begins by establishing legal educators and mentors to create a supportive, less competitive environment. The institutions may discourage attaching stigma on requesting and encouraging comfort with interdependence, culturally in the legal profession. Communication skills and conflict resolution training may be added to the law school curriculum and the continuing legal education programs to benefit lawyers who manage conflict within their offices, with colleagues, and with clients.

Creating a less competitive and a more pro-active, collaborative foundation may prevent wrongdoing. When lawyers make mistakes, replacing the adversarial, punitive model with restorative processes may prove more healing for the affected lawyer, the client, family members, and the legal community. By focusing not on the rule and sanction, but on the identification of the harm and unmet needs that result from the harm, victims may experience greater satisfaction. Participants’ involvement would be expanded to include the lawyers’ families and the victim in the early part of the case. As the resolution develops, a broad community of lawyers may be part of the team supporting the impacted lawyer.

119 Brown & Wolf, supra note 54, at 254.
120 Id. at 308.
VI. A multi-step process to increase participation and collaboration should be adopted to create and evaluate restorative practices and expand the culture of wellness into lawyer discipline.

A process adopting restorative practices for lawyer discipline cannot be prescribed but developed collaboratively within our extended legal community. One of the most successful restorative justice-based educational and judicial systems (RJOY) developed an implementation guide that this article has adapted as a roadmap to implement restorative practices in lawyer discipline.\textsuperscript{121} The RJOY guide begins by articulating goals of a restorative justice-based discipline process: “[T]o build relationships, to strive to be respectful to all, to provide opportunity for equitable dialogue and participatory decision-making, to involve all relevant stakeholders, to address harms, needs, obligations, and causes of conflict and harm, and to encourage all to take responsibility.”\textsuperscript{122} The guide encompasses a group of steps and tiers to implement the changes incrementally.\textsuperscript{123}

\begin{itemize}
  \item[A.] Step 1: Explore the concept of restorative justice and examine practices that may be integrated into lawyer discipline to improve lawyer well-being, professional competence, and community satisfaction.
\end{itemize}

The RJOY program posits that 80\% of the restorative practices positively create a shared culture and building relationship, and 20\% respond to conflicts.\textsuperscript{124} Members of the Bar may accept responsibility for the “toxic” culture.\textsuperscript{125} Bar activities, continuing education programs for lawyers, judges, disciplinary counsel, and consumers’ forums may provide opportunities to examine how the values and principles of restorative justice may positively change the climate of the practice of law.\textsuperscript{126} Concurrently, dialogue should begin discussing how

\textsuperscript{122} Id. at “Using This Guide.”
\textsuperscript{123} Id. at 1.
\textsuperscript{124} Id. at 15.
\textsuperscript{125} Id. at “Using This Guide”; COMM. ON LAWYER WELL-BEING OF THE SUPREME COURT OF VA., supra note 16, at 3.
\textsuperscript{126} See DAVIS ET AL., supra note 121, at “Using This Guide.”
a restorative approach addresses lawyer wrongdoing, mental health challenges, and additional needs that adversely impact a client or the community.127

The questions moves from, “What rule was broken? Who broke it? What punishment is deserved?” to, “What was the harm? What are the needs and obligations that arise out of that harm? How can all affected parties create a plan to heal the harm as much as possible?”128

The inclusive dialogue may consider how restorative processes may be embedded within our state Bar to promote lawyer well-being.129 Stakeholders may learn the benefits of inclusionary discipline tactics.130

B. Step 2: Assemble the restorative justice team and assess needs.

The RJOY guide emphasizes the importance of inclusion from the beginning stages: “Engaging as many members of the . . . community early on in the planning and training process is important.”131 A team of experienced stakeholders, including staff members from the Office of Disciplinary Counsel, staff members from the Lawyer Assistance Program, a diverse group of practicing attorneys, a group of attorneys who have been subject to attorney discipline, and members of the public could form the initial Restorative Justice Team.132 A neutral facilitator may convene the team who may initially locate existing strengths and unmet needs in our current disciplinary systems.133 The team should analyze existing data to determine gender, race, or age disparity represented in sanctioned attorneys and create opportunities to discuss these issues.134 The team may then move to create a preliminary design for a restorative practice-based process to enforce the Model Rules, consistent with their initial findings of strengths and weaknesses.135

127 See id. at 26.
128 Id. at 3.
129 Id. at “Using This Guide.”
130 Id. at 2.
131 Id. at 7.
132 Id. at 5.
133 Id. at 5.
134 Id. at 9.
135 Id. at 15.
C. *Step 3: Work with extended community, expanding the team to design a discipline rooted in restorative principles and practices.*

In the next step, RJOY encourages expanding the team who creates the initial plan. A restorative approach requires input and buy-in from the whole community. The team’s plan serves as a starting point to share and expand the vision. The input may include public meetings or circulating proposals for written comment. The RJOY guidebook provides guidance when stakeholders remain skeptical: “Don’t worry about the members of your team with a low appetite for Restorative Justice. These people represent those that will need to see a proof of concept to feel brought in, which will take time.”

D. *Step 4: Create a restorative environment, sanctions, and re-entry process to implement a multi-tiered strategy.*

After the expanded team integrates restorative practices into the discipline process, the plan involves three tiered stages. Tier I brings changes within the legal culture to reduce the toxicity, including implementation of a proactive approach to improve relationships and teach positive communication strategies. Tier I may include training and coaching lawyers, judges, disciplinary counsel in facilitating restorative conversations and community-building circles. This training builds the capacity of the legal community to prevent and address conflict. Tier I interventions may foster secure interconnectivity that will radically transform the culture and climate. Tier I integration of restorative practices requires skills often overlooked in law schools and continuing legal education programs such as facilitation skills like listening, empathy, validating, and mirroring. These strategies
should be voluntary, restorative, and create systems of support to decrease lawyers’ barriers to engage, participate, and explore.\textsuperscript{147}

Tier II strategies provide restorative alternatives for disciplinary infractions.\textsuperscript{148} These strategies have dramatically altered the detention and suspension rates in educational settings.\textsuperscript{149} The Tier II strategies may include victim-offender dialogues, circles of accountability and support, or Family Group Conferences.\textsuperscript{150} Tier II strategies require neutral, trained facilitators, and may require modifications to formal written policies—including the Rules of Professional Conduct—to provide detailed guidance on the criteria and process for the practice.\textsuperscript{151} Documentation and statistical gathering should provide data to review the successes of various processes in this Tier.\textsuperscript{152}

In Tier III, the strategies develop reintegration of a lawyer after a period of suspension or absence due to sanctions.\textsuperscript{153} In Tier III, the neutral facilitator convenes a circle of support and accountability before the return to practice.\textsuperscript{154} The reentry circle should include a diverse group of colleagues, family members, support professionals, and the lawyer disciplinary staff or committee that makes commitments to provide both support and accountability to the lawyer returning to practice.\textsuperscript{155}

\textbf{E. Step 5: Evaluate, reflect, and refine.}

The final step requires reconvening the restorative justice team quarterly.\textsuperscript{156} The team reviews relevant data, including past and present data on referrals, sanction rates, incidents, racial disparities, and gender disparities in discipline.\textsuperscript{157} The team may survey lawyers, consumers, judges, and disciplinary staff regarding their experiences with restorative justice.\textsuperscript{158}

\textsuperscript{147} Id.
\textsuperscript{148} Id. at 27.
\textsuperscript{149} Id.
\textsuperscript{150} See id. at 26.
\textsuperscript{151} See id. at 25.
\textsuperscript{152} See id. at 27.
\textsuperscript{153} Id. at 38, 58.
\textsuperscript{154} Id. at 38.
\textsuperscript{155} Id. at 38–39.
\textsuperscript{156} Id. at 42–43.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
Conclusion: A Perfect Fit for a Perfect Time

I don’t have any immediate solutions, but for the sake of retaining people like Gabe in these important professions, something needs to change. We need people like him walking this earth; they make it a better place. My husband was impeccable with his word, and actually cared so immensely about the job he did and how people viewed him. He wasn’t focused on the bottom line or lining his pockets with more money. He cared about his clients and the hundreds and thousands of people impacted by a corporation filing bankruptcy. Not to mention, he was really good at what he did.\(^{159}\)

The legal profession now recognizes the difficulties that lawyers experience in day-to-day work and accepts the duties to recreate the profession into one that encourages members to be satisfied with their work and personal lives. With that growing awareness, every aspect of our profession should be examined from the way law students are recruited and treated their first day of class to the way lawyers approach retirement. Support should be provided not only for the lawyers who find ways to maintain wellness in our challenging profession, but also for those who struggle. Clients who feel harmed by lawyer misconduct deserve greater participation in the process, which may increase confidence in the profession.

The leaders of the ABA Report state: “[L]awyer well-being issues can no longer be ignored. Acting for the benefit of lawyers who are functioning below their ability and for those suffering due to substance use and mental health disorders, the National Task Force on Lawyer Well-Being urges our profession’s leaders to act.” Engaging the potential of restorative practices to create disciplinary processes provides us with a path to reach our mission of improving our profession, protecting our clients, and finding fulfillment and satisfaction in our work.

RACE, GENDER AND RESTORATIVE JUSTICE: 
TEN GIFTS OF A CRITICAL RACE FEMINIST APPROACH

**Johonna Turner, Ph.D.**

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By reading past this point you agree that you are accountable to the council. You affirm our collective agreement that in the time of accountability, the time past law and order, the story is the storehouse of justice. You remember that justice is no longer punishment. You affirm that the time of crime was an era of refused understanding and stunted evolution. We believe now in the experience of brilliance on the scale of the intergalactic tribe. / Today the evidence we need is legacy.

-From “Evidence” by Alexis Pauline Gumbs

INTRODUCTION

At this moment, we have not yet reached the time invoked in the epigraph where punishment, violence, and oppression have been eradicated because of “what the people did to break the silence.” But, this is a time when silences are being broken. In this moment, largely because of the efforts of the Movement for Black Lives and multiple #MeToo campaigns, United States society is increasingly aware of the realities of racialized police violence against people of color; and a continuum of sexual violence and harm that disproportionately affects women and girls of color, as well as queer and trans people of color. These and other forms of interpersonal and institutionalized violence map onto geographies of racial and gender oppression, and are interconnected and interlocking.

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2 Id.
4 An intersectional analysis of violence has been germane to activist efforts by women of color. As the editors of a journal issue on movements to transform violence explain: At the turn of the 20th century, Ida B. Wells publicly critiqued how the issue of rape was exploited to justify ongoing lynchings of black people, stressing that the lynchings themselves were organized acts of police-sanctioned sexual violence and torture. During the 1969 Stonewall Riots in New York City, Puerto Rican drag queen, Sylvia Rivera, and others defined by the state as gender and sexual...
women and girls—including transgender women and girls—in ICE detention facilities, prisons, and juvenile halls experience higher rates of sexual violence. White supremacy and xenophobia place women and girls of color at a higher risk of being detained and incarcerated, which are processes of racialized harm. Lesbian, gay, bisexual and transgender people are criminalized, aggressively policed, and routinely assaulted for expressions of gender nonconformity. Restorative justice is a philosophy that emphasizes healing and accountability to repair harm and wrongdoing, build community, and strengthen relationships. Therefore, it is imperative that we ask what restorative justice has to offer in relation to these realities. Academic scholarship and professional literature on restorative justice has been largely silent about sites and forms of interlocking racialized and gendered harms and what restorative justice might contribute. However, there

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5 ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 80 (Greg Ruggiero ed., 2003) (“Studies on female prisons throughout the world indicate that sexual abuse is an abiding, though unacknowledged, form of punishment to which women, who have the misfortune of being sent to prison, are subjected. This is one aspect of life in prison that women can expect to encounter, either directly or indirectly, regardless of the written policies that govern the institution.”); see also Beth Richie, Queering Antiprison Work: African American Lesbians in the Juvenile Justice System, in GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX 73, 73–74 (Julia Sudbury ed., 2005).


7 JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 23 (Michael Bronski ed., 2011).

8 Johonna Turner, Assistant Professor, Presentation at the Center for Justice & Peacebuilding: Introduction to Restorative Justice Class (2015). My definition is informed by articulations of restorative justice as a philosophy rather than a process, as well as an emphasis on unifying values and principles. See GEORGE PAVLICH, GOVERNING PARADOXES OF RESTORATIVE JUSTICE 2, 16 (2005); DENNIS SULLIVAN & LARRY TIFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES 21 (2d ed. 2005); HOWARD ZINER, CHANGING LENSES 181, 186 (3d ed. 2005).

9 On restorative justice and gender violence, legal scholar Angela P. Harris attests, “Restorative justice theorists and practitioners have been slow to make the leap . . . from their vision of ‘making things right’ to undoing gender violence.” Angela P. Harris, Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice, 25 BERKELEY J. GENDER L. & JUST. 199, 210 (2010). On restorative justice and racial subordination, Harris writes, “Restorative justice advocates
is a grassroots tradition of restorative justice largely enacted by feminists of color grounded in social justice movements that places these realities at the forefront. I believe that the perspectives and praxis of these grassroots practitioners reflect the principles, politics, ethics and ethos of critical race feminism—a framework advanced in the academy by feminist legal scholars of color, but has always transgressed academic borderlands.

In this essay, I will build on the work of legal scholar Angela P. Harris who has argued that conventional approaches to restorative justice require the contributions of critical race feminism in order to address the realities of racial subordination and gender violence. Specifically, I will outline ten gifts that a critical race feminist approach offers restorative justice advocates and practitioners. Inspired by Harris’ insights as well as my life experiences, I will talk about critical race feminism as embodied by theory and praxis in two sites. The first site is a body of grassroots restorative justice practice being led by women of color grounded in social justice movements. The second site is a related movement for reparative justice strategies known as the transformative justice and community accountability movement. Several years before my involvement as an advocate have had surprisingly little to say about racial subordination. For example, Dennis Sullivan and Larry Tiff argue that restorative justice should be concerned not only with interpersonal violence but also with ‘social-structural violence’ . . . They also take note of ideological violence, observing that social hierarchies are justified by naming persons at the bottom as less valuable than those at the top. Through their use of the terms, ‘ghettos and barrios’ hints at their presence, Sullivan and Tiff never name or analyze racism as a category of social-structural violence.”


12 See Harris, supra note 9, at 210–12, 216–17.


14 See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 113–14 (Greg Ruggiero ed., 2003) (using the term, reparative justice strategies to describe a spectrum of approaches to respond and repair harm without the use of criminalization and incarceration); see also Harris, supra note 9, at 212 (arguing that the politics and perspectives of the transformative justice movement offer a solution to restorative justice practitioners’ romanticized notions of the state and the family).
and educator of restorative justice, I became involved in learning about and working from the philosophy of transformative justice and community accountability. My involvement with the transformative justice movement, more than anything else, has deepened my understanding of the power and potential of restorative justice, and particularly its relevance to addressing harms rooted in racial and gender oppression. More recently, I have seen how a tradition of restorative justice practitioners whom are often women of color with roots in social justice movements also work from a critical race feminist orientation.

There are two parts to the remainder of this essay. In Part I, I will provide a brief background on critical race feminism and the contemporary transformative justice movement, including my own participation in the latter. In Part II, I articulate the gifts, or contributions, that a critical race feminist approach offers restorative justice. First, I will discuss gifts related to understanding, analysis, and consciousness, including terminology and language. Secondly, I introduce gifts related to vision and goals. Finally, I identify gifts related to strategies and practices. I use the term ‘gifts’ intentionally. For many of us, learning about restorative justice was experienced as receiving a gift, or a set of gifts, that provided clarity of vision, new language, and a set of strategies that resonated with values we have long held or ways that we already saw the world. We can continue to receive these kinds of gifts in the form of understandings and analysis, visions and goals, and strategies and practices, by learning from related movements.

Whereas a critical race feminist approach is reflected in many restorative justice spaces because of the efforts of grassroots practitioners, it is in the transformative justice movement that we can find the clearest and most pervasive articulation of critical race feminism in relation to reparative justice.

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18 Harris, supra note 9, at 211–12.
Critical Race Feminism and Transformative Justice

A. Critical Race Feminism

Critical race feminism emerged from and includes core aspects of critical legal studies, critical race theory, and feminist theory, but also responds to the shortcomings of each approach. Critical race feminism is both an analytical tool and multidisciplinary approach that sees law as important but insufficient to understand and improve the legal plight and related social, political and economic conditions of women of color in the United States and around the world. Although the term critical race feminism was originally coined by Richard Delgado in the first edition of his edited volume on critical race theory, Professors Adrien Wing, Angela P. Harris, Kimberlé Crenshaw and Dorothy Roberts are among the leading theorists of critical race feminism. Because “women of color are disproportionately stalled at the bottom of every society,” a critical race feminist approach centers the experiences and perspectives of women of color not only because such a focus is beneficial to women of color, but also because of adherence to the Black feminist notion of radical humanism, which posits that everyone in a given society can enjoy the fruits of such efforts.

The anti-subordinationist vision of critical race feminism rests on five principles, many of which are also shared with critical race theory and black feminist theory. The first principle, which I call the prism principle, posits that dimensions of social identity, such as race and gender, are socially constructed, multi-dimensional, and co-

19 ADRIEN KATHERINE WING, CRITICAL RACE FEMINISM: A READER 4 (2d ed. 2003); Nancy Clark & Nasrin Saleh, Applying Critical Race Feminism and Intersectionality to Narrative Inquiry: A Point of Resistance for Muslim Nurses Donning a Hijab, ADVANCES NURSING SCI. 156, 162 (2019).
22 Adrien Katherine Wing, Critical Race Feminism, in THEORIES OF RACE AND ETHNICITY 162, 162 (Karim Murji & John Solomos eds., 2015).
23 Here, I synthesize the core tenets of CRF area into five principles, which I then name using an alliterative approach. On the relationship between critical race feminism, critical race theory and black feminist theory, see generally WING, supra note 20, at 1–22; Adrien K. Wing & Christine A. Willis, From Theory to Praxis: Black Women, Gangs, and Critical Face Feminism, 11 LA RAZA L.J. 1, 15 (1999).
constituted. The analytical tool of intersectionality, as articulated by legal scholar and critical race feminist Professor Kimberlé Crenshaw, reflects the prism principle. Secondly, we have the plurality principle, which is the idea that marginalization, oppression, and violence exist as overlapping and intertwined pluralities and therefore also require an intersectional analysis. Sociologist Patricia Hill Collins’ notion of a ‘matrix of domination’ reflects the plurality principle.

Third, we have the ‘placement principle,’ which states that women of color are placed at the center of theorizing, research, and practice in critical race feminism. However, in keeping with intersectionality, critical race feminism seeks to increasingly focus on the experiences of those on the margins, which may include the poor and working-class, transgender people, involvement or participation in the sex trade, migrant and refugee status, and experiences of incarceration and confinement. The ‘placement principle’ therefore grows out of the ‘prism principle’ and deepens our engagement with the ‘plurality principle’—our ability to understand more about the interlocking nature of marginalization, oppression, and violence. Critical race feminists also believe that one’s placement in relation to power and privilege can give one unique vantage points from which to see, analyze, theorize, and vision. Those who are placed at increasingly vulnerable positions in society (for example, who experience multiple, interlocking oppressions) are uniquely able to offer an


23 Id. at 150.


28 Wing, supra note 20, at 5, 7; Adrien K. Wing & Christine A. Willis, From Theory to Praxis: Black Women, Gangs, and Critical Face Feminism, 11 LA RAZA L.J. 1, 3 (1999).
emancipatory social analysis and vision. We must articulate our own placement, or positionality, vis-à-vis societal power relations within our scholarship and practice, and acknowledge not only our experiences of oppression but also our relationship to privilege and culpability in the marginalization of others.

Fourth, we have what I call the ‘planted principle.’ Like critical race theorists, critical race feminists understand that systems of oppression, including but not limited to white supremacy and patriarchy, are embedded or ingrained within societal institutions including the state. Likewise, the law is never an objective tool for ameliorating social injustices, but has also been inflected with subordinationist values. Finally, we have the ‘praxis principle.’ Social and political knowledge, to be relevant and useful, must be created through direct engagement in social and political struggle. Praxis is the symbiotic relationship between reflection and action, and the cyclical process by which we theorize through our practice and work from sustained study and reflection. The praxis principle not only calls those of us positioned in academia and similar institutions to be working alongside the individuals and communities whom we purport to affect, but also requires us to understand emancipatory social movements as incubators of critical theory and praxis.

Critical race feminism is an outgrowth, or offshoot, of critical race theory. Concurrent with the narrative methodology that is central to critical race theory, critical race feminists engage in counter-

33 Id.
34 Kimberlé Crenshaw et al., Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995); Adrien Katherine Wing, Critical Race Feminism, in THEORIES OF RACE AND ETHNICITY, supra note 22, at 163.
38 See id. (asserting that “social theory is flawed at its core to the degree that it is unable to ground itself in the lives of those whom it is supposed to affect.”); KELLEY, supra note 36 (arguing that Black freedom movements serve as incubators of critical theory and emancipatory social vision).
39 Wing & Willis, supra note 32, at 2.
storytelling in order to critique dominant power relations and understandings, and to construct new ways of seeing and existing. According to legal scholar and critical race feminist Margaret Montoya: 

[N]arratives invoke the right of the subordinated person to narrate—to interpret events in opposition to the dominant narratives and to reinvent one’s self by bringing coherence to one’s life stories . . . Outsider stories, often freighted with the emotions of marginality and the agony of the social pariah have dialectical and epistemological features that distinguish them from the stock stories of the dominant culture.

Critical race feminists bring the stories of women and girls of color, in particular, into conversation with legislation and policy as well as institutional norms, dominant theoretical frameworks, and advocacy agendas, in order to reveal flawed assumptions and blind spots. These individual and collective accounts of lived experience are also used to develop or refine epistemologies, theoretical frameworks, intellectual strategies, and material practices that will improve the conditions of women and girls of color, and more broadly, to advance personal and social transformation.

B. Transformative Justice and Community Accountability


41 Margaret Montoya, Celebrating Racialized Legal Narratives, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 243, 245 (Francisco Valdes, et al. eds., 2002).

42 See Theodorea Regina Berry, Engaged Pedagogy and Critical Race Feminism, 24 EDUC. FOUND. 19, 23–24 (2010); Adrien K. Wing, Critical Race Feminism, in THEORIES OF RACE AND ETHNICITY, supra note 22, at 174–75.

43 Judy Scales-Trent, Black Women and the Constitution: Finding Our Place, Asserting Our Rights, in CRITICAL RACE FEMINISM: A READER 306, 307–08 (2d ed. 2003) (describing the court’s holding that discrimination can exist against black females in the absence of discrimination against black men or white women and how holdings like this, initiated under Title VII of the Civil Rights Act of 1964 as coming about from black women’s formation as a group in these proceedings); WING, CRITICAL RACE FEMINISM: A READER, supra note 20, at 7 (explaining how Sojourner Truth’s statement “Ain’t I a Woman?” prompted philosophy that interrogated feminism’s intersection with race and questioned feminism’s early reliance on white women’s experiences); see also Wing & Willis, supra note 32, at 3 (explaining how critical race feminism uses narratives to aid in exposing the reality of racism and validate the experiences of people of color, calling for a deeper understanding of the lives of women of color based upon their multiple identities).
The contemporary transformative justice and community accountability movement principally emerged from women of color who were a part of feminist movements to challenge domestic and sexual violence, as well as racial justice movements working to challenge police brutality and mass incarceration.\textsuperscript{44} By centering and utilizing their shared experiences, they formulated a holistic anti-violence agenda that embraced the contributions and addressed the gaps in each movement.\textsuperscript{45} Their insights and efforts led to the formation of the organization, INCITE! Women of Color Against Violence, which is now known as INCITE! Women, Trans, and Gender Non-Conforming People of Color Against Violence, or simply, INCITE!.\textsuperscript{46} INCITE!’s founders recognized that women of color experience state and interpersonal violence disproportionately and simultaneously.\textsuperscript{47} For example, when undocumented women call the police to report domestic violence, they are often arrested and deported.\textsuperscript{48} Survivors of gender-based violence are incarcerated when their actions to survive are criminalized.\textsuperscript{49} Efforts to expand policing and criminalization in communities of color place people of color at a higher risk of being arrested and incarcerated, which puts women of color and others at a higher risk of sexual violence, ranging from routine strip searches to rape.\textsuperscript{50}

\textsuperscript{44} See, e.g., Andrea Smith et al., \textit{The Color of Violence: Introduction}, in \textit{COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY} 1, 2 (2006) (describing “The Color of Violence: Violence Against Women of Color” conference as one of few events that were profoundly important to the antiviolence movement that women of color have orchestrated against the use of violence by the state as a response to the violence faced by survivors of sexual and domestic violence).


\textsuperscript{46} Welcome!, INCITE!, https://incite-national.org (last visited Nov. 17, 2019) (“INCITE! is a network of radical feminists of color organizing to end state violence and violence in our homes and communities.”).


\textsuperscript{49} About S&P, SURVIVED & PUNISHED, https://survivedandpunished.org/about/ (last visited Nov. 17, 2019); see also About Survived & Punished, SURVIVED & PUNISHED, https://survivedandpunished.org/ (last visited Nov. 17, 2019) (describing the organization as one that brings attention to the criminalization of survivors and wages defense campaigns on their behalf).

\textsuperscript{50} See, e.g., Andrea Smith et al., \textit{The Color of Violence: Introduction}, in \textit{COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY}, supra note 44, at 1 (discussing an incident in which a woman was raped, waved down a police car, and was then raped by the police officer as an example of the power of the criminal legal system to increase rather than dissipate acts of violence against women of color).
In developing a holistic anti-violence agenda, these advocates were in fact calling for a return to sensibilities enshrined in the radical feminist anti-violence efforts of the 1970s and 1980s led by feminists of color who challenged gender-based violence while also challenging state violence. Feminists of color advancing a holistic anti-violence agenda argued that two critical forefronts of earlier efforts—naming the state’s role in perpetuating violence and pushing to end violence against women (rather than only reacting to it)—became increasingly absent from feminist anti-violence work. Instead, anti-violence programs became more professionalized and institutionalized, resourced by federal funding and aligned with the criminal legal system. The 1994 Violence Against Women Act (“VAWA”)—the first federal law to focus on violence against women—characterized this tension, as VAWA represented decades of work not only to illuminate the severity of violence against women and provide much-needed resources for survivors, but also an increasing shift toward seeing the criminal legal apparatus and its expansion as the solution

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51 See generally JOY JAMES, RESISTING STATE VIOLENCE: RADICALISM, GENDER, AND RACE IN U.S. CULTURE 24–26 (1996) (analyzing state violence on both international and domestic fronts with keen attention to the interconnected dimensions of racism, capitalism and patriarchy); DANIELLE MCGUIRE, They’d Kill Me if I Told, in AT THE DARK END OF THE STREET 3, 3–39 (2010) (contending that the civil right movement was launched by black women’s efforts to organize to stop sexual violence against black women by white men of which the state was complicit); KIMBERLY SPRINGER, LIVING FOR THE REVOLUTION: BLACK FEMINIST ORGANIZATIONS: 1968–1980 2, 4 (2005) (describing black feminist organizing during the 1970s, which connected efforts to challenge sexism and institutionalized racism simultaneously, including sexual violence against black women by police officers and jail/prison guards).

52 See Mimi Kim, Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, supra note 48, at 197; Beth Richie, Community Accountability: Emerging Movements to Transform Violence, 37 SOC. JUST. 12, 12–13 (2011); Andrea Smith, Preface to THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES xiii–xvii (Ching-In Chen et al., eds., 2011).

53 Andrea Smith, Preface to THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES xiii, xiii (Ching-In Chen et al., eds., 2011) (maintaining that most anti-violence programs were “almost entirely funded by the state,” and describing programs such as the Violence Against Women Act as being unquestioned in their reliance on the criminal legal system to achieve the goals of the anti-violence movement).
to gender-based violence. This approach has become known as “carceral feminism.”

Challenging the logic of carceral feminism, radical feminists of color promoted a vision to end interpersonal and state violence, a recognition of the interlocking nature of gendered and racialized violence, and a strategy of organizing for cultural and social change. In 2001, INCITE! began circulating their analysis and vision through a groundbreaking statement released in partnership with Critical Resistance, a national prison abolitionist organization. The INCITE! Critical Resistance Statement on Gender Violence and the Prison Industrial Complex ended with a call to “social justice movements . . . to develop community-based responses to violence”—strategies that do not rely on the criminal legal system and have mechanisms that ensure safety and accountability for survivors of sexual and domestic violence. Furthermore, “[t]ransformative practices emerging from communities should be documented and disseminated to promote collective responses to violence.” INCITE! also advocated for a strategy it called community accountability, “a process in which a community—a group of friends, a family, a church, a workplace, an apartment complex, a neighborhood, etc.—work together” to:

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54 Mimi Kim, *Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN*, supra note 49, at 203. As Mimi Kim has explained, VAWA 1994 mandated a national domestic violence hotline and established the Office of Violence against Women, opening significant funding and advocacy opportunities for anti-violence programs. Advocates struggling many years for the passage of these provisions were finally able to get this Act passed as an attachment to the Violent Crime Control and Law Enforcement Act of 1994 (Crime Act) under the Clinton Administration, an example of pragmatism or opportunism which took the breath away from many struck by the political and practical implications of this compromise.


59 Id. at 223–26; Sudbury, supra note 45, at 134.
• Promote values that resist abuse;
• Address abusive behavior, and create processes to help people responsible for abuse to account and change;
• Transform the political conditions that reinforce violence; and
• Provide safety for people who experience violence that also respects their self-determination.\(^6^0\)

Organizations and collectives largely comprised of women of color and queer people of color increasingly came together to document or strategize around their existing or emergent experiments with community accountability and the broader framework anchoring the strategy, which became known as transformative justice.\(^6^1\) GenerationFIVE is a transformative justice organization that survivors of child sexual abuse started with a vision of ending child sexual abuse in five generations.\(^6^2\) Its members defined the goals of transformative justice as three-fold:

Transformative Justice seeks to provide people who experience violence with immediate safety, long-term healing and reparations; to demand that people who have done harm take accountability for their harmful actions, while holding the possibility for their transformation and humanity; and to mobilize communities to shift the oppressive social and systemic conditions that create the context for violence.\(^6^3\)

Networks of largely informal organizations and collectives that work toward these goals devoid of linkages to state institutions (from the criminal legal system to the child welfare system) comprise the contemporary transformative and community accountability movement.\(^6^4\)

\(^6^0\) Community Accountability: How Do We Address Violence Within Our Communities?, INCITE!, https://incite-national.org/community-accountability/ (last visited Nov. 17, 2019).
\(^6^1\) See Andrea Smith, Preface to The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities, supra note 53, at xiii–xvii.
\(^6^3\) GENERATIONFIVE, ENDING CHILD SEXUAL ABUSE: A TRANSFORMATIVE JUSTICE HANDBOOK 45 (2017).
I began learning about the movement for transformative justice and community accountability fifteen years ago when I joined the Washington, D.C. chapter of INCITE! Women of Color Against Violence. The movement resonated with my lived experience as a Black woman and sexual abuse survivor, along with my values as a prison abolitionist and follower of Jesus. At the time, I was also involved in local efforts for juvenile justice reform, which were often stalled or reversed because of high-profile incidents of “youth violence.”

I, along with other advocates for reform, attested that the legislation—often introduced as anti-violence measures to benefit young people—actually placed more young people at risk of harm by expanding the tentacles of the criminal legal system into their lives. The transformative justice and community accountability movement offered me analysis, vision, and strategies that recognized the reality and horror of direct violence within communities—including gun violence and sexual abuse—while also recognizing the reality and the horror of violence inflicted against entire communities through punitive policies and the increasing presence of law enforcement personnel.

In 2007, I was awarded a Soros Justice Fellowship from the Open Society Institute to engage young people impacted by these multiple sources of violence in learning about and promoting strategies for challenging violence within communities that do not depend upon prisons, policing and punitive policies. Ultimately, this work led me to launch and direct the Visions to Peace Project, a short-term youth leadership development and anti-violence organizing initiative that principles of transformative justice informed.

However, my the non-profit industrial complex, and the limitations of reliance on non-profit institutions and foundation funding presents to holistic anti-violence efforts).

65 See Johonna R. McCants, Re-Visioning Violence: How Black Youth Advance Critical Understandings of Violence in Climates of Criminalization 89–90 (2009) (unpublished Ph.D. dissertation, University of Maryland, College Park) (on file with University of Maryland Libraries) (challenging the discourse of youth violence as reifying criminalization of Black youth, and suggesting the term “violence against youth” be used instead to point to a nexus of violence experienced by black youth which include but go far beyond gun violence within urban communities).

66 Id.


68 I describe the work of the Visions to Peace Project in more detail in: Johonna Turner, Transforming Trauma: Wounded Healing in the Way of Jesus, in MAKING PEACE WITH FAITH 189 (Michelle Garred & Mohamed Abu-Nimer eds., 2018).
first step was to learn directly from organizations who were already active in creating and experimenting with visionary approaches to safety and justice. Thus, I traveled to cities including Chicago, San Francisco, Oakland, and New York City to talk with organizers and activists, attend forums and conferences, and later design and present workshops alongside those who became mentors to me.\(^{69}\)

Nearly ten years later, as an educator and advocate of restorative justice, I began to look and long for the robust critical analysis, emancipatory vision, and liberatory approaches that captured my attention as a young adult. I not only found what I was longing for by reconnecting with the transformative justice and community accountability movement, but I also came to realize that there were restorative justice practitioners (some of whom were also active in transformative justice organizing and many whom were not) who worked from similar analytical orientations, objectives, and strategies. Many of these practitioners, though not all, were women of color who were seemingly shaped by participation in social justice movements aiming to transform power relations, institutions, and group relationships.\(^{70}\) Like advocates of transformative justice, their ideas and efforts reflected a critical race feminist approach to restorative justice. In what follows, I seek to synthesize what I have learned from these overlapping groups of practitioners over the past fifteen years about what a critical race feminist approach contributes to restorative justice, particularly as we consider sites and forms of interlocking racial and gendered harms. Specifically, I will sketch the broad contours of ten gifts that critical race feminism offers to restorative justice: gifts of consciousness, gifts of vision, and gifts of strategy.\(^{71}\)

\(^{69}\) Mimi Kim, Rachel Herzing, Shira Hassan, Dominique McKinney, Mariame Kaba, Marshall Trammell, Janelle White, Ejeris Dixon, Isaac Ontiveros, Ann Russo and RJ Maccani are but a few of those who generously shared their insights and wisdom with me. Moreover, I learned from a myriad of organizations and collectives including Creative Interventions, Critical Resistance, SpiritHouse, the Young Women’s Empowerment Project in Chicago, the Rogers Park Young Women’s Action Team, GenerationFIVE, San Francisco Women Against Rape, and the Audre Lorde Project’s Safe OUTside the System Collective.

\(^{70}\) For profiles on a few such practitioners, see CARL STAUFFER & JONNAR TURNER, ROUTLEDGE INTERNATIONAL HANDBOOK OF RESTORATIVE JUSTICE xiii-xxi (Theo Gavrielides ed., 2019).

\(^{71}\) The framework of “consciousness, vision, and strategy” comes from Project South: Institute for the Elimination of Poverty and Genocide, who assert that consciousness, vision and strategy are the three building blocks of effective social movements. WALDA KATZ-FISHMAN & JEROME SCOTT, A MOVEMENT RISING: CONSCIOUSNESS, VISION, AND STRATEGY FROM THE BOTTOM UP, in PUBLIC SOCIOLOGIES READER, supra note 17, at 69–81.
II. Gifts of Critical Race Feminism

A. Gifts of Consciousness

1. Integrate your own identity and experiences.

Critical race feminist approaches insist that we locate ourselves and identify our multiple and shifting relationships to power and privilege, oppression and victimization, complicity in the exploitation of others, and participation in efforts for social change.72 For restorative justice advocates and practitioners, integrating personal identities and experiences includes understanding, acknowledging, and naming relationships to harm and healing, notions of justice and injustice, and past efforts at repair, reconciliation, and transformation.73 Being clear about what critical race feminists call our ‘positionality’ enables us to draw more deeply from the insights generated from personal experiences, including individual and collective experiences of being harmed, and of being responsible for harm.74 My personal experience as an incest and sexual abuse survivor has not only provided me with a deep level of critical insight and vision, but


73 nuri nusrat, who created the first restorative justice diversion program for young people charged with sexually harming others, began a conversation about this topic by introducing panelists through such a practice:

I also wanted to just orient us around why we do this work and so I'll go first. So why do I care about sexual harm? Why do I care about using restorative justice to address sexual harm? Both my parents are child sexual abuse survivors and I think that if I really think about why I do this work it's that I want away forward that my parents didn't have the opportunity to have and the way forward for me looks like healing and accountability and stopping the harm while also making space for love and there's space. My mom loved the person that harmed her and did until she passed and so I think that honoring her wisdom and agency rather than pathologizing her for loving that person is something that feels important to me.


74 Restorative justice practitioner sujatha baliga, a former public defender and victim advocate, models this principle by consistently integrating her experience as a survivor of child sexual abuse and incest within her commitment to and practice of restorative justice. For example, she writes:

As a survivor of child sexual abuse, sexual assault, and rape, I’ve often wondered what justice would look like for the sexual violence I’ve endured. I, like professor Christine Blasey Ford and the vast majority of survivors, never reported any of the men who violated me. Even as a child, and later, as a young woman, I knew what I needed could not be delivered by a school expulsion hearing or a court proceeding.

is also a source of motivation and commitment to work for liberatory strategies for safety and justice. Finally, we can better see and acknowledge the limitations of our own understanding when we examine our social identities and experiences in relation to the individuals with whom and communities that we work alongside.

2. Commit to a holistic anti-violence agenda.\(^{75}\)

Nonviolence educators have taught us that by expanding our understanding of what counts as violence, we are more equipped to respond to violence without a contradictory reliance on violent strategies.\(^{76}\) Furthermore, the critical race feminist commitment to intersectionality, as well as its recognition that law and legal systems are not experienced as benevolent and helpful resources for all, but are often harmful and oppressive, call for understanding violence as intersectional and as encompassing institutional and state-sanctioned sources of harm.\(^{77}\) For the organizers of the Color of Violence conference, held in 2000, a holistic anti-violence agenda that places women of color at the center of anti-violence efforts involves challenging violence against women of color in all its forms, including attacks on immigrants’ rights and Indian treaty rights, the proliferation of prisons, militarism, attacks on the reproductive rights of women of color, medical experimentation on communities of color, homophobia/heterosexism and hate crimes against lesbians of color, economic neocolonialism, and institutional racism; and to encourage the anti-violence movement to reinsert political organizing into its response to violence.\(^{78}\)

A holistic anti-violence agenda is critical for advocates of restorative justice who remain vulnerable to co-optation by individuals and institutions who seek to use restorative justice to silence or stonewall survivors of gender violence and/or to expand, rather than

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\(^{75}\) Sudbury, supra note 45, at 136–37, 139.

\(^{76}\) LAURA SLATTERY ET AL., ENGAGE: EXPLORING NONVIOLENT LIVING xvii (2005).


curtail, the budgets, mandates, and operations of criminal justice agencies and institutions.\(^79\)

3. Acknowledge multi-layered histories of harm.\(^80\)

Both restorative and transformative justice approaches emphasize the centrality of survivor needs within processes to respond to harm and prevent further harm.\(^81\) However, transformative justice and approaches to restorative justice guided by critical race feminism acknowledge multi-layered histories of harm.\(^82\) This perspective holds that it is possible to put a survivor’s needs in a specific situation at the center, and also acknowledge that the person responsible for the harm may also be a survivor of violence.\(^83\) Critical attention to multi-layered histories of harm reflects the attention to complexity, intersectionality, history, and humanity at the heart of critical race feminism.\(^84\)


\(^80\) Oakland-based restorative justice trainer and educator Robert Howard introduced this language to me in a webinar I hosted saying:

[H]arm is multi-layered. What comes to mind is in the moment that we’re talking about one specific harm it feels complex . . . we’re not usually just talking about that one harm or that one circle of people involved in that story. We’re thinking also about the macro . . . It’s really hard for me—whenever I’ve had a question asked about harm, or time when I've harmed somebody else, or been in circle facilitating when someone has done harm—to focus only on what they did and not why they did it. What has happened to you that created that to be okay or what made that moment real for you? It usually connects back to some other harm. So, it’s hard to just sit in this one place where we’re in two possible situations at the same time. [I]t’s complex, It’s multi-layered. There’s power. There’s agency. There’s a lack of consequences. There’s a privilege to be able to avoid consequences with some identities or cultures. There’s so much there, that yeah, it’s multi-layered.


\(^83\) Restorative justice practitioners Sonya Shah and nuri nusrat of the Ahimsa Collective, encourage supporting people who have violated others in being accountable by starting with that person’s experiences as a survivor of serious harm, helping them to grapple with their own trauma and victimization, including their experiences of shame. Sonya Shah & nuri nusrat, Project Nia & Bernard Ctr. for Research on Women, Workshop on How to Get to Interpersonal Accountability, at *Building Accountable Communities: A National Gathering on Transforming Harm* (Apr. 27, 2019); see also nusrat et al., *supra* note 73.

B. Gifts of Vision

1. Learn and promote the ideas and insights of groups and communities that are most impacted by harm, oppression, and violence.

Critical race feminists emphasize that those who are placed at increasingly vulnerable positions in society (for example, those who experience multiple, interlocking oppressions) are uniquely able to offer an emancipatory social analysis and vision. Critical race feminism also imparts that the individuals and groups that harm, oppression, and violence impact the most must be at the center of theorizing and praxis. For restorative justice advocates, this insight has significant implications for whose stories of harm and healing guide the goals of restorative justice, how restorative justice is practiced, and where restorative justice is situated within communities (for example, within informal networks, non-profit organizations, or criminal justice agencies). Transformative justice and community accountability has been largely advanced through projects aimed at collecting and disseminating counter-stories that reveal how dominant institutional approaches perpetuate the violence such projects purport to resolve. Furthermore, these projects use a bottom-up strategy of recovering concealed and transformative approaches employed by communities positioned at ‘dangerous intersections’ of institutional and interpersonal violence. The critical race feminist approach of amplifying...
the stories of communities that are not only marginalized but are also responding with creativity and insight is essential to cultivating a more vibrant imagination among advocates of restorative justice.\(^89\)

2. Foster a shared political vision of a world that does not depend upon prisons and policing for safety and security.\(^90\)

People are more likely to turn to people they know for help when facing intimate violence, rather than seek intervention from state institutions.\(^91\) The implications of this insight, alongside the recognition of a violent and oppressive criminal legal system, have helped make the political vision of prison abolition an explicit component of critical race feminist approaches to reparative justice.\(^92\) Providing a cogent argument for prison abolition, feminist scholar and activist Professor Angela Y. Davis insists that we stop trying to imagine a new system that would take the place of the current prison-industrial complex and instead:

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\text{[I]} \text{magine a constellation of alternative strategies and institutions, with the ultimate aim of removing the prison from the social and ideological landscapes of our society. In other words, we would not be looking for prisonlike substitutes for the prison, such as house arrest safeguarded by electronic surveillance bracelets.}
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\(^89\) See id. at 4.


\(^91\) Mimi Kim, \textit{Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges}, in \textit{RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN}, supra note 48, at 216; \textit{STORYTELLING \\& ORG. PROJECT}, supra note 88. “In cases of sexual and domestic violence, the community often sides with the perpetrator rather than the victim. Thus, developing community-based responses to violence cannot rely on a romanticized notion of ‘community’ that is not sexist, homophobic, or otherwise problematic. We cannot assume that there is even an intact community to begin with. Our political task then becomes to create communities of accountability.” Andrea Smith, \textit{Preface} to \textit{THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES}, supra note 53, at xvi.

\(^92\) See Harris, supra note 9, at 211.
Rather, positing decarceration as our overarching strategy, we would try to envision a continuum of alternatives to imprisonment—demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance.  

Seen through this lens, restorative justice is a necessary but insufficient component to create a society “in which safety and security will not be premised on violence or the threat of violence [but] on a collective commitment to guaranteeing the survival and care of all peoples.” By committing to and promoting a broader and more daring political vision that envisions a range of deep-rooted systemic correctives to dominant social structures and arrangements, restorative justice practitioners can better work alongside other social justice movements combating violence and injustice.

3. Recognize and confront systems of oppression.

Critical race feminists understand violence as rooted in systems of oppression including white supremacy, patriarchy, and global capitalism. Therefore, recognizing and confronting these systems must be part of what it means to challenge harm, including racial and gender violence. Transformative justice organizers hold a pervasive commitment to recognize the transforming social and political conditions at the root of violence, including harmful dynamics of

95 Sara Kershnar et al., Generation Five, Toward Transformative Justice 4 (2007), http://www.generationfive.org/wpcontent/uploads/2013/07/G5_Toward_Transformative_Justice-Docu-ment.pdf; Harris, supra note 9, at 210. Angela Y. Davis also contends, “Alternatives [to incarceration] that fail to address racism, male dominance, homophobia, class bias, and other structures of domination will not, in the final analysis, lead to decarceration and will not advance the goal of abolition.” Davis, supra note 93, at 108.
oppression within families and communities. In fact, this commitment is what proponents of transformative justice say most differentiates articulations and practices of transformative justice from restorative justice. Yet, although a commitment to transforming systems of oppression is not articulated within mainstream restorative justice literature, grassroots restorative justice practitioners often reflect this commitment in their praxis. Those that operationalize critical race feminist frameworks are both attentive and responsive to the existence of a matrix of domination and its relationship to individual and institutional harms.

C. Gifts of Strategy

1. Engage in political education to dismantle harmful cultural and social norms.

Critical race feminist frameworks contribute a focus on engagement in political education in order to challenge the harmful logics that perpetuate or justify direct and systemic violence. Political education refers to a process of building critical consciousness of how society is organized and how we can play a role in transforming harmful power relations and social structures. Political education about, for example, race and racism, gender and patriarchy, class and capitalism, sexuality and heterosexism, (dis)ability and ableism, and immigration status and xenophobia, should be a critical component of

99 “A defining feature of [transformative justice] is its commitment to change conditions in order to prevent further and/or future harms.” GENERATIONFIVE, supra note 63, at 37.
100 As trainer and organizer Ejeris Dixon once told me in an interview, “Particularly most people doing this work within communities of color, I think, have some analysis of state violence, and intersecting forms of oppression, and this point in the game, you know.” Johonna Turner, Creating Safety for Ourselves, in COLORIZING RESTORATIVE JUSTICE (Edward Valandra ed., Living Justice Press, forthcoming 2020).
101 Harris, supra note 9, at 210.
the training and formation of restorative justice practitioners. Political education is also important to provide within restorative justice processes in order to dismantle the harmful cultural and social norms that encourage and sustain individual harms.

2. Pursue long-term engagement strategies as prerequisite or alternative options to “primary-party encounter” models.

Citing inadequate safety mechanisms and insufficient attention to power dynamics, many anti-domestic violence and sexual assault advocates have been distrustful of restorative justice because of its reliance on encounter models that bring the primary parties—persons who have been violated and the persons who violated them—together for face-to-face dialogue. Alternative options rely on long-term interaction with persons harmed and persons directly responsible, separately and/or long before bringing people together for dialogue. One common approach to community accountability in

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104 nur i nusrat provides an example of the need and uses of political education within restorative justice approaches to sexual harm among youth:

> [P]olitical education is necessary . . . the person that's done the harm and the survivor—everybody needs tools, support, and agency. And for the people that have done the harm we want them to be able to care about what happened to the survivor and care and understand why they did it and understand the impact and want to be accountable. And so everyone needs resources for that. Some of that is literally just sitting with people and asking questions and really listening, . . . There's another case I did and the person that was harmed wanted the person that harmed her to listen to this podcast called “The Heart” (I think) on consent and it was a four-part podcast and she was like, ‘from my experience with this person, they didn't understand what consent was and so this is important to me.’ And that was part of what we did, right? And so political education means kind of unpacking the messages that we're getting around sex.

nusrat et al., supra note 73.

105 Mimi Kim, Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, supra note 48, at 205.

106 Philly Stands Up (PSU), a collective in Philadelphia was formed to work with men who committed sexual assault using community accountability approaches: “Our work departed from traditional RJ practice mainly in that we never asked the survivor to sit down with the person who caused harm. In the aftermath of a sexual assault, this experience would be tremendously retraumatizing and unproductive.” PSU which was primarily comprised of white cis-gender men in Philadelphia’s anarcho-punk community, also described their work as informed by queer, gender-nonconforming, and women of color-led transformative justice organizations. Esteban L. Kelly, Philly Stands Up: Inside the Politics and Poetics
cases of sexual assault is to develop a team of supporters for the person who was assaulted; team members support the survivor in naming their needs and seeking healing. Simultaneously, a different team works with the person who committed the assault; this team works to facilitate and support accountability, and address material and psycho-social needs (e.g., unemployment, healing from historical abuse). The process often lasts more than a year and does not necessarily result in a face-to-face dialogue between the parties. Commitment to long-term engagement strategies prioritizes safety and healing for survivors, healing and accountability for persons responsible for harm, and the related needs and responsibilities of those surrounding them. Long-term engagement also involves intentional and strategic efforts at consciousness-raising and cultural change within the social and geographic spaces where harm has occurred.

3. Utilize sustained and collective approaches to prevention, intervention, and response including community organizing.

Community organizing—a process of building, mobilizing, and investing in groups of people to shift power relations and create new ways of living and existing over time—is fundamental to the prevention, intervention, and response to racial and gender violence. Community organizing acknowledges that communities are

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Id. at 44–45.

In the aforementioned case of Philly Stands Up, a sister organizer, Philly’s Pissed, was first started to support cisgender women who were sexually assaulted. Id. at 44–45.

Id. at 56.

Id. at 56–57.

“Working from a transformative justice framework means that PSU acknowledges the broader systems of oppression (e.g., racism, male supremacy, capitalism, and the prison-industrial complex) that instigate sexual assault. Furthermore, we do not assign sole culpability for the assault on the perpetrator or the ‘person who has caused harm.’ Rather, we ask: ‘What did the community do to create and support safer spaces or to ensure cultural competency in communicating sexual needs, desires, and boundaries?’” Id. at 49.

See id. at 54–55.

The Storytelling and Organizing Project describes their approach to developing collective responses for addressing intimate violence through community organizing: “For those of us engaged in community organizing projects, we gather together to develop our own solutions and responses to the problems we face rather than relying on (or actively being denied) responses by those in power. We gather together because we understand that we are the experts on our own situations and that we are the essential agents in transforming our conditions.” STORYTELLING & ORG. PROJECT, supra note 88, at 4, 5.

not already cohesive or healthy, and, may need to be built.\textsuperscript{115} Furthermore, the integration of grassroots organizing acknowledges the need for learning and transformation within communities—for example, that there will not already be a widespread commitment to standing up for survivors of gender violence, challenging racism, or resisting heterosexism.\textsuperscript{116} Restorative justice practitioners can learn from transformative justice approaches that rely on community organizing to transform the conditions that fuel racial and gendered violence.\textsuperscript{117} Other sustained and collective approaches include trauma healing, critical dialogue and community education.\textsuperscript{118}

4. Build capacity to challenge violence within informal networks (for example, groups of friends, school clubs, social organizations, faith-based small groups, study circles, etc.).

Building capacity to challenge violence within informal networks disconnected from the state is crucial to ending intimate and state violence rooted in white supremacy and patriarchy among other systems of domination.\textsuperscript{119} Given that the meaning of ‘community’ is often amorphous and ambiguous within community-based approaches for responding to harm, it is important to identify specific networks of relationships through which people can access resources

\textit{Interventions to Intimate Violence: Defining Political and Pragmatic Challenges, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, supra note 48, at 196.}
\textsuperscript{115} See Mimi Kim, \textit{Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, supra note 48, at 196.}
\textsuperscript{116} Harris, \textit{supra} note 9, at 221 (stating that although “restorative justice advocates have endorsed family conferencing and mediation as tools for healing the wounds caused by criminal behavior[,]” in cases where someone is a survivor of intimate violence, expecting resolution involving close friends and family is “naive at best, and dangerous at worst.”). “In cases of sexual and domestic violence, the community often sides with the perpetrator rather than the victim. Thus, developing community-based responses to violence cannot rely on a romanticized notion of ‘community’ that is not sexist, homophobic, or otherwise problematic. We cannot assume that there is even an intact community to begin with. Our political task then becomes to create communities of accountability.” Andrea Smith, \textit{Preface to THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES, supra note 53, at xvi.}
\textsuperscript{118} For example, the Audre Lorde Project’s Safe OUTside the System Collective created a community organizing campaign to respond to and prevent stranger-based bias violence perpetrated against queer people of color in public spaces. Id.
\textsuperscript{119} See \textit{id.}
and support for healing, accountability, and transformation. Building capacity in these spaces, where there is already trust, is key to challenging intimate violence and other sites of harm. An investment in informal networks can include bringing networks of people together to deepen relationships, build understanding, develop and practice skills, and participate in critical dialogue. It can also involve creating and providing resources that enable groups of people connected through care and concern for one another to effectively and autonomously intervene in situations of abuse. Building capacity within relational networks reflects the critical race feminist principle of praxis and a direct engagement in transformative resistance.

**CONCLUSION**

In *Freedom Dreams: The Black Radical Imagination*, historian and cultural critic Robin Kelley emphasizes that those of us interested in the development of theory for social change must theorize through practice and engagement in grassroots political

120 The Bay Area Transformative Justice Collective created the concept of pods to help people identify the informal networks they could turn to in relation to “violent, harmful and abusive experiences, whether as survivors, whether as survivors, bystanders or people who have harmed. These would be the people in our lives that we would call on to support us with things such as our immediate and on-going safety, accountability and transformation of behaviors, or individual and collective healing and resiliency.” Mia Mingus, *Pods and Pod Mapping Worksheet*, BAY AREA TRANSFORMATIVE JUST. COLLECTIVE (June 2016), https://batjc.wordpress.com/pods-and-pod-mapping-worksheet/.

121 Id.

122 The Bay Area Transformative Justice Collective invites people to attend their workshop and training events with people in their pods in an effort to build capacity within networks of people in relationships of trust with each other. Their events include multiple-hour ‘labs’ on foundational skills for healthy and accountable relationships including how to listen actively, how to share accountability, and how to give a good apology. *BATJC Transformative Justice Lab: Communication Skills Building*, BAY AREA TRANSFORMATIVE JUST. COLLECTIVE, https://batjc.wordpress.com/2017/10/03/batjc-transformative-justice-lab-communication-skills-building/ (last visited October 5, 2019).

123 An example of this approach is Creative Intervention’s development of a comprehensive toolkit to guide community-based interventions to interpersonal violence. The toolkit is based on their experiences and stories from a pilot project in which Creative Interventions staff facilitated dialogue and planning among everyday people seeking to stop interpersonal violence within families without state intervention. *The Creative Interventions Toolkit: A Practical Guide to Stop Interpersonal Violence*, CREATIVE INTERVENTIONS (2012), http://www.creative-interventions.org/tools/toolkit/.

124 Shawn Ginwright uses the term ‘transformative resistance’ to describe an oppositional stance to repression in everyday life that also produces critical consciousness, connection, and community resilience. For Ginwright, “transformative resistance is precisely the capacity to cultivate and sustain what Melucci called ‘submerged networks’ of everyday political life where actors produce and practice alternative frameworks of meaning, social relations, and collective identity below the horizon of established or officially recognized institutions.” Shawn Ginwright, *Toward a Politics of Relevance: Race, Resistance and African American Youth Activism*, SOC. SCI. RES. COUNCIL http://ya.ssrc.org/african/Ginwright/ (last visited October 7, 2019).
Furthermore, he draws our attention to the intellectual contributions of social movements:

Social movements generate new knowledge, new theories, new questions. The most radical ideas often grow out of a concrete intellectual engagement with the problems of aggrieved populations confronting systems of oppression. For example, the academic study of race has always been inextricably intertwined with political struggles. Just as imperialism, colonialism, and post-Reconstruction redemption politics created the intellectual ground for Social Darwinism and other manifestations of scientific racism, the struggle against racism generated cultural relativist and social constructionist scholarship on race. The great works by W.E.B. Du Bois, Franz Boas, Oliver Cox, and many others were invariably shaped by social movements as well as social crises such as the proliferation of lynching and the rise of fascism. Similarly, gender analysis was brought to us by the feminist movement, not simply by the individual genius of the Grimke sisters or Anna Julia Cooper, Simone de Beauvoir, or Audre Lorde. Thinking on gender and the possibility of transformation evolved largely in relationship to social struggle. Progressive social movements do not simply produce statistics and narratives of oppression; rather, the best ones do what great poetry always does: transport us to another place, compel us to re-live horrors and, more importantly, enable us to imagine a new society.\textsuperscript{126}

Social movement organizations including activist collectives and community organizing groups continue to serve as catalysts for critical theory and incubators of emancipatory vision today. It is imperative that scholars and practitioners look to and amplify the analysis, visions, and strategies emerging from such spaces. Such was my goal in this essay.

\textsuperscript{125} \textit{KELLEY, supra note 36, at 9.}

\textsuperscript{126} \textit{Id.}
I have highlighted individuals and collectives comprising the contemporary transformative justice movement and women of color who are restorative justice practitioners grounded in social justice movements as the purveyors of a critical race feminist approach to reparative justice. Furthermore, I have identified ten gifts proffered by their critical race feminist praxis. There are gifts of consciousness: the integration of our own identity and experiences; commitment to a holistic anti-violence agenda, and the acknowledgement of multi-layered histories of harm. There are gifts of vision: promotion of the ideas and insights of those most impacted by multiple forms of violence; a shared political vision of a world that does not rely on the criminal legal system for safety; and the recognition and confrontation of systems of oppression, even as they live within us. There are also gifts of strategy: engagement in political education to dismantle harmful cultural and social norms; the pursuit of long-term engagement strategies as pre-requisite or alternative options to primary-party encounter models; the use of sustained and collective approaches to preventing, intervening and responding to harm; and an investment to build capacity for challenging violence within non-state-based informal networks.

A critical race feminist approach to restorative justice requires more of us. It requires us to think about and grapple with our own histories of victimization and our participation in a wider range of harms. It requires us to confront and transform our relationship to institutionalized oppression and our complicity with the state. It requires us to learn how to disrupt and respond to harm beyond the cases taken up by formal restorative justice organizations or programs in ways that encompass all aspects of our lives—including the partner abuse that we may suspect is occurring in the apartment building below us, and the police harassment and abuse that we might witness in public spaces. It requires us to be more analytical, more

127 Organizer Ejeris Dixon, the founding director of the Audre Lorde Project’s Safe Outside of the System Collective, put it this way: “Community safety is not a certification that we place on our resumes. We have the invitation to practice with one of our most precious resources, our lives.” Ejeris Dixon, Building Community Safety: Practical Steps Toward Community Liberation, in WHO DO YOU SERVE, WHO DO YOU PROTECT? POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 166 (Maya Schenwar et al. eds., 2016).
visionary, more creative, and more radical in our approaches to safety and justice.¹²⁸

¹²⁸ In 1969, educator, organizer and activist Ella Baker defined the need for a radical political commitment within efforts for justice: “In order for us as poor and oppressed people to become a part of a society that is meaningful, the system under which we now exist has to be radically changed. This means that we are going to have to learn to think in radical terms. I use the term radical in its original meaning—getting down to and understanding the root cause. It means facing a system that does not lend itself to your needs and devising means by which you change that system.” BARBARA RANSBY, ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION 1 (2003).
Table 1
Race, Gender and Restorative Justice: Ten Gifts of a Critical Race Feminist Approach

Gifts of Consciousness

1. Integrate your own identity and experiences.
2. Commit to a holistic anti-violence agenda.
3. Acknowledge multi-layered histories of harm.

Gifts of Vision

4. Learn and promote the ideas and insights of those most impacted by multiple forms of harm, oppression and violence.
5. Foster a shared political vision of a world that does not depend upon prisons, detention centers, and policing for safety and security.
6. Recognize and confront systems of oppression.

Gifts of Strategy

7. Engage in political education to dismantle harmful cultural and social norms.
8. Pursue long-term engagement strategies as pre-requisite or alternative options to "primary-party encounter" models.
9. Utilize sustained and collective approaches to prevention, intervention, and response including community organizing.
10. Build capacity to challenge violence within informal networks (for e.g. groups of friends, campus clubs, social organizations, church-or other religious groups, study circles, extended families, etc.)
RESTORATIVE JUSTICE IN PUBLIC HOUSING:
HOW IMPLEMENTING RESTORATIVE PRACTICES CAN REDUCE EVICTIONS AND RETURN STABILITY TO INDIGENT FAMILIES AND CHILDREN

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ABSTRACT

Exclusionary One-Strike housing policies first implemented in President Clinton’s administration continue to adversely affect indigent, vulnerable tenants and families by vesting housing authorities with broad discretion to evict based on criminal behavior or drug use. The collateral consequences of such evictions include the displacement of families from their neighborhoods and networks, children being forced into new school districts, exclusion from subsidized housing, and homelessness. Similarly, Zero-Tolerance policies in public schools resulted in severe collateral consequences for children, and those policies have been recognized as ineffectual. Restorative justice-based practices have seen success in the public school setting by encouraging positive school climates and productive learning environments. This paper’s aim is to show that the goals of both One-Strike and Zero-Tolerance policies, namely, reducing crime and drug use in neighborhoods and schools, are best effectuated by restorative-based practices focused on inclusion, reparation, and engagement. Because both policies arose out of the same “Tough on Crime” regime, this paper suggests that the same restorative approach to confronting Zero-Tolerance in schools can also be effective in the public housing setting. Thus, this paper suggests several restorative justice-based approaches to confronting housing instability and evictions, including more informed decision making in the eviction process, policy change grounded in research and data collection, community engagement, and housing courts.

INTRODUCTION

A teenage girl was involved in a physical fight at a federally subsidized housing project. No one was hurt, and no charges were pressed against her. The teenager has social and academic disabilities, she sees a counselor and psychiatrist regularly, and she takes medication to control her impulsive behaviors. Her school provides special accommodations, an individualized education plan, and regular reports of her behavior and academic performance. She lives with her grandmother and her brother in housing subsidized by the federal government. The family has lived there for thirteen years.
While it would seem to benefit everyone involved to allow the teenager to continue living with her grandmother and to continue receiving the educational and emotional support that she needs and is accustomed to, the opposite resulted at the hands of the local housing authority. Her behavior was not criminal, she was not arrested, and the altercation happened unbeknownst to the grandmother at a location the grandmother had no control over. And yet, without considering any mitigating circumstances, the housing authority terminated the grandmother’s housing assistance, effectively putting her and her two dependent grandchildren out on the street. This is how one strike eviction policy works against innocent tenants—holding them strictly liable for the acts of family members, with or without knowledge of any alleged criminal activity. Because of the broad discretion granted to public housing authorities in carrying out an eviction, the courts offer very little recourse for evicted tenants.

The U.S. Department of Housing and Urban Development’s (“HUD”) harsh eviction policies serve to exclude vulnerable families from subsidized housing, leaving them with nowhere to turn but shelters and the street. HUD’s exclusionary policies have detrimental effects on anyone with a criminal past and anyone who has a run-in with crime or drug use. This includes innocent tenants whose family members or guests violate HUD’s policies. The wide discretion granted to public housing authorities across the United States to make the eviction decision, together with the goal of keeping public housing communities crime- and drug-free, results in an astounding number of evictions. Particularly when children are involved in such evictions, the

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1 This story is based on a real case that I worked on as an intern with the Central Virginia Legal Aid Society during the summer of 2018. I have received permission from my supervisor to use these facts to illustrate the proposition that housing authorities do not always act in accordance with the letter and the spirit of federal housing regulations, whose goal is to provide safe and affordable housing. Instead, public housing authorities too often strive for administrative and cost efficiency at the expense of vulnerable, indigent, and underserved families and children.


3 See id.


5 See Lane, supra note 2.

collateral consequences of a swift (and usually totally lawful) eviction are severe.\textsuperscript{7} Some of those collateral consequences include the displacement of families from their neighborhoods and networks, children moving into new school districts, exclusion from subsidized housing for indeterminate lengths of time, and ultimately in the worst cases, homelessness.\textsuperscript{8}

This article proposes that one-strike eviction policies and zero-tolerance school discipline policies have similar long-term effects on children and adolescents, in that both policies are exclusionary, overbroad, overly harsh, and stunt the future of children across the United States. Restorative justice practices have been implemented in school discipline contexts to counteract the exclusionary zero-tolerance policies and have seen some success.\textsuperscript{9} Similar practices can and should be implemented when families are facing eviction pursuant to HUD’s federal regime or state and local public housing policies, where tenants’ past criminal records and criminal or drug-related activity while living in public housing typically results in exclusion from public housing.\textsuperscript{10} My aim is to show that implementation of restorative justice practices in communities suffering from endemic poverty, high crime, and poor housing can serve to counteract HUD’s exclusionary policies, thereby keeping poor people from becoming homeless solely because of their criminal records or because of the acts of dependent children or guests. Employing restorative justice practices in the housing realm is a better option for tenant families, landlords, and communities in an effort to combat the harsh collateral consequences of eviction on indigent families and children.

This article argues against one-strike evictions as an effective way to combat crime and drug use in federally subsidized housing communities, paying particular attention to the innocent-tenant scenario, the involvement of children, and the consequences of HUD’s exclusionary policies on their futures as successful, active, and law-


abiding community members. Part I of this article reviews the origin and development of one-strike policies at federal and local levels and the Supreme Court’s interpretation of the law and regulations that support those policies in Department of Housing and Urban Development v. Rucker. Part I then reviews zero-tolerance policies in public education and provides evidence of the failure of such policies. Finally, Part I provides an overview of restorative justice theory and its success in the realm of discipline in public education. Part II analyzes the efficacy of restorative alternatives in combating the collateral consequences of zero-tolerance policies in public education. Part II posits that those collateral consequences also follow from one-strike eviction policies in the public-housing context, and that similar restorative alternatives to those used in school discipline settings should be employed to avoid resorting to evictions, noting anticipated criticisms of this proposition.

I. Background

A. The One-Strike Eviction Policy in Public Housing

1. Origin, Enactment, & Purpose

The One-Strike Rule governs evictions from public housing for alleged criminal activity. The policy “refers to the practice of imposing strict liability on public housing tenants and evicting them for their own alleged criminal activity or that of a member of their household, a guest, or another person under their control—in essence, allowing tenants only ‘one strike’ before they are ‘out.’” The policy creates the “innocent tenant scenario,” allowing a tenant’s eviction “regardless of the tenant’s own fault, knowledge, or ability to control the criminal activity” of a family member or guest. The One-Strike Rule was first enacted by Congress as part of the Anti-Drug Abuse Act of 1988, which amended the 1937 National Housing Act to require that public housing leases include the following language:

[A] public housing tenant, any member of the tenant’s household, or a guest or other person under the tenant’s control shall not engage in criminal activity, including

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11 Id. at 159.
12 Id.
13 Id.
drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be the cause for termination of tenancy.\textsuperscript{14}

This provision, calling for strict lease enforcement and eviction of public housing tenants who engage in criminal activity, was not enforced by most housing authorities until President Bill Clinton’s State of the Union address in 1996.\textsuperscript{15} In his announcement of the “One Strike and You’re Out” Initiative, Clinton explained: “From now on, the rule for residents who commit crime and peddle drugs should be one strike and you’re out.”\textsuperscript{16}

Two months later, President Clinton signed into law the Housing Opportunity Program Extension Act of 1996 (the “Extension Act”),\textsuperscript{17} which established the legal foundation for the One-Strike policy in public housing communities across the United States.\textsuperscript{18} Housing authorities across the country were instructed to prohibit admitting any person to public housing “if...it has reasonable cause to believe that such person’s illegal use...of a controlled substance, or abuse...of alcohol, may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.”\textsuperscript{19} The 1996 amendment provided:

Each public housing agency shall utilize leases which provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household,
or any guest or other person under the tenant’s control, shall be the cause for termination of tenancy.\textsuperscript{20}

HUD added this provision, requiring state and local housing authorities to include this language in tenant leases, in response to inconsistent enforcement of this provision by public housing authorities.\textsuperscript{21} Furthermore, President Clinton linked funding allocations for public housing authorities to the number of one-strike evictions they carried out each year, which incentivized housing authorities to act on allegations of criminal activity swiftly and harshly.\textsuperscript{22} Thus, the new rule became “the toughest admission and eviction policy” ever implemented by HUD, effectively instructing housing agencies to exercise no discretion when a tenant or guest engaged in criminal activity.\textsuperscript{23}

The purposes and justifications behind the One-Strike rule are multifold. The broad purpose behind the Housing Act of 1937 (“the Act”), of which the One-Strike rule became a part, is to provide decent, safe, and affordable housing for families of low income.\textsuperscript{24} The legislation provides for subsidies to be paid from the United States government to local public housing agencies in order to improve living conditions for low-income families.\textsuperscript{25} Further, the Act’s declaration of policy states that “it is the responsibility of the [federal] Government to promote and protect the independent and collective actions of private citizens to develop housing and strengthen their own

\textsuperscript{20}42 U.S.C. § 1437d(1)(6) (2016). The phrase “on or off such premises” resulted from an amendment made by the Housing Opportunity Program Extensions Act of 1996. Section 1437(d)(1)(6) originally accounted for criminal activity that took place “on or near such premises.” Housing Opportunity Program Extension Act of 1996 § 9. The change in language clearly broadens the reach of the housing authority’s control over the conduct of its tenants. \textit{See id.}

\textsuperscript{21}\textit{See Clinton, supra} note 16 (“Believe it or not, the federal law has actually authorized one strike eviction since 1988. But many public housing authorities have not understood the scope of their legal authority.”).

\textsuperscript{22}\textit{See John F. Harris, Clinton Links Housing Aid to Eviction of Crime Suspects; Civil Libertarians Attack 'One-Strike Policy' That Affects Defendants Not Yet Convicted, WASH. POST.} (Mar. 29, 1996), https://www.washingtonpost.com/archive/politics/1996/03/29/clinton-links-housing-aid-to-eviction-of-crime-suspects/fdf1a35b-a407-4f55-bf47-5ad67574da5f; \textit{see also One Strike Eviction Rule to Be Enforced in Public Housing, TIME} (Mar. 28, 1996), http://content.time.com/time/nation/article/0,8599,6137,00.html (“Now, housing authorities will be graded on their compliance with the law, low scores resulting in lowered federal aid and increased supervision.”).

\textsuperscript{23}\textit{U.S. DEP’T OF HOUS. & URBAN DEV., supra} note 18.

\textsuperscript{24}\textit{42 U.S.C. § 1437(a)(1)(A)–(B) (2019). (“It is the policy of the United States to promote the general welfare of the nation . . . to assist States . . . to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families; to assist States . . . to address the shortage of housing affordable to low-income families.”).}

\textsuperscript{25}\textit{Id. § 1437(a)(2).}
neighborhoods.” The Act seeks to “promote the goal of providing decent and affordable housing for all citizens.”

Responding to public comment following the 1988 amendments, HUD stated that the purpose of the one-strike policy was to “promote the welfare of public housing residents in general, and … support the effective management of the housing.” HUD justified the harsh public housing eviction policy by stating that families that could not control drug-related or other criminal activity were a threat to other public housing residents. Further, and most troubling, HUD justified the one-strike policy for reasons of prosecutorial efficiency and cost—that it would be too difficult for a public housing authority to establish that a tenant had knowledge of or could have foreseen or prevented a crime.

Another stated purpose of the One-Strike legislation was uttered by President Clinton himself in his 1996 State of the Union address: “Our first challenge is to cherish our children and strengthen America’s families. Family is the foundation of American life. If we have stronger families, we will have a stronger America.” Thus, Clinton challenged local housing authorities to enforce the one-strike rule in response to the “[c]riminal gang members and drug dealers [who] are destroying the lives of decent tenants.”

2. Implementation

In the wake of the Clinton administration’s more stringent eviction legislation, which broadened the reach of proscribed tenant conduct, HUD developed guidelines to press public housing agencies to implement screening policies in order to “keep out drug dealers and other criminals.” In an effort to clarify what public housing agencies were authorized to do, HUD hosted a summit to ensure that public

26 Id.
27 Id. § 1437(a)(4).
29 Id.
30 Id.
31 Clinton, supra note 16.
32 Id.
housing authorities understood the strict policy of “zero tolerance,” updated public housing agencies on the new act and its requirements, and disseminated guidelines.34

Even so, state courts and public housing authorities were divided as to whether the law did in fact permit the eviction of an innocent tenant who lacked knowledge or control over the person responsible for the criminal activity.35

What was clear, however, was that public housing agencies, acting on HUD’s authority to “take full advantage of…stringent screening and eviction procedures,” had adopted exclusionary policies that denied eligibility to applicants even with the most minor criminal backgrounds.36

3. Review of Department of Housing and Urban Development v. Rucker

The Supreme Court’s decision in Department of Housing and Urban Development v. Rucker37 settled the innocent tenant question and held that, under federal law, public housing tenants can be evicted regardless of whether they had knowledge of or participated in alleged criminal activity.38

Overturning the lower courts, the Supreme Court found that Congress did intend to allow housing authorities to evict innocent tenants under HUD’s one-strike policy if they believed it was appropriate.39 The Rucker opinion’s purely textual analysis of Section 1437 omitted any discussion of the Act’s legislative scheme and history.40 The Court ignored the Senate Report accompanying § 1437d(l)(6), which explained:

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34 U.S. DEP’T OF HOUS. & URBAN DEV., supra note 18, at xiv.
38 See id. at 136.
39 Id. at 130.
The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.\footnote{41}

The \textit{Rucker} decision was, and is, recognized as harsh, but proponents of HUD’s strict policies argue that, despite the harsh penalty imposed on evicted tenants, other poor people will pay the price if authorities are denied all the power they need to keep the projects drug-free.\footnote{42} At the time of the \textit{Rucker} decision, there were no precise statistics as to how many people have been evicted under the one-strike policy, but even then, advocates for low-income residents criticized the policy as draconian and unfair and argued that poor people who have no other housing option should not be held strictly accountable for the conduct of their relatives or guests.\footnote{43}

4. \textit{Rucker}’s Progeny and Current State of Affairs

Since \textit{Rucker}, advocates, scholars, and policymakers have conducted substantial research and have accumulated data relating to evictions under the one-strike policy. In Chicago alone, 1390 one-strike evictions occurred between 2005 and 2010.\footnote{44} Analysis of states’ treatment of \textit{Rucker} provides additional data. Cases from Illinois, Vermont, Massachusetts, Kentucky, New Jersey, Ohio, and Washington D.C. show how different jurisdictions handle the Supreme Court’s strict liability standard in innocent tenant eviction scenarios.\footnote{45} However, on a nationwide level, synthesized data on evictions, denials, and terminations of housing assistance is still inadequate. One scholar found that there were 900,000 evictions in 2016, but that number is an underestimate.\footnote{46} Because of the informal nature of eviction proceedings, there

\begin{footnotesize}
\begin{itemize}
  \item \footnote{41}{S. REP. NO. 101-316, at 179 (1990), reprinted in 1990 U.S.C.C.A.N. 5763, 5941.}
  \item \footnote{42}{Lane, supra note 2.}
  \item \footnote{43}{Id.}
  \item \footnote{44}{Angela Caputo, \textit{One and Done}, CHI. REP. (Sept. 1, 2011), http://chicagoreporter.com/one-and-done.}
  \item \footnote{46}{See Brancaccio & Long, supra note 6.}
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is no way to know exactly how many households are denied assistance based on drug-related activity, alcohol use, nonviolent criminal activity, and violent crimes.\textsuperscript{47} Furthermore, it seems likely that these restrictions keep some (financially) eligible households from even applying for help or from reuniting with family members receiving household assistance.\textsuperscript{48} What we do know is that the \emph{Rucker} decision and subsequent HUD guidelines permit housing authorities to read HUD’s policies narrowly in order to ensure “efficient” termination of housing assistance and subsequent eviction.\textsuperscript{49}

\section*{B. The Zero-Tolerance Policy in Public Education}

\subsection*{1. Origin, Enactment, & Purpose}

Zero-tolerance policies emerged in the 1990s, at the same time as one-strike policies in public housing, as part of the Clinton Administration’s “tough on crime” platform.\textsuperscript{50} President Clinton declared, “Our fourth great challenge is to take our streets back from crime and gangs and drugs[,]” and “our schools . . . have a responsibility to help our children to make it and to make the most of their lives and their God-given capacities.”\textsuperscript{51} A zero-tolerance policy calls for the removal of a student from school using a mandatory sanction such as expulsion.
or suspension. These policies leave little or no room for consideration of the circumstances of the student or incident.

The underlying purpose of zero-tolerance policies in school discipline was originally to deter students from bringing weapons into schools, a legislative response to widespread public fear following the Columbine mass shooting. “With this theory in mind, school districts and states began cracking down on minor violations to prevent serious crimes from occurring in the future.” Tied to the War on Drugs, zero-tolerance policies also made suspension and expulsion from school common punishments for having any alcohol or drugs on campus, including tobacco and over-the-counter medications. Because of the broad grant of federal authority to school administrators and teachers, minor, disruptive student behaviors were punished harshly, often leading to absurd results. According to Michelle Alexander, children living in high-crime communities are the most “likely to attend schools with zero-tolerance policies, where police officers patrol the hall, where disputes with teachers are treated as criminal infractions, where a schoolyard fight results in their first arrest . . . [and] find that even at a very young age, even the smallest infractions are treated as criminal.”

2. Implementation & Evidence of the Failure of Zero-Tolerance Policies

Though created with the intent to ensure safe learning environments, the tough zero-tolerance policies have proven to be

53 Id.
56 Id.
ineffective.\textsuperscript{59} Instead, zero-tolerance policies have generated racial disproportionality in discipline, academic failure, high dropout rates, and a clear school-to-prison pipeline.\textsuperscript{60} Further, zero-tolerance policies jeopardize the futures of schoolchildren because their youthful actions are criminalized, which creates a cycle of exclusion through punishment.\textsuperscript{61} In an American Psychological Association report, a task force found that the assumption that only with swift, strict, and uniform zero-tolerance punishments would students be deterred from breaking rules was false.\textsuperscript{62} Instead, the report found:

The notion of deterring future misbehavior is central to the philosophy of zero-tolerance, and the impact of any consequence on future behavior is the defining characteristic of effective punishment. Rather than reducing the likelihood of disruption, however, school suspension in general appears to predict higher future rates of misbehavior and suspension among those students who are suspended. In the long term, school suspension and expulsion are moderately associated with a higher likelihood of school dropout and failure to graduate on time.\textsuperscript{63}

These consequences did not go unnoticed. A large body of research has developed across multiple disciplines documenting the negative consequences of zero tolerance and punitive discipline.\textsuperscript{64} In response to disturbing suspension and expulsion data,\textsuperscript{65} some states have attempted to remedy the crisis by proposing new laws, or replacing or


\textsuperscript{60} See id. at 999–1001 (indicating that the rise in zero-tolerance policies in schools has led to racially disproportionality in discipline, academic failure, high dropout rates, and a clear school-to-prison pipeline).

\textsuperscript{61} Id.


\textsuperscript{63} Id.

\textsuperscript{64} See Daniel Losen et al., Are We Closing the School Discipline Gap?, CTR. FOR CIVIL RTS. REMEDIES 1, 4 (2015) (charting the rates of suspension in 2011 and indicating that secondary schools, on average, reported an annual suspension rate of 10.1%); see also Pamela A. Fenning & Miranda B. Johnson, Developing Prevention-Oriented Discipline Codes of Conduct, 36 CHILD. LEGAL RTS. J. 107, 108–09 (2016).

\textsuperscript{65} See, e.g., CTR. FOR CIVIL RTS. REMEDIES, A SUMMARY OF NEW RESEARCH CLOSING THE SCHOOL DISCIPLINE GAP: RESEARCH TO POLICY 1, 2 (2013) (reporting, for example, that nearly 60% of students have been suspended by the time they graduate high school in Texas).
modifying zero-tolerance policies. In response to this national dilemma, the Council of State Governments Justice Center released a report in 2014 that pulled together consensus-based and field-driven recommendations from over 100 advisors and 600 contributors aimed at “reducing the millions of youth suspended, expelled, and arrested each year while creating safe and supportive schools for all educators and students.” The report’s central recommendation focuses on the critical role of positive school climate and the use of restorative justice in education as the underpinning for productive learning environments.

C. Restorative Justice

1. Restorative Justice Theory Generally

Restorative justice practices seek to heal injuries rather than to assign blame and punishment. [R]estorative justice aims at helping offenders to recognize the harm they have caused and encouraging them to repair the harm, to the extent it is possible. Rather than obsessing about whether offenders get what they deserve, restorative justice focuses on repairing the harm of crime and engaging individuals and community members in the process.

Restorative justice is rooted in the principles of respect, dignity, and the inherent worth and well-being of all people. “[F]requently linked to low-level juvenile offender programs, [restorative justice] expands

2. What Restorative Justice Looks Like in the School Discipline Context

Although restorative justice began as a response to criminal behavior, its practices have spread beyond the criminal justice system to schools.73 “Restorative justice empowers students to resolve conflicts on their own and in small groups, and it is a growing practice at schools around the country. Essentially, the idea is to bring students together in peer-mediated small groups to talk, ask questions, and air their grievances.”74 When focused on improving school safety, promoting positive school learning environments, and increasing academic achievement, restorative justice is based on three core principles: (1) repairing the harm, (2) involving stakeholders, and (3) transforming community relationships.75

The body of research on the ineffectiveness of zero tolerance in schools as a mechanism for improving school safety76 gives credible justification for employing restorative justice practices as alternatives to zero-tolerance policies. As such, states have successfully implemented restorative practices in schools by providing toolkits and trainings and passing school discipline reform laws requiring alternatives to exclusionary discipline.77 Restorative justice, in the context of school discipline, has been shown to address disproportionality in discipline and dismantle zero tolerance.78 “Because the focus is on inclusion and community-based problem solving, restorative justice in schools not only addresses harm but also uses processes that concurrently create a climate that promotes healthy relationships, develops

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74 Matt Davis, Restorative Justice: Resources for Schools, EDUTOPIA (Oct. 4, 2013), https://www.edutopia.org/blog/restorative-justice-resources-matt-davis. Davis’s blog post aggregates resources from various states, which are intended to serve as guides for developing a successful implementation plan for restorative justice programs in classrooms.
75 González, supra note 9, at 270–71.
76 Id. at 269.
77 Id. at 272–73.
78 Id. at 273.
social-emotional understanding and skills, increases social and human capital, and enhances teaching and learning.”

Schools implement restorative practices to counteract ineffective punitive and exclusionary policies in a variety of ways. Operationally, these practices are associated with a non-authoritarian culture of high expectations with high levels of support. For example, a school in California utilizes restorative circles to build community, problem solve, facilitate student and teacher connectivity, and to provide a respectful space for establishing the values for the class based on human dignity and democratic principles. Circles, restorative conferencing, and peer juries are used for more intensive interventions that include repairing damage, reintegrating back into the school after a student absence, and resolving differences. Such practices serve as interventions concurrent with the disciplinary problem, but they can also be preventative by equipping the school with the necessary tools to resolve issues early on, instead of as a reaction.

Restorative justice programs have been successfully implemented in schools in California, Illinois, Michigan, Maine, Texas, Minnesota, and Pennsylvania—just to name a few. These programs have helped strengthen school communities, prevent bullying, reduce student conflicts, and most concretely, have resulted in drastic reductions in suspension and expulsion rates with students reporting improved feelings of happiness and safety. Because schools “are [the] cornerstone for youth socialization and the social control of delinquent behavior,” these positive outcomes are empowering schools across the country to do a better job of socializing and educating America’s youth.

79 Armour, supra note 59, at 1018.
82 Id. at 10, 13.
84 See, e.g., Armour, supra note 59, at 1019–23; Davis, supra note 74.
85 Davis, supra note 74 (aggregating resources from various states, which are intended to serve as guides for developing a successful implementation plan for restorative justice programs in classrooms).
II. Argument

A. Restorative Justice in School Discipline is Effective in Counteracting the Collateral Consequences of Exclusionary Zero-Tolerance Policies

Apart from the direct consequences of zero-tolerance policies, namely, expulsion and suspension, zero-tolerance policies in school discipline settings are problematic because of the many and severe collateral consequences suffered by America’s youth. Such collateral consequences include absence from school, increased dropout rates, disintegration of social and familial networks, removal and displacement from school districts, lost future earning capacity, and the “School-to-Prison Pipeline.” The “School-to-Prison Pipeline” refers to a national trend in which zero-tolerance policies and practices are directly and indirectly pushing students out of school and on a pathway to prison.

As a response to widespread recognition that punitive zero-tolerance policies are unhealthy for students and contradictory to positive school culture, restorative justice practices have been successfully adopted and implemented in schools to address safety and violence, reconstruct discipline models, decrease reliance on exclusionary practices, and ground principles of human dignity and respect. Focusing on the context of a school disciplinary infraction using peer-mediated restorative justice themes and techniques avoids the negative effects of zero-tolerance policies, which “punish students harshly regardless of the severity of the infraction, the existence of mitigating circumstances, or the context in which the conduct occurred.”

Evidence of the impact and efficacy of restorative practices on the collateral consequences of zero-tolerance policies is ample and

87 González, supra note9, at 267.
89 See, e.g., González, supra note 9, at 288–90; see also id.
90 Maxime, supra note 55.
91 González, supra note 9, at 270.
continuing to grow. Indeed, inclusive, community-based problem solving which creates healthy school climates has resulted in students who are “much more likely to take responsibility for harm done if they have a choice in repairing the harm,” school communities that provide the necessary support for students, and positive outcomes resulting from students holding themselves and others accountable.93

B. One-Strike Eviction Policies Have Resulted in Similar Collateral Consequences for Children

By virtue of the exclusionary nature of both zero-tolerance school discipline policies and one-strike eviction policies, each carries with it long-term, collateral consequences for children.94 Exclusion from one’s school or one’s home and neighborhood negate the important and stabilizing feeling of belonging.95 As evidenced by zero-tolerance research, such exclusion from stable school environments results in higher future rates of misbehavior and does little by way of deterrence.96

Although a suspension or expulsion results in direct, negative consequences for students’ lives, exclusionary discipline policies have historically been considered necessary and justified for school safety purposes.97 One of the key rationales for excluding offending students from the educational environment is to ensure that others can learn without disruption, especially where students are deemed behaviorally at-risk or “out of control.”98 However, research indicating that zero-tolerance school discipline policies do more harm than good prompted stakeholders to find a better way to deter misbehavior and ensure safe learning environments for children.99 That better way is restorative justice.

93 SUMNER ET AL., supra note 83, at 2, 6.
94 Armour, supra note 59, at 1001; Ramsey, supra note 8, at 1171.
96 Armour, supra note 59, at 1001.
98 Id.
Similarly, being evicted likely has negative consequences for children’s’ lives, but exclusionary one-strike eviction policies are considered necessary for neighborhood safety.100 One of the key rationales for evicting offending tenants or their children from the public housing community is to ensure that others can live without disruption and fear, especially where the evicted tenant’s behavior is beyond anyone’s control.101 However, the collateral consequences of one-strike eviction policies, including homelessness, disintegration of social networks, separation of families, removal from school districts, administrative backlog, and lost rents for landlords,102 should outweigh that policy objective. The direct consequence of one-strike eviction policies, namely the eviction itself, is undoubtedly a nationally recognized problem.103 Paying close attention to the additional long-term, collateral consequences of one-strike eviction policies provides even more incentive to counteract such consequences by employing restorative alternatives.104

One-strike policies are problematic because too often, they fail to serve the underlying purposes of the legislation, which are to provide safe and affordable housing, to combat crime and drug use, and to ensure the best outcomes for America’s youth.105 This is particularly so with regard to the innocent tenant scenario, where an entire tenant family can be evicted because of one family member’s or guest’s criminal or drug-related activity on- or off-premises.106 There is vast support that the purposes of one-strike policies are not being served such that a transition is necessary.107 In many communities, the felon or criminal label that might attach to a tenant or child poses a greater threat to the family than the crime itself does to the community.108 In

101 Kaplan & Rossman, supra note 7, at 110.
102 Ramsey, supra note 8, at 1195.
104 See Ramsey, supra note 8, at 1198–99.
105 See Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51560; id. at 1178, 1195.
106 See Ramsey, supra note 8, at 1174.
107 MICHELLE ALEXANDER, THE NEW Jim CROW 236 (rev. ed. 2012) (“We need an effective system of crime prevention and control in our communities, but that is not what the current system is.”).
108 See generally TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED COMMUNITIES WORSE (2007). Using quantitative and qualitative data to support his hypotheses, Clear discusses the need for “community justice” based on community life, social and
other words, an eviction for criminal or drug-related activity poses a greater threat to families than the crime itself because of the collateral consequences that follow. Eviction makes it difficult or impossible for the family to find housing, destroys familial bonds, rips apart social networks, and makes homelessness and future eviction and involvement with criminality more likely in the most vulnerable communities. 109

The flaws of one-strike policies are evidenced by countless cases in which housing authorities defer too much to statutory grants and court precedents in terminating housing assistance and carrying out eviction proceedings without affording adequate due process. 110 The explanation for housing authorities’ and courts’ reliance on broad statutory grants is likely that they are overworked and understaffed. 111 However, fiscal and administrative efficiency should not trump the goals of fairness and equity, especially for children, who are most susceptible to collateral consequences such as broken social networks and displacement from school. 112

One consequence of eviction from public housing is the statutory mandate that the tenant family be banned from any public housing for three years. 113 Typically, public housing wait lists are so long that this three-year ban can turn out to be indefinite. 114 Significantly, these policies most negatively affect the people who are least able to find other affordable housing after being evicted, whether an innocent tenant scenario or not. 115 The One-Strike Rule is unfair for low-income

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109 ALEXANDER, supra note 107.
112 See Bridget M. Kuehn, Eviction Diversion Program Defers Trauma of Homelessness, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN. (2015), https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/eviction-diversion-program. Kathy Smyser, Program Director for Michigan’s Housing Resources, Inc., explained that losing one’s home has a lasting impact on individuals and families. She noted that children are often uprooted from their schools, which can harm their academic performance long term. “You can’t overstate the trauma and stress it causes.” Id.
113 42 U.S.C. § 13661(a) (stating that tenants evicted from federally subsidized housing shall not be eligible for housing assistance for three years after their eviction).
114 See NAT’L HOUS. LAW PROJECT, AN AFFORDABLE HOME ON REENTRY 12 (2018).
tenants because they are unwittingly put out on the street and have no other housing option. They should not be held strictly accountable for the conduct of their relatives or guests, especially if the relative is a child or if the tenant has dependent children. Despite the valid goal of better crime and law enforcement, in the housing context, increased levels of law enforcement potentially saddle children and tenants with felony convictions, which can ultimately ensure economic and social marginalization.

For example, it is likely that a juvenile will misbehave, whether criminally or not, especially in impoverished neighborhoods with few community structures that encourage active and lawful engagement in the community. However, as evidenced by the failure of zero-tolerance policies in schools, criminalizing normal juvenile behavior results in far-reaching collateral consequences that undermine the goals of school discipline. The same logic follows from treating scuffles in the street among teenagers as criminal behavior: just as zero tolerance fails to actually deter misbehavior and incapacitate dangerous students, one-strike eviction policies fail to deter misbehavior and incapacitate dangerous community members and instead promote a cycle of instability for families and children.

C. A Restorative Approach to Public Housing Assistance and Eviction: Suggestions for a Way Forward

This section provides several suggestions for implementation of restorative ideals and practices into the public housing context. Some of these suggestions are outside of the traditional conception of restorative justice, but they are nonetheless grounded in and animated by restorative justice theory’s key tenets, namely, community justice, mutual resolution, reparation of harm, and well-being of all people.

116 Id. at 303.
119 See Armour, supra note 59.
120 See González, supra note 9, at 275.
These suggestions draw from the efficacy of restorative practices in the school-discipline context. Of course, the specific restorative justice-based practices that are employed in schools as alternatives to harsh zero-tolerance policies are not directly applicable to one-strike eviction policies in the housing context. In the school setting, those practices include restorative circles, small-group conferencing, and peer juries. However, the restorative justice-based practices employed in schools are animated by the underlying goals and themes of repairing (rather than punishing) harm, transforming (rather than eliminating) community relationships, and inclusion (rather than exclusion). No matter the context, restorative justice is grounded in principles of respect, dignity, and the inherent worth and well-being of all people. As such, these principles which animate restorative justice’s efficacy in schools will do the same in combatting exclusionary one-strike policies in the housing context.

Thus, with the goal of ensuring better outcomes for families and children in mind, public housing authorities, law enforcement, and communities at large should strive to implement restorative practices to combat the collateral consequences of eviction. If implemented in the same thoughtful, deliberate, and researched way as the restorative practices in school discipline contexts, restorative justice has the potential to begin the transition in housing policy from the “One Strike and You’re Out” regime to a more community-based and effective system of addressing homelessness in impoverished communities.

1. Housing authorities must consider all of the circumstances surrounding alleged criminal or drug-related activity prior to making an eviction decision.

A restorative approach to eviction policies will require housing authorities to take a much deeper dive into mitigating circumstances and all evidence surrounding the alleged criminal or drug-related activity that results in an eviction decision. Public housing authorities should not ignore the discretion granted to them by law in evaluating the circumstances surrounding an eviction in the name of

121 See id. at 270, 279 n.36.
122 See id. at 271.
123 ZEHR, supra note 73, at 38–39.
124 See Armour, supra note 59.
administrative efficiency and cost-cutting. The Rucker decision, while still good law, has been over-relied upon by public housing authorities, who bypass discretionary measures in order to force swift evictions. A restorative approach to eviction policy will require advocacy on behalf of wrongdoers—something which public housing authorities (acting as landlords) have been reluctant to do.

In the event of alleged criminal or drug-related activity, the approach that I suggest housing authorities take is one grounded in restorative justice principles of reparation of harm, community engagement, and support. Rather than view such delinquent activity as a direct path to eviction, housing authorities should evaluate whether the juvenile is a danger to the community and whether there is some lesser punishment available rather than eviction of the entire family. Especially in an innocent tenant scenario, where the alleged wrongdoer is a juvenile, punishing an entire family with an eviction notice does little to foster healthy communities and support the well-being of America’s youth. In other words, public housing authorities must adopt a compassionate, humane approach to the problems of public housing tenants—an approach that goes beyond the rhetoric of “community policing” to a method of engagement that promotes trust, healing, and genuine partnership.

2. Research and data collection strategies should be employed as the building blocks for policy change.

Additionally, policymakers and other stakeholders should model the research and comprehensive data collection practices that have been employed in the education context to better understand how exclusionary policies in housing lead to long-term consequences for children. One way to accomplish this is to conduct longitudinal surveys of families excluded from public housing, paying particular attention to negative outcomes for children who are subjected to the

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126 ALEXANDER, supra note 107, at 226.


128 ALEXANDER, supra note 107, at 233.

129 See Armour, supra note 59, at 1001–02.
eviction process. It seems very likely that a similar “pipeline” phenomenon is occurring for juveniles who have fallen victim to housing instability and who are living on the streets.

The RVA Eviction Lab is one example of a program conducting the research that seems necessary nationwide to address the eviction crisis. The program found that five of the top ten cities with the highest eviction rates in America are located in Virginia. In response, the program uses data in conjunction with the work of local government, community-based organizations, elected officials, and other advocates in its commitment to improving social justice in the housing context. Notably, the RVA Eviction Lab considers factors such as the stability of rental history and criminal history in analyzing the accessibility of certain housing units to tenants with a past eviction or run-in with the law. RVA Eviction Lab’s researchers have a mantra that they are “looking at data science for the public good [and] social justice.” They aim to think about ways in which data science can be deployed to right social wrongs and to highlight and bring voice to social inequality. Similarly, the Princeton Eviction Lab, comprised of a team of academics, students, and citizen researchers, aims to study and track national eviction rates over time and advocate for policies that more equitably address housing and evictions in American cities. Data collection for public housing authorities should also be mandated nationwide to ensure that selective enforcement of eviction policy is no longer taking place.

3. Community-engagement programs should be more widely implemented.

Stakeholders should also emphasize neighborhood programs that foster community engagement and law-abiding activities as a way

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132 Id.
133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
138 ALEXANDER, supra note 107, at 233.
to divert youth from delinquent behavior. There is evidence that this type of research, along with community development programs, is happening to some degree.\textsuperscript{138} Projects such as NeighborWorks America, Virginia’s Campaign to Reduce Evictions, Chicago’s Community Restorative Justice Hub, and Richmond’s Eviction Diversion Pilot Program, are all collecting data on evictions and employing community stakeholders to address it.\textsuperscript{139} These programs depend on support from landlords, the judicial system, housing agencies, and nonprofits.\textsuperscript{140} These community-centered programs focus on creating safe spaces where youth and their families are welcomed and supported in building healthy relationships and developing necessary skills and competencies.\textsuperscript{141} In 2013, one eviction diversion program in Michigan “prevented 360 evictions, sparing 719 adults and 363 children the trauma of being displaced from their homes and communities.”\textsuperscript{142} This restorative approach, which parallels that of the education context, will more effectively turn juvenile wrongdoers in the right direction, thereby decreasing the incidence of evictions based on the delinquent behavior of children.

4. Housing courts should be integrated by states and localities to provide an alternate avenue for tenants and landlords to resolve disputes.

Finally, “Housing Courts,” which have been established in a few cities,\textsuperscript{143} should be more widely integrated by states and localities. Housing courts can combat the severe consequences of eviction by providing a forum for tenants, landlords, and housing authorities to

\textsuperscript{138} See generally About National Night Out, NNO (last visited Nov. 10, 2019), https://natw.org/about/.


\textsuperscript{142} Kuehn, supra note 112.

\textsuperscript{143} See Housing Court, URB. OMNIBUS (Feb. 7, 2018), https://urbanomnibus.net/2018/02/housing-court/.
come before a neutral arbiter and have the option to choose mediation or a private settlement rather than filing an unlawful detainer, which results in an eviction.144 This type of restorative court, along with other initiatives, focus on the underlying causes of behavior rather than merely punishing the outcomes and paving the way for repeat trips to court.145 Instead of pushing indigent and often unrepresented tenants through the traditional judicial eviction proceedings, housing courts serve people who need connections to social services by employing a proactive strategy for both the individuals involved and the entire community.146 Housing courts provide a way for people to get their lives back on track, which can effectively counteract the alternative exclusionary one-strike housing policies and prevent their collateral consequences from attaching to vulnerable tenant families.

Though not an exhaustive list, these suggestions, grounded in restorative justice, will do a better job of promoting human value, making people feel that they belong to a community, and ensuring familial stability. It simply does not make sense that the government’s attempt to fight crime in public housing has resulted in entrenched policies which are aimed at innocent people rather than guilty people. The problem of delinquent youth is not reconciled by an eviction. Rather, it is transferred to another venue.

D. Anticipated Criticisms

I anticipate the critique that restorative alternatives to the current housing and eviction legislation might be inefficient, or at least less efficient than the current regime.147 But, as evidenced by the above discussion, the current system, which puts administrative efficiency and cost-cutting above fairness and justice, results in more collateral costs in the long run.148 Restorative justice as an alternative to “tough
on crime” legislation might appear inefficient if considered narrowly, but a deeper dive into the collateral costs of both zero-tolerance policies in school discipline settings and one-strike eviction policies in the housing context will show critics that these policies and systems prove less efficient and more costly in the long run.\textsuperscript{149}

I also anticipate the critique that a total overhaul of HUD policies is unfeasible, and I recognize the accompanying critique that restorative justice principles and practices may not be practical or safe depending on the crime- or drug-related activity giving rise to a tenant’s eviction. Sometimes, the hard and fast rules that HUD and public housing authorities employ might be the best option to ensure ongoing public safety in communities. However, restorative justice should be \textit{integrated} into the existing eviction policies and serve as supplementary, such that the punishment or consequence fits the violation for all members of a tenant family.\textsuperscript{150}

\textbf{CONCLUSION}

In conclusion, there is ample data and evidence in the field of school discipline which shows that zero-tolerance policies are ineffective, and that restorative justice alternatives have been successfully implemented to ensure better outcomes for students. “One Strike and You’re Out” legislation in the housing context is similarly ineffective, particularly as it applies to children and adolescents.\textsuperscript{151} This is evidenced by the similar and overlapping collateral consequences that result from both of these exclusionary policies. These harms are not happening in a vacuum. Rather, the exclusionary policies that emerged from the same “tough on crime” political climate two decades ago work together to destabilize the lives of children.

Take the story of the teenage girl briefly recounted at the outset of this article. A non-criminal fight, unbeknownst to her grandmother until after the fact, led to the eviction of the teenager, her brother, and their grandmother from their home. A restorative approach to her case

\textsuperscript{149} See Kaplan & Rossman, \textit{supra} note 7, at 135; Mitchell, \textit{supra} note 92, at 281.


\textsuperscript{151} See Kaplan & Rossman, \textit{supra} note 7, at 135.
would have prevented the consequences of eviction from afflicting her family and would have more adequately upheld the underlying ideals that brought about these policies in the first place: “to cherish our children and strengthen America’s families.”  

152 Evicting a family from their home of thirteen years on the basis of a no-harm, no-foul altercation between two teenagers does little to “signal to drug dealers and to gangs: If you break the law, you no longer have a home in public housing. One strike and you’re out.”  

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State and local housing authorities, as well as legal practitioners and third-party organizations and policymakers, should strive to repair the harms evicted families incur by modeling a restorative regime after those implemented by school districts nationwide. What we need are policies that support vulnerable families and solutions that address the crime, violence, and drug use that plague our country’s poorest and most racially segregated communities. Until we effectively address those problems, it is likely that the children who live in public housing communities and other high-poverty communities will experience instability and consequences far worse than those considered by one-strike eviction legislation. These policies and solutions should be grounded in restorative goals instead of the current exclusionary and punitive purposes that HUD’s local housing authorities’ policies mandate.

152 Clinton, supra note 16.
VULNERABLE IMMIGRANT POPULATIONS:
AN ALTERNATIVE ADJUDICATION PROCESS

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ABSTRACT

The American immigration process is notoriously complex, often leaving applicants on waitlists, unsure of their legal status, for months or even years. In the face of such uncertainty, nonresident migrants confront the possibility of removal, separation from their family, unemployment, or detention. These procedural and practical hurdles to applying for legal status compound when vulnerabilities intersect. Undocumented immigrant survivors of domestic and sexual violence are some of the most vulnerable populations who partake in the immigration adjudicatory process. Currently, there are insufficient resources available to this population when seeking legal status, and an alternative system should be established that would provide more surety and support to applicants seeking to escape dangerous and abusive situations.

INTRODUCTION

Recent changes to immigration policies accompanied by public condemnation of undocumented immigrants has made it more difficult for many to escape dangerous or abusive relationships. Survivors of domestic and sexual violence already face nearly insurmountable barriers to gaining independence from their abusive partners, and the intersection of undocumented status and domestic abuse only reinforces those barriers. Immigrant populations are generally less able to access resources that would ordinarily be more readily available to survivors with citizenship status. Language barriers, legal impediments, the lack of established community support

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3 See, e.g., Engelbrecht, supra note 1.
structures, and the ever-present threat of deportation leave undocumented immigrants stuck in abusive relationships, suffering in silence.

Undocumented immigrants subject to abuse at the hands of a significant other or family member often face significant hardship if forced to leave the country. Some have children with their abusive partner that they would have to leave if they were removed from the country, others would return to even more dangerous situations in their home country, and others were brought here against their will when they were younger and would have no connections to their country if they were deported.

Deportation is a punishment, or punitive action, taken against those who have violated United States immigration law. Punitive action is appropriate in certain circumstances; however, in many cases, punitive responses are inappropriate, ineffective, and sometimes harmful. Drug courts are one example of the success of using nonpunitive responses. Some of the drug courts’ main motivations stem from recognizing that imprisoning members of the community who are suffering from an addiction is not helpful to the individual who committed the crime, nor to society as a whole. Drug courts remain effective in reducing recidivism rates for their participants and allowing those who go through the programs to re-enter society as productive members rather than revictimizing them through a system designed for punitive purposes.

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9 See id. at 327.


11 See id.


16 *Id.* at 13.

17 *Id.*
This comment argues that similar non-punitive responses should be available to undocumented immigrants, specifically those trying to escape abusive situations. Currently, there are limited options available for undocumented immigrant populations who want to escape abusive relationships. The Violence Against Women Act (VAWA) allows for certain individuals to self-petition for their stay of removal if they fulfill the criteria outlined in the statute. The United States Code also provides two other visa opportunities through U-Visas and T-Visas, both of which have a long list of requirements and only allow for a limited number of applicant approvals. These limited options are complicated and not widely available to the populations that need them most.

Undocumented immigrant survivors of domestic violence and sexual assault are among some of the most vulnerable populations in the country and should be afforded more opportunities for obtaining legal status. The United States should implement a system, similar to the existing drug court program, that offers this population broader alternatives to deportation than the limited options available through visa programs and VAWA. To that end, this comment will first address the reasons why certain populations of immigrants are present as undocumented persons in the United States, and will then give a brief history of drug courts and how their non-punitive processes have proven successful over the last few decades. Finally, this paper will propose that the United States should engage in similar non-punitive responses for undocumented immigrant survivors.

I. Why Are Undocumented Immigrants Here?

Before delving into policy considerations, it is important to consider the reasons why undocumented immigrants arrive in the United States initially. Most undocumented immigrants have overstayed a legal visa with work or a student visas. Individuals may also arrive with a K-1 visa, offered to

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23 K-1 visas are non-immigrant visas: “Nonimmigrant visas are for foreign nationals wishing to enter the United States on a temporary basis - for tourism, medical treatment, business, temporary work, study, or other similar reasons.” Requirements for Immigrant and Nonimmigrant Visas, U.S. CUSTOMS & BORDER
those planning on marrying an American citizen or legal resident, and fail to get married prior to the ninety-day timeframe before visa expiration.\textsuperscript{24}

Those who have overstayed visas or did not successfully meet the visa requirements, face a difficult choice. They can either leave the country voluntarily—and likely be prevented from returning to the United States—or they can stay and risk future deportation.\textsuperscript{25} Abusive relationships further complicate the decision. Abusive partners may make it more difficult if not impossible for immigrants to achieve legal status, and abusers often use their victim’s undocumented status to maintain power dynamics that allow them to control the relationship.\textsuperscript{26} This cycle of abusive behavior can fully impede an immigrant’s path to legal citizenship regardless of the immigrant’s original path of entry to the country.

\textbf{A. Undocumented Immigrants Arrive in the United States in Several Ways}

Undocumented immigrants arrive in the United States in a myriad of ways; however, there are at least three common pathways. Most enter the country legally and overstay their visas for various reasons.\textsuperscript{27} Some arrive with a conditional visa and cannot fulfill the required condition\textsuperscript{28} or their visa extensions are denied.\textsuperscript{29} Others come to the country by either crossing the United States border or applying for asylum,\textsuperscript{30} though recent policy changes have severely limited opportunities for asylum—specifically for

\begin{thebibliography}{99}
\item[28] E.g. Visas for Fiancé(e)s of U.S. Citizens, supra note 24.
\end{thebibliography}
domestic violence survivors. In 2014, overstays accounted for almost two-thirds of new undocumented immigrants, and approximately forty-two percent of the total undocumented population was a result of overstays.

Student or work visas allow for migrants to enter the country for a limited period for a specific purpose. Both student and work visas come with a variety of requirements and limitations that prevent the holder from fully engaging with society. Student visas prohibit holders from working for compensation in most circumstances, and work visas could prohibit holders from traveling back home during their visa period. Those with student or work visas may not remain in the United States after their visas expire because they missed the deadline or were unable to renew in time. If these individuals attempt to leave the country once their visa is already expired, they may not be allowed to return. While seemingly not an exorbitant burden, it can be especially difficult for those who don’t have any resources in their country of origin or those who send money back home to families, because they would lose their main source of familial income if they were banned from entering the United States for an extended period.

Some immigrants enter the country legally through other means. Foreign nationals can enter the country legally as the fiancée of a U.S. citizen. These individuals and their fiancéés must fulfill the necessary requirements before they are eligible for entry. Both parties must intend to marry and “establish a life together” in good faith within ninety days of entering the United States, and the couple must be legally free to marry. All

32 Kerwin & Warren, supra note 22.
34 Id.
37 8 U.S.C. § 1182(a)(9)(B)(i) (2019) defines inadmissible aliens as: Any alien...who (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States...and again seeks admission within 3 years of the date of such alien’s departure or removal, or (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien’s departure or removal from the United States.
39 Visas for Fiancé(e)s of U.S. Citizens, supra note 24.
40 Id.

https://scholarship.richmond.edu/pilr/vol23/iss2/2
former marriages must be legally terminated and the couple must have met each other in person at least once within the two-year period before applying for the visa unless a meeting would violate foreign cultural practices or result in extreme hardship for the U.S. citizen petitioner.41

Once the immigrant is deemed eligible, they will receive a K-1 visa. Upon arriving in the United States, this visa requires that the holder and their significant other marry within ninety days of the non-citizen’s entry into the country.42 Thus, to obtain full legal status, the applicant must have the assistance and approval of their U.S. citizen fiancée.43 As a result, legal status could be nearly impossible to obtain if individuals in this situation arrive in the United States only to discover that their fiancée never intended to marry them, leaving them without the ability to petition for legal status and unable to leave the country for risk of inability to return. Other undocumented immigrants were trafficked here either through labor or sex trafficking against their will.44 The United States Department of State estimates that 14,500 to 17,500 people are trafficked into the country each year.45 Human trafficking is most common in industries that routinely violate employment safety laws such as agriculture, manufacturing, construction, hospitality, or private household domestic work.46 Once they arrive, trafficked individuals often are terrified of local police officers and authorities, are unable to speak the language, and are unfamiliar with United States law.47 Many workers in this situation also deal with employers who threaten to call immigration authorities as an additional means of exercising control.48 These circumstances leave immigrants in an incredibly vulnerable position, unable to contact authorities for help out of fear of deportation or to leave the workforce as a result of actual imprisonment or poverty.49

41 Id.
42 8 U.S.C. § 1101(a)(15)(K) (2019); 8 U.S.C. § 1184(d) (2019) (“In the event the marriage with the petitioner does not occur within three months after the admission of the said alien and minor children, they shall be required to depart from the United States and upon failure to do so shall be removed.”).
43 Visas for Fiance(e)s of U.S. Citizens, supra note 24.
47 Immigration Policy, NAT’L NETWORK TO END DOMESTIC VIOLENCE, https://nnedv.org/content/immigration-policy/ (last visited May 1, 2019).
48 FREEDOM NETWORK USA, supra note 46, at 2.
49 Id.
Of course, some immigrants enter the country by illegally crossing American borders. Though not the most common means through which immigrants arrive illegally, such arrival still accounts for a majority of the current total population. Unlike visa overstays or human trafficking, illegal border crossings involve an initial intent on the part of the immigrant to break American immigration law since the individual is knowingly crossing the border illegally. Still, the motivations are often not nefarious in nature, because many who cross the border do so with hopes of gaining employment to support their families, or to stay with their few remaining living relatives. As a result, they are unlikely to leave the country freely, especially if they have children who were born here or would be separated from their children if removed.

No matter how undocumented immigrants arrive in the United States, the entire population faces many of the same barriers to engaging with law enforcement. Fear of deportation, lack of resources, limited community connections, and inadequate knowledge of the American legal system all play a significant role in keeping abused, undocumented immigrants from contacting law enforcement or otherwise escaping abusive situations. Even without these barriers, survivors of abuse face significant hurdles in fleeing their abusers.

B. Why do Domestic Violence Survivors Stay in Abusive Relationships?

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51 Kerwin & Warren, supra note 22.
53 See id. (noting that a third of undocumented immigrants are 15 years old and older and have at least one child who is a U.S. citizen by birth).
54 See Danyelle Solomon et al., The Negative Consequences of Entangling Local Policing and Immigration Enforcement, CTR. FOR AM. PROGRESS (Mar. 21, 2017), https://www.americanprogress.org/issues/immigration/reports/2017/03/21/428776/negative-consequences-entangling-local-policing-immigration-enforcement (discussing how undocumented immigrants are less likely to report crimes or to communicate with law enforcement out of fear they will be questioned about their immigration status).
56 See 50 Obstacles to Leaving, NAT’L DOMESTIC VIOLENCE HOTLINE (June 10, 2013), https://www.thehotline.org/2013/06/10/50-obstacles-to-leaving-1-10/ (discussing obstacles abused persons might face when trying to leave an abusive relationship).
Regardless of an individual’s immigration status, leaving an abusive relationship is incredibly difficult. Supra note 58. There are significant socioeconomic, psychological, and legal barriers in place that survivors must overcome before leaving their abusive partner. Supra note 59. A cursory look at some of those barriers is appropriate and necessary to continue discussing the importance behind a policy proposal supporting and protecting domestic violence survivors.

The power dynamic that exists between the abuser and the survivor allows the abuser to manipulate and control the other person. Supra note 60. Abusive relationships rarely begin with one partner physically harming or restraining the other; instead, abusive tendencies show themselves in subtle manipulations that build over time. Supra note 61. These include limiting the survivor’s access to resources and community, isolating them from friends and family, and restricting their ability to work and gain monetary freedom, among other manipulation tactics. Supra note 62. The severity of the abuse often increases the longer the relationship lasts, often culminating in physical violence or even death. Supra note 63. Isolation makes survivors feel like they must rely increasingly on their abusive partner until they are unable to live independently. Supra note 64. The cycle of physical and psychological abuse leads many to become accustomed to abusive treatment and feel that they are deserving of and responsible for the violence. Supra note 65. This is not necessarily true of all relationships, especially not situations where one partner was initially forcefully trafficked; however, this devastating cycle is the most common result of long-term domestic violence. Supra note 66.

In addition to the psychological barriers abusers place on their victims, survivors also face physical danger if they attempt to leave. Supra note 67. Abusers value control over their victims, and losing that control generally triggers...
increased violent behavior. Consequently, the most dangerous period for domestic violence survivors is when they attempt to leave their abuser because the abusive party does not want to lose power and control over the survivor’s life. Survivors who have lived in abusive relationships for an extended period are aware of the patterns of violence particular to their abusive partner and are familiar with the dangers associated with fleeing. This is a significant deterrent to survivors who want to extricate themselves from violence, and is only compounded by undocumented status.

Given that the current options available to undocumented immigrants are limited and require the individual to fulfill a set of complicated requirements, as thoroughly discussed in Part III of this comment, immigrants who have a reasonable distrust of government systems are unlikely willing to put themselves at risk of deportation without guaranteed protection. As a result, the lack of resources available to undocumented immigrants contributes to the suffering of domestic violence survivors, a population undeserving of punitive action and in dire need of support.

II. Alternatives to Punitive Action Already Exist.

The United States criminal justice system is notoriously punitive for even minor offenses. The country has the highest incarceration rate per capita, with the majority of incarcerations for drug crimes. Several jurisdictions observed this trend and are working to address it through implementing a drug court program. These programs focus on rehabilitative and cooperative processes, shifting from the traditionally punitive goals of

68 Id. at 816 n.46.
69 Id. at 816; see also Barriers to Leaving an Abusive Relationship, CTR. RELATIONSHIP ABUSE AWARENESS, http://stoprelationshipabuse.org/educated/barriers-to-leaving-an-abusive-relationship/ (last visited Oct. 20, 2019).
71 Id. (including threats to call Immigration and Naturalization Services as a real situation that may prevent an undocumented immigrant from leaving an abusive relationship).
73 Id.
incarceration to a more rehabilitative purpose. Jurisdictions with these kinds of programs often save money by limiting incarceration time and reducing recidivism rates.

While drug crimes and immigration violations are not identical, the limited harm that perpetrators pose to society is comparable. Regardless of why or how they arrive in the United States, immigrants in abusive situations are vulnerable and should be provided with more opportunities to gain legal status as an enormous first step in helping these individuals leave abusive situations by taking down one of the major barriers to escape. An immigrant population undeserving of society’s punishment should have access to a streamlined system of assistance and social integration that allows them to access the support networks necessary to limit continued abuse. Drug courts provide an excellent example of how our nation implements a similar system with a similarly vulnerable population.

A. Drug Courts are an Effective Alternative to Punishment in the Criminal Context.

Drug courts are a form of problem-solving specialty courts that were originally formed as an alternative to punitive action for those who engaged with the criminal justice system as a result of drug addiction. "Specialty courts aim to reduce recidivism; produce better outcomes for clients; modify legal responses to crime; reform governmental and legal approaches to crime; incorporate mostly constant (and long-term) judicial monitoring; collaborate with outside agencies to achieve their goals; and promote a less adversarial courtroom dynamic." Drug courts as an alternative adjudication were specifically implemented to help reduce the strain that drug crimes placed on the criminal justice system.

78 Id. at 21.
79 Compare Tauber & Huddleston, supra note 76, with Portillo, supra note 72, at 356–59.
82 Kaplan et. al., supra note 77, at 15.
83 Id.
85 Id. at 15.
The judicial system began turning toward alternative adjudicatory processes with the understanding that not all criminal cases require the same treatment nor amount of court resources. Initially these programs were formed purely for the purpose of establishing a more efficient system of dealing with addicted persons, but later iterations of drug courts focused on treatment. These new programs were called drug treatment courts (DTC).

The second generation of specialized drug courts and the most prominent, are more service-oriented than their predecessors, which were aimed primarily at improving the speed and efficiency of case processing...they are predicated on the assumptions that drug use is deeply rooted in the community, addiction is “as much a public health problem as a criminal justice problem.”

Support for drug courts and other alternatives is on the rise. Society no longer views addiction with the same sense of moral culpability as it did historically, and this shift mirrors the rise in support for drug court programs. Drug offenders are rarely dangerous; they generally need support rather than punitive action. A majority of drug offenders suffer from addiction and lack of resources, and effective alternatives to incarceration, such as drug treatment court programs, provide them with the resources they need to escape the cycle of recidivism. Drug courts focus on treatment, therapy, and reintegration into society. This therapeutic focus

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87 Lurigio, supra note 84.
88 Id.
89 Id.
90 Id.
91 Candace McCoy, The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts, 40 AM. CRIM. L. REV. 1513, 1513 (2003) (“Therapeutic justice is a growing intellectual and socio-political movement, and like all movements it has diverse sources, influences, and goals.”).
92 Lurigio, supra note 84.
93 See Shima Baradaran, Drugs and Violence, 88 S. CAL. L. REV. 227, 286–87 (2015); see also id.
96 Id.
contributes to higher success rates for participants,\textsuperscript{97} leading ultimately to a more successful society.\textsuperscript{98}

B. Drug Court Programs Focus on Rehabilitation Instead of Punishment.

Drug court programs differ depending on jurisdiction; however, they generally follow the same model.\textsuperscript{99} They function as a diversion program where drug offenders can reduce or completely erase their sentence by fulfilling the requirements set forth by the court.\textsuperscript{100} These can be treatment programs and therapy, check-ins, job training, among other possible requirements.\textsuperscript{101} Usually the participants are engaged with the entire court, including the prosecutor, judge and defense attorney to achieve a common goal rather than the traditional adversarial system that is more familiar to the courts.\textsuperscript{102} These programs use the carrot and stick method, which creates incentives of release or erasure of criminal consequences in exchange for the participant’s cooperation in treatment, therapy, and job training.\textsuperscript{103} If the participant fails to continue job training or fails to pass a drug test during their time in the program, they are returned to prison for a period of time until they can re-enter the system if they choose.\textsuperscript{104}

This process allows individual participants significantly more agency over their own outcomes than merely imprisoning them and provides them with motivation to engage with the training and therapy for their own sake.\textsuperscript{105} Drug courts, unlike ordinary criminal proceedings, are not adversarial and involve social workers and treatment service professionals in

\textsuperscript{97} Id.
\textsuperscript{98} See William Moore, Changing Lives: Drug Court Helps Participants Get Jobs, Re-enter Society, DAILY J. (Sept. 8, 2019), https://www.djournal.com/news/changing-lives-drug-court-helps-participants-get-jobs-re-enter/article_4218c7f6-cdb7-5beb-b0fe-de9b59287333.html (illustrating how drug courts allow participants to enter the job market, pay debts, and re-enter society).
\textsuperscript{99} Hora et. al., supra note 86, at 453 ("[M]ost [Drug Treatment Courts]...appear to contain certain essential elements: (1) intervention is immediate; (2) the adjudication process is nonadversarial in nature; (3) the judge takes a hands-on approach to the defendant’s treatment program; (4) the treatment program contains clearly defined rules and structured goals for the participants; and (5) the concept of the DTC team - that is judge, prosecutor, defense counsel, treatment provider, and corrections personnel - is important.").
\textsuperscript{100} LISA N. SACCO, CONG. RESEARCH SERV., FEDERAL SUPPORT FOR DRUG COURTS: IN BRIEF 2–4 (2018).
\textsuperscript{101} Id.
\textsuperscript{102} Peggy F. Hora et. al., Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America, 74 NOTRE DAME L. REV. 439, 469 (1999).
\textsuperscript{103} LISA N. SACCO, CONG. RESEARCH SERV., FEDERAL SUPPORT FOR DRUG COURTS: IN BRIEF 2–4 (2018).
\textsuperscript{104} Id.
\textsuperscript{105} Ellis, supra note 15, at 14–15.
the process. 106 Even though the initial costs of establishing a new system may be significant, drug courts have reduced short-term costs and the burdens on courts and prison as a whole. 107 While there are not a significant amount of resources on the statistical success of drug courts this early into their use, 108 certain counties that implemented the programs found that felony re-arrest rate was reduced from forty percent to twelve percent after the use of drug courts became more widespread. 109 Drug courts are generally successful in reducing recidivism and helping reintegrate participants into society. 110

III. Resources Available to Immigrants are Limited.

Undocumented immigrants who find themselves trapped in abusive relationships by violent partners only have limited opportunities for relief under current immigration law. 111 With the exception of asylum seekers, 112 there are three narrow exemptions to deportation for undocumented immigrant survivors of domestic violence and violent crime currently residing in the United States: self-petition through the Violence Against Women Act (VAWA), 113 U-visas, 114 and T-visas. 115 All three exceptions require that survivors report to relevant government agencies, putting themselves at risk for deportation and prohibiting many from legally working while they are waiting for green card approval. 116

A. Violence Against Women Act

106 See id. at 14.
107 See id. at 12.
108 William Werkmeister, Drug Courts: Are They All They Are Cracked Up to Be?, KENNEDY SCH. REV. (June 26, 2015), https://ksr.hkspublications.org/2015/06/26/drug-courts-are-they-all-they-are-cracked-up-to-be/.
110 Id.
111 See SHETTY ET AL., supra note 5.
112 See IMMIGRANT LEGAL RES. CTR., supra note 31 (noting the limitations placed on seekers of asylum who suffer domestic violence in their home country).
114 Id.
116 See Moira Lavelle, Immigrant Women in Abusive Relationships Face Long Delays for Green Cards—and Possible Deportation, REWIRE NEWS (Nov. 19, 2018), https://rewire.news/article/2018/11/19/immigrant-women-in-abusive-relationships-face-long-delays-for-green-cards-and-possible-deportation/ recounting the story of an immigrant woman, Maylela Sanchez Miles, who fled an abusive relationship in the hopes of attaining a green card and had to wait for sixteen months, without the ability to legally work, before her application was processed); Violence Against Women Act (VAWA) Provides Protection for Immigrant Women and Victims of Crime, supra note 18.
VAWA created an exception to removal for survivors of domestic violence or abuse who “self-report.” Self-reporting requires that survivors present themselves to the relevant Department of Homeland Security (DHS) before they can begin the application process. Undocumented immigrants under threat of an abusive partner are unlikely to fulfill the requirements for VAWA exceptions to removal and thus are at constant risk for either abuse or deportation.

Applicants self-petitioning as an abused spouse must show that their marriage or intent to marry a United States citizen was in “good faith,” and that they were subjected to battery or extreme cruelty perpetrated by a U.S. citizen. “Good faith” generally requires a demonstration that the couple intended to establish a life as a couple together at the time of the marriage. The extreme cruelty standard includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence.

Additionally, applicants must demonstrate that they were subjected to abuse at the hands of a U.S. Citizen or lawful permanent resident spouse, parent, or child, and they must also demonstrate that they have “good moral character.” The Immigration and Nationality Act (INA) identifies the kinds of people who would not fulfill the moral character requirement. This list includes habitual drunkards, gamblers, felons, any person who has been confined for a total of one hundred and eighty days or more. The INA also allows for discretion for any kinds of violations that do not fall under this itemized list. Congress specified some possible exceptions to the rule:

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121 See Lutwak v. U.S., 344 U.S. 604, 614 (1953) (noting that parties who enter into relationships without the intent to live together are likely not engaging in good faith).
122 8 C.F.R. § 204.2(c)(H)(vi) (2019).
126 Id. § 1101(f).
A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. 127

Given the discretion allowed, however, these exceptions are not always available to immigrant applicants. 128 Individuals have been found to be without good moral character based on failure to pay income taxes, adultery, having a child out of wedlock, and other similarly trivial factors under the discretionary denial of good moral character. 129

Even if applicants satisfy all the standards for self-petition, they still must present evidence of the abuse to ensure their application is approved. 130 This presents an additional burden as abusive partners may suppress records of reports in the rare cases when survivors do report domestic violence incidents. 131

Taking and/or destroying the victim’s documents is part of the pattern of abuse that is a particularly effective means of exerting power and control over immigrant victims that serves as a form of severe psychological abuse and at the same time undermines the victim’s ability to gain

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129 Id.
131 See Arvind Dilawar, How Anti-Immigration Policy Spurs Domestic Violence, PAC. STANDARD (Aug. 10, 2018), https://psmag.com/social-justice/how-anti-immigration-policy-spurs-domestic-violence?bclid=8AR1qetsWFaC8HfhkhecaX96MebxZYPB5sBx5JBFHGFqy6VTQx_TZSbhU (telling the story of immigrant, Tatyana, who reported her abusive partner for domestic abuse only to find out that he had sealed the records when she needed to access them for a visa application).
Furthermore, “[l]oss of identity documents, passports, immigration papers, or other documents impedes the victim’s ability to travel, drive a car, and attain legal immigration status.”

Thankfully, Congress recognized the difficulties that evidentiary standards could present in this context and enacted the “any credible evidence” standard in the 1994 amendment to VAWA. This more flexible evidentiary standard takes into account the unique limitations that undocumented immigrants face in acquiring specific forms of documentation and allows them to submit affidavits or other non-official documentation as well as photographs or testimony to prove any aspects of their case. The Immigration and Naturalization Service General Counsel issued a memo categorically stating that “[a] self-petition may not be denied for failure to submit particular evidence. It may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility.” Both INS and DHS confirm the application of the “any credible evidence” standard apply in VAWA, U-visa, and T-visa cases.

B. **U-Visa**

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133 Id. at 629–30.

134 8 U.S.C. § 1186a(c)(4) (2019) (amended in 1994: “in the concluding matter of subsec. (c)(4), inserted ‘In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.’”).

135 Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Barred or Abused Spouses and Children, 61 Fed. Reg. 13066 (codified at 8 C.F.R. pts. 103, 204, 205, 216) and states, in relevant part:

Available relevant evidence will vary, and self-petitioners are encouraged to provide the best available evidence of qualifying abuse . . . Persons who have obtained an order of protection against the abuser or taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women’s shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. This rule also provides that other forms of credible evidence will be accepted, although the Service will determine whether documents appear credible and the weight to be given them . . . The Service is not precluded from deciding, however, that the petitioners’ unsupported affidavit is credible and that it provides relevant evidence of sufficient weight to meet the self-petitioners burden of proof.


U-Visas were created as part of the Victims of Trafficking and Violence Prevention Act of 2000.\footnote{See 8 U.S.C. § 1101(a)(15)(U) (2019).} These visas were designed for victims of crimes who have suffered “substantial physical or mental abuse” and are willing to provide aid to government officials in their investigation and prosecution.\footnote{Id. § 1101(a)(15)(U).} The applicant must be certified as helpful or likely to be helpful to the investigation or prosecution of the crime.\footnote{Id. § 1101(a)(15)(U).} Only 10,000 U-Visas are available every year.\footnote{Id. § 1184(p)(2)(A).} Victims of a crime may only seek a visa for themselves or for family members, and applicants under the age of twenty one may include a spouse, minor child, parent, or unmarried sibling under the age of 18 on their petition.\footnote{Natalie Nanasi, The U Visa’s Failed Promise for Survivors of Domestic Violence, 29 YALE J.L. & FEMINISM 273, 280 (2018).} Applicants who are older than twenty one can only include a spouse and minor children.\footnote{Id.}

While the purpose of the legislation was purportedly to increase law enforcement’s ability to investigate and prosecute domestic violence, sexual assault, and trafficking crimes,\footnote{Leigh Goodmark, Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases, 37 FLA. ST. U.L. REV. 1, 37 (2009).} the result of the U-visa application process can actually be retraumatizing to victims of violence by stripping them of their agency.\footnote{Nanasi, supra note 142, at 295.} Some survivors are reasonably suspicious of the criminal justice system and do not trust it to bring about favorable or just results.\footnote{Id. at 279.} Furthermore, “mandatory interventions perpetuate the cycle of violence intrinsic to domestic abuse relationships by supplanting the abuser’s power and control with the authority of the state.”\footnote{Id. at 296.} Applicants may be denied their visa if at any point in the investigation they decide not to cooperate with law enforcement, even if they stopped cooperating because the process was traumatic.\footnote{Id. at 296.} Forcing survivors to engage with a system they believe is not acting in their best interests as a condition of receiving aid causes immediate harm and could dissuade survivors from seeking help from the criminal justice system in the future.\footnote{Id. at 296.}
C. T-Visa

T-Visas are specifically designed for victims of human trafficking who would suffer extreme hardship if deported.\textsuperscript{150} Extreme hardship is defined as “‘unusual and severe’ [as] to require a showing that something more than the inconvenience and dislocation that any alien would suffer upon removal might occur.”\textsuperscript{151} The applicant, if older than eighteen, must help with the investigation and prosecution unless they would undergo trauma if required to comply.\textsuperscript{152} The applicant must also demonstrate severe harm if removed from the U.S.\textsuperscript{153} Additionally, immigrants are ineligible for this kind of visa if there is “substantial reason to believe that the alien has committed an act of a severe form of trafficking.”\textsuperscript{154} Severe forms of trafficking is defined as:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.\textsuperscript{155}

Only 5,000 T-visas are available every year.\textsuperscript{156}

\textsuperscript{153} Id. § 1101(a)(15)(T).
\textsuperscript{155} Id. § 7102(11).
IV. Forming an Alternative Adjudicatory Process

The pathways to cancelation of deportation currently available to undocumented immigrant survivors of domestic violence are insufficient. VAWA self-petition requirements are difficult to meet and are only available to those whose abusers are United States citizens.\textsuperscript{157} U-visas and T-visas are limited in number\textsuperscript{158} and both require the applicant be helpful to law enforcement investigations.\textsuperscript{159} The limitations of the current pathways toward cancelation of removal are barriers in the way of survivors getting the resources they need. The constant threat of deportation leaves immigrants unsure of what could happen even if they attempted to reach out to authorities. Those unwilling to take the gamble, suffer in silence.

The widespread nature of domestic violence, specifically for immigrant populations, requires a response that accommodates more than the current system. Undocumented immigrant survivors should be able to apply for cancelation of removal regardless of the immigration status of their abuser; moreover, their status during the application process should not be left to pure discretion. Instead, there should be a system in place that streamlines and accommodates domestic violence immigration disputes and provides a process through which an applicant can access training or therapy that they need to rebuild their lives. A specialized problem-solving court system similar to existing drug treatment courts would be a stepping-stone toward that goal.

A. Undocumented Immigrants are Particularly Vulnerable.

Due to increased social isolation, changing immigration policies, and turbulent relationships with law enforcement, undocumented immigrants are significantly more at risk for sexual assault, human trafficking, and domestic violence among other crimes than the general population.\textsuperscript{160} “[B]etween 34 and 49.8 percent of immigrant women in this country experience domestic violence in their lifetimes,”\textsuperscript{161} and immigrant status itself can be identified as the source of increased abuse and domestic violence.\textsuperscript{162}

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\textsuperscript{159} Id.
\textsuperscript{160} Mindlin et al., supra note 6.
\textsuperscript{162} Cecilia Menjivar & Olivia Salcido, Immigrant Women and Domestic Violence: Common Experiences in Different Countries, 16 GENDER & SOC’Y 898, 902 (2002) (explaining that “immigrant-specific
Immigrant populations are often more susceptible to isolation and as a result may not readily have access to external support systems.\(^{163}\) They are less likely to be familiar with the American legal system, may not have as many friends or family in the country to support them in times of need, and likely face language barriers to reaching out for help.\(^{164}\) In addition to lack of social support, immigrant populations are understandably wary of the government and law enforcement.\(^{165}\) All of these factors add significantly to the risk of victimization.

Undocumented immigrants who survive domestic and sexual violence from abusive partners also face immense difficulties in coming forward about their abuse. Domestic violence survivors already face a myriad of difficulties in leaving their abusive partner, and those difficulties are amplified by lack of legal status.\(^{166}\) Filing police reports or calling the authorities puts them at risk for deportation.\(^{167}\) Abusive partners also tend to use the survivor’s immigration status as a means of control by threatening undocumented immigrant survivors with deportation to discourage them from reporting incidents to authorities.\(^{168}\)

Recent changes to immigration policies accompanied by public condemnation of undocumented immigrants further ostracize an already marginalized group and increase distrust between immigrant populations and law enforcement.\(^{169}\) Immigration and Customs Enforcement (ICE) activity increases distrust between law enforcement and the undocumented immigrant population.\(^{170}\) ICE has been known to present themselves as police officers, even going so far as to wear articles of clothing labelled “police.”\(^{171}\) This kind of representation combined with aggressive deportation policies can cause immigrant populations to associate police with ICE.\(^{172}\) Because of this, fear of deportation reduces the likelihood that undocumented

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\(^{163}\) See Dilawar, supra note 131.

\(^{164}\) Immigration Policy, NAT'L NETWORK TO END DOMESTIC VIOLENCE, https://nnedv.org/content/immigration-policy/ (last visited Oct. 16, 2019).

\(^{165}\) Engelbrecht, supra note 1.

\(^{166}\) Id.

\(^{167}\) Id.

\(^{168}\) Dilawar, supra note 131.

\(^{169}\) See id.


\(^{172}\) See id.
immigrants will report criminal activity or abuse to police. ICE has also been known to arrest victim witnesses who arrive at court, which naturally decreases immigrants’ willingness to cooperate with law enforcement.

The increased risk of victimization that results from social isolation, current immigration policies, and ICE behavior presents unique risks for undocumented immigrants. Congress, in the 1994 amendment to VAWA, already recognized the importance of accounting for the specific challenges of victimization, and the disparate effect that these challenges present for immigrant non-English speaking individuals or those who have limited access to resources. Creating a new system of adjudication for undocumented immigrant domestic violence survivors would take these unique challenges into consideration and further the legislature’s expressed goals.

B. The Current System of Adjudication is Insufficient.

The limited options available to undocumented immigrant survivors of sexual assault are insufficient. Those present with a K-1 visa cannot obtain legal status without the aid of their citizen partner unless they fulfill the requirements for one of the three narrow exceptions to removal through VAWA or U-visas and T-visas. Undocumented immigrants who are under constant threat of an abusive partner are unlikely to fulfill the requirements for VAWA and visas applications to cancel removal. The current system allowing for self-petition, U-visas, and T-visas is inadequate.

To apply for any of these programs, undocumented immigrants must report themselves to the authorities, and their removal lies at the discretion of the Attorney General, DHS, or other administrative agency. The discretion available to these agencies leaves the applicant without any surety that they will be protected or that their deportment will be cancelled.

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177 See Visas for Fiancé(e)s of U.S. Citizens, supra note 23.
if they report their abuser.\textsuperscript{180} Thus, the potential benefits of reporting are possibly low if not non-existent; whereas, the risks of contacting law enforcement or self-reporting are incredibly high considering that “deportation means separation from one’s home, family and children, potentially indefinitely, as well as a loss of income and the possibility of increased violence in one’s home country.”\textsuperscript{181} Undocumented immigrants who have a reasonable distrust of government systems and are unlikely to be willing to put themselves at risk of deportation without some guaranteed protection.\textsuperscript{182}

Furthermore, VAWA self-petition only extends to those who were abused by U.S. citizens or legal residents.\textsuperscript{183} U-visas and T-visas similarly have demanding standards and require that the applicant have useful information for law enforcement.\textsuperscript{184} Additionally, the limited number of U-visas and T-visas available per year can lead to a backlog of applications, leaving applicants at risk.\textsuperscript{185} Without more options available, undocumented immigrant survivors are left either unqualified for visa applications\textsuperscript{186} or at the mercy of administrative discretion.\textsuperscript{187} Legislatures should work toward a better and more comprehensive program for undocumented immigrant survivors that provides more concrete hope for legal status.

C. Establishing an Alternative Process

Establishing a streamlined process for domestic and sexual violence survivors is essential to achieving the purposes that Congress asserts are foundational principals of the VAWA, U-visa, and T-visa programs. A special problem-solving court system specifically tailored for domestic and sexual violence survivors must address immigration concerns regardless of their marital status and without requiring that they retraumatize themselves by being involved in the investigatory process. Drug courts, as discussed above, provide a decent model for this kind of issue-specific court system, the costs it may incur, and the benefits that it could provide.\textsuperscript{188}

\textsuperscript{181} Nanasi, supra note 142, at 303.
\textsuperscript{182} Portillo, supra note 72, at 354–55.
\textsuperscript{184} Id. § 1101(a)(15)(U); id. § 1101(a)(15)(T).
\textsuperscript{186} See supra Part III.
\textsuperscript{187} See supra Part III.A.
\textsuperscript{188} See supra Part II.A.
1. The Social and Economic Value of Alternatives to Punitive Action

There is significant value in alternative remedies for offenders who are not a danger to others. As discussed above, support for drug courts and other alternatives are on the rise as society alters its views about moral culpability for criminal acts. Drug offenders do not often present significant physical danger to others, and effective alternatives are available through programs like drug courts. Similarly, undocumented immigrant survivors of domestic violence who desire to become legal residents are not inherently dangerous to society and should be offered alternatives to deportation or detention. Even those who originally entered by crossing the border in violation of U.S. immigration law do not present a danger to society, though they are arguably more “culpable” than those brought or kept here against their will.

The continued changes in broadening VAWA self-petition exceptions indicate changing attitudes toward undocumented immigrants, specifically survivors of domestic violence. Congress acknowledges the current hurdles that exist in the system for this population and continued increasing available options for survivors between the introduction of VAWA and its latest amendment in 2005, in which they eliminated the extreme hardship requirement for VAWA specifically in order to increase the availability of the self-petition option.

Alternatives to punitive action can be effective. Asylum seekers who are provided alternatives to detention comply with the requirements, routinely show up for proceedings, and successfully complete the

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189 See supra Part III.A.
190 See Mitchell, supra note 95 (describing those convicted of “non-violent” drug crimes).
191 Alex Nowrasteh, Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes, CATO INST. (Feb. 26, 2018), https://www.cato.org/publications/immigration-research-policy-brief/criminal-immigrants-texas-illegal-immigrant (showing that undocumented immigrants have lower incarceration rates nationwide relative to native-born Americans); see also Anna Flagg, Is There a Connection Between Undocumented Immigrants and Crime?, MARSHALL PROJECT (May 13, 2019), https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime (noting that illegal immigration is a civil violation or misdemeanor and that “[a]reas with more unauthorized migration appeared to have larger drops in crime rates, although the difference was small and uncertain”).
193 See supra Part III.A.
process. Given similar motivations and circumstances, undocumented immigrant survivors of domestic violence are similarly likely to comply and succeed if offered an alternative. Programs for human trafficking survivors are similar to drug courts in that they marginally restrict the freedoms of participants in exchange for therapy, treatment, and legal assistance that survivors need to recover. Local volunteer shelters, such as Richmond’s own Safe Harbor, run housing programs that aid survivors of domestic violence and human trafficking. Local programs may work with the judicial system and law enforcement to provide more intensive supervision combined with therapy and job training. These shelters could provide a model for a more expansive program designed specifically for undocumented immigrant survivors country-wide, reflective of how other specialty courts work with local community shelters in cooperation with social services and the judicial process.

Immigration courts are currently overburdened—with backlogs on the rise since 1998—and effective strategies to limit that burden could include alternatives to removal. Just as drug courts were established to help reduce the burden on the criminal justice system, it would be worth considering that a similar program could aid in the current crisis facing immigration courts. Special problem-solving courts demonstrate the potential effectiveness of finding an alternative solution to removal for survivors of domestic violence. Drug courts differ by jurisdiction, but generally are a voluntary program over an extended period that work through a variety of mandatory treatment services to detoxify and stabilize participants before

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engaging in aftercare. This process works through incentivizing participants back into compliance with the law. Passage through the drug court system requires continued adherence to the established rules of the program, and violation of those rules leads to re-incarceration.

2. Establishing an Immigration Court Based on Existing Problem-Solving Court Models

In the immigration context, the legislature could create an issue-specific immigration court system modeled after drug treatment courts. Eligibility should be similar to, but more expansive than, the current VAWA self-petition requirements, including those subjected to “battering or extreme cruelty.” Undocumented immigrants who have suffered domestic or sexual violence at the hands of a partner, family member, or other abusive party would be eligible for the program regardless of the immigration status of their abuser. This element of eligibility should be judged on a similar “any credible evidence” standard as current VAWA self-petitions, allowing for individuals to bring forth documentation, eyewitness testimony, text records, phone records, or other potential evidence to show they are currently attempting to escape an abusive partner.

Eligible participants could engage in a more therapeutic process similar to those provided by drug treatment court programs such as access to therapy, training, counseling, and other essential resources. Helping survivors reintegrate into society should be the focus of the process, and taking their unique circumstances into consideration would likely focus on therapeutic resources, job training, and language classes. Instead of requiring that immigrant applicants assist prosecutors or law enforcement (as required in U-visas and T-visas), the program would instead require that participants attend job trainings or partner with local safe-houses that offer therapy and rehabilitation programs. Like drug treatment courts, the proposed system for immigrants would also include a monitoring system either built into the individual programs or overseen by specialized court

204 Hora et al., supra note 86, at 521.
205 Id. at 475–76 (“The procedures of the treatment program reflect the premise that the DTC utilizes the coercive power of the court to encourage the addicted offender to succeed in competing the treatment program.”).
206 Id. at 489 (“DTC sanctions “demonstrate that there are immediate and swift consequences” for not following treatment protocol, which range from verbal admonishments to incarceration.”).
officials. Successful completion of trainings should be the deciding factor in cancellation of deportation, removing the discretionary risks associated with the current system.

Providing a more comprehensive and less discretionary program for immigrant survivors to apply for legal status would not only allow more survivors to report their abusive partners but would be more in line with Congresses stated goals of protecting vulnerable populations.

D. Criticisms

The first main criticism of creating a new issue-specific court is that the drug court model may be ineffective, and studies regarding their success are often filled with methodological problems. However, these methodological problems do not wholly discount the broad success seen since the implementation of this system. Drug court programs are not uniform or consistent across jurisdictions, and this places natural limitations on identifying their success. Even with these limitations, they still reduce recidivism in individual jurisdictions, and that achievement should not be overshadowed.

An additional critique is that society still values deterrence against illegal immigration and leniency will reduce the deterrent effect of our current policies. While this does not apply to the large number of immigrants whose undocumented status is a result of external forces, it is also an insufficient reason to prevent aid to survivors of domestic violence. Even if undocumented immigrants are here of their own volition, the need for deterrence does not exceed our moral responsibility to aid those suffering from crimes. This is a value that Congress recognized specifically in the passage of VAWA and continues to uphold in subsequent amendments. In engaging in harsh immigration policy in the name of deterrence, we

211 See Nolan, Jr., supra note 209, at 1543–44.
214 Lurigio, supra note 84.
215 Id.
219 Id.; see also H.R. REP. No. 103-395, at 38 (1993).
discourage those who are suffering from coming forward and escaping their abuser. 220

There is also a possible criticism that this kind of system would increase costs in a judicial structure that is already underfunded. 221 While funding discussions are beyond the scope of this paper, it would hardly be unfair to say that any changes to the immigration system would increase costs because it is already chronically underfunded. 222 Furthermore, as seen in the drug court programs, streamlining the process for all applicants may be a long-term solution that would reduce costs overall. 223

Finally, possible problems exist with relaxing the current eligibility requirements. One could argue that this might incentivize false reporting. 224 The fear of false reporting already presents itself with the options available for immigrants today. 225 For example, the chairmen of the Senate and House Judiciary Committee expressed concerns over the potential for false reporting with U-visas. 226 This misconception finds its nexus in the false impression that it is easy to get through the current immigration systems. 227 False reporting for domestic violence cases is already rare considering that the crime of domestic violence is underreported. 228 Immigrants who still need to be verified and wait for the process to complete after exposing themselves to potential deportation are not likely to do so with fraudulent intent. 229 The same is true for a majority of other processes through which immigrants gain legal status. 230 Furthermore, even if there is a small number of false reporting through this process, the risk of not increasing availability

of legal status to domestic violence survivors is that those survivors and their children continue to suffer violence, abuse, and possibly death.

CONCLUSION

Survivors of domestic and sexual violence are already a vulnerable class and undocumented status should not be an impediment to them receiving aid in reaching better circumstances. Based on the success of limited programs such as drug courts, a similar model should be developed to provide domestic violence survivors a path to citizenship and a better life. Undocumented immigrant survivors do not present a threat of violence against the general population; instead, they are victims of a system that has failed to represent their interests and has allowed them to suffer in silence with little hope of reprieve.

The current options available to undocumented immigrants are limited and allow for immense discretion in the hands of the government. That discretion leaves immigrant futures in the dark, which adds to the long list of disincentives that are already present for any domestic violence survivor who is trying to free themselves from their abuser. Addressing this problem means that the United States should implement a system, similar to the existing drug court program, that offers this population broader alternatives to deportation than the limited options available through the VAWA. Victimized and weak populations do not need to face punitive action, but rather deserve support and an open door to having access to more resources.

POSITIVE YOUTH DEVELOPMENT NETWORKS:
THE COMMUNITY-BASED SOLUTION TO JUVENILE DELINQUENCY AND
OTHER PROBLEM BEHAVIORS

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ABSTRACT

The American criminal justice system’s acknowledgement of the difference between adult and juvenile offenders in the late 1890’s lead a push towards prevention of young people’s interactions with the law. Although there is government funding and regulations for the current efforts to prevent juvenile offenses, the efforts are often disjointed. Researchers found that many problem behaviors including juvenile crime, truancy, drug and alcohol use and pregnancy often stem from the same risk factors. Many existing programs only address one root cause or one problem behavior. By creating an easy to access network of new and existing programs addressing health, education, job readiness and youth development, some communities have seen tremendous reduction in juvenile crime rates, lower participation in problem behaviors, and overall positive community development. This network model should be standardized by federal funding mandates and implemented in all low income, high risk neighborhoods to break the cradle to prison pipeline that implicitly exists in those communities.

INTRODUCTION

The American criminal justice system has long recognized that youth should not face the same punishment as adults. The creation of the juvenile justice system introduced the concept of delinquency and status offenses rather than the adult concept of crime in an attempt to address these differences. This recognition sprouted the idea of taking measures to prevent any youth contact with the justice system. To regulate these efforts, the federal government established the Office of Juvenile Justice and Delinquency Prevention (OJJDP). The OJJDP provides federal funding for state prevention programs and juvenile justice reformation initiatives. Although grants are only given to programs that meet a long list of statutory requirements, some programs fail to provide a meaningful decrease in juvenile delinquency.
Ongoing developmental research has created several frameworks to better understand and address delinquency prevention. Researchers have identified factors commonly associated with an increased likelihood of contact with the juvenile justice system. This research uncovered disparities between youth that come into contact with the juvenile justice system and those that do not. Socioeconomic differences, such as race, class, and ethnicity, are among the leading causes of disparately impacted youth. Positive Youth Development (PYD) is a framework that identifies and addresses these disparities in strategic ways. Although PYD has proven to be a successful theory, there are numerous inconsistent models implementing PYD practices. Because the ideal PYD practices have not been identified, the success of these programs is difficult to assess.

Preventative programs can effectively decrease contact with the juvenile justice system if the Office of Juvenile Justice and Delinquency Protection standardizes and implements a Positive Youth Development Model in all disadvantaged communities. Although reducing contact with the juvenile justice system is a worthy objective on its own, rehabilitating at risk youth and their families can be the remedy to various problem behaviors. Part I of this paper will explore the history of America’s juvenile justice system and explain the emergence of delinquency prevention programs. Part II will discuss the social science concept of positive youth development and how it became the foundation of modern youth serving programs. Finally, Part III will discuss some various positive youth development program models and explore how the more successful models could be expanded into integrated community networks with federal funding assistance.

I. BACKGROUND

The unsettled state of modern prevention programs could be attributed to the fluctuating history of juvenile justice reform and prevention efforts. Juvenile justice reform began as a purely rehabilitative movement.  

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However, shifts in politics, legislature, and behavioral science have led to
the current disjointed system.\textsuperscript{12}

\section*{A. HISTORY OF PREVENTATIVE PROGRAMS IN THE UNITED STATES}

\subsection*{1. Emergence of Juvenile Court}

Until the nineteenth century, the American legal system uniformly
pursued all criminal offenses.\textsuperscript{13} Juvenile and adult offenders were granted
the same due process rights, received the same sentences, and were housed
in the same detention facilities.\textsuperscript{14} Throughout the late nineteenth century,
social reformers urged for better treatment of juvenile offenders.\textsuperscript{15} Specifically, there was a push to create separate facilities for youth.\textsuperscript{16}

The growing awareness of the problematic justice system was a result
of rapid population growth in urban cities.\textsuperscript{17} During the 1880s roughly
5,200,000 people mostly of Polish, Slavic, Italian, Hungarian and Yiddish
descent immigrated to the United States.\textsuperscript{18} For example, in just a decade,
Chicago’s population more than doubled due to this spike in immigration.\textsuperscript{19}
Families in search of job opportunities immigrated to industrial American
cities.\textsuperscript{20} The surge in population and an insufficient job market lead to dire
economic conditions, densely populated tenements and increased crimes in-
volving children.\textsuperscript{21} During this time the Chicago Juvenile Protective Association
released reports on children’s disheartening living conditions that led to
their criminal involvement.\textsuperscript{22} Social reformers’ advocacy efforts increased as more children became entangled in the criminal justice system.\textsuperscript{23}

\begin{footnotesize}
\begin{enumerate}
\item See John D. Elliott & Anna M. Limoges, Deserts, Determinacy, and Adolescent Development in the Juvenile Court, 62 S.D.L. REV. 750, 767 (2017) (describing shifts in behavioral science); id. at 474–75 (describing shifts in politics and legislatures).
\item See Gardner, supra note 11.
\item KRISTIN M. FINKLEA, CONG. RESEARCH SERV., RL33947, JUVENILE JUSTICE: LEGISLATIVE HISTORY AND CURRENT LEGISLATIVE ISSUES 3 (2012).
\item See FINKLEA, supra note 14, at 3.
\item Id.
\item Id.
\item Id.
\item Id.
\item Jacometty & Jacometty, supra note 17.
\item Id. JPA’s formal mission was “safeguarding the children by dealing with conditions which demoralize them and promote delinquency, such as the selling of liquor to minors, indecent shows, disreputable dance halls, obscene postal cards, and the traffic for houses of prostitution.” Id.
\item See id.
\end{enumerate}
\end{footnotesize}
As a result of collaborative charitable efforts, the first juvenile court in America emerged in 1899 in Cook County, Illinois. The juvenile court was an accomplishment that relied heavily on social science and British common law. Parens patriae, Latin for parent of the country, is a British common law doctrine that allows the state to serve as the guardian for juveniles. The state’s paternal role charges the government to act in the best interest of the child. This shifted the state’s response to juvenile misconduct from punishment to rehabilitation. Alongside social science and the parens patriae doctrine, theories against the institutionalization of youth by pioneering developmental psychologists, like Stanley Hall, further legitimized the movement. As the movement gained legitimacy nationally, other densely populated cities established their own juvenile courts shortly after Chicago. By 1925, all states had a juvenile court system.

To create the juvenile justice system, states first needed to make several distinctions between juveniles and adults. These distinctions rest on the social science and parens patriae doctrine used to create the new court system. First, states determined who is a juvenile. Most states defined a juvenile as a person under the age of eighteen. States then developed substantive and procedural rules to distinguish the rehabilitative goals of juvenile courts from the retributive nature of adult courts. Some examples of the substantive and procedural rules which still exist in juvenile courts today include delinquency findings, status offenses, trial rights, and sentencing and punishment options. Rather than a finding of guilt for a crime, juveniles are found delinquent. A juvenile is found delinquent if they engage in illegal acts that, but for their age, would result in a criminal charge. Juvenile courts also introduced the concept of status offenses. Status offenses are noncriminal acts that are only considered a legal violation.

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24 FINKLEA, supra note 14, at 1; id.
25 Id.
26 FINKLEA, supra note 14.
27 Id.
28 Jaconetty & Jaconetty, supra note 17.
30 FINKLEA, supra note 14.
32 FINKLEA, supra note 14.
34 Id.
35 Id.
because of the youth’s minor status. A few common status offenses are truancy, curfew violation and underage drinking. Juveniles also do not have the right to a public trial by jury, instead, a judge is the trier of fact who makes a delinquency determination based on a “beyond a reasonable doubt” standard.

Also, sentencing in juvenile cases take on quite a different meaning than in adult criminal sentencing. A delinquency finding is followed by a dispositional hearing where the judge creates a rehabilitative plan for the minor rather than a punitive incarceration sentence. These plans can consist of counseling, community service, electronic monitoring, secured juvenile facilities, diversion programs, teen/youth court, out of home placements, and in extreme cases, adult jail. These delineations between juveniles and adults helped to further accomplish the rehabilitative goals of the new juvenile justice system.

2. Juvenile Justice and Delinquency Prevention Act
   a. Rehabilitating Youth

   Although juvenile courts sought to rehabilitate youth by establishing special due process protections and comprehensive treatment plans, studies found that the juvenile justice system was inconsistent and sometimes ineffective. As patterns in youth behavior became measurable through the mental health findings of court programs, behavioral experts used those findings to discover prevention methods.

   In response to the nationwide creation of juvenile court and the increased focus on delinquency prevention, the federal government

   36 U.S. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, supra note 3, at 1.
   37 Id. at 4–5.
   38 In re Winship, 397 U.S. 358, 367 (1970) (finding that the standard of proof beyond a reasonable doubt must be applied to juvenile delinquency hearings as a safeguard against due process violations); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (finding that the Sixth Amendment trial by jury does not apply to juvenile cases).
   39 See Amanda McMasters, Effective Strategies for Preventing Recidivism Among Juveniles 6 (June 1, 2015) (unpublished Honors Senior Theses, Western Oregon University) (on file with the Digital Commons, Western Oregon University).
   40 See generally VA. CODE § 16.1-278.8 (describing the dispositional options of the juvenile court); see also JAMES AUSTIN ET AL., U.S. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS (Sept. 2005), https://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf (listing a variety of juvenile alternatives to adult jail).
established the Office of Juvenile Justice and Delinquency Prevention. Through this agency, the federal government passed the Juvenile Justice and Delinquency Protection Act (hereinafter “the Act”) in 1974.

The Act established core mandates and other requirements that states must comply with to receive funding. The core mandates resulted in positive changes in the system, but their objectives were undermined by subsequent revisions. Some grant requirements are that states maintain programs that focus on positive youth development for at-risk youth and juvenile offenders, provide services to address learning disabilities and language barriers, and develop programs that address abuse and neglect. It also requires that states provide counseling and mentoring to youth offenders in detention facilities. There are thirty-three statutory requirements asserted in 34 U.S.C. §11133(a), which governs the issuance of federal grant proceeds.

In 1980, the Act established additional mandates; first, juveniles were not to be detained or confined in any jail or confinement facility for adults, except for juveniles who were accused of non-status offenses. These juveniles may be detained for no longer than six hours as they were being processed, waiting to be released, awaiting transfer to a juvenile facility, or awaiting their court appearance. Secondly, following demographic finding of Disproportionate Minority Contact (DMC), states were required to show that they are implementing juvenile delinquency prevention programs designed to reduce—without establishing or requiring numerical standards or quotas—the disproportionate number of minorities confined within their juvenile justice systems.

Disproportionate Minority Contact (DMC) is a term used to explain a bias that exists within the juvenile justice system. “DMC is the phenomenon in which juveniles of minority backgrounds have a disproportionate rate of contact with the juvenile justice system than their nonminority counterparts.” In 1992, after it was reported that seven out of every ten

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44 Id.; see also FINKLEA, supra note 14, at 6.
46 FINKLEA, supra note 14, at 7.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id. at 12.
53 Kyle, supra note 10, at 1.
54 Id.
juveniles in secure facilities were minorities, the Act was amended to specifically include disproportionate minority confinement reduction as a core mandate for federal funding.\textsuperscript{55} It was later expanded from “confinement” to “contact” to emphasize prevention in 2002.\textsuperscript{56} The goal of the DMC mandate is “to ensure equal and fair treatment for every youth in the juvenile justice system regardless of race and ethnicity.”\textsuperscript{57} This mandate has encouraged states with high DMC rates to implement police training curriculums to encourage more positive interactions with minority youth.\textsuperscript{58} These trainings have been instrumental in decreasing the disparities between minority arrest rates in comparison with their similarly situated counterparts.\textsuperscript{59}

\subsection*{b. A Shift in Focus}

Although the structural objectives of the Act remained, several amendments caused the execution of the Act to have an increasingly punitive shift.\textsuperscript{60} When first passed, the Act focused on preventing juvenile delinquency and rehabilitating juvenile offenders.\textsuperscript{61} Subsequent revisions, however, placed greater emphasis on punishing juveniles for their crimes.\textsuperscript{62} Congress added sanctions and accountability measures to ensure that states were holding juveniles accountable for their crimes.\textsuperscript{63} Among these increasingly punitive efforts, states allowed for juveniles to be tried as adults.\textsuperscript{64}

The added sanctions and transfer provisions had detrimental effects on the rehabilitative nature of the juvenile justice system. Children were being punished as adults, and the general public’s attitude toward youth misconduct became less forgiving.\textsuperscript{65} Between 1980 and 1990, there were escalating rates of serious youth violence, and the arrest rates for homicide committed by adolescents had doubled.\textsuperscript{66} The public reaction from political leaders incited the youth crime scare.\textsuperscript{67} Warnings of the “coming storm of juvenile

\begin{footnotes}
\item[56] Kyle, supra note 10, at 1.
\item[57] Id.
\item[58] ELIZABETH SPINNEY ET AL., DEV. SERVS. GRP., CASE STUDIES OF NINE JURISDICTIONS THAT REDUCED DISPROPORTIONATE MINORITY CONTACT IN THEIR JUVENILE JUSTICE SYSTEMS 18 (2014).
\item[59] Id. at 3 (showing that communities in Connecticut that employed the use of DMC Programs reduced their disparity from 2.9 to 1.6 for Hispanic youth and 6.3 to 4.7 for African American youth).
\item[60] FINKLEA, supra note 14, at 13, 18.
\item[61] Id. at 5.
\item[62] Id. at 18.
\item[63] Id. at 19.
\item[64] Id. at 2.
\item[65] Id.
\item[67] Id. at 276–77.
\end{footnotes}
violence” and the shunning of “juvenile super predators” was a part of the tough on crime rhetoric that perpetuated the legislative crackdown on juvenile offenders. The tough on crime era had damaging effects on prevention efforts. However, high recidivism rates and more effective alternatives highlighted the inefficiency of the harsher juvenile justice system.

**B. Creating the Framework for Prevention**

One of the effective alternatives to the punitive juvenile justice system were prevention programs. The first wave of delinquency prevention programs used a “medical model” structure. The medical model refers to the isolation of specific causes of deficient behavior or dysfunction and attempts to administer issue specific treatments. Federal public assistance programs are an example of medical model remedies. However, some researchers moved away from medical model remedies. However, some researchers moved away from medical model treatment to focus their effort on optimizing the effectiveness of prevention programs.

To understand the communities which they hoped to serve, researchers used mental health data, child psychology theories, and social science to create useful building blocks of delinquency prevention. A foundational finding that emerged at this time is that there are two stages of juvenile justice: prevention and court processing. Court processing consists of intake, detention, adjudication, disposition, and aftercare. Prevention, although not a part of the formal judicial process, is a precursor to the proceedings. Practitioners found that prevention exists at a primary and...
secondary level. Primary prevention programs are general and directed at all youth—for example, Boy Scouts, Girl Scouts and the Y.M.C.A. Secondary prevention programs narrowly target youth “at risk” of delinquency. The level of risk is determined by factors such as income, neighborhood, or prior record of misconduct.

Another more integral finding, however, was the identification of factors common among youth that have frequent contact with the juvenile justice system. Social scientists coined concepts such as “cradle to prison pipeline” and “school to prison pipeline” to refer to the trending disproportionate level of minority youth incarceration. Further research revealed that the intersectionality of certain factors common to those minority groups further led to delinquency. Some of the issues particular to minority youth include poverty, discrimination and exclusion, and access to low performing schools. Also, these children’s lives are at further risk of disruption than others because they are at higher risk of Child Protective Services removal, removal from school, and removal from their communities. A child’s environment serves an important role in their development. It helps children develop a sense of belonging and helps establish healthy relationships with other actors in their community. CPS removal interrupts that function of building stability.

II. Positive Youth Development

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78 Id.
79 Id.
80 Id.
82 Kyle, supra note 10, at 31.
86 Id. at 1–2.
87 Robert Hill, supra note 84, at 17–18 (describing foster care as a predictive factor of producing future homelessness, welfare recipients, delinquents, drug addicts, criminals, and child abusers in adulthood).
The ability to predict the likelihood of problematic behavior before it occurred lead to more useful prevention program models.88 However, because the information in the area was consistently evolving, state efforts continued to be scattered.89 Positive Youth Development (PYD) was one of the promising new concepts that emerged in this era.90 Although the underlying principles of Positive Youth Development were clear and largely supported by science, its popularity lead many to create PYD model that did not adequately uphold its integrity.91 The OJJDP even incorporates a positive youth developmental statutory requirement for federal funding.92 The issue is, no one quite knows what a pure positive youth development program looks like. States have no standard way to apply these principles.93 The extensive list of requirements, paired with the expansive field of positive youth development research, left prevention program developers at a loss.94

A. Process, Principles, Practice

The term youth development is commonly used in three different ways; a natural process, principles, and practices.95 Together, the three create the basis of positive youth development programming:

- Youth development as a natural process is the “growing capacity of a young person to understand and act in their environment.”96 Scientists explain that this early stage of human development sets the foundation for a healthy and productive life.97 The more one is exposed to a positive environment, the more likely a person is to thrive starting at an early age.98

88 See, e.g., Daniel Shek et al., Positive Youth Development: Current Perspectives, ADOLESCENT HEALTH, MED. & THERAPEUTICS 131, 134–35 (2019) (describing, for example, Social Emotional Learning, a form of Positive Youth Development that is useful for determining developmental outcomes for youth based on their social-emotional competencies).
90 Shek et al., supra note 88, at 131 (describing, for example, Social Emotional Learning, a form of Positive Youth Development that is useful for determining developmental outcomes for youth based on their social-emotional competencies).
92 FINKLEA, supra note 14, at 1.
93 See id. at 31.
94 See id. at 1.
96 Id.
97 Id.
98 Id. at 1, 5, 9, 13.
Youth development principles are a set of ideals which embrace the growing capacity of young people. These principles emerged as counter to the existing problem-centered approach to delinquency prevention. The problem-centered approach focused on individual deficiencies of a child and attempted to remedy them. Instead, youth development seeks to include all youth in positive practices that build on their existing strengths.

Youth development practices are the implementation of youth development principles into the spaces where development occurs, for example; family homes, neighborhoods, youth organizations, faith-based spaces and schools.

The positive youth development framework for prevention programs uses youth development principles to construct a set of practices that deter from problem behaviors.

B. The Five C’s

To help put principles into practice, researchers use the Five C’s to summarize the goals of PYD and provide focus for program developers. The human qualities that PYD should seek to improve are best summarized as “The Five C’s”: (1) competence – knowledge and skills that help people to positively interact with their environment; 2) character – the intention to do what is right; 3) connections – social relations with adults peers and younger children; 4) confidence – the assurance youth need to continue to build and demonstrate competence and character; and 5) contribution – engagement in selfless acts for others or their community. The Five C’s are used as a guideposts for various program models.

C. Risk and Protective Factors

99 Id. at 1.
101 Id. at 720.
103 Id. at 3.
104 Bowers et al., supra note 100, at 720–21, 732.
106 Bowers et al., supra note 100, at 720–21, 732.
To further guide programs, social scientists identified an extensive list of risk factors. Risk factors are a set of indicators which are common among youth with delinquency issues. Risk factors commonly fall into four categories: individual, peer, family, school/community. To combat risk factors, positive youth developmentalists identified protective factors tailored to each risk.

1. **Risk Factors**

Risk factors are circumstances or conditions that increase the probability of problematic juvenile behavior. The OJJDP identified four categories of risk factors:

1) Individual – Common individual risk factors include early antisocial behavior, poor cognitive development, lower I.Q. and hyperactivity.

2) Family – Family risk factors include inadequate or inappropriate child rearing, general home discord, maltreatment and abuse and neglect, large family size, poverty, exposure to family violence, divorce, parental psychopathology/antisocial, teen parenthood and low parental involvement.

3) Peer – Peers who engage in delinquent acts, risky behavior or gang activity are less exposed to social opportunities.

4) School/Community – Poor academic performance, unsafe/inadequate schools, low educational commitment, and low income/high crime neighborhoods are a few school and community risk factors.

2. **Protective Factors**

The identification of risk and protective factors serve the function of determining if a program has met the grant requirements. To combat the above listed risk factors, the OJJDP also identified categorical protective

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108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id.
115 Id.
factors.\textsuperscript{116} These factors were developed as a result of resiliency research.\textsuperscript{117} Resiliency refers to people’s ability to achieve positive life outcomes despite the presence of multiple risk factors.\textsuperscript{118} Researchers looked for the influences that combat the risks and allowed these individuals to overcome.\textsuperscript{119} Preventative factors, which are separated into the same four categories as risk factors, include:

1) Individual – Developing positive social skills and striving to increase I.Q.\textsuperscript{120}
2) Family – Increasing the availability of economic and other resources to expose youth to multiple experiences, shared activities between youth and family (parents and siblings), providing the forum to discuss problems and issues with parents, presence of an adult ally in the family to mentor and be supportive.\textsuperscript{121}
3) Peer – Engagement in healthy and safe activities with peers during leisure time, positive and healthy friends to associate with.\textsuperscript{122}
4) School/Community – Schools that address academic social and emotional needs, safe school environment, a community that fosters healthy activities for youth.\textsuperscript{123}

The use of risk and protective factors to achieve the Five C’s gave prevention programs some needed guidance. The underlying sources of positive youth development gained widespread support due to its scientific reliability.\textsuperscript{124} However, PYD programs struggled to gain traction due to a lack of uniformity and structural clarity.\textsuperscript{125}

D. “Problem Behavior Syndrome”

Risk and protective factors are used to assess other unhealthy behaviors in youth. While many youth programs strive to decrease delinquency, there is much overlap in the causes and detrimental effects of delinquency and other risky activities.\textsuperscript{126} If the goal is to develop youth

\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Bowers et al., supra note 100, at 732.
\textsuperscript{125} Id. at 732–33.
\textsuperscript{126} STEPHEN F. HAMILTON ET AL., Principles for Youth Development, in THE YOUTH DEVELOPMENT HANDBOOK: COMING OF AGE IN AMERICAN COMMUNITIES, supra note 95, at 6.
resiliency to negative external factors, those skills can be an effective combatant to various problem behaviors.

Positive youth developmentalist Joy Dryfoos brings light to the issues with the common practice of dividing youth problem behaviors into different categories. The four leading youth problem behaviors are delinquency, pregnancy, poor school performance and truancy, and substance abuse. Jointly named “problem behavior syndrome,” the challenging behavior of children is affected by three systems: the perceived environment system, the personality environment, and the behavior system. Similar to the division of risk and protective factors, these systems link problem behavior syndrome to peer and familial interactions, self-esteem, independence, exposure and use of substances, and risky sexual behavior.

Although overlap exists in the roots of all problematic behavior, federal funding causes these to be very distinctive issues with separate funding requirements. Because each behavior is governed by a different federal agency and funding, the local programs are structured to address each issue in separate domains. She states that problem specific programs emphasize problem behavior, sometimes enhancing it. The labeling effect or self-fulfilling prophecy causes selected youth to become hyper aware of their troubled identity which can have damaging effects on development. She proposed that “problem behavior syndrome” is best addressed as a whole by building strengths, or resilience, in children. Delinquency has long been the focus of prevention programs discussed throughout this paper. Below, risk factors and effects of other problem behaviors are discussed:

1. **Teen Pregnancy**

   Teen pregnancy, like delinquency, is considered an adolescent problem behavior because of its adverse effects on youth. Nearly all teen

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127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id. at 7.
134 Id.
135 Id. at 6.
pregnancies are reported as unplanned pregnancies. Behavioral experts looked for common factors that lead to teen pregnancies and found significant overlap in the root of delinquency, unplanned teen pregnancy, and other problem behaviors. Among the reasons cited, poverty, race and ethnicity, lack of information and resources and low education, and foster care were the most common risks. Although teen pregnancies have steadily declined (showing a seventy percent decline in the United States since 1991), this decline is somewhat misleading. Each year, about 210,000 teens are still having unplanned pregnancies. Unplanned pregnancy can lead to other disheartening effects on young people—specifically, young women. Nearly one-third of young girls who drop out of high school cite pregnancy or motherhood as the reason. Only forty percent of teen moms finish high school, and less than two percent finish college by age thirty. Young mothers also face heightened health risks, greater unemployment rates, and greater poverty rates.

In 2010 the Office of Adolescent Health (OAH) established the Teen Pregnancy Prevention Program to invest in the implementation of evidence based programs and the development of innovative approaches to teen pregnancy. The OAH currently funds ninety-one grants that either: (1) fund the implementation of new teen pregnancy prevention programs; (2) build the capacity of youth serving organizations to sustain pregnancy prevention programs; (3) support technology-based innovations that have promising approaches to preventing teen pregnancy prevention programs; or, (4) rigorously evaluate new and innovative approaches to teen pregnancy prevention that particularly address male, Latino, LGBTQ+, Native youth and foster care youth teen parentage rates. With the focus on teen pregnancy prevention, the United States saved 4.4 billion dollars in public savings in 2015 alone. This accounts for the reduction on young families’ dependency on

140 Why It Matters, supra note 137.
141 Id.
142 Id.
143 Id.
144 Id.
145 Id.
147 Id.
148 About Teen Pregnancy, supra note 139.
federal welfare programs. Between 2001 and 2009, national graduation rates increased by 3.5%. While these results are promising, it is often difficult for young women to receive the help that these programs have to offer because of the ever changing social and legal perceptions of women’s reproductive rights.

2. Truancy and Poor Academic Performance

Poor academic performance is most commonly linked to truancy. Truancy is the intentional unauthorized absence from school. Each state has an attendance requirement mandating school attendance until a certain age. For example, in most states, youth missing more than ten days are required to repeat the entire grade. Truancy is the most common status offence in the United States. A status offence is an illegal act which is directly tied to a person’s identity as a juvenile. By 2003, the negative effects of truancy had become so pervasive that the Office of Juvenile Justice and Delinquency Prevention named it a national priority.

The consequences of truancy have many negative societal implications such as dropout rates and negative long-term adult outcomes. Those long-term adult outcomes include mental health issues, lower status jobs leading to poverty, substance use, and adult criminality. The negative effects of truancy often extend beyond the individual’s low academic achievement and seep into the community causing clusters of youth engaging in delinquent behaviors. The students most prone to low academic achievement were those who lived in socially disorganized neighborhoods and had low socioeconomic status.
is categorized as one with high crime and few resources. Because school is responsible for 95% of adolescent friendships and provides opportunities for social development through sports and extracurricular opportunities, it is deemed one of the most important ecological settings in youth developmental theory. When students have weak school bonds they are more likely to engage delinquent activities, further advancing their problem behavior syndrome.

3. **Substance and Alcohol Abuse**

The last of the commonly cited problem behaviors is youth substance abuse. Substance use during adolescence has both individual and societal effects. On an individual level, substance and alcohol abuse interferes with cognitive abilities, contributes to mood disorders and increases risk of injury or death. The societal effects include higher cost of healthcare on the state, poor academic performance, mental health services, and increased probability of delinquent acts. An additional cost of adolescent substance and alcohol abuse is that the use and health complications extend into adulthood.

Similar to other adolescent problem behaviors, there are known risk factors. Those factors are categorized as contextual and individual/interpersonal. The contextual risk factors are those pertaining to culture and societal norms, for example: laws implementing legal drinking age, availability of substances, extreme economic deprivation and neighborhood disorganization. Individual and interpersonal factors are the characteristics of individuals and their personal environments that lead to alcohol and substance use. Some individual and interpersonal factors include physiological challenges, family substance and alcohol use, family conflict and low family bonding, peer rejection, peer substance and alcohol use, and overall alienation.

E. **Positive Youth Development and Problem Behaviors**

161 Id. at 508.
162 Id. at 507–08.
163 Id. at 516.
164 Id.
165 Id.
166 Id.
168 Id.
169 Id.
170 Id. at 81–85.
The PYD framework gained much support because of its ability to address all of the problem behaviors. By identifying the common underlying risks that lead to all youth problem behaviors, not just delinquency, PYD programs offered a holistic remedy to struggling communities. It builds on the work of progressive reformers, like Jane Addams, who sought a calculated method to understanding delinquent behaviors. The foundation of the well-founded resilience theory to create protective developmental assets which reduce risk factors was both cohesive and effective. Many supporters of delinquency prevention efforts began to create various models of PYD. While the lengthy statutory requirements give detailed program objectives and goals, they do not provide any structural requirements. A detrimental side effect of having this reliable framework with no structural guidance was the emergence of models that failed to reach the desired result.

III. Argument

Positive Youth Development programs and practices are most impactful when a standardized model is implemented in all states. The standardized model should be one that addresses multiple common risk factors by engaging youth in pro-social activities build resiliency to problem behaviors. Community program networks, mandating interconnected community efforts, will ease access into necessary youth and family services. The disparate impact of race and poverty often leave children and families in need of extended services, and a community network will ease access to health, education, employment services to strengthen youth resilience to delinquency, and other problem behaviors.

A. APPLYING POSITIVE YOUTH DEVELOPMENT

A Positive Youth Development Program is a set of principles put into practice. There are broad findings under this theory which leave

172 Id.
174 See id. at 7; U.S. Dep’t of Health & Human Servs., supra note 171.
176 FINKLEA, supra note 14, at 20.
177 BUTTS ET AL., supra note 173, at 9.
178 Id. at 23.
programs with a lot of room for interpretation. Programs build various models based on the foundational principles which makes it difficult to measure the success of PYD programs. It is also impossible to integrate PYD into more formal state practices because of the large variation in programs. Using a model as a framing device provides a blueprint for youth justice practitioners.

In a survey of PYD models, researchers compiled a list of characteristics of effective programs. On this list, researchers cite that programs targeting at least five developmental constructs, including competence, self-efficacy and prosocial involvement, were among the most successful. Also, programs with frequent engagement and a structured curriculum supporting those developmental constructs were most effective. What this study found is that the most effective programs had many similarities in their implementation and structured curriculum. The participants in those programs showed improvement in interpersonal skills, quality of peer and adult relationships, self-control, problem solving, cognitive abilities, academic achievement, reduced drug and substance use, school misbehavior, violence, and risky sexual behavior. Using the findings from the most effective program to create a standard model, could lead to similar, more consistent results.

1. Positive Youth Justice Model

The Positive Youth Justice Model (PYJM) is one of the effective manifestations of Positive Youth Development that seeks to reduce delinquency and possesses many of the characteristics found in the study on successful programs. It proposes that programs should address six life domains: Work, Education, Relationships, Community, Health and Creativity. These programs address the work domain by giving youth job experiences and job preparedness skills. This provides income and develops a sense of independence for youth. The education domain is addressed by improving literacy and learning skills, which builds students confidence and ability to positively contribute in their schools.

180 BUTTS ET AL., supra note 173, at 32.
181 Id.
182 Catalano et al., supra note 91, at 115.
183 Id.
184 Id. at 116.
185 Id. at 117.
186 Id.
188 Id.
189 Id.
190 Id. at 19.
191 Id.
192 Id. at 19, 22.
The relationship domain often refers to youth’s relationships with family members and people of authority. Youth in these programs are taught communication skills, conflict resolution and intimacy and support. This teaching process is very subjective because it is done by creating a sense of community and belonging. Programs have to create a family-like system to mirror what those relationships may look like for its participants. Often, these programs are the healthiest (or only sense of) family that they have so program directors must strive to build connections with participants who may not have any examples of healthy bonds.

The community domain incorporates civic engagement and service to build a sense of responsibility in its participants. When youth have meaningful engagement in their community that manifests in positive changes, their sense of responsibility to maintain that advancement becomes stronger. The health domain is most addressed through education about diet, nutrition, sexuality, and lifestyle. They often integrate or promote group physical activity (i.e. sports teams, group workout activities). These programs also teach about behavioral health. However, the behavioral health undergirds all of the interactions between participants and practitioners.

The final domain, creativity, provides youth participants space for personal expression. Programs also foster opportunities to explore visual, performing and language arts.

Within each of these six life domains, the PYJM implements a two-tiered approach of (1) learning/doing; and, (2) attaching/belonging. This approach is not unique to the positive youth justice model; it is commonly used in various PYD models. Learning and doing allows youth to take an
active role in their betterment through skill-building.\textsuperscript{207} This is because “it is easier to act your way into better thinking, than to think your way into better acting.”\textsuperscript{208} This tier focuses on developing and using new skills, taking on new roles and responsibilities and developing self-efficacy and personal confidence.\textsuperscript{209} The attaching and belonging allows youth to use the skills they are learning and integrate them into their communities (i.e., families, school organizations, community organizations).\textsuperscript{210} This gives them a sense of responsibility and increases pro-social involvement.\textsuperscript{211} When youth become an active member of social groups, they develop and enjoy a sense of belonging.\textsuperscript{212} They then begin to place a high value on service to others and being part of a larger community.\textsuperscript{213} These pro-social engagements with one’s community and family promote long term engagement with the skills they have learned.\textsuperscript{214}

B. Expanding Beyond a Program: Community Networking

An increasingly popular prevention model goes a step further than a program. It incorporates positive youth development programs into a community safety net. Community-wide interventions strive to incorporate the primary youth serving institutions into an easy-to-access network.\textsuperscript{215} Those institutions respond to adolescent needs and typically include health, education and employment.\textsuperscript{216} This approach to prevention forces different systems to collaborate with a common goal in mind: the positive development of youth and their families.

This approach moves away from addressing isolated, individualized problems and instead aims to holistically meet the multifaceted needs of youth.\textsuperscript{217} Because an overwhelming percentage of “at risk” youth are often exhibiting multiple problem behaviors, a targeted remedy approach to each issue can be burdensome to the participant and therefore will lead to a lack

\begin{footnotesize}
\begin{enumerate}
\item Id. at 8.
\item Id. at 17.
\item Id. at 16.
\item Id.
\item Id. at 8–9 (2010). Prosocial behavior is the voluntary behavior intended to benefit another. Lisa Horn, et al. Social Status and Prenatal Testosterone Exposure Assessed Via Second-To-Fourth Digit Ratio Affect 6-9-Year-Old Children’s Prosocial Choices, 8 SCI. REP. 9198, 1 (2018).
\item BUTTS ET AL., supra note 173, at 17–18.
\item Id. at 19.
\item Id. at 16.
\item NAT’L RESEARCH COUNCIL, supra note 179, at 193–94.
\item Id.
\item Martha Burt et al., Comprehensive Service Integration Programs for At-Risk Youth, ASPE (Dec. 7, 1992), https://aspe.hhs.gov/basic-report/comprehensive-service-integration-programs-risk-youth (“The results of many years of program impact evaluations demonstrate that single-focus programs targeting at-risk adolescents may not be the most effective way to help youth. Increasing attention is being paid to programs capable of dealing with the whole child, including the child’s parents and neighborhood.”).
\end{enumerate}
\end{footnotesize}
of participation. The most commonly cited reason for program failure is lack of participation. While it is true that children facing adversity are less likely to be motivated to attend a program that is not mandated, a wholistic program that is not specifically for problem youth but rather for the positive development of all youth, is more attractive to young people and reduces the adverse labeling effect.

The interagency sharing of funds is not an unfamiliar concept. In 2010, the Center for Disease Control and Prevention and the U.S. Department of Health and Human Services Office of Adolescent Health partnered to create pregnancy prevention programs. That joint venture funded the implementation of more progressive an informative sexual education courses in schools as well as community-based efforts to educate young people about safe sexual practices.

Similar to integrated health service centers, which is defined as “the organization and management of health services so that people get the care they need, when they need it, in ways that are user-friendly,” the goal of positive youth development networks would be to organize community services addressing risk factors common among problem behaviors. The networks would use the most successful positive youth development methods and models, like PYJM, to create an easy-to-access holistic service system. Doing this would combine the disjointed funding and resources to create an efficient developmental network.

1. Communities that Care

219 See id.
222 Id.
Communities that Care is a program that seeks to mobilize communities towards their own advancement.\textsuperscript{225} Communities that Care seek out neighborhoods that exhibit the interplay of risk factors.\textsuperscript{226} The first implementation step is to take a youth poll, similar to the method employed by Jane Addams, to identify what they think their communities strengths and weaknesses are.\textsuperscript{227} They then reach out to existing programs in the community to bridge their efforts together in an intentional way.\textsuperscript{228} Communities that Care organizes workshops in communities to address their needs where services are lacking.\textsuperscript{229} After implementation, evaluations are regularly completed to assess the progress of the programs and evaluate their effectiveness.\textsuperscript{230} Communities that Care encourages stakeholders in a community to “build it themselves,” and they take a hands-on approach to the long-term advancement of their own communities.\textsuperscript{231}

2. Community Schools

Community Schools are another example of a full-service strategy that makes schools a central hub for community activities.\textsuperscript{232} Neighborhood public schools partner with community agencies to share the responsibility of raising the local youth.\textsuperscript{233} The goal of the joint effort is to surround children with healthy relationships with responsible adults.\textsuperscript{234} Having many responsible adults engage with a child builds relational assets that they may lack in their naturally occurring home and community environments.\textsuperscript{235} Also, another effect of this consistent contact with responsible adults, is that such adults can quickly recognize when intervention is necessary.\textsuperscript{236} The earlier the intervention, the greater the likelihood of building resistance to problem behaviors that may later result.\textsuperscript{237}

\textsuperscript{225} H.B. Jonkman et. al., \textit{Communities That Care, Core Elements and Context: Research of Implementation in Two Countries}, 30 SOC. DEV. ISSUES 42, 43 (2009).
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} See \textit{Communities That Care: Models for Community Health and Development}, supra note 226.
\textsuperscript{233} Id.
\textsuperscript{234} Id. at 8.
\textsuperscript{235} Id. at 9.
\textsuperscript{236} Id. at 8.
\textsuperscript{237} ATELIA MEAVILLE ET AL., \textit{COAL. FOR CMTY. SCH.}, COMMUNITY-BASED LEARNING: ENGAGING STUDENTS FOR SUCCESS AND CITIZENSHIP 23–24 (Jan. 2006), http://www.communityschools.org/assets/1/AssetManager/CBL_Book_1_27_06.pdf (describing the positive impact of community schools on childhood behavior); \textit{id.} (explaining the importance of early intervention).
Both of these community-wide efforts have proven successful in serving youth who feel the greatest disparate impacts of societal flaws. The early intervention and building of resistance, engages youth in their environment, giving them a sense of belonging and safety. Participants learned how to engage in healthy interactions with various members of their communities. These community-wide efforts created a reciprocal relationship between youth and other community stakeholders that ultimately benefitted all involved.

CONCLUSION

The network approach to youth development has proven successful where it has been implemented. The issue is that these broader reaching programs are only found in a few communities. Many states have existing services and programs addressing risk factors, but few states combine these efforts into an accessible system. Using narrower regulations in the Juvenile Justice and Delinquency Prevention Act’s mandates for federal funding, a standardized PYD program would provide a strong base from which a community network can emerge across all states.

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238 See, e.g., Dryfoos, supra note 232, at 8 (describing the positive impact of the Quitman Street Community School’s successful implementation of the community school model); Research & Results, COMMUNITIES THAT CARE PLUS, https://www.communitysthatcare.net/how-etc-works/ (last visited Oct. 22, 2019) (demonstrating the success of Communities that Care through research and studies).


240 See ATELIA MELAVILLE ET AL., COAL. FOR CMTY. SCH., COMMUNITY-BASED LEARNING: ENGAGING STUDENTS FOR SUCCESS AND CITIZENSHIP 42 (Jan. 2006), http://www.communityschools.org/assets/1/AssetManager/CBL_Bk_1_27_06.pdf (emphasizing the importance of children using community members as valuable resources).

241 Dryfoos, supra note 232, at 10.

242 See MELAVILLE ET AL., supra note 240, at 23.

243 Dryfoos, supra note 232, at 11–12.
OPPORTUNITIES FOR VIRGINIA LAW SCHOOLS TO IMPLEMENT
RESTORATIVE JUSTICE APPROACHES IN THE HONOR CODE SYSTEM

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ABSTRACT

Lawyers are bound to certain ethical obligations in the representation of their clients. The instruction of this ethical code begins as students enter law school with the acceptance of the school’s honor code system. All Virginia law schools have an honor code, although the composition can greatly vary from school to school. What is common among these codes is an approach to the honor code that mimics an adversarial criminal justice proceeding rather than an educational tool to teach and reinforce ethical expectations. Additionally, the potential outcomes of honor code violations can be overly punitive. Borrowing from restorative justice approaches, I argue that law school honor codes should include restorative aspects to better serve students as budding professionals. Particularly, student violators need opportunities to truly accept their behavior and repair harm to the learning community. This approach would be particularly helpful in law schools before students enter the profession.

INTRODUCTION

Law students around the country are bound by an honor code when they enter law school.1 These honor codes, honor systems, or codes of academic conduct provide rules and guidelines about permitted and unpermitted academic conduct.2 Honor codes serve an important role in providing law students with guidance about the level of academic integrity expected from them, and ensuring fairness to all students.3

When honor code violations occur, students are held accountable through the school’s honor code grievance process.4 This can include everything from informal resolutions, to trials with peers, or faculty and administration, serving as both prosecutors and jury members.5 Often, these

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3 See id. at 824–25 (describing many law schools’ use of an adversarial process to hold students accountable for violations of the honor code).
4 See id.; Univ. of Richmond Sch. of Law, Honor Code 5–7 (2018), https://law.richmond.edu/students/honor-code.pdf; Coll. of William & Mary, Honor System, Section IX: Honor Council Resolution Procedures, https://www.wm.edu/offices/deanofstudents/services/communityvalues/studenthandbook/honor_system/section_IX/index.php (last visited Nov. 6, 2019); Wash. & Lee Univ.,
processes mimic the criminal justice system and provide familiar rights to students accused of violations, such as the right to counsel and the right against self-incrimination. These protections are important to ensure that the honor system treats each accused and prosecuted student fairly.

In Virginia, the dean of the law school is required to report charges of honor code violations to the Virginia State Bar. This fact, along with additional sanctions imposed by the school, can turn honor codes into particularly punitive devices, which can become a barrier to ultimately practice law. Students who make academic integrity mistakes early in their law school careers can potentially suffer consequences for years to come. This is particularly problematic when understood within the wide variety of offenses that can be prosecuted under honor code systems.

Because of the nature of the “crimes” under most honor code systems, a restorative justice discipline approach is preferable because it gives law students opportunities to grow from their mistakes before entering the profession. Restorative justice is an approach which encompasses processes seeking to restore those harmed by offenders’ actions. It is a victim-centered process that attempts to create a dialogue between offender and victim in order to provide restoration to the victim while also providing dignity to the offender. Additionally, by implementing restorative justice in law schools, students can learn, model, and practice restorative approaches which can then be used in actual practice.

Part I of this comment will look at current honor code systems at law schools in the Commonwealth of Virginia. This section explores various honor code system models and philosophies behind different...
approaches. Particularly, this section explores honor code systems as a set of duties that apply to the law school, to the students, and to the profession at large. Part II of this comment will provide a basic overview of the ideas and principles of restorative justice. While restorative justice is typically seen in criminal cases, Part III will explain why a restorative justice approach is fitting for law school settings and discuss why law schools should incorporate restorative values into their current honor code systems.

I. Law School Honor Code Systems

The Commonwealth of Virginia is home to eight law schools, each with their own honor code system. Each system is unique, as some honor code systems are university-wide and apply to the undergraduate and graduate programs, including law schools. Other honor systems are belong exclusively to the law school. Each honor code system holds students accountable to academic standards—typically against lying, cheating, and stealing.


The current honor code models used in Virginia law schools can vary from each other in many respects. For example, some schools have completely student-run honor systems while others are mainly handled through school administrations. Washington and Lee’s honor system is “exclusively student-administered and is in no way responsible to the faculty or administration.” This student-centric approach is also seen at the George Mason University Antonin Scalia Law School, the University of Richmond T.C. Williams School of Law, and the University of Virginia School of Law. Other law schools, namely at Appalachian, Liberty, and Regent, process honor code violations through the administration—most often, through the Dean of Students. Students accused of violations have a number of rights ascribed to them, such as the right to be notified of charges and provided with evidence. Accused students also have the right to some form of counsel, usually through student councils.

While these honor systems may have different approaches, their underlying purposes are similar. Two law schools even use the same language to illustrate their guiding principle: “a person’s honor is his or her most cherished attribute.” The preamble or mission statements included in these honor code systems provide students with an idea of the standards they will be subject to and the role each student plays in creating a “community of trust.” The mission statements are crucial elements in defining the duties
students have to the school, to themselves, and for law students, to the legal profession.

Honor codes generally serve regulatory or educational purposes; or, a blend of both. The function of the educational purpose is to teach students proper behavior and prepare them for life beyond the university as a citizen and as a professional. The function of the regulatory purpose is to enforce good academic behavior through oversight, enforcement, and sanctions. These concepts apply to any undergraduate or graduate student experience. The law school experience is unique because of its focus on preparing students to enter the legal profession. Law school honor codes thus have an obligation to mirror conduct required by practicing attorneys.

Law students, through their school’s honor system, have an obligation to the profession. In fact, these honor codes “provide aspiring lawyers with their first exposure to the appropriate standards necessary to preserve the spirit of the law and the profession.” Honor codes provide law students with the first glimpse at the underpinnings of a self-regulating profession. All lawyers are governed by the Rules of Professional Conduct, and while the specifics of each states’ rules vary, every state can refer to the American Bar Association’s Model Rules of Professional Conduct as their starting point. The Virginia State Bar’s Rules of Professional Conduct starts with a preamble that states, “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs” and “[t]he legal profession is largely self-governing.” Students entering law school should be aware of the professional responsibilities by which will soon be required to abide, and honor systems are one way to reveal that obligation. Moreover, law

26 Id. at 64.
28 Id. at 45.
30 Id.
31 Id.
32 Id. at 638; see also Jurisdictional Rules Comparison Charts, Am. B. Ass’n, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ (last visited Nov. 2, 2019).
34 See Berenson, supra note 2, at 824.
schools have a duty to certify the character and fitness of law students admitted to the bar.\textsuperscript{36}

While these obligations may provide an ideological underpinning for honor code systems, duties to the profession are only recognized in a few law school honor codes.\textsuperscript{37} The George Mason’s Antonin Scalia Law School explicitly states, “Each student at Antonin Scalia Law School (“Scalia Law”) is expected to behave honorably and with the highest personal integrity toward other law students, toward the law school and university, and toward other members of the legal profession.”\textsuperscript{38} In contrast, the University of Richmond School of Law introduces the concept of self-regulation but does not explicitly link it with the legal profession.\textsuperscript{39}

Most law school (and university-wide) honor systems focus less on duties to the profession and more on duties to the academic system and other students.\textsuperscript{40} The College of William and Mary best describes this approach in the Purpose section of their Honor Code which states, “In a community devoted to learning, a foundation of honor among individuals must exist if that community is to thrive with respect and harmony among its members.”\textsuperscript{41} This approach emphasizes the regulatory functions of an honor code system.\textsuperscript{42} Regulation of the academic environment is crucial to ensure that all students are treated equally, as universities have an obligation to ensure that certain students are not able to gain unfair advantage over other students.\textsuperscript{43}

Students honor code duties to both the profession and to the academic system are not singularly exclusive, and the blending of these duties and purposes results in the wide array of honor code systems currently in


\textsuperscript{39} UNIV. OF RICHMOND SCH. OF LAW, HONOR CODE 1 (2018), https://law.richmond.edu/students/honor-code.pdf (“By embracing self-regulation, we hold ourselves accountable and take responsibility for our actions, neither burdening nor suffering interference from other members of the academic community.”).

\textsuperscript{40} E.g., id. at 1–2; see also WASH. & LEE UNIV., supra note 18. Regent University and Liberty University, as Christian campuses, also emphasize a student’s duty to faith. LIBERTY UNIV. SCH. OF LAW, ADMINISTRATIVE POLICIES AND PROCEDURES 1 (2017), https://www.liberty.edu/media/1191/Law-School-Honor-Code.pdf; REGENT UNIV. SCH. OF LAW, HONOR SYSTEM, COUNCIL AND CODE 2 (2011), https://www.regent.edu/acad/schlaw/student_life/docs/honorcode.pdf.

\textsuperscript{41} COLL. OF WILLIAM & MARY, HONOR SYSTEM, SECTION I: PURPOSE, https://www.wm.edu/offices/deanofstudents/services/communityvalues/studenthandbook/honor_system/ (last visited Nov. 6, 2019).

\textsuperscript{42} DiMatteo & Wisner, supra note 25.

\textsuperscript{43} Id. at 76.
Virginia law schools. Moreover, law school honor code systems share educational and regulatory roles to ensure that students are bound to standards reflecting both their roles as students and aspiring professionals.44

A. Violations and Sanctions in Virginia Law Schools

Law schools in Virginia typically penalize three basic forms of academic misconduct: lying, cheating, and stealing.45 These violations are more defined in each honor code. For example, the University of Virginia’s honor code states that students will not participate in academic fraud.46 Academic fraud includes plagiarism, multiple submissions, false citation, false data, and misuse of Internet sources.47 The general idea is to prohibit students from intentionally acting in a way to give themselves an unearned advantage.48 In addition, because honor codes are often student-regulated, most honor codes also impose a duty to report on students.49

Sanctions for violations also vary from school to school. Washington and Lee University and the University of Virginia state that dismissal from the school is the only sanction available for anyone found guilty of an honor code offense.50 Under the scheme used by the University of Virginia and Washington and Lee, the severity of the violation does not factor into the sanction; regardless of whether the student is found guilty of major or minor plagiarism, he or she is removed from the campus community.51 William and Mary takes a more progressive approach to sanctions, although this process is not available to graduate or law students, where students accused of “level I offenses” (which include minor forms of plagiarism and unauthorized collaboration on homework assignments) can have an informal resolution process requiring the student to resubmit the assignment for

44 See Boothe-Perry, supra note 30, at 640.
45 Academic conduct violations are typically found in the law school’s honor code, while violations of student misconduct of a non-academic nature are usually held in student codes of conduct and undergo different processes and procedures. See, e.g., UNIV. OF RICHMOND SCH. OF LAW, supra note 39; COLL. OF WILLIAM & MARY, supra note 41, at SECTION VI: HONOR CODE VIOLATIONS, UNIV. OF VA., supra note 21.
47 Id.
48 COLL. OF WILLIAM & MARY, supra note 41, at SECTION VI.
49 See, e.g., GEORGE MASON LAW SCH., supra note 38, at 2; UNIV. OF RICHMOND SCH. OF LAW, supra note 39, at 2; see also Berenson, supra note 2, at 834 (“[I]t does seem quite likely that students are in the best position to detect violations of the code by classmates, and that student reporting is more likely to lead to discovery of code violations than any other source.”).
51 WASH. & LEE UNIV., supra note 18; UNIV. OF VA., supra note 21.
no credit. While William and Mary has a university-wide honor code, the law school honor council has separate bylaws and a sanctions guide that tailors the university-wide policies to the law school. These sanctions include a non-exhaustive list that contains primary sanctions and includes “warning,” “withholding of degree,” and “permanent dismissal” to secondary sanctions—which can include “loss of privileges” and “grade adjustment.”

In law schools like William and Mary and the University of Richmond, sanctioning varies depending on the severity of the violation. However, while not as punitive as Washington and Lee and the University of Virginia, William and Mary and the University of Richmond law school honor systems are overwhelmingly punitive in both approach and outcome.

II. What is Restorative Justice?

Restorative justice is a victim-centered criminal justice approach that grew out of radically differing thoughts about the value of the punitive criminal justice system in the 1970s. This approach differs from “the traditional view of crime from the violated norm to the harm caused to the individuals most affected by the crime.” Restorative justice developed as a response to growing apathy towards the criminal justice system, namely that—even after trying to understand underlying causes of crimes—there seemed to be no reduction in the number of offenses. Simultaneously, in the 1980s, politicians grew increasingly “tough on crime” and ushered in an era full of “longer jail terms, mandatory sentences, elimination of parole, lifetime incarceration for repeat offenders, and juvenile ‘waivers’ for treatment as adults.” Restorative justice strives to fundamentally change the way crime is viewed and handled through a “restorative lens.”

52 COLL. OF WILLIAM & MARY, HONOR CODE, APPENDIX I, https://www.wm.edu/offices/deanofstudents/services/communityvalues/studenthandbook/honor_system/ (last visited Nov. 6, 2019).
54 COLL. OF WILLIAM & MARY, LAW SCHOOL HONOR COUNCIL SANCTIONS GUIDE 1, https://wmpeople.wm.edu/site/page/lawhonor/councilbylaws.
55 Id.
56 Id.; UNIV. OF RICHMOND SCH. OF LAW, supra note 39, at 7, 9–10.
57 Compare WASH. & LEE UNIV., supra note 18, with UNIV. OF VA., supra note 21.
59 Gabbay, supra note 11.
60 ROSS LONDON, Overviews and Early Inspirations, in A RESTORATIVE JUSTICE READER, supra note 58, at 1.
61 Id.
62 Gabbay, supra note 11.
views “crime as a violation of people and relationships” and creates an “obligation to make things right.”

The basic premise of the restorative justice process is to focus on the victim and the obligation of the offender to repair the harm caused. It is imperative that offenders truly understand “one’s actions and take responsibility for making things right.” In other words, offenders are held accountable. This can take many different forms, but most often involves practices where “parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.” According to Howard Zehr, the adversarial criminal justice system often lacks a true accountability element because offenders are discouraged from admitting guilt and taking responsibility to make things right.

While restorative practices are victim-centered, part of its success is how it treats offenders. Traditional criminal justice systems are based on retributive punishment, where the fundamental idea is that an offender deserves punishment for breaking the law. In contrast, restorative justice is more productive for two specific reasons: (1) it redefines the meaning of “punishment;” and (2) it restores dignity to offenders. Restorative justice does not eliminate the premise of “punishing” an offender; rather, it changes the experience of that punishment. Rather than punitive structures (such as incarceration and fines) punishment is defined broader, to “enrich the criminal justice system with alternative forms of punishment.” These alternative forms of punishment include paying fines, performing community service, and participating in counseling sessions. Further, requiring offenders to face their victims to atone for their behaviors constitutes “punishment.” Additionally, restorative justice provides an opportunity to restore dignity to offenders by emphasizing “disapproval of the act while

64 Ross London, Overviews and Early Inspirations, in A Restorative Justice Reader, supra note 58, at 1.
66 Id.
67 Gabbay, supra note 11, at 359.
68 See Howard Zehr, Retributive Justice, Restorative Justice, in A Restorative Justice Reader, supra note 65.
69 See id. at 23–24.
70 Gabbay, supra note 11, 376.
72 Gabbay, supra note 11, at 378.
73 Id.
74 Id.
75 Id.
refraining from stigmatizing and humiliating the offender.\textsuperscript{76} By providing procedural justice—i.e., treating the offender with fairness throughout the process—offenders are more likely to accept restorative justice outcomes, which can potentially reduce recidivism.\textsuperscript{77} Howard Zehr argues that offenders need “an experience of empowerment” for their own healing, as crime is a way for offenders to assert power and create self-identity “in a world which defines worth in terms of access to power.”\textsuperscript{78}

Restorative justice practices have become increasingly popular in the wake of mass incarceration, and are implemented across the globe.\textsuperscript{79} Both local and state criminal justice systems use restorative justice approaches in an effort to reduce recidivism.\textsuperscript{80} Additionally, school systems across the country have used restorative justice approaches to reduce the school-to-prison pipeline to keep students in school and reduce disruptive behaviors.\textsuperscript{81}

\textbf{III. Why Should Law Schools Implement Restorative Justice Principles in Disciplining Honor Code Violations?}

Law school honor code processes often imitate practices in the criminal justice context.\textsuperscript{82} Students accused of honor code violations are often “prosecuted” in a way similar to criminal prosecution.\textsuperscript{83} For example, at the University of Virginia, accused students have the right to an impartial panel, student jurors, to be assisted by counsel, to present evidence, and to refuse to testify.\textsuperscript{84} Accused students may be given an option for informal resolution, or a trial/hearing; or, the student may resign from the school.\textsuperscript{85} Because these schools use systems that mirror the criminal justice systems, applying a restorative approach makes sense for two reasons.\textsuperscript{86} First, law

\textsuperscript{76} Id. at 384; see also HOWARD ZEHR, Retributive Justice, Restorative Justice, in A RESTORATIVE JUSTICE READER, supra note 65.

\textsuperscript{77} Gabbay, supra note 11, at 384.

\textsuperscript{78} HOWARD ZEHR, Retributive Justice, Restorative Justice, in A RESTORATIVE JUSTICE READER, supra note 65.


\textsuperscript{80} Id. at 324.

\textsuperscript{81} See Thalia Gonzalez, Restorative Justice from the Margins to the Center: The Emergence of a New Norm in School Discipline, 60 HOW. L.J. 267, 273–74 (2016).

\textsuperscript{82} See Berenson, supra note 2, at 824.

\textsuperscript{83} See, e.g., UNIV. OF VA., supra note 21, at ARTICLE V. RIGHTS OF THE ACCUSED.

\textsuperscript{84} Id.

\textsuperscript{85} E.g., id.; UNIV. OF RICHMOND SCH. OF LAW, supra note 39, at 7, 9–10; COLL. OF WILLIAM & MARY, supra note 41.

\textsuperscript{86} I would also argue that law school honor systems should not mimic criminal proceedings but rather mirror processes and procedures followed by the Virginia State Bar disciplinary processes. This shift would better prepare students for what will be expected in their professional careers. The difficulty here is that students, at least in public universities, have due process rights, which leads to a system that mimics criminal/adversarial proceedings. See Kimberly C. Carlos, \textit{The Future of Law School Honor Codes}:
schools can use the educational function of honor code systems to give students the opportunity for growth and restoration. Second, law schools are the proper environment for students to learn about and implement restorative practices.

A. The restorative justice approach gives law students opportunities for growth and restoration in contrast to the traditional punitive models

Many law students, like other university students, cheat. Cheating is an honor code violation in every Virginia law school, and many of the honor code violations are related to cheating/plagiarism. In law schools, cheating is particularly problematic because law students are preparing “for a profession regulated by high ethical standards via a code of professional conduct.” As such, law students are expected to be ethical. Students who cheat in law school also implicate the academic integrity of other students because students are graded on a curve. Each student’s grade is not only reflective of their own academic achievements, but also of their standing relative to the students around them. This can cause students to feel pressure to remain competitive. Cheating is also problematic because law schools have a duty to certify the moral character and fitness of their students, which means reporting honor code violations. The stakes are high for law students to perform well enough to secure post-graduate employment (especially in a field where grades play such a large role in hiring decisions), and to behave ethically in accordance to the standards of the

Guidelines for Creating and Implementing Effective Honor Codes, 63 UMKC L. REV. 937 (1997) for further discussion on due process rights for students held in violation of the honor code.

90 See id.
91 Id. at 1180.
92 Id.
93 Id. at 1167–68.
94 Id. at 1168.
It’s almost inevitable that students will face ethical dilemmas concerning their grades, and not all students will choose the best option. Because of this, it is important that accused students are treated fairly and are given opportunities to grow while repairing harm caused.

Students who do violate the honor code should be allowed to learn from the experience rather than face potential barriers to practice. Law students are not practicing attorneys, and while they are aiming for that goal, students should be able to learn from minor ethical mistakes while they are in still in the law school environment rather than in actual practice. In no way would restorative justice prevent students who commit honor code violations from facing “punishment” for their behavior, but the definition of punishment would shift away from its punitive meaning to a more restorative meaning. Violators would be responsible with still attempting to make the community whole from their mistakes. Particularly with cheating/plagiarism violations, because student violators breach trust between themselves, their professor, and their classmates, it is incumbent upon the violator to make amends.

Restorative justice serves another purpose because, regardless of the severity of the violation, an honor code violation is still reported to the Virginia State Bar. Allowing students to repair harm to the academic community pre-charge and in-lieu of a formal hearing process provides students with the opportunity to make amends to professors and classmates as well as an educational opportunity to grow from the experience. Fulfillment of the violators restorative obligations would allow the law school not to move forward with any proceedings (except in extreme cases) on a good-faith basis.

However, one problem that law schools face with this approach is that restorative justice requires an admission of guilt. Students who are accused of honor code violations would have to admit their guilt from the beginning of the process rather than go through traditional trial/hearing models. Some law schools implement informal resolution proceedings, and

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95 Id.  
96 See Jones, supra note 87 (“About 45% of law students have engaged in some form of cheating at least once in the previous year.”).  
97 See Finkelstein, supra note 8, at 40.  
98 See id. at 33 (“A finding of prior academic misconduct is radically different from a prior criminal conviction.”)  
99 Gabbay, supra note 11, at 378.  
101 See HOWARD ZEHR, Retributive Justice, Restorative Justice, in A RESTORATIVE JUSTICE READER, supra note 65.
these would provide restorative opportunities for students accused of violations to admit their shortcomings and, together with the prosecutorial body, discuss ways to make amends. 102 The process of making amends, in the case of cheating, would involve the entire class and the professor because of the implications of grading students on a curve. 103 However, this raises privacy concerns, as making a student’s entire class aware of their classmate’s violation could stigmatize the violator. Students have a right to privacy, and schools take great lengths to keep these hearings confidential.104 However, acceptance of responsibility to those harmed is a central tenant of restorative justice. 105 It is crucial in these interactions between students (i.e., the violator and those harmed) to create an accountability system that addresses the behavior without stigmatizing the violator, and welcomes the student back into the classroom community. 106 Therefore, restorative practices must be fully voluntary and the violator must be willing to allow his or her status to be shared with classmates and professors. 107

Building a culture around restoration of both the violating student and the classroom would likely also benefit the efficiency of the entire honor code system. Students who feel that their classmates are given a fair opportunity to repair their mistakes and are welcomed back into the classroom community may be more likely to report violations. 108 Law students are required to report honor code violations, 109 and studies from the University of Virginia demonstrate that students only report a paltry number of honor code violations because they are concerned with the “severe consequences” violators may face. 110 If students had more faith in the procedural

102 See e.g., UNIV. OF RICHMOND SCH. OF LAW, supra note 39.  
104 See, e.g., WASH. & LEE UNIV., supra note 18 (“All information about a possible Honor Violation or an Executive Committee Hearing is highly confidential. In addition to reviewing cases involving alleged Honor Violations, the Executive Committee may take disciplinary action against any student, including, but not limited to, the accused student, witnesses, Hearing Advisors, and Executive Committee members, found to have breached confidentiality.”).  
105 See HOWARD ZEHR, RETRIBUTIVE JUSTICE, RESTORATIVE JUSTICE, in A RESTORATIVE JUSTICE READER, supra note 65.  
106 See Gabbay, supra note 11, at 392 (“[T]he restorative paradigm channels these efforts to a supportive and effective community environment.”); Kara & MacAlister, supra note 103.  
108 See Gabbay, supra note 11, at 390.  
109 See, e.g., UNIV. OF RICHMOND SCH. OF LAW, supra note 39, at 2; see also GEORGE MASON LAW SCH., supra note 38, at 2, see also Berenson, supra note 2, at 834 (“[I]t does seem quite likely that students are in the best position to detect violations of the code by classmates, and that student reporting is more likely to lead to discovery of code violations than any other source.”).  
justice afforded to their classmates, law schools could become truly self-regulating.111

Again, aside from the damage to the student’s reputation at the law school, law school administrations must report honor code charges and violations to the Virginia State Bar.112 A restorative approach does not ask law schools to forgo any duty to the bar; rather, it asks the schools to implement restorative practices pre-charge in order to prevent barriers to practice for students who deserve forgiveness from currently punitive honor code structures. Of course, the severity of the violation will affect what accountability will look like for a violator. This may range from an apology to the professor and the class, to community service, or to suspension for a certain number of semesters. In a particularly egregious case, a charge and report to the Bar must be issued.113 In the case of repeat offenders, it would be irresponsible for law schools to not report multiple charges to the Bar. However, law schools also have the duty to educate students on their expectations, and to provide guidance to allow the violating student to work towards becoming a practicing attorney.114 Restorative practices would limit the unnecessary removal of students, address the underlying issues of violations, and allow students who violate the honor code to make amends and amiably re-enter the academic community.115 Student growth should be a primary concern for law school administrations, and law schools implementing restorative practices should have structures in place to respond to violations in a non-punitive manner.

B. Law schools are the proper laboratory for students to learn about and implement Restorative Justice Practices

The use of restorative justice practices in honor code systems does not just benefit the violator and those harmed; it benefits the entire school culture. Implementing restorative justice also introduces concepts that law

111 See Gabbay, supra note 11, at 384.
112 See UNIV. OF RICHMOND SCH. OF LAW, supra note 39, at 2 (“In every case where a charge has been issued, the Chief Justice must report to the Dean of the Law School the name of the accused, the charge, and the ultimate resolution, whether by informal resolution or trial, and sanction, if any. Under applicable regulations, the Dean may have to report this information to State Bar or other authorities.”).
113 Id. at 5. I would argue that the intent of the student matters in these cases. If a student shows blatant disrespect for the law school community and bad faith in a pre-charge restorative effort, then that justifies the issuance of a charge.
114 See Roberts & Todd, supra note 89, at 1168 (“By calibrating students’ ethical compasses…reinforcing and reorienting that compass regularly, and employing other best practices throughout law school, legal educators can help students develop a sense of integrity.”).
115 Kara & MacAlister, supra note 103, at 447.
students can then take with them into actual practice.\textsuperscript{116} Restorative justice is well-suited for law schools because of the emphasis on “positive ideals of respect, tolerance, and understanding.”\textsuperscript{117} Students will learn first-hand the values of the community if law schools explicitly wrote restorative justice practices into their honor code systems.\textsuperscript{118} School values would shift from a punitive system to a system of “restoration and reintegration through the development of personal responsibility and accountability.”\textsuperscript{119}

Additionally, introducing law students to restorative justice practices may improve the legal profession at large, as these students graduate and carry these principles with them into practice.\textsuperscript{120} Many law students’ ultimate goal upon entering law school is to help people, and introducing restorative justice practices early in their legal education may motivate students to remain true to this goal.\textsuperscript{121} Students will have the opportunity to practice necessary skills such as communication, conflict mediation, and community building, which are skills that a traditional legal education tends to lack.\textsuperscript{122} Law schools would be amiss to not take advantage of the opportunity to teach students restorative justice approaches early in their legal careers.

CONCLUSION

Implementing restorative justice approaches to law school honor codes would likely have a positive affect on the students, law school community, and the profession as a whole. The difficulty is balancing the duties and responsibilities of law schools to report the character and fitness of their students with the responsibility to ensure that law students can grow and develop into ethical attorneys. Law schools can, and should, strike this balance to best benefit their students.

\textsuperscript{116} See id. at 452 (“With individual growth and development comes institutional growth and development, where a unified approach that demonstrates honesty, integrity and responsibility become mutually reinforcing.”).
\textsuperscript{117} Id. at 446.
\textsuperscript{118} Id. at 446–47.
\textsuperscript{119} Id.
\textsuperscript{121} Id. at 1297–98.
\textsuperscript{122} See id. at 1301–02.