

# STANFORD LAW SCHOOL

**RESTORATIVE JUSTICE AND THE  
DANGERS OF COMMUNITY**

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## **Introduction**

Though much of what follows may sound like a fundamental criticism of the restorative justice movement, it is not so intended. Rather, it is an admonition to the restorative justice movement about a danger it faces—but that it can beneficially overcome—if it at least remains vigilant in detecting it and self-critical in avoiding it. It is the danger of community.

Restorative justice needs something to restore, and one key thing it is very often said to restore is, in some formulation or other, “community.” In the language of restorative justice, “community” is be the bedrock on which justice stands, or the latent source of moral energy on which justice draws. But “community” is a very dangerous concept because it sometimes means very little, or nothing very coherent, and sometimes means so many things as to become useless in legal or social discourse, and because sometimes the sunny harmonious sound of the very word “community” masks the conflict and uncertainty underlying legal issues, and because sometimes “community” turns out to refer to something very concrete but which is actually very bad for justice.

To unravel the many meanings of “community,” I begin with three different semantic forms, each representing a cluster of meanings.

There is first simply the notion of “community,” which, in the absence of a definite or indefinite article is a normative concept. As a noun it signifies a value, a goal, and a condition or phenomenon that is sometimes embodied in a real social or political entity but also floats above or just beyond it as an ideal condition to which any social or political entity might aspire. (a corollary formulation is the common phrased “a sense of community.”) Often “community” is not a referent of anything at all, but rather serves as a “performative” speech act, a rhetorical eruption designed to remind listener or reader of certain moral values in speaker or author. And as a thing itself, or as a phenomenon of which we need the “sense” to be realized, it is the goal of much of restorative justice.

Of course, to define such an expansive concept even with in the boundaries of American law and culture is beyond my scope here; at the very least, it requires an understanding of “communitarianism” as a vital and visible social and political movement in the United States today. But a brief look at communitarianism usefully places it as a continuing response to and purported correction of Enlightenment liberalism and modern American individualism in their various forms. In the words of a major academic proponent,

the communitarian critics of modern liberalism question the claim for the priority of the right over the good, and the picture of the freely-choosing individual it embodies. Following Aristotle, they argue that we cannot justify political arrangements without reference to common purposes and ends, and that we

cannot conceive our personhood without reference to our role as citizens, and as participant in a common life....<sup>1</sup>

Communitarianism roots all hope for individual liberty and fulfillment in group life, and carefully distinguishes itself from any positivistic definition of the state itself:

A communitarian perspective ... mandates attention to what is often ignored in contemporary policy debates: the social side of human nature; the responsibilities that must be borne by citizens, individually and collectively, in a regime of rights; the fragile ecology of families and their supporting communities; the ripple effects and long-term consequences of present decisions.

America's diverse communities of memory and mutual aid are rich resources of moral voices--voices that ought to be heeded in a society that increasingly threatens to become normless, self-centered, and driven by greed, special interests, and an unabashed quest for power. \*\*\*. It is precisely because this important moral realm, which is neither one of random individual choice nor of government control, has been much neglected that we see an urgent need for a communitarian social movement to accord these voices their essential place. \*\*\* Communitarians recognize--indeed, insist--that communal values must be judged by external and overriding criteria, based on shared human experience.<sup>2</sup>

The notion of "community" derives not just from Aristotle, but also from Cicero and the Roman concept of the common interest, and from the medieval and Augustinian notion of a community of emotional ties, and the Eighteenth-Century Burkean notion of the continuous community linking the living and dead.<sup>3</sup> Its many sources are matched by its many contemporary forms.

Generally, the premises of communitarianism are that the common picture of freely-choosing individual is false; that we cannot perceive personhood without reference to our role as citizens, that political discourse must proceed from common meanings.<sup>4</sup> At time is it refers to abstract or universal rules of morality, and yet paradoxically it also refers to the ethical principles of a specific social group.<sup>5</sup> Not only does "community" live in a tug of war between the ethereally abstract and the locally grounded, it also is

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<sup>1</sup> Michael J. Sandel, *Introduction to Liberalism and its Critics* 5 (Michael J. Sandel, ed., 1984).

<sup>2</sup>The Communitarian Network, Responsive Community Platform (originally released 1991, now at [www.gwu.edu/~ccps/flyer.html](http://www.gwu.edu/~ccps/flyer.html)).

<sup>3</sup>Shlomo Avineri & Avner De-Shalit, *Introduction to Communitarianism and Individualism*, Introduction 1 (Shlomo Avineri & Avner De-Shalit eds., 1992) [hereafter Avineri & De-Shalit.]

<sup>4</sup>Stephen Gardbaum, *Law, Politics, and the Claims of Community*, 90 Mich. L. Rev. 685, 691 (1992).

<sup>5</sup>Id. at 2.

pulled conceptually between a “methodological” and a “normative” version. The former, which also might be called ontological or empirical, would hold that as a matter of fact individuals are creatures, and their supposedly individual choices are consequences, of the collective identity of the social world in which they live.<sup>6</sup> As for the former, it holds that whatever the actual source of values, concern with maximizing individual choice rather than collective good leads to very bad moral consequences.<sup>7</sup>

Thus, as a movement in modern social thought, communitarianism tries to define itself by opposition to classical liberalism in general, and to liberal individualism in particular, but its relationship to individualism is complex.<sup>8</sup> As Stephen Gardbaum has shown, community can stand as a substantive opposite to atomism as the basic component of social life; it can also be “metaethical” in that it may describe the source of ethical value but not necessarily the content—so that there can be a communal commitment to individualism; or it can simply be the positive source of social identity, independent of moral value. Indeed, depending on what kind of communitarianism you adopt, you might believe that community fosters respect differences among specific communities, or favor pluralism over natural law universalism.<sup>9</sup> In a further complication, communitarians disagree over whether one can meaningfully “choose” a community is we are constituted our community. One answer has come from feminists who speak of “communities of choice” and suggest that these are matters of “reconstitution,” where individuals can freely choose to draw on the norms of a new community to help them within their individual projects of self-definition.<sup>10</sup>

In terms of law itself, communitarianism may smack of some sense of popular sovereignty or spontaneous collective life, but it also captures notions of public deliberation and discipline, and the thoughtful creation of a collective identity.<sup>11</sup> Indeed, even in describing of the role of the state in its most extreme form—the punishment of crime— Anthony Alfieri hopefully suggests that the law’s role is to “safeguard community” or “to maintain ordered community through punishment.”<sup>12</sup> More

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<sup>6</sup>E.g., Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, in Avineri & De-Shalit, supra note \_\_, at 12; Alasdair MacIntyre, *Justice as a Virtue: Changing Conceptions*, in Avineri & De-Shalit, supra note \_\_, at 51.

<sup>7</sup>E.g., Charles Taylor, *Atomism*, in Avineri & De-Shalit, supra note \_\_, at 29.

<sup>8</sup>For a full treatment of this issue, a useful new work is a collection of commentaries on the writings of Amitai Etzioni, perhaps the most prominent modern promoter of the communitarian cause, see Edward W. Lehman, ed., *Autonomy and order: A Communitarian Anthology* (2000).

<sup>9</sup>Stephen A. Gardbaum, supra note \_\_, at 692-95.

<sup>10</sup>Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in Avineri & De-Shalit, supra note \_\_, at 101.

<sup>11</sup>Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 *Stan. L. Rev.* 809, 816 (2000).

<sup>12</sup>*Id.* at 827.

hopefully, he conceives one possible role for the prosecutor as “community trustee,” in a contractual and even covenantal relationship centered less on punitive sanctions than on “espousing an ethos of community constituted by atonement, forgiveness, and reparation.”<sup>13</sup> Less hopefully, Robert Cover sees “community” manifesting itself in law as “jurisgenerative communities” in perennial battle, overwhelming all positive political boundaries; he sees this as destroying any hope of an overall political or legal interpretive authority, leaving only the imposition of the state’s meaning backed by force.<sup>14</sup> Thus, the relations among laws, state, “community,” and individual are complex and highly contestable.<sup>15</sup>

Now the second formulation is “the community.” This is the version most prominent restorative justice, but, as we will see, it can only be understood in its relationship to the first formulation, and in its inherent tendency to devolve into the third, below. It too is normative and it too is a performative trope. The assumed positive part of the term is the premise that there is a definable social entity called “the community” to which judicial procedures and behavioral norms can apply. Sometimes the term implies some specificity—in “the local neighborhood, etc., or perhaps the judicial district. In that case, use of the term “the community” is perhaps a harmless shorthand, though it often exploits the normative halo associated with any version of the word “community,” suggesting that there are strong social bonds or moral authority that necessarily underlie any grouping that can be so designated.

Sometimes the implication is stronger—meaning regard for others, or the general value of “community”—see above. Sometimes the term “the community” is used to distinguish things: i.e., the community is that which is not the state, though as with the bare term “community” and the state, this relationship is hugely complex. Sometimes “the community” means a particular chunk of the local geography—private homes and apartments and perhaps highly local commerce, but not the larger public and private entities that represent, legally or sociologically, denatured or abstract public space and not natural social vitality. Thus, often “the community” contains a suggestion of vibrant private life—i.e., authentic lives of individuals away from their commercial or state-defined roles, especially with reference to the private sphere. Thus, certain civic

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<sup>13</sup>Id. at 847. For a thoughtful elaboration of this notion and of the role of “community prosecution, as an alternative to narrowly adversarial prosecution, see Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 *Notre Dame L. Rev.* 321 (2002).

<sup>14</sup> Robert Cover, *Nomos and Narrative* 97 *Harv. L. Rev.* 4 (1983).

<sup>15</sup> This itself is a huge subject in both legal scholarship and communitarian philosophy, but the defining modern scholarship on these questions is surely the work of Richard T. Ford. See *Law’s Territory (A History of Jurisdiction)*, 97 *Mich. L. Rev.* 843, 858-62 (1999) (comparing “organic” and “synthetic” notions of territorial jurisdiction); *Geography and Sovereignty; Jurisdictional Formation and Racial Segregation*, 49 *Stan. L. Rev.* 1365, 1421-35 (1997) (communitarianism in its ideal form would achieve perfect fit between “experienced community and a formal jurisdiction,” but law-related notions of community are caught up in tension between “essentialist” and “constructivist” views of group identity).

figures are said to be “active in the community” as volunteers or leaders leading private non-profit efforts to work below the sphere of the corporate and governmental programs to remedy social ills that larger entities cannot remedy or even notice.

Now this sense of “the community” immunizes itself against the charge of being monolithic by allowing for different communities in the world and multiple ones for any individual, any one of which is “the community” for a particular purpose—and the locus is often geographical. Hence we get to the third formulation and associated cluster of meanings, the notion of “the [insert group name] community.” This has become an extremely common trope in political, sociological and legal discourse. And it hints of political and social danger, and thereby might cause us to worry about the roots of that danger in the earlier formulations (“community” and “the community”), since the parent virtue of those earlier terms is that they do not *overtly* contain the danger. Consider such specific uses of the term as “the Black (or African-American) community,” “the Asian community,” the Muslim community,” “the gay community,” and so on. These cover a lot of territory and often are simply as comfortable-sounding shorthand to name a separately coherent social, ethnic, or racial grouping. But what does it mean to refer to “the gay community” rather than “gay Americans” or “gays living in [a certain locale]”? The value, of course is to suggest some harmonious collective sense of identification; the danger is that this value is not present or provable, but only rhetorically pleaded for or question-begged in the formulation. Hence it can mask fundamental ambiguities of group definition (is “the Jewish community” one of religion, ethnicity, culture?) or serious political conflicts within what otherwise seems a determinate group (i.e., liberal vs. conservative African-Americans or gays).

But other dangers lurk. Consider the odd but popular term “the international community.” Even if intended to refer to the particular group of nations involved in resolving particular conflicts, the term, again, carries a normative halo; it may suggest an unproven claim of a commonality of interest and experience or a harmonizing aspiration, and hence, in the international sense, morally high-minded and disinterested goals. But the greater danger is that no matter how many “communities” any individual is allowed to belong to, every such community identification has to have an outside in order to define the inside, and so any use of the term must exclude—and not always harmlessly.<sup>16</sup> The harm may be a kind of second-level atomism that destroys “community” in the first sense<sup>17</sup>—this is the common criticism of “identity politics” or the antagonist to the

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<sup>16</sup> For a searching examination of this problem, including discussion of the idea of “constitutive communities” and the slippery moral relativism of notions of “shared meaning” in the context of plural communities, see generally, Daniel Bell, *Communitarianism and Its Critics* (1993).

<sup>17</sup> For an excellent discussion of this problem, see Mark S. Cladis, *A Communitarian Defense of Liberalism: Emile Durkheim and Contemporary Social Theory* (1992). Cladis praises Durkheim’s conception of a pluralism of communities sharing certain core political and moral values, see, e.g. Emile Durkheim, *Moral Education* (trans. Everett K. Wilson & Herman Schnurer (1961), as against Alasdair MacIntyre’s insistence on the

American “melting pot” dream.” Sometimes the harm is more specific and pernicious, though subtler.

I offer the small anecdote of a recent discussion of multiculturalism at my University. An administrator was extolling the multicultural goals of an undergraduate program but decrying the opposition or resistance she had discovered in some faculty. When pressed to identify whom on the faculty she meant—not necessarily named individuals but groups of any denomination—she first hesitantly stumbled over words like “older” or “more senior” or “more conservative” and then somewhat nervously settled on the term “the white community.” A white faculty member present at the meeting was frightened enough by that term to ask whether he was unavoidably a member of “the white community” and, if so, whether he could opt out, since it sounded alarmingly like the “White Citizen’s Council” of yore. The point is that the use of “the community” formulation was meant as a conflict-avoiding, palliative, or even congratulatory phrase, and yet in its transparency only clarified the tension and anger the speaker was expressing.

Restorative justice relies on the first two formulations or clusters of meaning—“community” and “the community.” It rarely finds the need or occasion to invoke the third, but the third formulation is a virtual logical entailment of the confusions of the first two, and thus lies in the background of discussions of community justice. In any event, my goal is not a formal taxonomy of the verbal uses of “community” so much as a demonstration of the potential range of and confusion among meanings. So informed, let us turn to restorative justice.

### **Tracings of "Community" in Restorative Justice**

To unravel the role these different meanings of "community" in restorative justice, we can take three cuts of various degrees of specificity.

First, at the most abstract level, consider possible relationships between "the community" and the formal legal system or the state. At this level, we are not strictly focusing on restorative justice per se, but remain aware that this very question is of special importance to restorative justice.

- The community is the victim of the crime; it has been ruptured and it must be restored—indeed to a sense of community.
- The community is the source of norms, deeper than those legislated by the state, of the things "malum in se" that are punished by most criminal laws.
- The community is that to which the state re-reverts when it legislates or adjudicates when it expresses condemnation.
- The community is the ideal condition of society to which the state aspires but which it never quite becomes: the goal is asymptotic.

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impossibility of a coherent community encompassing plural subcommunities, Alasdair MacIntyre, *After Virtue* (1981).

--The community is the residue which we do not expect the state to represent—it is the public version of the private sphere.  
--The community is the party represented by the prosecutor or the judge.  
--The community is the authority that determines rights to participate in proceedings—so indeed in addition to offender, victim, “support persons,” etc., there is the key and mysteriously undefined figure called the “community member.” And this raises the question of what criteria there are to determine whether someone is indeed a community member.<sup>18</sup>

Now, to get a glimpse of how “community” actually appears in restorative justice writing, consider first a general essayistic statement by Prof. Paul McCoid<sup>19</sup>: McCoid begins by referring to three injured parties--“victim, offender, and community.”<sup>20</sup> He then uses the trope of “ownership of conflict”--“Conflicts are the property of the victim, the offender, and their local community.”<sup>21</sup> Then consider the following litany of uses of “community” or “the community” drawn from his essay (admittedly wrenched from context, but not, I believe, misleadingly so):

--“The victim might also be the community, if community-owned property is damaged. Otherwise, the community has a direct interest in the conflict but is not the victim.”<sup>22</sup>

--“Delineating the role of the community in the restorative justice paradigm is essential to complete the theoretical structure. While individual citizens have been involved as volunteer mediators or service providers, the programs have all failed to include a strong role for the whole community.”<sup>23</sup>

--“Effective crime control needs to be communized because most crimes of aggression are committed between persons living in the same community, and, thus, must be coped with by all the members involved and not by professionals who are outsiders.”<sup>24</sup>

--“It may be that part of the problem in addressing crime on a local level stems from a general lack of a sense of ‘community.’ The devastating social conditions in our inner cities are both a cause and a result of dysfunctional community.”<sup>25</sup>

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<sup>18</sup>See note \_\_ infra and accompanying text. Sally Engle Merry notes that the population of the United States is often too individualist and mobile for this to be a coherent concept. Sally Engle Merry, *Popular Justice and the Ideology of Social Transformation*, 1 Soc. And Leg. Studies 161, 167 (1992).

<sup>19</sup>Paul McCoid, *Restorative Justice and the Role of Community*, in Burt Galaway & Joe Hudson, eds., *Restorative Justice: International Perspectives* 85 (1996).

<sup>20</sup>Id. at 87.

<sup>21</sup>Id.

<sup>22</sup>Id.

<sup>23</sup>Id. at 90.

<sup>24</sup>Id. at 91.

<sup>25</sup>Id.



"The community cannot be specifically defined a priori within the restorative justice paradigm, as it depends upon the nature of the conflict... The community with standing in any given conflict will be dependent on a number of factors, including the level of harm inflicted, the relationship of the disputants, and the aggregation presented....Each offender and victim are embers of several communities and of informal organizations--personal communities such as family, friends, neighborhood and school organizations, and churches and community organizations."<sup>26</sup>

--"How should the community be defined when the dispute involves normal, stranger crime?...The community with an interest could include the entire American public, since individual conflicts contribute to the general fear of crime in society."<sup>27</sup>

--"Communities not only have a need for concrete responses [to crime], they have an affirmative responsibility for providing them."<sup>28</sup>

--"Every conflict represents an opportunity for reaffirming the importance of every member of the community to its over all health."<sup>29</sup>

--"The public educative function of the restorative justice process is the least often explicitly mentioned responsibility of the community."<sup>30</sup>

McCoid's essay is a heartfelt but conflicted attempt to proclaim (or discover?) a role for concepts of "community" and the notion of "the community" in restorative justice. It reads, however, almost like a moral plea in which the "community" terms are regularly invoked like images or sounds arranged as a motif, to cast a sense of moral seriousness and emotional empathy over the landscape of restorative justice, rather than to elucidate its principles or delineate its procedures.

Finally, and at much greater length, consider the very analytical and concrete assessment of the goals and methods of "Four Models" of restorative justice by Profs. Gordon Bazemore and Mark Umbreit<sup>31</sup>:

Bazemore & Umbreit begin with some general programmatic statements.

Restorative justice also suggests that the response to youth crime must strike a balance among the needs of victims, offenders, and communities and that each should be actively involved in the justice process to the greatest extent possible.

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<sup>26</sup>Id.

<sup>27</sup>Id. at 92.

<sup>28</sup>Id. at 93.

<sup>29</sup>Id. at 95.

<sup>30</sup>Id.

<sup>31</sup> Gordon Bazemore & Mark Umbreit, A Comparison of Four Restorative Conferencing Models, *Juv. Just. Bull.* (Feb. 2001), at 1.

The term “restorative conferencing” is used ... to encompass a range of strategies for bringing together victims, offenders, and community members in nonadversarial community-based processes aimed at responding to crime by holding offenders accountable and repairing the harm caused to victims and communities. ...<sup>32</sup>

They then outline the various forms and models of restorative justice they address.

*The community reparative board.* This concept traces back to so-called youth panels, neighborhood boards, or community diversion boards, which go back to the 1920’s, and have continued under the name “reparative boards” in Vermont in particular. They usually involve adult offenders convicted of nonviolent and minor offenses; more recently, the boards have also been used with juvenile offender., and they typically include a small group of citizens who have face-to-face meetings with offenders ordered by the court to participate in the process and out sanction agreements with offenders, monitor compliance, and submit compliance reports to the court. Their goals are said to include:

- Promoting citizens’ ownership of the criminal and juvenile justice systems by involving them directly in the justice process.
- Providing an opportunity for victims and community members to confront offenders in a constructive manner about their behavior.
- Providing opportunities for offenders to take personal responsibility and be held directly accountable for the harm they caused to victims and communities.
- Generating meaningful community-driven consequences for criminal and delinquent actions, thereby reducing costly reliance on formal justice system processing. ....<sup>33</sup>

Note some key factors here. Citizens, or the community, must once again have “ownership,” of the criminal justice system, as if it has been stolen from them by an alien state. The citizen community has the right to confront the offender, and to claim victimhood or judgmental authority. It is also the moral authority that offers opportunities for penitence and reintegration. The term “community-drive consequences” suggests that punishment can be diffused in terms of “debt to society,” and that to pursue the contract analogy, this is a cost-saving transaction-cost saving alternative. Finally, note the ominously undefined appellation “community members.”<sup>34</sup>

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<sup>32</sup>Id.

<sup>33</sup>Id. at 3-4.

<sup>34</sup>A recent brochure by the Center for Court Innovation offers at least some explanation of how people join this category. See Robin Campbell, "There Are No Victimless Crimes": Community Impact Panels at the Midtown Community Court (2000). This Manhattan court, in adjudicating crimes of public urination and soliciting prostitution,

*Family group conferencing.* This model is rooted in traditions of the Maori of New Zealand, is now a formal program in New Zealand and also as a police-initiated diversion approach known as the Wagga Wagga model in Australia, using police officers or school officials to “facilitate” family conferencing meetings. It has become one of the most influential new models in North America. It deals with a variety of offenses, including theft, arson, minor assaults, drug offenses, vandalism, and, in a number of States, child maltreatment cases. The family group conference relies on a notion of “the community of people most affected by the crime,” and hence builds a “community” out of the crime itself, and this “community” includes the interesting constituency called “supporters,” who are left undefined. This community is “brought together by a trained facilitator to discuss how they and others have been harmed by the offense and how that harm might be repaired.”<sup>35</sup>

This model thereby gives us a picture of the community as process or in process--both running the process, determining who shall participate, and, in a sense, being defined in the process. The so-called “facilitator” organizes the event, inviting the participants and asking both “victim and offender to identify key members of their

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includes "community representatives" who are volunteers from the local neighborhood, including "merchants, activist citizens, social service providers, the police, and representatives of the faith community." They constitute a "Community Impact Panel" and confront a small group of offenders, testifying as to the harm these crimes cause the neighborhood and (at least rhetorically) questioning the offenders as to whether they understand the harmful effects of their actions. Both the offenders and these representatives receive a one-hour training course before the panel meeting, presumably to learn about the agenda for the event and the roles they are expected to play. *Id.* at 3. Though the panel hearings, as described here, sound more like informal versions of administrative notice-and-comment hearings as much as trials, left somewhat sketchy here are important questions about selection, authority, and standing of these representatives. The questions may not be serious where, as, here, the crimes are so minor that they even one day of community service is deemed too harsh for them. *Id.* But the questions would need to be addressed for even slightly more serious crimes, considering that the panel meeting is itself treated as a punishment and, even in the case of these minor crimes, can be "a very intimidating process," so that skilled facilitators are essential to ensure that disapproval doesn't degenerate into shaming." *Id.* Indeed, in the Manhattan court, where assembling enough "community representatives" at a suitable time proves difficult, court personnel may serve as the panelists. Further, though police often are invited to appear as representatives, they wear plainclothes to reduce intimidation. *Id.* at 7. Cf. Merry, *supra* note \_\_\_, at 167 (in many efforts at indigenous justice systems, the “community” ends up getting represented by a new system added on to state law—a new professional “community” of informal bureaucrats).

<sup>35</sup>*Id.* at 5.

support systems, who also will be invited to participate.” “facilitator” is, of course, the bizarre cliché born of the marriage between self-help group therapy in the 1970’s and bureaucratic manipulation of discussion or decisionmaking in corporate or political settings. It is a wonderfully evasive euphemism for a character who wishes to deny or suppress any notion of authoritarianism or even authority, but who is nevertheless a trained specialist in eliciting natural voices. So the facilitator is both highly professional and self-deprecatingly amateur. In seriatim fashion,

The conference typically begins with the offender describing the incident. The other participants then describe the impact of the incident on their lives.

...Through these narrations, the offender is faced with the impact of his or her behavior on the victim, on those close to the victim, and on the offender’s own family and friends, and the victim has the opportunity to express feelings and ask questions about the incident.<sup>36</sup>

The goals of the family conference include:

- Engaging the collective responsibility of the offender’s support system for making amends and shaping the offender’s future behavior.
- Allowing both offender and victim to reconnect to key community support systems. ...<sup>37</sup>

Thus the key innovation here is the somewhat undefined phenomenon of the “support system.” Also born of contemporary new-school psychotherapy, the notion of “support” or a “supportive environment” is ambiguous between a natural social or familial grouping or a more contrived arrangement, and even more ambiguous as to what “support”

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<sup>36</sup>Id. As elaborated by Paul McCoid,

“The hallmark of community group conferences is that they are scripted; facilitators follow a simple written script during the conference. The conference begins with the facilitator reading a preamble that sets the focus of the conference—to understand how everyone has been affected by the specific indigent of wrongdoing and agree on how best to repair the harm. Facilitators explain the consequences of failing to satisfy the agreement to be reached, and remind participants that their participation is voluntary. Normally, the criminal justice system, remains an option should the offender fail to comply with the agreement.” Paul McCoid, Primary Restorative Justice Practices, in Allison Morris & Gabrielle Maxwell, eds., *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* 41, 48 (2001).

The process then unfolds with seriatim speeches by offender, victim, and the “support groups” for both. Id. groups of supporters.<sup>54</sup> In addition, most conferences require training of “facilitators.” See Heino Lilles, Circle Sentencing: Part of the Restorative Justice Continuum, in Morris & Maxwell, supra, at 161, 169

<sup>37</sup>Bazemore & Umbreit, supra note \_\_\_, at 5-6.

substantively means--empathy, instruction, moral guidance, and so on. So the notion becomes especially richly vague and ambiguous when these undefined "support systems" become players in a legal proceeding.

*Circle sentencing* traces back to the sanctioning and healing practices of aboriginal peoples in Canada and American Indians in the United States.<sup>38</sup> Under the new name of "peacemaking circles" it was revived in 1991 by judges and community justice committees in the northern Canada. It partakes of the "holistic reintegrative strategy" of which Braithwaite has been the most famous expositor.<sup>39</sup>

Within the "circle," crime victims, offenders, family and friends of both, justice and social service personnel, and interested community residents speak from the heart in a shared search for an understanding of the event. Together they identify the steps necessary to assist in healing all affected parties and prevent future crimes. The significance of the circle is more than symbolic: all circle members— police officers, lawyers, judges, victims, offenders, and community residents— participate in deliberations to arrive at a consensus for a sentencing plan that addresses the concerns of all interested parties.<sup>40</sup>

The stress then is on a kind of communal penitential introspection. But it is subdivided into first "healing circles: for both victim and offender, then a collective sentencing circle seeking consensus, and invites "commitments" by others—undefined. It offers a kind of moral Chapter 11 proceeding. The depiction here takes care to enumerate the interesting variety of characters who participate, leaving the term "community residents" for last, as if they are different from the others, but also ambiguous as to whether the term simply means local residents by some geographic definition or rather must meet some higher criteria to be residents of the relevant community.

The goals of circle sentencing are said to include:

- Empowering victims, community members, families, and offenders by giving them a voice and a shared responsibility in finding constructive resolutions.
- Addressing the underlying causes of criminal behavior.
- Building a sense of community and its capacity for resolving conflict.

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<sup>38</sup> Id. at 6, citing B. Stuart, *Sentencing Circles—Making "Real" Differences*, (unpublished paper, 1995) Whitehorse Canada: Territorial Court of the Yukon; A. Melton, *Indigenous Justice Systems and Tribal Society*, 70 *Judicature* 126 (1995).

<sup>39</sup> Id. at 6. See John Braithwaite,

<sup>40</sup> Bazemore & Umbreit, *supra* note \_\_\_, at 6.

- Promoting and sharing community values.<sup>41</sup>

The stress is on a “healthy partnership between the formal juvenile justice system and the community.” Moreover, it is “critically important that the community’s planning process allow sufficient time for strong relationships to develop between justice professionals and community members.” But Bazemore & Umbreit do not much explore what this relationship will be. Nevertheless, the “community justice committee” has discretion to determine the jurisdiction and simultaneously “develops support groups for the victim and offender,”<sup>42</sup> raising again the question whether “support groups,” which are surely creations of modern group psychotherapy, are different from, or representatives of “support systems,” whether they are natural or contrived arrangements, and what relation they bear to immediate families, extended families, pre-existing “supporters” like teachers, social workers, or clerics and so on. More strikingly, the notion that both victim and offender have support groups greatly complicates the unclear role and identity of these support groups and the underlying jurisprudential goals of circle sentencing. As for the concept of an offender “support group,” in one model, they are organized by community justice committees, which are “responsible for achieving an appropriate balance among victim, offender, and community needs and representation. Usually a support group is formed at the time an offender petitions for admission to the circle, but the group may expand at any time (including during the circle ceremony itself).”<sup>43</sup>

To some extent, we have old-fashioned functional legal process here—the nature of the process helps determine the jurisdiction, so that violent crimes tend to be excluded, and:

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<sup>41</sup>Id.

<sup>42</sup>Id. at 6-7.

<sup>43</sup>Id. at 11-12.

Key factors in determining whether a case is appropriate for the circle process include the offender's character and personality, sincerity, and connection to the community; the victim's input; and the dedication of the offender's and victim's support groups. Moreover, circles are often labor intensive and require a substantial investment of citizen time and effort; circles should not, therefore, be used extensively as a response to first offenders and minor crime.<sup>44</sup>

So circle sentencing offers a tradeoff in terms of functional propriety and logistical investment to find the ideal type of crime for this jurisdiction. Moreover, it requires the funded bureaucracy for volunteer coordination "to supply logistical support, establish linkages with other agencies and community representatives, and provide appropriate training for all staff."<sup>45</sup> This itself raises an interesting ambiguity is whether the community (volunteer) mediator also is part of the community definition.

*The "dialog" process.* The models vary in their use of dialog, on a continuum from supposed spontaneity to highly scripted orchestration.

In victim-offender mediation sessions, the mediator manages the dialog by encouraging victim and offender to take primary responsibility for expressing their feelings and concerns directly to each other, by ensuring that each participant respects the other's right to speak, and by occasionally probing to keep the discussion flowing. In circle sentencing, participants rely primarily on the process itself, which requires that only one person speak at a time and only when handed the talking piece. Each circle has a "keeper," but the keeper's role is not to manage the dialog but simply to initiate it, ensure the process is followed, and occasionally summarize progress. ...<sup>46</sup>

As Bazemore & Umbreit deliberately note, "[t]he way "community" is defined and involved in restorative conferencing models is a critical factor affecting the nature and extent of citizen participation in and ownership of the conferencing process" For

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<sup>44</sup>Id. at 7.

<sup>45</sup>Id. at 8 & n.7

<sup>46</sup>Id. at 7.

example, in victim-offender mediation it is defined as “the victim-offender dyad”<sup>47</sup> On the other hand, in circle sentencing, it is conceived “much more broadly as all residents of a local neighborhood, village, or aboriginal band; for purposes of implementing the circle process, the community may be defined as anyone with a stake in the resolution of a crime who chooses to participate in the circle.”<sup>48</sup>

Promoters of restorative justice acknowledge that treatment of the victim in these proceedings can be contestable. They are concerned that the emphasis on “offender education may cause victim needs to be overshadowed or trivialized as appears to have been the case when conferences have been held with little or no victim input or involvement.” For example, the common protocol that offenders speak first may deter some victims from speaking further, the expected sanction which, if is a self-shaming apology, may hardly satisfy the victim, and indeed the victim may feel pressured into participating in a ceremony of forgiveness. Hence the concern with “use of victims to serve as “props” or to meet offender needs.”<sup>49</sup> Moreover, “because the circle sentencing model requires extensive preparation on the offender’s part before the circle convenes (see discussion in the following section), some circles become “stacked” with offender supporters who have little relationship to victims.”<sup>50</sup>

The contrivance of the community setting is apparent when we see the emphasis on “pre-session preparation” as a means to help enhance “community empowerment and healing” in circle sentencing.

As a condition of admission to a circle, offenders are required to petition the community justice committee, visit an elder or other respected community member for a conference, begin work on a reparative plan that may involve some restitution to the victim and community service, and identify a community support group.<sup>51</sup>

This is especially interesting in regard to the requirement of “identify[ing] a community support group.” This preparation is said to accelerate the work of the sentencing circle so it can be “less a hearing about disposition requirements than a celebration of the

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<sup>47</sup>Id. at 8.

<sup>48</sup>Id.

<sup>49</sup>Id. at 9-10.

<sup>50</sup>Id. at 11.

<sup>51</sup>Id. at 12.



offender's progress and an opportunity for victim and offender to tell their stories."<sup>52</sup>

The support group's role slides into that of judge, jury, and probationer officer as well, since the groups for both offenders and victims also monitor offenders and act as victim advocates to ensure that agreements made within the circle are carried out. The group then somewhat slides into the community as a whole, since "the judge may assign further monitoring responsibilities to members of the community and may withhold a final decision about detention terms or other sanctions pending the offender's completion of obligations as verified at a followup hearing."<sup>53</sup>

But "the community" seems more *outside* the natural circle of victim and offender when promoters of restorative justice note the importance of "[e]fforts to increase community participation in the dispositional decisionmaking process." By this reckoning, the federal government has to induce community justice by devolving funds to localities, to implant conventional criminal justice agencies in neighborhoods in order to promote less formal sense of justice. Thus, note Bazemore & Umbreit, the judicial system tries in a sense to devolve into something less formal than itself, but on the inducement of governmental programs and money. Yet these programs run the risk that if they still are seen to much as government agencies that just happen to have been dispersed geographically, "the result is an isolated program or process that may be said to be in, but not of, the community."<sup>54</sup> Hence the community can resist the importunings of the justice system to achieve a blending or marriage. The community may be resisting the very idea of becoming an instrument of justice. Or, slightly differently, the community will conceive itself as in a dependent relationship with formal law, so that

increasing flexibility and breaking down formal barriers may increase citizens' willingness to seek and receive assistance but will not necessarily increase their involvement as participants in the justice process or even allow them to determine what services they would like in their neighborhoods.

The community has to be persuaded to see itself as a "decisionmaker" that has "a stake in (and sense of ownership of the process."<sup>55</sup> Which suggests that it does not naturally so conceive itself.

Ultimately, what is the conceived relationship between the community and justice? One is quite utilitarian:

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<sup>52</sup>Id.

<sup>53</sup>Id. at 13.

<sup>54</sup>Id.

<sup>55</sup>Id.

The ultimate measure of success for any approach that claims to advance restorative justice should be its ability to strengthen the capacity of communities to respond effectively to crime. In restorative justice, crime is viewed as both a cause and result of broken or weakened relationships.<sup>56</sup>

So failed community is both a cause and a result of crime.

The fabric of community is the weaving of relationships. Crime harms relationships and thus weakens community. Our response to crime needs to attend to these relationships to rebuild or strengthen the community fabric.<sup>57</sup>

But this restorative model also assumes there is always something there called community, but it can be educated and improved in a technical as well as a spiritual sense, since one goal is to “increase community skills in problem solving and constructive conflict resolution” as well as to “increase the community sense of capacity and efficacy in addressing problems.”<sup>58</sup> And yet the justice system is also “building community, since it also aims to “increase individual awareness of and commitment to the common good” and “create informal support systems or safety nets for victims and offenders.”

“Community members” can play a variety of roles, ranging from the natural to the bureaucratic, such as service on advisory boards at local, county, and State levels; policy input through public forums and community surveys; prevention policy development; a variety of victim and offender support activities, including church- and community-based programs, police chaplaincy programs, healing circles, and neighborhood outreach programs; and volunteer service as victim advocates, mediators for victim-offender mediation programs, and reparative board members. But at the same time an important challenge is whether “new professional roles are being developed,” since conventional justice bureaucrats do not know how to help create restorative justice.<sup>59</sup> A related concern is that

Care must be taken to ensure that family and kinship networks and the community power hierarchy do not compromise the administration of justice. As in any community, there is a danger of a tyranny of community

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<sup>56</sup>Id. at 15.

<sup>57</sup>Id., citing K. Pranis, *Restorative Justice: Principles, Practices and Implementation: Section 6, Building Community*, Nat. Inst. of Corrections Curriculum, Washington, D.C., U.S. Dept. of Justice 10 (1998).

<sup>58</sup>Bazemore & Umbreit, *supra* note \_\_, at 15.

<sup>59</sup>Id. For example, in Deschutes County, Oregon, probation officers are now called community justice officers, and their responsibilities include developing and supporting community service projects, developing restorative conferencing, coordinating services to crime victims, and performing a variety of community-building and restorative functions.

in which certain individuals and groups of residents, particularly those who are members of vulnerable groups, find themselves at the mercy of those in positions of power and influence.<sup>60</sup>

Because there are “often dramatic and dysfunctional power differentials within communities,” the natural dynamics of community life may not encourage participation. Communities are not inherently whole, but rather need the services of programs to promote “holistic restorative justice programs.”<sup>61</sup>

Thus, consider the following very interesting sentence:

If these communities are ever to benefit from a restorative approach to the problem of youth crime, proponents of restorative justice must direct specific attention to developing strategies for building a sense of community among residents and for recruiting and retaining resident volunteers.<sup>62</sup>

Ultimately, a partnership is sought, ostensibly between formal and informal justice, but also, in a sense, between two different notions of community:

If new models are to avoid net-widening, marginalization, and irrelevance, community advocates should begin to work with sympathetic justice professionals who are also committed to community-driven systemic reform.<sup>63</sup>

New concepts of community justice must be “institutionalized” and yet top-down system control must be avoided. The federal funding is not simply a way to provide resources to enhance the dynamics that are naturally present: Without sufficient “community input” at the start, “an administrative focus (i.e., one concerned primarily with grant-funding processes) may even result in cooptation or watering down of new approaches in ways that ultimately function to undermine the philosophy and objectives of restorative justice.”<sup>64</sup>

But Bazemore & Umbreit take a more bluntly political science approach when they recognize that the informal and formal systems, the community and the courts, can

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<sup>60</sup>Id. at 14, citing C.T. Griffiths & R. Hamilton, *Spiritual Renewal, Community Revitalization and Healing*, 20 *Int. J. Comp. & Applied Criminal Just.* 289 (1996).

<sup>61</sup>Bazemore & Umbreit, *supra* note \_\_\_, at 16.

<sup>62</sup>Id.

<sup>63</sup>Id. at 17.

<sup>64</sup>Id.

engage in power struggles that may or may not resolve into power-sharing. Hence the community might also be conceived as the rival to state justice.

For example, from a restorative justice perspective, perhaps the biggest challenge to Vermont's reparative boards is the fact that they have been implemented within the State's formal justice system itself. On one hand, the boards may have the greatest potential for significant impact on the response of the formal system to nonviolent crimes. Moreover, the commitment of administrators to local control may also result in communities assuming and demanding a broader mandate. On the other hand, as a creation of the State corrections bureaucracy, the reparative boards may find themselves at the center of an ongoing struggle between efforts to give greater power and autonomy to citizens and needs of administrators to maintain control and ensure system accountability. Indeed, citizen board members may ultimately be challenged to decide the extent to which their primary client is the community or the probation and court system.<sup>65</sup>

Circle sentencing is seen as the most advanced in terms of successful power-sharing, but the dynamics involve concrete distribution of power more than sunny harmony. Thus, through their "community justice committees," certain communities are said to be the "drivers" in determining which offenders will be admitted to the circle and how that process will unfold. Apparently, those committees have been more successful than anyone expected in winning the sincere cooperation of offenders, and the result has been a tendency to shift more to the more serious rather than the less serious offenders. But that in turn has created tensions among state and local agencies as to how power should be shared and whether the informal initiatives are actually violating state law.<sup>66</sup> In other words, it might become the tendency of informal circles to claim such success that they want to take on cases which the state thinks they should not, which again raises basic conceptual problems about the relationship between community and state.

Bazemore & Umbreit end on a note of caution. In effect, see an absence of "community" in "community corrections," whether the community is viewed "as a target of intervention or as a participant in the justice process," and they attribute that absence to a political failure to "identify meaningful roles for citizens." Thus, they implicitly, or perhaps explicitly recognize the sifting, ambiguous relationship between "sense of community" and "the community" and the formal justice system." They decry "the current dynamic in which the community is largely a passive observer of juvenile justice processes." But they also fall prey to those ambiguities when they propose that "juvenile justice professionals identify ... a small support group willing to assist with offender reintegration and victim support."<sup>67</sup> Who supports whom, and how, and what relation

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<sup>65</sup>Id.

<sup>66</sup>Id.

<sup>67</sup>Id.

support bears to sanctioning, and what all this means in terms of "community" is a perilous set of questions. Ironically, they conclude on a renewed note of self-criticism.

[C]omparative discussions of new approaches at this relatively early stage of development are important because they serve to highlight similarities and differences across emerging models. Such discussions may prevent, or at least minimize, what some have referred to as the "community-policing syndrome": the widespread application (and misapplication) of a generic term to a broad range of initiatives without a clear understanding of the differences between interventions or benchmark criteria that can be used to assess consistency with fundamental principles and objectives.<sup>68</sup>

This is wise caution, and if Bazemore & Umbreit suggest that a sobering admonitory example of the dangers of intellectual confusion is the "community-policing" movement (and it is). I offer here an older and better documented example of what Bazemore & Umbreit might rightly fear.

### **The Sad History of Deinstitutionalization and the Danger of Community**

In recent American history there is one very telling example of the dangers of assuming that there is some independent social phenomenon called the community. It is the thing that happened to state mental hospitals in the 1970's, the thing called deinstitutionalization.. There is a well-developed critical scholarship<sup>69</sup> on this episode in or social history which lends strong support to the view that one key factor in this public disaster was the entrancement of both people out in society generally and mental health professionals and some politicians with the notion that there was something out there called the community to which drugged and incarcerated mental patients could return, and where they would, be, if not cured, respected and thrive far better.

It is now an axiom that deinstitutionalization caused the homelessness epidemic for mentally ill. The campaign to empty the state mental hospitals started in 1950's and was codified in Community Mental Health Center Act of 1963. It was premised on supposed new science about organic cause of illness and hence utility of psychotropic drugs in controlling it.<sup>70</sup> Between 1955 and 1985, the United States saw an 80 percent

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<sup>68</sup>Id., citing S. Mastrofky & R. Ritti, Making Sense of Community Policing: A Theory-Based Analysis, Paper presented at the annual meeting of the Am. Soc. Criminology, 1995.

<sup>69</sup>The key works are Alice Baum & Donald W. Burnes, *A Nation in Denial: The Truth About Homelessness* (1993); Ann Braden Johnson, *Out of Bedlam: The Truth about Deinstitutionalization* (1990); Michael J. Dear & Jennifer R. Wolch, *Landscapes of Despair: From Deinstitutionalization to Homelessness* (1987); Rael Jean Isaac & Virginia C. Armat, *Madness in the Streets: How Psychiatry and the Law Abandoned the Mentally Ill* (1990).

<sup>70</sup>Baum & Burnes, *supra* note \_\_, at 162-63.

decline in state mental hospital population—from 552,000 to 110,000. Until 1970, most of the releases were the best candidates for “community living” or were elderly transferred to nursing homes. The problem was with the post-1970 wave of releases, as well as with a major decrease of about 60 percent in admissions between 1970 and 1980, resulting ultimately in, for example, a 59 percent decrease in beds in the VA hospitals between 1963-80. Congress funded CMHC’s and also liberalized eligibility for SSI benefits, and states reduced their own share of support for care of the mentally from 96 percent to 53 percent between 1963-85. 164:But in fact, fewer than 800 of the intended 2000 CMC’s were created, and between 1968 and 1978, only 5 percent of CMHC admissions were patients who had been released from mental hospitals. Most of these CMHC's had no inpatient beds, and a third had no emergency services. What did happen was that the CMHC's got recharacterized as part of "community empowerment" campaigns and ended up providing mainly therapeutic counseling for the "worried well."<sup>71</sup>

The birth of community psychiatry and notion of prevention is traceable to the 1940’s. In part this movement did not purport to prevent any specific person from becoming sick but rather to reduce the risk for the population in general by modifying "networks of emotional influences through social action."<sup>72</sup> Pathogenic social institutions had to be cured. An unusual and important political project, the Joint Governor’s Commission, was agnostic on prevention but urged secondary and tertiary prevention—early treatment of actual illness and custodial care of chronically ill.<sup>73</sup> But this cautious approach was rejected by anti-institutionalization lobbies.<sup>74</sup> In the view of the new anti-institutional psychiatry, the very notion of the mental patient had to be reinvented. The city itself became the patient—the whole society needed mental health treatment. In effect, this campaign failed to distinguish politics and economics from psychosis, and resulted in a huge overinvestment in CMHC’s.

A coalition of medical bureaucrats, civil rights lawyers, liberal psychiatrists, and leftist intellectuals helped to reject the Joint Commission's urging of small but intensive hospitals centers. The new goal of psychiatry was to provide a cure not just for the mentally ill but for “the entire community.”<sup>75</sup> The chronically mentally ill were viewed as too inconvenient to be compatible with the design of the CMHC's.<sup>76</sup> As both a rationalization of cost-savings and an actual belief of the medical and political forces, it was the entrancement with the idea of "the community" that made a difference. "[T]he notion of 'community' had a romantic aura in the 1960’s and its imaginary warmth was

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<sup>71</sup>E. Fuller Torrey, *Nowhere to Go: The Tragic Odyssey of Homeless Mentally Ill* 150-52 (1988); *Thirty Years of Shame: The Scandalous Neglect of the Mentally Ill Homeless*, 48 *Policy Rev.* 10, 11 (Spring 1989).

<sup>72</sup> Isaac & Armat, *supra* note \_\_, at 71.

<sup>73</sup>*Id.* at 73.

<sup>74</sup>*Id.* at 72.

<sup>75</sup>*Id.* at 78.

<sup>76</sup>*Id.* at 81.

itself seen as therapeutic.”<sup>77</sup> Said one medical leader in retrospect, “The community had a halo at the time. We were federal bureaucrats on an NIMH campus talking about community, but really from some conceptual level as opposed to hands-on experience.” The romantic political and economic goals of the CMHC's were explicitly include

not only the reduction of those factors which tend to produce mental and emotional disturbances, but also the provision of a climate in which each citizen has optimum opportunities for sustained creative and responsible participation in the life of the community, and for the development of his particular potentialities as a human being.<sup>78</sup>

"Community psychiatry" psychiatry became committed to a new myth of social curability. Once in the 19<sup>th</sup> century the asylum had been a therapeutic environment—now it was "the community."<sup>79</sup>

Always implicit, and often explicit was the role of the "anti-psychiatry" movement promoted by such as R.D. Laing and Thomas Szasz, so that a strongly anti-professional and anti-institutional fervor got coopted and transformed in the design of the CMHC's,<sup>80</sup> though ironically psychiatry from this perspective takes on a broader heroic, romantic aura just as it being attacked for its more conventional conception. In retrospect, the psychiatric profession sounds guilty and bitter about this cooptive entrenchment: “Nobody had ever actually proved that community-based care was either more humane, more therapeutic, or less expensive than state hospital care.”<sup>81</sup>

The ultimate result was "the community" consisting of the flotsam of patients tossed back at their families (chiefly their parents) if they had any, but mostly the creation of Single-Room Occupancy hotels in the psychiatric ghettos of cities like San Jose, California.<sup>82</sup> And one of the wonderfully awful ironies is that former patients had to be condensed into SRO's in run-down inner city neighborhoods, rather than at least benefit from dispersion into more amenable ones, because of what came to be known as "community opposition." Residents of outerlying urban and suburban areas like Saratoga instituted a virulent no-growth policy to maintain their "community's" semi-rural air. And

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<sup>77</sup> Id. at 84, quoting interview with Harry Cain, M.D. See Gerald Caplan, *Principles of Preventive Psychiatry* (1964).

<sup>78</sup> Isaac & Armat, *supra* note \_\_, at 91, quoting Robert Felix, NIMH Director, in David Musto, *Whatever Happened to “Community Mental Health,”* *The Public Interest* Spring 75, at 66.

<sup>79</sup> Isaac & Armat, *supra* note \_\_, at 103, quoting Fritz Freyhan, *The History of Recent Developments in Psychiatry*, 21 *Comprehensive Psychiatry*, 406 (1980).

<sup>80</sup> Isaac & Armat, *supra* note \_\_, at 105.

<sup>81</sup> Id. at 287, quoting Leona Bachrach *Speaks: Selected Speeches and Lectures*, *New Directions for Mental Health Services* 83 (1987).

<sup>82</sup> See Dear & Wolch, *supra* note \_\_, at 146-58,

as a result, downtown San Jose became a magnet for not only for CMHC's but for every kind of job corps, vocational rehabilitation, and drug treatment program, and then, when regentrification of downtown San Jose began, the wealthier population of Santa Clara county, needless to day, complained that inner-city crime would slow economic development.<sup>83</sup>

Deinstitutionalization seemed a "juggernaut,"<sup>84</sup> an coincidental but inexorable coalition of liberal and libertarian politics, high-tech chemical therapies, psychiatric doctrine, and budgetary stress. Professionals at first were somewhat ambivalent about ceding control of patients and recognized that patients' ability to cope "in the community" depends on a variety of factors and skills.<sup>85</sup> Yet the psychiatric ghetto in a sense adapted itself to the disabilities of the new residents: most of the social services clustered in the inner city, so a "zone of dependency" evolved as the new community.<sup>86</sup> In California, even the elderly population of the old state mental hospitals dropped 95 percent from 1955 to 1977, and the under-65 population 67 percent, most of them moving into the new "service-dependent ghetto."<sup>87</sup>

In sober retrospection, deinstitutionalization does not seem to have been a systematic social plan, but a romantic rationalization of some very pragmatic concerns blended with ironically convergent social movements.<sup>88</sup> First it was decided that hospitals were too expensive—the closest thing to an original medical governmental plan was simply to have fewer patients. All else followed. The name "deinstitutionalization" itself did not appear until 1970, and it was not even indexed in clinical journals until 1981.<sup>89</sup> Even if in some abstract sense mental illness was a myth, deinstitutionalization did not recognize that thousands of people had been conditioned to their acquired role, so the "community" rhetoric of deinstitutionalization sought to change the pasts well as the future.<sup>90</sup> NIMH types opposed state hospitals period, in any form, but others suggested retooling into smaller facilities. Yet romantic voices emerged, with one of the most prominent congressional leaders proclaiming that mental health would be "under control in a generation or so," and America's most famous psychiatrist, Karl Menninger, saying that so diffused would his profession become that psychiatrists would become essentially general practitioners.<sup>91</sup> As the campaign leaders said:

The fullest development of outpatient and ex-patient services would reduce the mental hospital to a temporary phase in a total program for the mentally ill—a

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<sup>83</sup>Id.

<sup>84</sup>Johnson, supra note \_\_, at 37.

<sup>85</sup>Dear & Wolch, supra note \_\_, at 20..

<sup>86</sup>Id. at 3-4, 12-14, 57-58.

<sup>87</sup>Dear & Wolch, supra note \_\_, at 66.

<sup>88</sup> Johnson, supra note \_\_, at 24-25.

<sup>89</sup>Id. at 109-110.

<sup>90</sup>Id. at 69.

<sup>91</sup>Id. at 33-34, 36. The legislative compromise in federal law was a bill for CMHC's but not comprehensive service for the chronically ill.



way station as it were rather than an institution at the end of the road. The hospital then would be truly open, in this case, *open-ended* in the process of treatment. So extended—that is, into treatment services short of hospitalization and subsequent to hospitalization—the modern mental hospital might then emerge as the center of an integrated mental health service to the community.<sup>92</sup>

And as one somber critic observes: ““This passage contains all the elements of the dream, even as it acknowledges the limitations thereof: the community mental health center was expected to address to mental health needs of everyone before, during, after, and instead of hospitalization.”<sup>93</sup>

Ultimately, the dumped patients wandered lost around their new community--and as one former patient poignantly observed, “They moved all the buildings.”<sup>94</sup> Or as one commentator described a parallel movement in Italy:

People in the villages in the hills came down to recover their own people from the psychiatric institutions.” In the first place, there are getting to be fewer and fewer villages in the hills and fewer and fewer people in them. Secondly, there can be little doubt that such attempts to purge the asylum by evacuating its inmates into their homes of origin are increasingly doomed as the expectations of men and women (and particularly of women) move towards an independent social and economic role for themselves. “Community care” in the form at least, means tying women down to traditional servicing roles for their disabled kinfolk.<sup>95</sup>

Similarly, in Britain "community care" and "the replacement of the mental hospital" were slogans masking the depletion of mental health services; great numbers of mentally ill (and also retarded) people ended up in prisons or the British equivalent of SRO's--"common lodging-houses"--without decent homes or even day centers or skilled social-work resources. Families unable to care for them appealed in vain for renewed hospital admissions or at least skilled help.<sup>96</sup> As in the United States, the unintended consequence of a civil rights movement in favor of mental patients but misguided towards "community care" led to a "permanent reformist reaction to medical abuse—logical result was attack on all medicine and very notion of psychiatry--the permanent opposition syndrome."<sup>97</sup>

### **The Lessons of Deinstitutionalization**

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<sup>92</sup>Id. at 76, quoting the Joint Commission Mental Illness and Health, Action for Mental Health 179 (1980).

<sup>93</sup>Johnson, supra note \_\_, at 76.

<sup>94</sup>Johnson, supra note \_\_, at 111.

<sup>95</sup>Peter Sedgwick, Psycho Politics 241 (1982 ), quoting David Cooper, The Language of Madness 145 (1978).

<sup>96</sup>Sedgwick, supra note \_\_, at 192-94.

<sup>97</sup>Id. at 217.

I cannot offer anything like a testable theory of historical causation to prove with any rigor that entrancement with confused and romantic notions of “community” is was a but-for or proximate cause of the undeniable disaster of deinstitutionalization. But there is enough consensus in the historical appraisals of this period to suggest that the muddled and dishonest thinking or performative public rhetoric about “community” played a significant role—enough to ground the admonitory lessons I am drawing.

The remarkable thing about the admonitory lessons of deinstitutionalization is not just that they have gone unheeded in a rush toward restorative justice, but rather that they have implicitly been heeded by respectable professional and academic commentators, and yet have not fully informed the debate about implementing restorative justice programs.

A striking example Peter Fitzpatrick's appraisal of the Community Boards Program experiment in San Francisco. Fitzpatrick aims to show that a system of justice overly conceived in permanent opposition to the regular justice system anti-justice system may end up both depending on and reproducing the regular justice system through bureaucracy and authority.<sup>98</sup> "Community justice," he argues, may be based on a mythological rejection of formal realm and become a putative "wild child of law" and like many contrived binary oppositions may live in dependent tension with its enemy.<sup>99</sup> Formal law is accused of denying the existential involvement of the subject and the possibility of a "holistic community." The state is denounced for undermining human responsibility by narrowing the scope of justice's inquiry.<sup>100</sup> As Nils Christie has said, conflict may be seen as a form of property,<sup>101</sup> and the state is accused of stealing it from the people.<sup>102</sup>

The Board was criticized for delaying plausible resolutions as premature, because the resolution was not ripe enough to help build community and neighborhood.<sup>103</sup> The community becomes the aspirational figment of the legal process, "a utopia of depoliticized original innocence."<sup>104</sup> Fitzpatrick views it as a free floating entity, "not compromised by inexorable ties to the specific," and so able to produce a wide range of effects. As Fitzpatrick bitterly comments, "The acceptant, responsible individual and the protean community absorb any elements of popular justice, including elements that would otherwise be incompatible with its defining, informal attributes," including the a

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<sup>98</sup>Peter Fitzpatrick, *The Impossibility of Popular Justice*, 1 Soc. And Leg. Studies 199 (1992).

<sup>99</sup>Id. at 200.

<sup>100</sup> Id. at 201.

<sup>101</sup>Nils Christie, *Conflict as Property*, 17 Brit. J. Criminology 1 (1977).

<sup>102</sup> Fitzpatrick, *supra* note \_\_, at 202-03.

<sup>103</sup> Id at 204-05.

<sup>104</sup> Id. at 205.

mythical “self-realizing, responsible individual.”<sup>105</sup> He denounces this “true community of informalism” as “a vacuous Utopia constituted in abrupt opposition to the perceived inauthenticity of certain existent sites of power.”<sup>106</sup>

Similarly, Sally Engle Merry, a sympathetic anthropologist of popular justice movements, worries that community-based justice is all too glibly conceived not as an alternative form of law but the antithesis of law—more natural, informal, less adversarial, indeed “more feminine,” but notes that this self-conception refers not to actual practices so much as “the cultural categories by which they are understood.” As anti-law, it is always defined by reference to whatever the formal law is.<sup>107</sup>

Another observer of traditional justice notes that for many aboriginals, “references to community in the discourse of justice can intensify, rather than reduce, the identification of racial differences; the very notion of “community” is heavily coded with images of communal singularity.”<sup>108</sup> This is especially true when the concept is transported to other parts of Canada, where the only community perspectives articulated are those of the “populist” authoritarianism, that tend to be anti-tough and anti-black.<sup>109</sup>

Similarly, Richard Delgado has worried over the buried dangers in restorative justice, including the disadvantage victims face when the process focuses on integrating the offender, the tendency of restorative justice writing to reinforce racial and ethnic stereotypes in a misguided form of celebratory identity politics, an assumption buried in the celebration of community that the status quo is fair, and hence an evasion of the possibility that the community itself is in some sense to blame for social deprivation; and the refusal to treat conflict as anything but social pathology.<sup>110</sup>

The problem of ‘community in popular justice movements has been especially evident in one of its most important contexts—the sentencing circle used by aboriginal people in domestic violence cases. As Rashmi Goel notes,<sup>111</sup> the sentencing circle exhibits an odd duality of power both limited and excessive. The power may be limited

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<sup>105</sup>Id. at 207.

<sup>106</sup>Id. at 208-09. He acerbically adds that nevertheless “it cannot be denied that aspirational infinities are politically significant in generating support for and involvement in alternative justice.” Id. at 210

<sup>107</sup> Merry, supra note \_\_, at 161, 163 (noting irony that much so-called “popular justice” is actually designed by authoritarian national leaders, as in Cuba and China, rather than by bottom-up social transformation).

<sup>108</sup>Harry Blagg, *Aboriginal Youth and Restorative Justice: Critical Notes from the Australian Frontier*, in Morris & Maxwell, supra note \_\_, at 227, 234.

<sup>109</sup>Id. at 235.

<sup>110</sup> Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 *Stan. L. Rev.* 751 (2000).

<sup>111</sup> Rashmi Goel, *No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases*, 15 *Wisc. Women’s L.J.* 293 (2000).

by certain conditions normally put on the circle's use: Thus, the crime cannot be so serious as to warrant more than 2 years of incarceration, nor should the accused be a recidivist; the attitude of the offender's attitude must be conducive to the circle, the victim and "the community" must be willing to participate, and the accused must have deep roots "in the community."<sup>112</sup> And yet the circle may be too all powerful. Despite the circle's pretense of escaping into invisible neutrality as some default notion of community justice works itself out, the structure of the circle may ensure that the abstraction of community overwhelms the suffering individual. Thus, the restoration of a notion of community justice can be selective in its healing goals, and depending on the definition of the community to be restored, the victim may do no better, or indeed does worse, than she would through conventional justice.

Goel concedes that much of the domestic violence can be traced to the destruction of aboriginal sovereignty and culture by colonial forces, including colonial justice. But that does not mean that drawing on supposedly traditional model of restorative sentencing helps the victim. In fact, because these circles are offender-focused, they tend to see the *offender* as a victim of colonialism, and the restoration of communal sovereignty as the goal, and yet the reintegration of the offender may only serve to heighten the danger to the victim.<sup>113</sup> The victim is likely to be overwhelmed by the elders' call for communal healing, which may include protecting *the community* from the apparent need for intrusion by white justice. Moreover, the victim herself may fear that speaking out will only expose the weaknesses of communal justice and may end up appropriated as a mere player in a scripted call for self-government.<sup>114</sup> Ultimately, the victim may be overwhelmed by the larger goal, replicating learned helplessness, proving that she may have been the victim of the community all along.

One problem may be the romantic notion that restorative justice is locating or recreating a primal original community and set of traditions, and unmediated culture. But it does not take an obsession with social constructionism to see that traditions get invented or adaptively re-invented.<sup>115</sup> Thus, as Carol LaPrairie notes, one Indian form of pre-colonial justice involved feuding and family vengeance and settlement. As part of a highly contemporary new sovereignty campaign by the natives, a form of communal mediation is created that draws to some extent on the older models—more obviously in terms of goals than of means. Hence we get the so-called Longhouse justice, which turns out to be very much an invented tradition created to solve a contemporary political problem.<sup>116</sup> And the double irony is that there may be precisely a native tradition of

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<sup>112</sup>Id. at 318-19.

<sup>113</sup>Id. at 324-25.

<sup>114</sup>Id. at 325-27.

<sup>115</sup>See Eric Hobsbawm, *The Invention of Tradition* (1983).

<sup>116</sup>Carol LaPrairie, *Community Justice or Just Communities? Aboriginal Communities in Search of Justice*\_\_ *Can. J. Criminology* 521 (1995). This is especially evident in Mohawk communal sentencing, E. J. Dickson-Gilmore, *Finding the Ways of the Ancestors, Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems*, 34 *Canadian J. Criminology* 479 (1992),

constant readaptation of old forms to new necessities.<sup>117</sup> Custom, to quote Eric Hobsbawm, is both motor a flywheel,<sup>118</sup> that which changes and guides change. Custom is what judges do—tradition is the apparatus they use to do it, created past for each new tradition. It is thus difficult to distinguish between traditions forced to change and those that choose to change.<sup>119</sup>

In its aboriginal setting, restorative justice purports to be not just an alternative jurisdiction but necessarily a reform of justice, a recapture, an enhancing of an indigenous moral system.<sup>120</sup> But this effort is fraught with ironies, since the very fundamental forms of any legal system may thwart this recapture of the authentic. In the James Bay Creek area, for example, resolution of the land claims rights of the tribe required physical alteration and dislocation of plots to ensure fair allocation, and ultimately shifted the supposedly natural populations of rural communities to wage-labor groupings. That shift may, of course, be beneficial if it addresses serious economic problems. But if so, it underscores a deeper problem with the natural-community focus of restorative justice—that it may ignore or even reinforce economic inequality or deprivation.<sup>121</sup> Moreover, limiting sentencing circles to single small crimes may trivialize crime and so falsely legitimate what gets excluded. And the result in any event is that local justice soon begins to look like regular justice.<sup>122</sup> Maybe the buried question is what the crime says about divisions in the community. Why not always see crime as a failure or disproof of community? Domestic violence and economic demographics of offenders tell us something, “What does incarcerated reporting of property offenses signify about individual or collective notions of ownership or property?”<sup>123</sup>

### **Conclusion**

Community is another name for the phenomenally complex strand of populism in American history, in all of whose versions community is selectively invoked and law always appropriated to achieve highly contestable social ends to police boundaries or resolve disputes. At one extreme we have from the 1960’s Saul Alinsky-type left-wing “community organizing,” which explicitly seeks to create a new sense of community

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<sup>117</sup>Id. at 490.

<sup>118</sup>Hobsbawm, supra note \_\_, at \_\_.

<sup>119</sup>Dickson-Gilmore, supra note \_\_, at 492-96. Mediation may either be part of “a continuum of inherited values, an expression of new values or new justice, or the revival and adaptation of centuries-old customs.” LaPrairie, supra note \_\_, at 533.

<sup>120</sup>Carol LaPrairie, Community Justice or Just Communities? Aboriginal Communities in Search of Justice \_\_ Can. J. Criminology 521 (1995). LaPrairie notes that the term “community” is especially loose when applied to aboriginals living in cities. LaPrairie, supra note \_\_, at 525.

<sup>121</sup>Id. at 529.

<sup>122</sup>Id. at 522.

<sup>123</sup>Id. at 533-35.

identity in order to achieve highly specific redistributive goals.<sup>124</sup> But at the other extreme we have racist enclave-protecting crime aimed at solidifying a sense of community,<sup>125</sup> and somewhere along the continuum we have Not-in-My-Backyard environmental programs and the subtly exclusionary “Neighborhood Watch” programs.

As Carol Greenhouse, Barbara Yngvesson, and David Engel have written, the history of the concept of “community” in the United States has hardly been a simple or entirely happy one. “Community” cannot be at the heart of any society in which self-interested individualism is also proclaimed as a primary value. Community carries with it a “renunciatory” dimension which necessarily lives in tension with individualism, even while at some level of attraction one can be said to “choose community.”<sup>126</sup> Moreover, the notion of community bears a complex relationship to the state, especially in a nation with an anti-governmental or anti-federal strand in its social self-conception rooted in an anti-colonial revolutionary past. The community is an enclave against government, and community insiders may decry litigious attempts by outsiders to enter their world, and yet also in turn invoke the jurisdiction of the courts to protect community.<sup>127</sup> “Community” is a selectively invoked, free-floating signifier in American culture,

a warmly persuasive word to describe an existing site of relationships, or the warmly persuasive word to describe an alternate set of relationships. What is the most important, perhaps, is that unlike all other terms of social organization (state, nation, society, etc.) it seems never to be used unfavorably, and never to be given a positive opposing or distinguishing term.<sup>128</sup>

It is both local and transhistorical, abstractly national in conception and also chthonic, “accessible only through some particular home ground.”<sup>129</sup> It is a trope invoked as an unassailable value to be defended against corruption of all kinds.<sup>130</sup>

American history this illustrates the slippage among the three larger meanings of community outlined at the start. The term is about a sense of who is inside and who is

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<sup>124</sup>Christine B. Harrington, *Popular Justice, Populist Politics: Law in Community Organizing*, 1 Soc. And Leg. Studies 177. 183-84 (1992.)

<sup>125</sup>See Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, in Austin Sarat & Thomas Kearns, eds., *Law’s Violence* 174, 182-85 (1993) (offering examples, including racist murders in Brooklyn and Queens in which innocent appearance of young African-American men led to homicidal attacks by young white residents of old “enclave” neighborhoods).

<sup>126</sup>Carol J. Greenhouse Barbara Yngvesson and David M. Engel, *L & C in Three American Towns* 1994.172-74.

<sup>127</sup> *Id.* at 175.

<sup>128</sup>*Id.* at 179, quoting Raymond Williams, *Keywords: A Vocabulary of Culture and Society* 76 (rev. ed. 1983).

<sup>129</sup>Greenhouse, Yngvesson & Engel, *supra* note \_\_, at 179.

<sup>130</sup> *Id.* at 180-81.

outside, and about the complex relationship between equality and hierarchy.<sup>131</sup> "Community" is a principle defensively invoked to manage change and address a sense of loss of design and control. It is a term "voiced primarily by individuals who were searching for a term with which to name the price they feared the future might demand from them."<sup>132</sup>

Ironically, there may be no "escape from community" in working out restorative justice schemes. To say it is a confused set of concepts and performative tropes is not to suggest the feasibility or even desirability of eradicating the vocabulary of "community" from our discourse. Rather, the danger is that we will be used by, rather than learn to use, this vocabulary, and will therefore fail to nurture the growth of strong restorative justice projects because our entrancement will overcome our common sense and reason.

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<sup>131</sup>As Greenhouse, et al., note, "people who think of themselves as insiders thus view hierarchy as provisional and equality as enduring, but they imagine that, for outsiders, the opposite is true: For them, equality is provisional and hierarchy ultimately enduring." Id. at 182.

<sup>132</sup>190-92.