

## HOLDING RESTORATIVE JUSTICE ACCOUNTABLE

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### INTRODUCTION

Meet Alan. He is a 17-year-old high school dropout with a substance abuse problem who spends most of his time wandering around the streets in search of opportunities to make an easy profit. One night, he spots an open window on the second floor of a neighboring apartment building. He climbs a nearby tree and lets himself into the apartment. It is empty. After going through the “inventory,” he takes some jewelry and two hundred dollars in cash, stuffs them in his pocket and proceeds towards the door, just as Ms. Brown, the middle-aged woman living in the apartment, enters. Their eyes meet for a split second; they have seen each other in the neighborhood before. Alan pushes her aside, causing her to injure her knee in the fall, and escapes. Ms. Brown reports Alan to the police, and he is arrested the next day, but not before he disposes of the stolen goods and uses the money to satisfy his drug habit.

This hypothetical case was not chosen at random. It portrays the most common cases processed through the criminal justice system in the United States. According to statistics provided by the United States Department of Justice, property crime (which includes burglary, theft and motor vehicle theft) makes up slightly more than three-quarters of all crime in the United States. Moreover, of the 14 million property offenses committed during 2004, 9 million involved the theft of property worth less than \$250.<sup>2</sup> But

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<sup>2</sup> See U.S. DEPARTMENT OF JUSTICE – OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, “Crime Characteristics” available at [http://www.ojp.usdoj.gov/bjs/cvict\\_c.htm](http://www.ojp.usdoj.gov/bjs/cvict_c.htm).

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statistics aside, what does Alan face now? What should he expect now that he is arrested?

Surprisingly, the answer to this question is unclear. It depends on where Alan lives and how his local criminal justice system is structured. In most cases, he will be indicted for burglary and assault, either as a juvenile or as an adult.<sup>3</sup> In such a case, he will have a pretty good idea of what he will go through, and if not, his defense attorney can adequately prepare him. However, other localities may decide to refer Alan's case to a restorative justice program.<sup>4</sup> These programs commonly bring offenders and victims together for a facilitated discussion about the crime, and typically result in a restitution agreement in which Alan will repair some of the harm he caused Ms. Brown.

But how can Alan and his lawyer be assured that the process to which they are invited or forced to participate in can achieve its goals? How can the lawyer be assured that Ms. Brown will not abuse the process for personal vendetta? Can the defense attorney rely on the program directors to properly monitor the process so that her client's rights are upheld throughout the process? All of these questions fall under the title of "program accountability" - the assurance that restorative justice programs actually deliver what they are designed to deliver in the best way possible.

The problem is that restorative justice programs in the United States are not held sufficiently accountable. They are asked to col-

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<sup>3</sup> In New York, for example, anyone sixteen and older is tried as an adult. The same is the case in Connecticut and North Carolina. In ten states, including Wisconsin, Illinois, Massachusetts and Texas, seventeen is the cutting age. In all other states, that age is eighteen. See Pamela Ferdinand, *Seventeen an Awkward Age, N.H. Juvenile Justice Finds*, WASH. POST, Mar. 27, 2002, at A3.

<sup>4</sup> See Mark S. Umbreit, Robert B. Coats & Betty Vos, *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q., 279, 281 (2004) (according to Mark Umbreit, there are currently more than 300 victim-offender mediation (VOM) programs in the United States, which is only one of the few practice models for restorative justice. As stated by the authors: "[t]oday, restorative justice policies and programs, including victim-offender mediation, are developing in nearly every state. . ."); see also Mark S. Umbreit, Elizabeth Lightfoot & Jonathan J. Fier, *Legislative Statutes on Victim-offender Mediation: A National Review*, available at <http://2ssw.che.umn.edu/rjp/Resources/Documents/National%20Review%20Legislative%20Statutes.pdf> (2004) (according to this study, 29 states have legislation that addresses VOM or VOM-type programs in varying degrees of specification and authority); MARK S. UMBREIT & JEAN GREENWOOD, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES, 7 (2000), U.S. DEPT OF J., OFFICE OF J. PROGRAMS, OFFICE FOR VICTIMS OF CRIME, available at [http://www.ojp.usdoj.gov/ovc/publications/infores/restorative\\_justice/96520-national\\_survey/welcome.html](http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/96520-national_survey/welcome.html) (stating that low-level property offenses are the most common offenses referred to restorative justice programs in the United States) [hereinafter NATIONAL SURVEY].

lect and report the wrong information and their supervision and evaluation is inadequate. The fact that this malfunction takes place in a practice claiming to be a feasible and appropriate alternative to the criminal justice system makes it even worse. The public has a right to know, not only what restorative justice advocates claim these new processes can do, but also what they actually accomplish. This Article offers a theoretical model for holding restorative justice programs accountable through the implementation of Michael Dorf and Charles Sabel's theory of democratic experimentalism.

Part I of this Article provides a better understanding of the restorative justice theory and its practical expressions. It describes the values and objectives upon which restorative justice is premised and introduces the three most common restorative justice practices: victim-offender mediation, group conferencing and circles. Part II introduces the democratic experimentalism model and demonstrates its compatibility with the restorative justice theory. Part III introduces four restorative justice programs currently operating in the United States, two operated by courts and two by prosecuting agencies. Part IV demonstrates the inadequacy of the evaluation mechanisms currently employed by these programs and emphasizes the importance of comparison between different programs in holding restorative justice programs accountable. Part V establishes the compatibility of all four case studies with a democratic experimentalist regime and demonstrates the practicality of this proposal. Finally, part VI illuminates and discusses the difficulty of comparing very different restorative justice programs, but concludes that such a comparison, as an inseparable component of an experimentalist regime, is essential for effective program accountability.

## I. RESTORATIVE JUSTICE AND RESTORATIVE PRACTICES

According to the restorative justice paradigm, crime should be seen as an offense against people and relationships instead of a mere violation of legal norms.<sup>5</sup> Restorative justice views the appropriate public response to crime as a process involving the individuals most affected by crime - the victim, the offender and, when

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<sup>5</sup> HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 181 (Herald Press 1990); JOHN BRAITHWAITE & HEATHER STRANG, *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 1-2 (Braithwaite & Strang eds., Cambridge University Press 2001).

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relevant, the community<sup>6</sup> - “in a search for solutions which promote repair, reconciliation and reassurance”<sup>7</sup> as opposed to a narrow desert-based or deterrence-based process, handled and determined by legal professionals.<sup>8</sup> According to the restorative justice theory, offenders are obligated to repair the harm they caused the victim and community, and communities bear the responsibility to hold offenders accountable for their actions while allowing them to make such reparations.<sup>9</sup>

Restorative justice consists of a variety of values and principles. John Braithwaite, a prominent restorative justice advocate, distinguishes between three different groups of restorative justice values.<sup>10</sup> The first are “values that must be honored and enforced as constraints,”<sup>11</sup> such as non-domination and empowerment,<sup>12</sup> specific upper limits on sanctions, respectful listening and equal concern for all stakeholders, and accountability and respect for fundamental human rights.<sup>13</sup> The second group consists of values

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<sup>6</sup> It must be noted that in the context of restorative justice, the term ‘community’ is far from being self explanatory. On one hand, restorative justice proponents tend to include the needs of ‘communities’ in their ideal response to crime, and in some cases, may even regard ‘community building’ or ‘community strengthening’ as the ultimate goal of restorative justice. On the other hand, many restorative justice scholars do not explain what they mean when they talk about ‘communities’ and tend to treat this as obvious. For the purposes of this analysis, however, Crawford’s understanding of the ‘community’ in the restorative justice context will suffice: “[r]eference to communities in restorative justice generally alludes to some form of regulatory authority or moral value system with persuasive power to induce conformity beyond the family and below the state (the political community).” Adam Crawford, *The State, Community and Restorative Justice: Heresy, Nostalgia and Butterfly Collecting*, in *RESTORATIVE JUSTICE AND THE LAW* 101, 115 (L. Walgrave ed., 2002).

<sup>7</sup> Zehr, *supra* note 5, at 181.

<sup>8</sup> For a more thorough analysis of the roles of professionals in the criminal justice system, including the judge, prosecutor, defense attorney and probation officer, in light of the growing popularity of restorative justice practices, see Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 *UTAH L. REV.* 57.

<sup>9</sup> See Zehr, *supra* note 5; see also Paul McCold & Benjamin Wachtel, *Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project* 9 (1998), available at <http://fp.enter.net/restorativepractices/BPD.pdf>. One of the most acceptable definitions for restorative justice was coined by Tony Marshal as: “[a] process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.” See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION*, 11 (Oxford University Press 2002).

<sup>10</sup> John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 244 *CRIM. L. BULL.* 244, 247 (2002).

<sup>11</sup> *Id.* at 253.

<sup>12</sup> As elaborated by Braithwaite, non-domination means the assurance that the process will not be dominated by one stakeholder, but at the same time, the assurance that all participants will be empowered to express their opinions, even when they seem to contradict other restorative values. *Id.* at 248-49.

<sup>13</sup> *Id.*, at 247.

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that restorative justice practitioners should “actively encourage in restorative processes.”<sup>14</sup> Among these values are different forms of healing such as the restoration of human dignity, property loss, damaged relationships and emotional restoration; provision of social support for the development of human capabilities; and prevention of future injustice.<sup>15</sup> The third group includes values such as remorse, apology, forgiveness and mercy, which restorative justice practitioners may hope for but cannot urge participants to manifest.<sup>16</sup>

These restorative justice values and tenets are commonly manifested in three basic process models: (1) victim-offender mediation or reconciliation; (2) group conferencing; and (3) circles. However, there is a trend, mostly in English-speaking countries, towards the latter two models which include a broader circle of participants.<sup>17</sup>

Most cases are referred to restorative justice programs by probation officers, judges, prosecutors and the police. A minority of referrals are made by other sources, such as defense attorneys, community members or victim advocates.<sup>18</sup> Referrals may occur at any point in the criminal justice system, from the pre-charging stage to the post-sentencing stage. The main prerequisites are that the offender admits to committing the offense (or at least does not contest the facts of the offense) and that both parties voluntarily agree to participate in the process.<sup>19</sup>

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<sup>14</sup> *Id.* at 253.

<sup>15</sup> *Id.* at 250-51.

<sup>16</sup> *Id.* at 252-53.

<sup>17</sup> *Id.* at 246 (Braithwaite mentions the tendency toward broader restorative practices); see Patricia Scotland, Minister of State for the Criminal Justice System and Law Reform, *Restorative Justice: Helping to Meet Local Needs*, 3 (Mar. 31, 2005), available at <http://www.homeoffice.gov.uk/documents/rj-local-needs-guidance?version=1> (stressing the importance of “bringing in community members, and the friends and relatives of those involved. . . can help improve public confidence that our Criminal Justice System. . . meets the needs of victims and holds offenders to account.”); Similarly, in Australia and New Zealand, the most common restorative justice practices are called “conferences,” which include participants other than the victim and offender. See Kathleen Daly & Hennessey Hayes, *Restorative Justice and Conferencing in Australia* Trend & Issue in Crime and Criminal Justice (Australian Institute of Criminology Canberra Feb. 2001) 1, 2, available at <http://www.aic.gov.au/publications/tandi/tandi186.html>; Donald J. Schmid, *Restorative Justice in New Zealand: A Model For U.S. Criminal Justice* 11-18, (Aug. 2001) available at <http://www.fulbright.org.nz/voices/axford/schmid.html> (in pages 19-24, Schmid reviews restorative justice programs in Australia, Canada and the United States, all involving a broader circle of participants.); Albert W. Dzur & Susan M. Olson, *The Value of Community Participation in Restorative Justice*, 35 J. OF SOC. PHIL. 91 (2004) (arguing that restorative justice proponents and practitioners should clarify their reasons for wishing to include community members in restorative practices, and provide a number of justifications for such participation).

<sup>18</sup> UMBREIT & GREENWOOD, NATIONAL SURVEY, *supra* note 4, at 7.

<sup>19</sup> *Id.* at 8.

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All of the different models follow the same basic pattern. They differ mainly in the number of participants and scope of discussion. While victim-offender mediation is limited to the victim, offender and facilitator, group conferencing is open to family members and support people for both parties and, on occasion, to relevant professionals such as social workers, police officers and more.<sup>20</sup> The circle process is even broader and is open to the entire community, including participants who were not directly affected by the crime.<sup>21</sup>

In the first stage of the process, the mediator (or an administrative representative), establishes initial contact with the victim and offender individually and explains the process and its purposes. If both sides are interested, the process advances towards the second stage, screening and preparation. In most cases, this stage consists of private and separate meetings with the victim and offender in order to screen the appropriate cases and prepare the participants for the meeting.<sup>22</sup> Meetings, which last approximately two hours, begin with the victim and offender sharing their personal perspectives and feelings about the criminal event and its impact on their lives (in most cases the victim is the first to speak). After the “story sharing,” the participants are given the opportunity to ask each other questions and to gather information that is important to them, such as, “why me?” or, “what were you thinking?” which typically weigh heavily on victims and can only be answered by offenders. Finally, the participants discuss the losses suffered by the victim and try to agree on a restitution plan. Such agreements typically consist of monetary compensation, some kind of personal service as a substitute for financial restitution and com-

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<sup>20</sup> Leena Kurki, *Evaluating Restorative Justice Practices*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 293, 297-298 (Von Hirsch, Roberts & Bottoms eds., 2003).

<sup>21</sup> *Id.* at 303; For a good example of the circle practice, see ROBERT COATES, MARK UMBREIT & BETTY VOS, EXECUTIVE SUMMARY, *RESTORATIVE JUSTICE CIRCLES IN SOUTH SAINT PAUL, MINNESOTA* 5 (Sept. 1, 2000), available at <http://2ssw.che.umn.edu/rjp/Resources/Resource.htm>[http://www.rjp.umn.edu/imglassets/13522/Ex\\_Sum%\\_S\\_St\\_Paul\\_Circles.pdf](http://www.rjp.umn.edu/imglassets/13522/Ex_Sum%_S_St_Paul_Circles.pdf).

<sup>22</sup> On some occasions, when victims or offenders refuse to meet the other party face-to-face but wish to participate in the process, the mediations could be conducted as “shuttle mediation,” in which the mediator goes from party to party, and conveys their messages to each other. See MARK UMBREIT & JEAN GREENWOOD, *DIRECTORY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES, OFFICE OF VICTIMS OF CRIME, OFFICE OF JUSTICE PROGRAMS, THE U. S. DEPARTMENT OF JUSTICE* (Apr. 2001), available at [http://www.ojp.usdoj.gov/ovc/publications/infores/restorative\\_justice/96521-dir\\_victim-offender/welcome.html](http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/96521-dir_victim-offender/welcome.html) [hereinafter *THE DIRECTORY*] (a significant percentage of the programs surveyed indicated they use “shuttle mediation” or “shuttle diplomacy” in these processes).

munity service by the offender. A considerably high percentage of victim-offender mediations end with a restitution agreement.<sup>23</sup> The implications of not reaching an agreement vary from program to program. In some, the case may be returned to the traditional criminal justice system; in others, there may not be any repercussions.

While victim-offender mediation, group conferencing and circles are the three basic restorative justice processes used by most restorative justice programs, they do not encompass the entire gamut of restorative justice practices. New processes have emerged over the years which are based on the circle process, but which adopt elements from different process models, such as Youth Accountability Boards,<sup>24</sup> Community Review Panels and Community Reparative Boards.<sup>25</sup>

Although restorative justice practices in the United States differ in many respects, they do share one major problem: they are not held accountable for the methods they use and the outcomes they achieve. As will be demonstrated, current evaluation mechanisms employed by restorative justice programs that are highly integrated in the criminal justice system are insufficient. In practice, each program is on its own, recording and reporting the wrong information and accountable to no one for the fulfillment – or non-fulfillment – of restorative justice principles. As a result, restorative justice practices risk losing their credibility and their chance of successfully integrating into the criminal justice system. A possible solution to this problem is holding restorative justice programs accountable through a governing system based on a theoretical

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<sup>23</sup> The statistics vary between over 90% (MARK UMBREIT, EXECUTIVE SUMMARY: VICTIM-OFFENDER MEDIATION, AN ANALYSIS OF PROGRAMS IN FOUR STATES OF THE U.S., 10 (1992) available at <http://2ssw.che.umn.edu/rjp/Resources/Resource.htm>); see also Mark Umbreit, Robert Coates & Ann Warner Roberts, *The Impact of Victim-Offender Mediation: A Cross-National Perspective*, 17(3) *MEDIATION QUARTERLY* 215, 224 (2000)) to 87%; Kurki, *supra* note 20, at 295.

<sup>24</sup> ALEXANDRA LYNCH, BEST PRACTICES; YOUTH ACCOUNTABILITY BOARDS: HOW PROSECUTORS ARE ENGAGING COMMUNITIES TO RESPOND TO LOW-LEVEL JUVENILE OFFENDING (2004) available at [http://www.courtinnovation.org/center\\_1publications.html](http://www.courtinnovation.org/center_1publications.html) [hereinafter BEST PRACTICES].

<sup>25</sup> See, e.g., Susan Olson & Albert Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 *LAW & SOC'Y REV.* 139, 154 (March 2004) (describing the Salt Lake City "Passages" program which uses Community Review Panels) and 165 (a description of the Vermont Community Reparative Boards).

model for public decision-making, developed by Michael Dorf and Charles Sabel, called democratic experimentalism.<sup>26</sup>

## II. DEMOCRATIC EXPERIMENTALISM AND RESTORATIVE JUSTICE

### A. What is Democratic Experimentalism?

Democratic experimentalism is a novel model of governance in which government is decentralized, allowing public service providers, citizens and other agencies to “choose their own precise goals and the means for achieving them.”<sup>27</sup> In return for this extraordinary freedom, the decentralized actors are obligated to provide the central authority with detailed information about their activities, goals and performance. Instead of setting policy and enacting specific rules to implement it, the central authority, or the “government of officials” as Dorf and Sabel call it,<sup>28</sup> limits itself to “identification of a problem and simultaneous authorization of local experimentation on condition that the experimentalist entities . . . assure rights of democratic access to relevant participants, fully disclose their methods and results, and submit to evaluations comparing performance across jurisdictions.”<sup>29</sup> Through these evaluations, the central authority determines whether service providers are effective and whether they meet their set goals and objectives. Furthermore, the central authority determines which providers performed best, benchmarks their performance and demands that all other comparable decentralized actors meet that standard.<sup>30</sup>

As Dorf and Sabel explain, this system ensures that each actor is held accountable. On the one hand, service providers are accountable to the citizens they serve, and they regularly collect information from service-receivers on the quality of their performance in order to improve it. On the other hand, service providers are equally accountable to the central authority to which

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<sup>26</sup> Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) [hereinafter *A Constitution of DE*].

<sup>27</sup> Michael Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 833 (2000) [hereinafter *Drug Courts*].

<sup>28</sup> Dorf & Sabel, *A Constitution of DE*, *supra* note 26, at 317.

<sup>29</sup> Dorf & Sabel, *Drug Courts*, *supra* note 27, at 875-76.

<sup>30</sup> Dorf & Sabel, *A Constitution of DE*, *supra* note 26, at 351-53.



they report, which is comprised of elected officials who are accountable to the citizens through the election process.<sup>31</sup>

Two of the examples that Dorf and Sabel present as evidence of their new governing model are directly related to the criminal justice system. The first is community policing in Chicago and the second is the innovative model of drug treatment courts. These two examples clarify some of the elements necessary for an experimentalist governing system and support the claim that this kind of system can work when applied to restorative justice programs.

In the case of the Chicago Police Department (CPD), the governing process began its transformation when the central authority, the city of Chicago and the CPD created local neighborhood police units to closely collaborate with local residents. This collaboration aimed to utilize the community's knowledge and experience in order to prevent crime, instead of focusing on the traditional role of the police – to provide a quick response to crime. The overarching goal was to improve the police department's ability to fulfill its duty and purpose - to ensure citizens “the greatest possible social order with full respect [of] the[ir] rights.”<sup>32</sup> Thus, the CPD created “beat teams,” comprised of several police officers who were assigned to specific neighborhoods and cooperated with local residents, city service departments and even the mayor's office in identifying and resolving crime and civil disorder problems at the community street level. The main forum for this collaboration is a monthly “beat meeting,”<sup>33</sup> where all of the stakeholders gather, raise their concerns and seek ways to address them.

Drug treatment courts are the other example provided by Dorf and Sabel. Just as with community policing, here too reform began with central authorities (the United States federal government and the state court systems) creating local entities (drug treatment courts) designed and intended to address a previously identified problem (crime motivated by or caused by drug addiction). The federal government collects information from local drug courts and “extracts benchmarks and framework rules from these.”<sup>34</sup> In return, drug courts are free to collaborate with treatment providers and other agencies working with them to develop innovative and specific solutions that fit the different defendants that come before the courts. Furthermore, just as the drug courts

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<sup>31</sup> *Id.* at 319.

<sup>32</sup> *Id.* at 328.

<sup>33</sup> *Id.* at 330.

<sup>34</sup> Dorf & Sabel, *Drug Courts*, *supra* note 27, at 834.

themselves are accountable to a central authority, they also “monitor and discipline the activities of treatment providers and those with whom they collaborate.”<sup>35</sup> In so doing, the courts compel individuals to reform and treatment providers to systematically learn and improve the services they provide.<sup>36</sup> All actors are given broad discretion in choosing their methods of action in exchange for transparency, information provision and accountability. Through this system, a circle of accountability is created, ensuring quality of treatment and benchmark standardization for each link in the chain.

These two models exemplify the requisite elements for the success of an experimentalist regime. The first element is the creation of a subordinate entity by a central authority to provide a solution to a previously identified problem. The second element is the collaborative, citizen-oriented character of these newly created subordinate entities, which are autonomous and free to set their goals and methods independently. The third element is the strict requirement that service providers preserve the basic rights of their citizenry. The fourth element is the complete transparency of methods and results demanded of service providers in exchange for their relative independence. The fifth and final element is the existence of an experimentalist central authority. Such an authority is expected to monitor its subordinate service providers by collecting information about their goals, methods and results and comparing it with information provided by comparable subordinates. The central authority then derives best-practice standards which are used to evaluate the different service providers.

#### B. Dovetailing Democratic Experimentalism and Restorative Justice

The restorative justice paradigm is highly compatible with a democratic experimentalist benchmarking system. On one hand, this system requires not only the setting of standards, but the evaluation of service providers in accordance with them. This is what program accountability is all about and what restorative justice programs most need. On the other hand, democratic experimentalism avoids the crucial problem of standardization and over-regulation of restorative justice programs by state governments. As

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

<sup>36</sup> *Id.* at 837.

articulated by Braithwaite, “[i]f restorative justice is about shifting power to the people, surely reimposing the state to set standards for restorative justice shifts the power back to the state?”<sup>37</sup>

In an experimentalist regime, the power of standard setting is not shifted back to the state. It remains in the hands of restorative justice service providers who are monitored by their central authority through comparison with other programs and best practice standards. In doing so, democratic experimentalism realizes one of the most important premises of the restorative justice paradigm – the principle of non-domination. As Braithwaite explains, this principle comes into play in different levels in restorative justice practices: in their accessibility to all stakeholders, in their structuring and even in their limits.<sup>38</sup>

Democratic experimentalism adds another dimension to the principle of non-domination by empowering restorative justice practitioners to come up with the methods they wish to employ and the results they wish to achieve, instead of dictating them. Furthermore, under this regime, which establishes standards through ongoing evaluation and benchmarking best practices, the standards themselves are left open for reconsideration by the service providers. This emphasizes the fact that restorative justice programs in democratic experimentalism are not dominated by the central authority, since even the standards by which they are evaluated are determined “bottom up” and not dictated from above.<sup>39</sup>

Interestingly, non-domination is equally central in democratic experimentalism. In the latter, non-domination is translated into an innovative method of governing, breaking away from the New Deal governance paradigm.<sup>40</sup> According to this latter paradigm, pre-determined regulations, strictly structured programs and highly specific doctrines (all dictated by the central authority to service

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<sup>37</sup> John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY, 563, 564 (2002).

<sup>38</sup> *Id.* at 565-67. The principle of non-domination allows any interested stakeholder to participate in the process and prevents any attempt by one participant to silence or dominate another during the process. It structures restorative processes in ways that minimize power imbalance and domination; it endeavors to allow crime-affected stakeholders to decide whether they wish to participate in the process freely and without coercion (to the extent possible in a coercive criminal justice system), and it defends due process rights of all participants; it prohibits restorative processes to impose punishments on offenders that exceed the maximum punishment prescribed by law and it empowers all participants to speak and contribute to the process with “equal concern for all stakeholders.”)

<sup>39</sup> See generally *id.* at 572-73 (discussing bottom-up emerging restorative justice values and standards).

<sup>40</sup> Dorf & Sabel, *A Constitution of DE*, *supra* note 26, at 276-77.

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providers) are subject to periodic adjustment in order to adapt to constantly changing circumstances.<sup>41</sup> This is a highly domitory regime, in which service providers and citizens – holding invaluable information regarding the efficacy and relevance of methods used and rules established - are not formally part of the decision-making process on the use of those methods and rules and are excluded from participating in it.<sup>42</sup> Dorf and Sabel identified the ineffectiveness of this domitory governance model<sup>43</sup> and suggested that the central authority take on a new role of deference to its subsidiary service providers, in which it assists their learning process.<sup>44</sup> This is the essence of the fourth and fifth elements of the experimentalist regime described above. On the one side, there is complete transparency and full disclosure of both methods and results on the part of service providers. On the other side, there is an experimentalist central authority that articulates a general problem to be resolved by service providers, allows them to determine their preferred methods and goals, monitors their activities, holds them accountable for their results and develops best-practice standards for them to meet. In other words, the experimentalist central authority ceases to dominate its service providers.

Another important restorative justice principle is “respect for the fundamental human rights specified in the Universal Declaration of Human Rights”<sup>45</sup> and other United Nations human rights instruments. The centrality, of and commitment to, human rights are also reflected in the “maximizing standards” for restorative justice programs articulated by Braithwaite.<sup>46</sup> These standards are parallel to the second group of restorative justice values<sup>47</sup> and include standards such as restoration of human dignity, lost property, lost safety, lost health and more. According to Braithwaite, these standards should be maintained unless they contradict one of the specified “constraining standards”<sup>48</sup> in the first group of restorative justice values which must always be upheld (such as non-domination, empowerment and respect for fundamental human rights). These “maximizing standards” serve as restraints, when they do

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<sup>41</sup> *Id.* at 315.

<sup>42</sup> *Id.* at 278.

<sup>43</sup> *Id.* at 278-79 (discussing the growing difficulties of firms and service providers to apply their policies and “uniform routines” to an ever-changing reality).

<sup>44</sup> See *supra* notes 27-31, and accompanying text.

<sup>45</sup> Braithwaite, *supra* note 37, at 569 (constraining standards).

<sup>46</sup> *Id.* at 569.

<sup>47</sup> See *supra* notes 14-15 and accompanying text; see also Braithwaite, *supra* note 37, at 269.

<sup>48</sup> See *supra* notes 11-13 and accompanying text; see also Braithwaite, *supra* note 37, at 569.

not compete with “constraining standards,” but also as the likely results of a successful restorative justice process. Since these standards are all derived from basic human rights, their significance and impact on the process will only be enhanced when they are also seen as one of the objectives of restorative justice processes. In other words, human rights are not merely constraints on the implementation of the process; they are also a likely result and an aspired objective in successful restorative justice processes.<sup>49</sup>

Similarly, respect for fundamental rights is an important element of democratic experimentalism as well. According to Dorf and Sabel, it is one of the few prerequisites that constrain the relative freedom and autonomy given to service providers in determining and designing their methods and goals.<sup>50</sup> The fact that safeguarding clients’ fundamental rights is a prerequisite, whose absence causes the disintegration of the entire experimentalist structure, demonstrates the centrality of this element in the democratic experimentalism theory. Therefore, service providers in an experimentalist regime must be aware of their responsibilities vis à vis their clients’ rights. The fact that service providers in the area of restorative justice are already aware of these responsibilities and committed to these rights provides their central authorities with sufficient assurances regarding the fulfillment of this experimentalist central element.

A third premise in restorative justice is found in Braithwaite’s twelfth “maximizing standard” – “providing social support to develop human capabilities to the full[est].”<sup>51</sup> This important concept comes into play in restorative justice processes in various ways. Participants in restorative conferences and meetings are empowered to express themselves, listen to each other and, if possible, heal and forgive. Often, this empowerment results in a peculiar provision in the restitution agreement according to which an offender undertakes to go to the library twice a week, to take an active role in house-chores or to find a job. In other cases, victims may undertake to continue meeting with their offenders in order to help them comply with the resolutions they make in the aftermath of crime or to speak with their parole board on their behalf.<sup>52</sup> But

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<sup>49</sup> See Braithwaite, *supra* note 37, at 570.

<sup>50</sup> Dorf & Sabel, *A Constitution of DE*, *supra* note 26, at 284; Dorf & Sabel, *Drug Courts*, *supra* note 27, at 876.

<sup>51</sup> Braithwaite, *supra* note 37, at 570.

<sup>52</sup> All of these examples are based on actual resolutions achieved in different restorative justice programs, as observed by the author.

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Braithwaite suggests that this premise applies to the institutional level in designing restorative justice programs as well: “[t]he key design idea here is that regulatory institutions must be designed so as to nurture developmental institutions.”<sup>53</sup> In other words, a central restorative justice standard is that restorative justice programs continuously develop, improve and adapt to a constantly changing reality.

Other “maximizing standards” indicate the way in which restorative justice programs should change. Standards, such as restoration of communities and restoration of a sense of duty as a citizen,<sup>54</sup> suggest that institutional development go hand in hand with collaboration with other service providers and, most importantly, with the citizenry. The restorative justice paradigm attributes the restoration of citizens’ sense of duty to their participation in actual decision making processes that affect their lives; it views collaboration with communities as essential to strengthening and restoring them.

The centrality of this same premise is evident in democratic experimentalism. The first and second elements of an experimentalist regime, which include the establishment of local service providers dedicated to resolving predefined problems and granting them full autonomy to determine their goals and means, demonstrate this regime’s commitment to nurturing developmental institutions. The Chicago community policing is a perfect example of an experimental regime allowing an institution, here the police, to develop through local beat teams and beat meetings in which service providers collaborate with individual citizens and communities in addressing a predetermined problem. Beat meetings exemplify the feasibility of decentralization in a highly hierarchical and centralized organization such as a city police department and demonstrate that collaborative processes with citizens in distressed neighborhoods are not an illusion.<sup>55</sup> The fact that restorative justice values institutional development through collaboration with citizens and communities, as acknowledged by Braithwaite, is yet another example of its compatibility with the democratic experimentalism theory.

Now, after introducing the restorative justice theory and the democratic experimentalist model, and after discussing their potential compatibility, it is time to turn to the practice of restorative

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<sup>53</sup> Braithwaite, *supra* note 37, at 570.

<sup>54</sup> *Id.* at 569.

<sup>55</sup> Dorf & Sabel, *A Constitution of DE*, *supra* note 26, at 327-28.

justice and examine whether using a democratic experimentalist regime to hold restorative justice programs accountable is at all applicable. For this purpose, this Article will introduce four active restorative justice programs and explore their potential ability to perform as experimentalist entities under a democratic experimentalist regime.

### III. FOUR RESTORATIVE JUSTICE PROGRAMS – TRANSLATING THEORY INTO PRACTICE

#### A. Methodology

There are hundreds of restorative justice programs operating in the United States.<sup>56</sup> However, many of them are small, relatively new and receive referrals every year on an irregular basis,<sup>57</sup> and most, moreover, are either community-based or church-based non-profit organizations.<sup>58</sup> Yet for the purpose of this Article – illuminating the lack of program accountability in restorative justice

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<sup>56</sup> Modest estimates speak of approximately 300 programs. *See, e.g.,* Umbreit et. al., *Victim-Offender Mediation* note 4, at 281. Others estimate the number of restorative justice programs in the United States to be approximately 750. Mara Schiff, *Models, Challenges and The Promise of Restorative Conferencing Strategies*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 315, 317 (Andrew Von Hirsch et al. eds., 2003).

<sup>57</sup> *See* THE DIRECTORY, *supra* note 22. The Directory enumerates 303 programs, and provides, in most cases, the following information: contact information, the type of agency operating the program, date the program began, number and type of referrals in recent year, point in the justice process at which mediation occurs and general information regarding other mediation and activities performed by the program. It must be noted that although the Directory formally only applies to victim-offender mediation, many of the programs mentioned in it perform other restorative practices as well. Many of the programs report extremely small numbers of referrals per year.). *See also* Paul Nixon, Gale Burford, Andrew Quinn & Josh Edelbaum, *A Survey of International Practices, Policy & Research on Family Group Conferencing and Related Practices* 6 (May 2005), available at [http://www.americanhumane.org/site/DocServer/FGDM\\_www\\_survey.pdf?docID=2841](http://www.americanhumane.org/site/DocServer/FGDM_www_survey.pdf?docID=2841). This international on-line survey received questionnaires from 225 group conferencing programs, 143 of which are from the United States. 88 programs reported that they conducted less than 10 conferences overall and 32 additional programs reported they conducted less than 20 conferences overall. Only 48 programs reported they conducted more than 40 conferences overall, but 9 of them are from New Zealand, where group conferencing is mandatory by law. This is a strong indication of the small volume of referrals many restorative justice programs in the United States deal with.

<sup>58</sup> Of the 303 programs described in the Directory, 165 are non-governmental agencies, the vast majority of which are private community-based organizations and churches. Among the governmental agencies involved in restorative justice initiatives, most common are probation agencies, local prosecution agencies, the police, correctional facilities, juvenile and adult courts and municipalities.

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practice and offering democratic experimentalism as a mechanism for holding restorative justice programs accountable – different programs must serve as case studies. Therefore, this article reviews programs that are well integrated within the criminal justice system, are experienced and retain a steady and substantial number of referrals per year. Restorative justice programs operated by the court and prosecution were preferred due to the dominant roles of these agencies in the criminal adjudicatory process. Such agencies were identified and contacted on the basis of the information provided in the Directory of Victim-Offender Mediation in the United States, published by the U.S. Department of Justice, and by the Center for Restorative Justice & Peacemaking in the University of Minnesota, headed by Mark Umbreit, who was responsible for gathering the information contained in the Directory.

The four programs discussed in this Article typify successful practices of restorative justice in the United States. Together, they cover a wide range of criminal misconduct committed by juvenile and adult offenders. But, most importantly, they are all part of the criminal justice system, publicly funded and, in principle, are held accountable by their sponsoring agency. Program directors and coordinators of these programs were interviewed and a number of live observations were made. In addition, all four programs submitted quantitative and qualitative information regarding their practices and their evaluation mechanisms. The four programs are: (1) The restorative justice programs operated by the Milwaukee County District Attorney's Office in Wisconsin;<sup>59</sup> (2) The Restorative Justice Center of the Polk County Attorney's Office in Des Moines, Iowa;<sup>60</sup> (3) The restorative justice program, operated by the 31st Judicial District Circuit Court, Office of Dispute Resolution, in Manassas, Virginia;<sup>61</sup> and (4) Community Impact Panels in the Midtown Community Court, New York.<sup>62</sup>

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<sup>59</sup> Hereinafter "Milwaukee DA's Program"

<sup>60</sup> Hereinafter "Polk County DA's Program"

<sup>61</sup> Hereinafter "The Prince William County Program"

<sup>62</sup> Hereinafter "Midtown Impact Panels." It is important to note that this program is very different from the others described in this paper due to the fact that it was not created as a restorative justice practice, but rather as an additional sanction used by the Midtown Community Court in New York, which is governed by the community justice and problem-solving courts paradigms. Nevertheless, the Midtown Impact Panels were included in this paper, since they adopted a number of salient restorative distinctions and exemplify the deep influence restorative justice practices have on local criminal justice systems in the United States. Their restorative aspects qualify them, for the purposes of this analysis, as a restorative justice practice operating within a community-justice, problem-solving, experimental court.



## B. The Four Case Studies

### 1. The Milwaukee County District Attorney's Office Restorative Justice Programs

In 1998, a Task Force on Restorative Justice was created by the Milwaukee County Board of Supervisors to explore restorative justice applications in the criminal justice system. Two years later, in 2000, the County District Attorney's Office began to operate a restorative justice program titled "the Community Conferencing Program (CCP)," directed by the chair of the Task Force, Assistant District Attorney David Lerman. However, along with the new restorative justice practice, innovative legislation was introduced by the Wisconsin legislature, effective as of June 2001, which provided for a full-time Assistant District Attorney position in Milwaukee and Outagamie Counties devoted solely to implementing programming based upon the principles of the restorative justice theory. As of January 2002, Lerman is a full time restorative justice coordinator, in accordance with the new legislation. He is assisted by a program manager and a number of student interns. This small staff mainly focuses on two restorative justice programs – the CCP and the Neighborhood Initiative.

#### i. The Community Conferencing Program (CCP)

The CCP is a variation on the model of group conferencing, with the participation of community representatives. Once a case is referred to the program, pre-conference meetings are conducted with the victim and offender. If both victim and offender voluntarily agree to participate in the process, a conference is scheduled, usually at a location convenient to the victim. Conferences generally include an average of seven to ten participants: the victim, offender, defense attorney, a community volunteer facilitator, David Lerman or the program manager, community members and various support persons. In 2003, the program began to occasionally conduct "Modified Conferences" when the victim refused to meet with the offender, but did not object to a restorative intervention. In these cases, victims are given a voice through their police report statements, any additional material they wish to provide or through participating community representatives.

The CCP follows the same basic pattern in each case: discussion of the facts, the impact of the offense on the affected parties and the steps necessary to repair the harm. The vast majority of conferences result in an agreement. The CCP ends with a traditional "Bread Breaking," a light snack shared by all participants of

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the conference, emphasizing the community bond and the acceptance of all participants (including, and perhaps especially, the offender) as part of the community. Conferences average between one to two and-a-half hours and allow up to six months for fulfilling the agreement. The program handles only adult (aged 17 and up), non-violent cases, in which the “offender has admitted to wrongdoing.”<sup>63</sup> However, the program occasionally handles cases of violence when deemed appropriate and useful based on the particular circumstances,<sup>64</sup> such as assault and battery cases in which the victim asks to meet the offender. Due to the success of the “Modified Conference,” the program also developed the Community Accountability Circle: a similarly structured process intended for 17-year old first time offenders charged with certain felony marijuana offenses. This program is used either in the pre-charging stage, in which the offender’s case may be closed upon full compliance with the agreement, or in the post-charging stage, after receiving a continuance from the presiding judge. In the latter case, full compliance with the agreement often results in a joint recommendation by the defense attorney and prosecution for a mitigated sentence.

The CCP is prepared and facilitated by the County District Attorney’s Office staff along with a community volunteer. These volunteers go through a 24-hour training session, which includes sixteen hours of skills training and an “apprenticeship.” As of February 2005, the program has a cadre of 17 fully trained conference facilitators and an additional 24 volunteers who are still in their “apprenticeship” period.<sup>65</sup> Most of the community representatives come from this same cadre as well as from a group of volunteers who attended a restorative justice orientation given by Lerman. The program prefers to include community members who understand the process and its objectives, hence the use of a controlled and trained group of community representatives.

So far, there have been more than 183 community conferences, with an average of slightly more than 50 conferences a year (scheduled and performed approximately once a week). During the years 2002 and 2003, 82 conferences were held, enabling 106 victims, 95 offenders and 265 community members to participate in

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<sup>63</sup> 2002 REPORT, *infra* note 66, at 1.

<sup>64</sup> *Id.*

<sup>65</sup> Based on THE DEPARTMENT OF ADMINISTRATION BY THE MILWAUKEE COUNTY DISTRICT ATTORNEY’S OFFICE, RESTORATIVE JUSTICE COORDINATOR REPORT (pursuant to Wis. Stats. 978.044(3)) 5, January-December 2004 [hereinafter 2004 REPORT].

a restorative justice practice.<sup>66</sup> During 2004 alone, 69 conferences and 10 Accountability Circles were held, enabling 41 victims, 87 offenders and 221 community members to participate in two of these programs.<sup>67</sup> A recidivism study published by the Milwaukee County Community Conferencing Program in accordance with Wisconsin legislation shows that offenders whose cases were deemed appropriate for CCP but were not included in the program due to the victim's refusal to participate, re-offended<sup>68</sup> slightly more than twice as much than those who met with their victims and community members in a community conference.<sup>69</sup>

ii. The Neighborhood Initiative

The Neighborhood Initiative is intended to engage the community in intensified collaboration with the criminal justice system in an effort to reduce crime in two central city neighborhoods suffering from high crime rates. The practice model used in this program is the circle process. Through the circles, neighborhood residents discuss "neighborhood disputes, criminal cases that arise in those neighborhoods and re-entry of offenders from the corrections system back into their neighborhoods."<sup>70</sup> As part of the Neighborhood Initiative, Lerman has been meeting with a group of young men and assisting them in their reentry back into the community after completing their prison sentences. The circle process is used on a regular basis to help the group maintain a support system and assist these young men in their efforts to remain employed and out of trouble. Although to date, the District Attorney's Office has not been formally involved in any circle dealing with a particular crime, the program has made way for a number of circles, gathering on a monthly basis and averaging between 20-45 people per event.

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<sup>66</sup> THE DEPARTMENT OF ADMINISTRATION, MILWAUKEE COUNTY DISTRICT ATTORNEY'S OFFICE RESTORATIVE JUSTICE COORDINATOR REPORT (pursuant to Wis. Stats. 978.044(3)) 4, February 2003 [hereinafter 2002 REPORT], THE DEPARTMENT OF ADMINISTRATION, MILWAUKEE COUNTY DISTRICT ATTORNEY'S OFFICE RESTORATIVE JUSTICE COORDINATOR REPORT (pursuant to Wis. Stats. 978.044(3)) 4, February 2004 [hereinafter 2003 REPORT].

<sup>67</sup> See 2004 REPORT, *supra* note 65, at 5.

<sup>68</sup> "Re-offense" is defined as being charged with a new crime, other than Operating after Revocation, in the State of Wisconsin (2003 REPORT, Appendix D).

<sup>69</sup> See *id.*; 2002, 2003 REPORTS, *supra* note 66, at 5 in both reports; see also Appendix D of 2003 REPORT. The revised recidivism studies conducted during 2004 reiterate and support these findings. For example, according to the recidivism study attached to the 2004 report, *supra* note 65, at 6, and 9-11, participants of the program "have an overall reoffense rate of 20.8%, whereas the non-participants have an overall reoffense rate of 42.5%."

<sup>70</sup> 2002 REPORT, *supra* note 66, at 2.

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2. The Restorative Justice Center of the Polk County  
Attorney's Office, Des Moines, Iowa

Unlike the restorative justice program in Milwaukee, the Polk County DA's program never formally embraced the values and principles of restorative justice at any specific point in time. Rather, the gradual introduction of a restorative justice perspective into the criminal justice system was the initiative of a Borough Chief in this office, Fredrick Gay, who was in charge of eighty per cent of the cases handled by the County Attorney's Office.

The program began in 1992, when Mark Umbreit was brought in to perform the first skills training for mediators in the County Attorney's Office. It continued with the application of pilot programs to shoplifting and government fraud cases and was gradually extended to more serious crimes.<sup>71</sup> Today, the Restorative Justice Center employs seven full time employees, most of whom are victim liaison people, in addition to a full time center director operating under Gay. The Center operates the restorative justice programs using a cadre of 30 fully trained mediators who receive a small stipend for their work. All funding is provided by Polk County, in accordance with the decision of the County Board of Supervisors. The Center operates a number of restorative justice programs: (1) Victim-Offender Reconciliation Meetings (VORP); (2) Truancy Mediations; and (3) Civilian Intake Mediations.

i. Victim-Offender Reconciliation Meeting (VORP)

VORPs are based on the victim-offender mediation model, with the possibility of evolving into family group conferences where appropriate. Most of the cases involve the facilitator, victim and offender. Every victim in every case handled by the County Attorney's Office goes through a "victim intake" where the victim is offered the opportunity to meet with the offender. An estimated 20 percent of all victims agree to partake in the restorative process. However, unlike victims, offenders are not granted the opportunity to choose. In Polk County, most VORPs are court mandated as part of the sentence and take place in accordance with the victim's wish, without regard to the offender's willingness to participate. Nevertheless, when victim liaisons believe this might lead to re-victimization of the victim, the VORP will not be performed.

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<sup>71</sup> See Fredrick W. Gay, *Restorative Justice and the Prosecutor*, 27 *FORDHAM URB. L.J.* 1651, 1653 (2000).

All VORP facilitators go through intensive training and an apprenticeship period in which they observe ten VORPs and co-facilitate ten more before qualification. Once they complete this training period, facilitators are closely observed and supervised by the Center staff during their first ten VORPs. VORPs take place in two session rooms located in the County Attorney's Office. In most cases, preparation of victims and offenders is done over the phone. The actual meeting is approximately two hours long. Most felony cases are conducted during a six-week adjournment in the court proceedings between the guilty plea and sentencing, intended to allow the court to obtain a pre-sentence investigation report. Agreements reached in the VORP are incorporated in the verdict during sentencing. In misdemeanor cases, where there is no time separation between the guilty plea and sentencing, the VORP is court-ordered as one of the probation conditions, and if an agreement is reached, it is submitted to the judge as a supplement to the offender's sentence.

By June 2000, more than 5,000 victim-offender mediations were held.<sup>72</sup> During 2003 alone, 2,505 victims were given the choice of confronting their offender, 2,073 offenders were ordered to participate in VORPs and 416 meetings were actually conducted. In 2003, the cumulative amount of restitution agreed to be paid by offenders to their victims exceeded \$2 million. In 2004, the quantity of cases was somewhat reduced, but still amounted to considerable numbers.<sup>73</sup>

ii. Other Restorative Justice Programs Operated by  
the Polk County Attorney's Office

Other programs operated by the Polk County Attorney's Office include Truancy Mediation and Civilian Intake Mediations. The former program conducts "modified" family group conferences applied to the pre-charge and post-charge stages of the criminal justice system. It is intended to address the broader issues which cause truancy by bringing together the truant pupil, his or her parents, school social workers, administrators and any other person who may be of assistance. During the 2002-2003 school

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<sup>72</sup> *Id.* at 1653.

<sup>73</sup> Based on the VORP Statistical Report 2004, on file with the author. According to this report, during 2004 a total of 1592 offenders were ordered to participate in a victim-offender reconciliation meeting and 1942 victims were given the opportunity to confront their offenders. As a result, 338 VORPs were held generating over 1.8 million dollars of restitution paid to crime victims.

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year, 579 mediations were conducted. The Civilian Intake Mediations are pre-charge victim-offender mediations intended to avert prosecutions in certain types of cases. However, due to County Attorney policy to avoid diversion of criminal cases out of the justice system, this program is kept relatively small. During 2003, 115 mediations were conducted. In 2004, their number substantially dropped to 24.

3. The Restorative Justice Program, the 31st Judicial District  
Circuit Court, Office of Dispute Resolution, Prince  
William County, Manassas, Virginia

This program was initiated in 1997, after the court service director in charge of probation services for juveniles heard about the restorative justice movement and introduced the idea to the in-court Office of Dispute Resolution. As a result, a task force was put together, which included judges, prosecutors, probation representatives and different community representatives. After examining the ability of restorative processes to ease the caseload of juvenile judges, the task force launched a restorative justice program as part of the existing court-annexed Office of Dispute Resolution. The task force received a federal four-year declining fund, beginning with \$50,000 per year. The fund allowed the program to begin operating and as it got smaller the county funded the balance. Today, the program is entirely funded by Prince William County and is an inseparable component of the court's annual budget.

The program itself is structured differently from the processes reviewed above. It only accepts juvenile first time offenders (with the exception of certain status offenses such as truancy or curfew violation) of property and light violence crimes. In order to be eligible for the program, offenders must admit to the crime or at least to involvement in the incident. The program is mainly aimed at channeling young offenders out of the court system. However, a small percentage of the cases handled by the program are court-ordered, as an additional component of the final sentence imposed on offenders.

In the diversion cases, constituting approximately 85 percent of the cases handled by the program, Vickie Shoap, the program coordinator, is given ninety days to complete the process. The process begins with a 30-45 minute orientation meeting with the offender and his or her guardian to evaluate whether the offender is ready to meet the victim in a restorative justice process. During

the meeting, offenders are notified that to participate in the program they are required to waive their due process rights. In appropriate cases, offenders who give their consent continue to the second phase of the program – the Victim Impact Program (VIP).

The VIP is meant to continue the screening process and at the same time change the way offenders view their behavior and their reasons for committing the offense. This 8-10 hour program is “designed to help offenders take full responsibility for their actions, understand the impact of crimes on victims and to identify the thinking errors that led them to break the law.”<sup>74</sup> It is performed in classes with several juvenile offenders at a time. The presence of guardians is encouraged but not required. During these classes, offenders come across many of the experiences they might encounter during a group conference. For example, surrogate victims may address the class or a department store manager may educate the young offenders about the public effects of shoplifting. The VIP provides offenders with a meaningful and useful experience, even if their particular victim does not wish to join them in a conference.

The peak of the program occurs at the “Accountability Conference,” structured as a classic family group conference. All participants have the opportunity to discuss the facts of the offense, the impact it had on the participants and finally, possible ways of repairing the harm inflicted on the victim. Occasionally, the victim and offender prefer to meet without the presence of other people and the conference then becomes a victim-offender mediation. Conversely, some victims do not wish to meet with the offenders in person but agree to have the program coordinator represent them in the conference. In these cases, agreements are reached through “shuttle mediation,” in which the program coordinator or one of the volunteer conference facilitators meets separately with the victims and offenders until an agreement is reached. Currently, shuttle mediations are used in 50 percent of the cases handled by the program.

Vickie Shoap, the coordinator, with the help of eight volunteer conference facilitators and one VIP guide, operates the Restorative Justice Program. During 2004, 283 cases were referred to the program, of which 265 were for diversion purposes and 18 were court-ordered as part of the sentence. Due to the close monitoring conducted by the program during the twelve months following the

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<sup>74</sup> , 31ST JUDICIAL DISTRICT CIRCUIT COURT, OFFICE OF DISPUTE RESOLUTION, THE RESTORATIVE JUSTICE PROGRAM BROCHURE (on file with author).

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agreement, compliance rates are extremely high.<sup>75</sup> Through these agreements, an aggregated sum of \$9,469.70 was paid to victims during 2003, and 186 hours of community service were undertaken on their behalf. A reoffense study conducted from the start of the program, in 1997, until July 2002, followed offenders that participated in the Restorative Justice Program in order to discover their recidivism rates. The study uncovered a substantial difference between recidivism rates among offenders who were diverted out of the criminal justice system and offenders who were court-ordered to participate in the program. While recidivism rates in diversion cases were only 10 percent, they were 28 percent in court-ordered cases. Additionally, the study showed a significant drop in the severity and seriousness of the offenses generally committed by all reoffenders who participated in the Restorative Justice Program.

#### 4. Community Impact Panels at the Midtown Community Court, New York, NY

The Midtown Community Court in New York City, operating since October 1993, is designed to address low-level quality-of-life crimes in the Times Square area of Manhattan.<sup>76</sup> These crimes include, among others, prostitution, street-level drug possession, vandalism, disorderly conduct, trespass, shoplifting, public urination and violations of the open container law.<sup>77</sup> The Midtown Court's goal is "to ensure that justice in misdemeanor cases is prompt, restorative, and rehabilitative, and that the community views this local tribunal as a fair and effective dispenser of justice."<sup>78</sup> One of the sanctions imposed by the Court is the Community Impact Panels.<sup>79</sup>

The Community Impact Panels are based on the premise that the victim in the type of offenses dealt with by the Midtown Court is the midtown community itself.<sup>80</sup> Therefore, in Impact Panels, offenders meet with community representatives for a facilitated di-

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<sup>75</sup> In 2003 the program reported 100% compliance with agreements. In 2004, it reported a 97% rate of compliance (program reports are on file with author).

<sup>76</sup> Michele Sviridoff, David Rottman & Rob Weidner, *Dispensing Justice Locally: The Impacts, Cost and Benefits of the Midtown Community Court* (2000), available at [http://www.ncsconline.org/WC/Publications/Res\\_CtComm\\_MidtownExecSumPub.pdf](http://www.ncsconline.org/WC/Publications/Res_CtComm_MidtownExecSumPub.pdf).

<sup>77</sup> Judith S. Kaye, *Delivering Justice Today: A Problem Solving Approach*, 22 *YALE L. & POL'Y REV.* 125, 127 n. 11; Robin Campbell, *There Are No Victimless Crimes: Community Impact Panels at the Midtown Community Court*. Center for Ct. Innovation 1, 3 (2000), available at [www.courtinnovation.org/pdf/no\\_vic\\_crime.pdf](http://www.courtinnovation.org/pdf/no_vic_crime.pdf).

<sup>78</sup> See Kaye, *supra* note 77, at 132.

<sup>79</sup> See Campbell, *supra* note 77, at 5.

<sup>80</sup> *Id.* at 4.



alogue following the victim-offender mediation process model but with some variations. For one, the facilitated dialogue is mandatory for the offenders. Second, other than discussing theoretical ways of preventing such behavior in the future, the panel participants do not have any decision-making authority and are not empowered to reach restitution agreements. The process *is* the response to the wrongdoing; the dialogue *is* the sanction.

As of January 2004, Community Impact Panels are held twice a month and consist of one or two volunteer facilitators, an average of three to four offenders referred to the panel by the court earlier that day, three volunteer community representatives, a police department representative and a Midtown Court official. The facilitators are trained mediators, and the community volunteers are often midtown community leaders, area business owners, retirees, educators, artists and other residents from the Midtown Community. The police department representative is either a retired or active police officer, usually affiliated with one of the midtown NYPD precincts, who attends the Impact Panels in order to answer possible questions and to provide the police's approach to targeting low level quality-of-life offenses in the area. The Midtown Court official does the same from the court's perspective and provides information regarding the services and activities offered by the Court.

Before the process commences, the defendants are screened to determine whether they are capable of participating in such a dialogue. Those that are deemed unfit are ordered to participate in a "Quality of Life Group," provided by the Midtown Court and designed to deal with similar contents as the Impact Panels but through lectures as opposed to dialogue. At the same time, the community representatives attend an orientation session educating them about the Midtown Court's objectives, restorative and community justice and about what is expected of them as community panel members. Then, all participants enter a conference room located in the Court building and the process begins. First, the offenders share with the group the reason and circumstances that led to their referral to the panel. Next, the community representatives articulate how these types of offenses affect their lives, and the police and court representatives provide the law enforcement procedures and rationales relevant to the offenses and violations mentioned in the discussion. From there, the conversation may develop in any number of ways, while the facilitators ensure it does not stray to irrelevant matters and is conducted with utmost re-

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spect for all participants. The Impact Panels generally conclude with a conversation on reduction and prevention of the offenses at hand. Some of the solutions suggested by panel participants have been passed on to the relevant agencies and decision makers, occasionally achieving actual results.<sup>81</sup>

Between June 2003 and May 2005, a total of 27 Community Impact Panels were held, involving approximately 108 offenders, 20 community members who have participated in at least one panel, two retired police officers and approximately 10 active duty police officers. The facilitators come from a group of 10 trained mediators, eight of whom are community volunteers.<sup>82</sup> Evaluations completed by all panel participants show that community residents are extremely satisfied with the panel (93 percent) and that almost every resident considered the panel to be “instrumental in helping defendants understand quality of life crimes.”<sup>83</sup> According to the data gathered by the Midtown Court, most defendants are pleased with the process as well, and a vast majority indicated that they view quality of life crimes differently after participating in the impact panel.<sup>84</sup>

#### IV. LACK OF PROGRAM ACCOUNTABILITY: INADEQUACY OF EVALUATION MECHANISMS

##### A. Inadequacy of the Current Evaluation Mechanisms of All Four Programs

All four programs described above share the common goals of serving crime victims<sup>85</sup> and changing delinquent offender behav-

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<sup>81</sup> Based on an interview with Ariel Lublin, the Midtown Community Court Mediation Coordinator and Courtenaye Jackson-Chase, Project director for the Midtown Community Court, (Apr. 12, 2005) (on file with the author).

<sup>82</sup> Based on data provided by Ariel Lublin, the Midtown Court’s Mediation Coordinator (Apr. 26, 2005) (on file with the author).

<sup>83</sup> Based on a semi-annual report prepared by the Midtown Community Court, documenting the period between January-June 2004 (on file with the author).

<sup>84</sup> Based on a report documenting a six month period between June 2003 to January 2004, 93% of the defendants felt that “they had an opportunity to express their views” and 83% said they viewed quality of life offenses differently after the process (on file with author).

<sup>85</sup> As Vickie Shoap, the Prince William County Program coordinator explains: “[s]erving victims is making sure that someone is attending to them. . .we ask the victims what they need. . .victims need to have a say. We seek out their opinion and interests.” (taken from an interview with Vickie Shoap, Prince William County Program coordinator (March 31, 2005) (on file with the author). For Fred Gay, the Borough Chief in charge of the Polk County DA’s

iors. All but the Prince William County program formally strive to increase the community's role in the criminal justice system. In order to monitor their activity and success in achieving their stated goals, all four programs employ similar evaluation mechanisms. They use surveys or evaluation forms to gather participants' feedback on the process, and occasionally allow academic researchers to perform an external evaluation of the program.<sup>86</sup> Additionally, all four programs submit annual or semi-annual reports to their sponsoring (and often funding) agencies. These reports include mainly quantitative information such as the number of restorative interventions conducted in the previous year and numbers of participants and offense types referred to the program. Some of the reports describe the processes conducted,<sup>87</sup> others contain recidivism studies<sup>88</sup> and still others include a statistical analysis of the evaluation forms filled out by participants.<sup>89</sup> The only program that is held accountable to the quality of its work, as opposed to the quantity of it, is the Midtown Impact Panel.<sup>90</sup>

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Program, serving victims means satisfying their needs better by providing them with a process that is focused on victims as opposed to an offender-oriented one (interview with Fredrick W. Gay, Borough Chief in charge of the Polk County DA's program) (April 13, 2005) (on file with author). For David Lerman, the Milwaukee DA's program coordinator, this objective is achieved by providing victims with a meaningful, empowering and supportive process (interviews with David Lerman, Milwaukee DA's program coordinator) (April 4, 2005, March 10, 2004, and March 11, 2004) (on file with author). For Julius Lang, Director of National Technical Assistance in the CCI who took a leading role in establishing the Midtown Impact Panels, this goal means to enable community members to participate and get involved in the justice system in new and more meaningful ways (interview with Julius Lang, Director of National Technical Assistance, the Center for Court Innovation) (April 29, 2005) (on file with author).

<sup>86</sup> The Polk County DA's Program allowed a sociologist to interview victims and offenders in connection with VORPs; the Prince William County Program participated in an international survey of Family Group Conferencing and Related Practices as well as other external evaluations. Nixon et al, *supra* note 57, at 96.

<sup>87</sup> The Milwaukee DA's Program is mandated by Wisconsin law to report to the State the programming and outreach activities it is involved in, a breakdown of the time allocated by the staff to the different activities and various statistical data regarding the program; data regarding the Midtown Impact Panels are reported to two agencies: the Bureau of Justice Assistance in the United States Department of Justice (BJA) and the Center for Court Innovation (CCI). The BJA report explains the Impact Panel process, provides data about its participants, statistical data concerning satisfaction rates and an analysis of evaluation forms filled out by participants.

<sup>88</sup> The Prince William County Program and the Milwaukee DA's Program conducted extensive recidivism studies to measure the impact of their intervention on future reoffending rates.

<sup>89</sup> The Prince William County Program and the Midtown Impact Panels.

<sup>90</sup> The CCI supervised the Impact Panels through analyzing the evaluation forms filled out by participants on a regular basis, and is involved in reexamining every aspect of the program based on the evaluation forms and their comparison with other similar programs around the country.

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The problem with these evaluation mechanisms is that they inadequately monitor the performance of these programs and do not examine whether the programs' goals are being successfully achieved. The effectiveness of evaluation forms and surveys depends on their completion and analysis. Currently, the Milwaukee DA's Program, for example, estimates the completion rates of their evaluation forms at around 25 percent.<sup>91</sup> This low rate is unreliable as a reflection of the experience of the participants. But even in those cases where completion rates are higher, the focus and analysis of evaluations are insufficient.

First of all, data is not collected from an extremely valuable and knowledgeable group of people – the facilitators. Their training and familiarity with the underlying principles of the restorative justice process put them in a unique position to comment on their programs' success in implementing and upholding restorative justice values. Therefore, their feedback should be systematically gathered and analyzed with a view toward improving programs. This is especially important since, in each of the cases discussed above, a government agency decided to experiment with restorative justice and to examine its impact on the criminal justice system. In order to live up to the experiment, the programs not only have to translate restorative justice theory into practice, but they have to do it *right*. The evaluation forms used by these programs do not measure the fulfillment of many restorative justice principles, and therefore, do not provide program directors and their superiors with an accurate picture of the practice of restorative justice and its results.

Second, evaluation forms and surveys are not properly analyzed. In each of these programs, except for the Midtown Impact Panels, the entity receiving the information is solely interested in the costs and the numbers of cases disposed of through the restorative justice program. They glean this information from the annual reports they receive in the same way that data about the formal criminal justice system is collected. However, such dry data cannot provide evaluators with important information about how to address victims' needs in more meaningful ways, for example. Moreover, the entity receiving the information will only be able to understand what the program is doing and how results can be improved if it has the resources and ability to properly analyze the information. Numbers alone do not reveal this kind of information; evaluation forms and surveys do. However, the data recorded

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<sup>91</sup> Interviews with David Lerman, *supra* note 85.

in these forms and surveys are ignored by the entity receiving the reports in favor of numbers alone. It should be in a government's best interest to assess whether the programs it funds are doing what they were intended to do, not only whether they are cost-effective. In practice though, this is not the case.

Similarly, external evaluations performed by independent researchers are equally inadequate to hold restorative justice programs accountable. Due to their cost, they are performed sporadically, if at all,<sup>92</sup> providing a frozen picture of a program at a given period in time. This form of evaluation does not provide an ongoing mechanism for assessing the achievement of program objectives and its effectiveness. Furthermore, external evaluations are often aimed at achieving entirely different goals, many times academic ones, and are therefore inappropriate in holding programs accountable. Even the periodic reports submitted by each of the four programs are insufficient in sustaining adequate program accountability. Annual reports largely based on quantitative information shed very little light on the quality of the service provided to victims and offenders and on the overall success of the program in achieving its goals.

Admittedly, the recidivism studies conducted by the Milwaukee DA's Program and the Prince William County Program are important tools in examining this aspect of the program. However, recidivism studies are problematic for many reasons as well, especially when the study and control groups are relatively small and not enough time elapses following participation in the restorative process, as is the case in the two programs mentioned here.<sup>93</sup> Moreover, while recidivism studies may show that restorative justice is more effective than the criminal justice system in reducing recidivism, they do not reveal the underlying reasons. Without knowing which aspect of the restorative intervention has a dominant effect on recidivism, program directors cannot improve their programs to reach better results. At the same time, unwittingly, they may change something about their program that will decrease its impact on recidivism.

The Milwaukee DA's Program, the Polk County DA's Program and the Midtown Impact Panels, are deeply committed to the goal of increasing community involvement in the criminal justice

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<sup>92</sup> Interview with Julius Lang, *supra* note 85.

<sup>93</sup> For additional examples of the deficiencies of recidivism studies discussed above *see* PAUL F. CROMWELL & GEORGE G. KILLINGER, *COMMUNITY-BASED CORRECTIONS: PROBATION, PAROLE, AND INTERMEDIATE SANCTIONS* 351 (3d ed. 1994).

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system. However, their quantitative periodical reports simply do not reflect that commitment and do little to help these programs measure their efforts in this area. Undeniably, it is important for restorative justice program directors to know the number of community members who participated when assessing their success in integrating the community to the criminal justice system. Nevertheless, numbers do not tell program directors how to increase community involvement or how to do so more effectively. Numbers do not reveal whether community involvement is more important in certain offenses and less in others. They do not measure the effect of a program on the community or the effect of community representation on victims and offenders.<sup>94</sup> Most importantly, quantitative reports do not answer the question of whether community involvement should continue to be a stated goal and what priority it should be given.

Finally, as mentioned above, the Midtown Impact Panels are evaluated by the CCI based on their quantitative and qualitative achievements. While this is a big improvement compared to other programs, it is still not enough. The CCI does not hold the program accountable from a restorative justice perspective. The CCI is committed to the dissemination and implementation of two different theoretical frameworks – the community justice paradigm and the problem-solving courts model.<sup>95</sup> Although there are some similarities between the latter and the restorative justice theory, they are not identical. The community justice paradigm focuses on prevention of crime through closer community involvement in law enforcement decision-making, but leaves the legal intervention in the aftermath of crime in the hands of the existing criminal justice institutions. Restorative justice is concerned with the public response to past crimes and therefore dictates a different type of legal and social intervention.<sup>96</sup> The CCI develops programs intended

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<sup>94</sup> This is especially important since empirical evidence gathered to date does not unequivocally support advancing community involvement in the criminal justice system and is unclear about the positive effect of such efforts. See Leena Kurki, *Restorative and Community Justice in the United States*, 27 *CRIME & JUST.* 235, 250-263 (enumerating the main practices of Community Justice and citing studies that examined the impact of involving communities in criminal justice decision-making on the justice system).

<sup>95</sup> For a better and deeper understanding of the history and principles of the “problem solving court” model see Greg Berman & John Feinblatt, *Problem Solving Courts: A Brief Primer*, 23 *L. & POL.* 125 (2001), available at [www.courtinnovation.org/pdf/prob\\_solv\\_courts.pdf](http://www.courtinnovation.org/pdf/prob_solv_courts.pdf).

<sup>96</sup> See Kurki, *supra* note 94 (providing a broader and deeper discussion regarding the differences and similarities of the restorative justice theory versus the community justice theory, as well as a summary of the empirical studies that examined the effectiveness of various programs in the United States).

to improve and affect the way courts operate, in light of the community justice and problem-solving courts' models; it is not concerned with empowering crime-affected citizens to resolve their issues *without* the intervention of the courts. The CCI is simply the wrong entity to hold a program accountable to restorative justice principles and objectives.

### B. The Importance of Comparison

The evaluation of all four programs is deficient for another reason – it is done in isolation from other comparable restorative justice programs. There is no doubt that an able agency analyzing the correct information in light of restorative justice values and program objectives can learn a lot about the program and the ways it should be improved. However, the evaluation process is incomplete if it stops there. By comparing programs, evaluators will be able to find out whether the program is performing optimally and to learn about effective and ineffective improvement methods. The assessment of satisfaction rates is one example that can illustrate the importance of comparison. All four programs receive high victim satisfaction and approval ratings.<sup>97</sup> However, if they are not compared with other programs, there is no way of knowing whether they can (and should) do better.

The assessment of victim participation is yet another point of comparison. In the Polk County DA's Program, every victim in every type of crime is offered the opportunity to meet with the offender. Although this is an unprecedented achievement, which in itself promotes important restorative justice premises, only about 20 percent of the victims agree to participate in a VORP. For Fred Gay, this is an aspect of the program that needs to be improved. In fact, increasing the victim participation rates has been an ongoing challenge for the program, but with little success. Standing alone, Gay has no way of knowing what to push for: is 50 percent a good rate? He lacks important information that can enable him to determine an acceptable target. At the same time,

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<sup>97</sup> In the Midtown Impact Panels, satisfaction rates for victims – the community members – are around 93%, *see supra* note 83. In the Prince William County program, 100% of the victims surveyed reported they felt their needs were met in the conference, 60% were “very satisfied” with the process and the remaining victims were “satisfied”, program reports, *supra* note 75). In both programs, the vast majority of victims surveyed perceived the restorative intervention as beneficial and successful.

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Vickie Shoap of the Prince William County Program faces the same challenge, but she, unlike Gay at the Polk County DA's program, reports that "about 85 percent of victims agree to participate in the conference."<sup>98</sup> Based on this number, Gay could assess how far off he is from achieving optimal victim participation rates. Moreover, based on this information, Gay could contact Shoap to determine what specific aspects in her program are generating such impressive results.

Not surprisingly, all of the restorative justice practitioners interviewed for this Article expressed their desire and need for deeper connections and relationships with their colleagues in other restorative justice programs. A strong indication that this desire is more than an anecdotal commonality of the individuals interviewed here can be found in an international survey of family group conferencing practices which stated the following: "[w]hat came through clearly is a need for more international exchange of ideas, practice, policy initiatives, shared research models and comparative research."<sup>99</sup> Systematic comparison of different restorative justice programs answers these needs and enriches the evaluation process. It adds an important dimension to the evaluation of restorative justice programs, which cannot be achieved when working in isolation, regardless of the managerial abilities and evaluation skills of a program's director.

#### V. TESTING DEMOCRATIC EXPERIMENTALISM AS A MECHANISM FOR INSURING PROGRAM ACCOUNTABILITY

The immediate response of many restorative justice and criminal justice practitioners to the idea of adopting an experimentalist regime to hold restorative justice programs accountable is sure to be dismissal. "There is no chance in the world," they would undoubtedly say, "that this scheme can ever work. Who has the time or money to run around looking for other restorative justice programs to compare ours with? Our bosses don't even know what to do with the one they have." Others may attack the practicality of

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<sup>98</sup> Vickie Shoap, *Restorative Justice in Prince William County*, 11 RESOL 1 (2003), available at <http://www.courts.state.va.us/drs/resolutions/march2003/restorative.html>.

<sup>99</sup> Nixon et al, *supra* note 57, at 77. See also Umbreit, NATIONAL SURVEY, *supra* note 4, at 15. In a summary of common themes that emerged from interviews with restorative justice program staff, the authors identified that "VOM programs frequently operate in relative isolation from other programs and, as a corollary, mediators often complete their cases having minimal contact with other mediators or staff personnel".



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this scheme based on the difficulty of collecting qualitative information regarding their program and the expertise required to properly analyze it. However, as demonstrated above, the two theories are compatible in principle and the analysis of the four case studies suggests that this proposed mechanism of accountability is realistic in practice as well. As will be shown, these programs consist of many characteristics that are necessary for experimentalist entities, and with a few adjustments, can become a part of an experimentalist regime.

#### A. Creation of Subordinate Service Providers

Unlike community policing and the drug courts, the restorative justice programs described here were not created as separate, independent and locally-based units. In fact, the Polk County DA's Program is not even an official distinctive program, but rather a series of restorative justice interventions facilitated and operated by the County Attorney's office systematically. The Midtown Impact Panels are merely one type of sanction imposed on quality-of-life offenders sentenced by the Midtown Community Court in New York. The Milwaukee DA's Program and the Prince William County Program are indeed distinctive within the prosecutor's office and juvenile court through which they operate respectively. Nonetheless, they are a part of these agencies and are physically situated within them.

Does this mean that the first element of an experimentalist system as described above is missing in the case of these restorative justice programs? The answer is no. It is not the administrative distinctions or the physical location of a restorative justice program that is determinative, but rather the nature of its activities and the reasons behind its creation. As mentioned previously, for an experimentalist system to be established, a central authority must create a specified entity designed to answer a previously defined problem. The Milwaukee DA's Program began as a Milwaukee County initiative but turned into an institutionalized program as a result of the Wisconsin legislature's decision to devote resources for the implementation of restorative justice programming for a limited period of five years in order to combat crime more effectively and to answer the most basic needs of victims and offend-

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ers.<sup>100</sup> In essence, all of the necessary components exist here: (1) a central authority and (2) the creation of a separate local entity (3) intended to answer a predefined problem. The same goes for the remaining three programs. The Polk County DA's Program was created by the County Attorney's Office and by the county as a supplement to the traditional criminal justice system and as a vehicle for better addressing victims' needs.<sup>101</sup> The Prince William County Program was established by the 31st Judicial District Circuit Court of Virginia to ease the caseload of juvenile judges and integrate victims into the juvenile justice system,<sup>102</sup> and the Midtown Impact Panels were created by the Midtown Community Court as an appropriate and proportional sanction for quality-of-life offenders to deepen the involvement of the community in the local criminal justice system.<sup>103</sup> In all four cases, a central authority established a specific program or process to complement a lacking system or to answer a predefined problem.

### B. Collaborativeness and Autonomy

The second experimentalist element is the characterization of the newly created service provider as a collaborative, citizen-oriented entity. Just like the Chicago beat teams, the Midtown Impact Panels purposely seek out community members in order to improve the Midtown Court's understanding of the community's priorities and to increase the community's understanding of the justice system through active participation. Just like the beat meetings, the Milwaukee DA's Program provides a venue for community members and neighborhood residents to congregate with criminal justice professionals and discuss their concerns and experiences regarding crime. Just like drug courts, all four restorative justice programs facilitate close interactions and collaboration between various service providers and government agencies, such as

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<sup>100</sup> Scott R. Jensen, *Restorative Justice in Crime Prevention and Rehabilitation*, WISCONSIN LAWYER, May 2000, at 29. Assembly speaker Scott Jensen (Rep.), representing the 32nd Assembly District, held a key role in drafting Assembly Bill 533, which recommended the implementation of restorative justice approaches in three Wisconsin counties.

<sup>101</sup> Interview with Fredrick Gay, Borough Chief, Polk County Attorney's Office, Des Moines, Iowa, (Mar. 19, 2004) (on file with author).

<sup>102</sup> Interview with Vickie Shoap, Program Coordinator, 31st Judicial Dist. Circuit Court Restorative Justice Program, Office of Dispute Resolution, Prince William County, Manassas, Virginia, (Mar. 26, 2004) (on file with author).

<sup>103</sup> Lang, *supra* note 85.

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local public defender's offices, prosecutors, police and court officials, correction personnel, rehabilitation and social workers and more. Just like drug courts, all four programs are citizen-oriented, doing their best to answer the specific needs of individual victims, offenders, families and community members, as opposed to the criminal justice system's mass treatment of criminal cases and general disregard of victims, families and community interests.

But mere collaboration with the citizenry and fellow agencies is not enough. Perhaps one of the most unique features of the experimentalist governing model is the freedom that service providers are given to set their own goals, determine their priorities and design and execute the means for achieving these goals. The central authority takes a step back after defining the general problem and creating the subordinate entity intended to solve that problem. It is up to the subordinate entity – the service provider - to declare its goals, devise its strategy and execute it. This element is clearly evident in three of the four restorative justice programs described in this article, and to a lesser extent, in the fourth as well.

The Milwaukee DA's Program, the Polk County DA's Program and the Prince William County Program are all free to set their goals and employ the processes they see most fit to achieve these goals. It was not the Wisconsin legislature that instructed David Lerman to design the main restorative justice intervention in Milwaukee as a process combining the group conferencing and circle models. Although the CCPs require far more logistical and administrative efforts than victim-offender mediation or family group conferences, the Milwaukee DA's Program staff insist on a different type of process which they feel is superior in achieving their goals. The Prince William County Juvenile Court does not dictate to Vickie Shoap the number of young offenders she must accept into the restorative justice program, nor does it dictate the type of restorative intervention to be applied. The only dictated prerequisite is the amount of time in which the restorative justice program must be completed for each offender referred to the program. Shoap decides, based on the particular circumstances of each case, whether a VIP is necessary, whether to include community members in the conference or whether to facilitate the restorative intervention through shuttle mediation. All of these exemplify the freedom and broad discretion Shoap is given in running the program.

In the Polk County DA's Program, the freedom to determine the best means to achieve the goals reaches a new and even higher

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level. The specific circumstances of the case and the particular needs of the parties dictate the type of restorative intervention which is chosen. Thus, in prostitution cases which involve neighbors, a broader number of participants are invited to participate in the restorative intervention in addition to the direct victim and offender, hence adopting a process that resembles the group conferencing model. In appropriate cases, family group conferencing is conducted, and where additional participants are not needed, basic victim-offender mediation occurs. Moreover, another example of the freedom the program enjoys in experimenting with different processes in order to achieve its goals is the establishment of six reparative boards throughout the county. Although this enterprise requires additional funds, time and resources, the central authority was ready to provide them and went along with the initiative.

Although less evident and to a somewhat lesser extent, this freedom exists in the Midtown Impact Panels as well. Admittedly, this program is not similar to the previous three since it is not a program per se. It is a particular type of sanction available to the Midtown Community Court when sentencing quality-of-life offenders. However, even under these limited boundaries, previous program coordinators managed to introduce and implement changes in the process. For example, early panels consisted only of offenders and community members. However, after experimenting with the initial process structure, it became apparent to the Midtown Court staff that the presence of criminal justice representatives would greatly benefit the process. For this reason, an out-of-uniform police officer and later a Midtown Court representative were added to the panels. As time passed and more panels were conducted, the program staff recognized the need for a uniformed officer to provide the police department's perspective on a wide variety of issues that come up during Impact Panels, from police conduct during arrests and racial profiling to general policies in law enforcement. The out-of-uniform police officer became a uniformed officer. Experimentation changed other aspects of the program as well. Elements such as scheduling of the panels, identity of community members, types of offenders accepted into the program and even seating arrangements were all subject to change with the common purpose of better achieving the goals identified by the program coordinator and director.

These examples emphasize the degree of discretion and independence enjoyed by all four restorative justice programs in determining their goals within the framework of the predetermined

problem they were created to resolve. They also emphasize the freedom of these programs to decide on the means of achieving those goals, whether in terms of the process model or the mechanics of specific restorative interventions. All of these aspects are intentionally left unspecified by the central authority, allowing all four programs to go forth without predetermined protocols or rules to limit their discretion and with the full ability to learn from their own experience and that of their collaborators. This, in essence, is one of the most fundamental aspects of an experimentalist regime, as explained by Dorf and Sabel:

[t]he service providers are the link between the government of officials and the local knowledge of citizens. . .they pursue the agreed-upon goals, and propose further refinements and alternatives as operations bring difficulties to light. . .they must combine expertise in their respective areas of specialization. . . with the ability to collaborate closely with citizen users in the specification of services and the detection of errors in their provision.<sup>104</sup>

### C. Preserving the Basic Rights of Participants

A third necessary element identified by Dorf and Sabel is that service providers assure and preserve the basic rights of participants.<sup>105</sup> As mentioned previously, this element is central to the restorative justice theory and all four programs take different precautions to protect participants' rights and employ various safeguards to that end.

In the Milwaukee DA's Program, for example, the screening process is regarded as one of the most important safeguards to prevent abuse of the program and possible infringements on participants' rights. David Lerman, the program coordinator and an Assistant District Attorney, meets with every offender and defense attorney before deciding whether to proceed to a conference. During the interview, the procedural consequences of participating in the program are explained in detail. For instance, full compliance with the restitution agreement may lead to a dismissal of the case or to a mitigated sentence. Offenders are required to give their informed consent to proceed with the process since this implies a waiver of numerous rights and privileges associated with the adver-

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<sup>104</sup> Dorf & Sabel, *A Constitution of DE*, *supra* note 26, at 317.

<sup>105</sup> *Supra* note 50 and accompanying text.

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serial criminal justice system, such as the right to trial by jury. If Lerman concludes that the defendant understands the process and voluntarily wishes to participate in the program, the victim is contacted. Here too, victims are fully informed of their options and the consequences of their choices. The program receives an average of 150 referrals every year, but due to the screening process, only a third are accepted. This number indicates the seriousness with which Lerman and his staff takes the screening process and their efforts to ensure that fundamental rights are upheld.<sup>106</sup>

Additionally, all community members participating in CCPs undergo at least an introductory course on restorative justice, and, in many cases, they are trained conference facilitators who attend the conference as community representatives. This provides Lerman and his staff with a certain control over the mindset of these representatives. It allows Lerman to screen out community volunteers that seem overly accusatory or overly understanding of the offender's conduct, which can obstruct the process and contribute to unreasonable results.

In any case, the heaviest responsibility rests on the shoulders of the two facilitators assigned to each conference. Their main challenge is to prevent abuse of the process without silencing or disempowering participants unnecessarily. In fact, the mere use of co-facilitation in itself, as opposed to individual facilitators, is another safeguard. Although, as Lerman testifies, this is extremely rare, facilitators are sometimes required to amplify an outnumbered or unpopular opinion (whether it is the defendant's, the victim's or the community's point of view) or explain to the conference participants that a certain sanction they are discussing is unreasonably severe or shaming and should be reconsidered. In many cases, defendants are represented by defense attorneys before and during the restorative interventions, and the final agreement is subject to external scrutiny that can detect whether the sanctions imposed are unreasonable.

The Polk County DA's Program also emphasizes the screening process as one of the main mechanisms for detecting and anticipating potential risks of process abuse. All VORP facilitators are instructed to discontinue a meeting if they are concerned about the behavior of certain participants; however, as Fred Gay indicates,

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<sup>106</sup> At the same time, this screening process drastically limits the accessibility of the program, making it available to some and unavailable to others. This limited accessibility may be seen as a violation of equal protection rights, unless clear and non-discriminatory criteria are used in performing the screening process, and non-participants do not fare worse than participants.

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this rarely happens. At the same time, Gay has found that many victims tend to inflate their financial loss in order to increase the monetary restitution they receive from their offenders. Due to this tendency, facilitators are instructed to ask that victims provide the necessary documentation to support their demands, thereby protecting the offender's rights in the process.

The same is true for the Prince William County Program. Here too, particularly vengeful and excessively angry victims are identified in the screening process in order to protect the young offenders. All victims are required to abide by basic rules of behavior and respect the rights of offenders as prerequisites for their participation. Victims that cannot commit to these conditions do not partake in the conference. At the same time, all offenders receive a detailed explanation of their due process rights and are afforded the opportunity to consult with a defense lawyer before deciding to participate.

The VIP, unique to the Prince William County Program, provides an additional screening mechanism, ensuring that the actual family group conference is not abused. During the VIP, young offenders learn to recognize the behavior that led to the crime and begin to realize their ability to control it. This in itself provides these offenders with basic social skills which can later be used when meeting their victims. Moreover, at the end of each VIP class, participating offenders vote whether, in their opinion, one or some of their friends did not "get it." According to Shoap, this does happen on occasion, at which point such offenders are referred back to the court.

Finally, and similarly to the previous programs, the Midtown Impact Panels rely on the preliminary screening process of offenders and community members as well as the skills and alertness of its panel facilitators (again, usually two working together) to predict and prevent risks of violating the basic rights of participants.

#### D. Transparency

The fourth element required in any experimentalist governing process is total transparency of the service providers' activities. This is achieved through detailed and systemic reporting of both methods and results.<sup>107</sup> As described above, all four restorative

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<sup>107</sup> See Dorf & Sabel, *Drug Courts*, *supra* note 27, at 876.

justice programs provide their sponsoring institutions with detailed annual or semi-annual reports. However, these reports do not fully disclose the methods used to achieve the program's goals nor the results delivered. They do not explain the processes they employ, the rationale behind them, the expected outcomes and results actually achieved. These reports preclude the full transparency required in an experimentalist regime which is essential for holding service providers accountable.

By their very nature, experimentalist entities experiment with different means in order to identify the most effective way of achieving their goals. But in order for the system to work, in order for it to be productive and not merely experimental for the sake of experimentation alone, this governing system must be based on the close monitoring of methods used and results produced. The data is then compared with the data generated and the results achieved by other comparable entities under the same regime. This allows an experimentalist entity to learn from its own experience as well as from the experience of others. Current reporting requirements of the restorative justice programs described in this article lack the necessary elements to make this learning process possible.

First and foremost, quantitative data regarding the annual activities of restorative justice programs cannot respond to the requirement for full disclosure of methods and results because such data does not include information about methods. The Polk County DA's program and the Prince William County Program, for example, focus on quantitative data and do not include a single word about the processes they employ. Admittedly, while this data touches upon the results and achievements of these programs, it does so insufficiently since it does not reveal the program's impact on the participants, what was most meaningful to them, and more. Such information is not revealed because it is qualitative in nature and does not translate into numbers (especially when the numbers are of victims, offenders, offense types, amount of restitution paid, recidivism rates and similar data). Since quantitative information is the only type of information reported by the Polk County DA's Program, it is evident that the transparency requirement is far from fulfilled there too. The Milwaukee DA's Program takes a step in the right direction by including a detailed description of the types of activities performed during the year and the amount of time invested in each one. However, although the report recounts the methods employed as well as the quantitative results, it does not



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include qualitative results, hence missing a significant element in its periodic report.

The Prince William County Program is more advanced in this aspect, as it consists of a quantitative section and a qualitative section (a summary of the questions asked and some of the answers in the exit survey). Nevertheless, even this report does not suffice in fulfilling the transparency requirement since it does not include a detailed description of the methods used by the program, and it lacks information that links means and ends. For example, the restorative intervention in Prince William County consists of VIPs and family group conferences. However, on occasion, Vickie Shoap, the program coordinator decides to skip the VIP and move directly to a conference between offender and victim. Additionally, in a substantial number of cases (about 50%), Shoap performs shuttle mediation instead of conducting a face-to-face meeting between victims and offenders. One would expect that an effective annual report include the number of times VIPs were skipped and the results of this decision or a summary of the face-to-face meetings and their results compared with the results of shuttle mediation. Without this comparison, Shoap has no credible and systemic way of evaluating her decisions to skip VIPs or perform shuttle mediation. A simple comparison may encourage her to continue to trust her instincts, but it may also educate her on aspects of her decisions of which she was unaware. In any case, it would undoubtedly improve her decision making in the future.

The Midtown Impact Panels seem to have the most advanced form of reporting system. First, unlike the other programs, its report is semi-annual and not annual. This, in itself, forces the program to invest more time during the year gathering information on its activities, and the reports are closer in time to the events that generated the data, thus contributing to their accuracy, relevance and ultimately to enhanced program transparency. The Midtown Community Court's reports include a description of the various activities the mediation coordinator is involved in regarding the Impact Panels (community outreach, increasing police involvement and more), hence providing a recount of the methods used by the program. It then summarizes the basic quantitative results of the program, such as the number of panels conducted as well as the number of offenders, community members and police officers who participated in them. Additionally, the report provides a summary and sample of the qualitative results of the program, such as satisfaction rates and a sample of some of the responses of the panel

participants in their evaluation forms. However, even though the Midtown Court's report seems to include all the necessary elements to meet the transparency requirement, it is nonetheless insufficient. It lacks necessary information on possible connections between the use of specific methods and their results (if participants are satisfied, for example, why is this so? What in the program caused them to reach that conclusion? What would they change in the program?). It lacks information on changes and innovations implemented in the program (for instance adding more community members, applying the panels to new types of offenses, changing seating arrangements so that community members and offenders sit next to each other instead of opposite each other). And finally, it lacks information on the difficulties and challenges encountered by the program during the year and the way they were dealt with (difficulties in recruiting committed facilitators, difficulties in enlarging the cadre of active community members and more). This missing information is essential for the completion of the learning and experimental process.

#### E. An Experimentalist Central Authority

The fifth element necessary for an experimentalist governing system to work is the existence of a central authority to define the general problem, pool the information provided by various service providers, benchmark best practice standards and constantly encourage the service providers to question their methods and goals and improve their results.<sup>108</sup> This element requires an existing agency or institution to perform certain tasks and allow its subsidiary service providers to act as experimentalist entities. All four restorative justice programs lack "the essential institutional machinery of benchmarking discipline."<sup>109</sup>

This is most apparent in the case of the Polk County DA's Program and the Prince William County Program. In both, the central authority is a county board of directors, which oversees one restorative justice program. The only benchmarking they are capable of doing is through a comparison with the traditional criminal justice system. While this is useful for determining the effectiveness, size and impact of the restorative justice program, it reveals nothing about the intrinsic qualities of the program itself. Is it

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<sup>108</sup> See Dorf & Sabel, *A Constitution of DE*, *supra* note 26, at 316.

<sup>109</sup> *Id.* at 332.

good? Is it good enough? Are there other equally restorative methods that have been found to be more effective elsewhere? These types of questions cannot be answered by comparing restorative justice interventions with the traditional criminal justice system. Additionally, these entities lack any significant knowledge of the restorative justice theory, its practices and their expected results. As a result, they accept the information provided by their restorative justice program “as is,” without questioning the methods or the results, and without the ability to assist the restorative justice program in its learning process.

The Milwaukee DA’s Program is audited by the State of Wisconsin. Section 978.044 of the Wisconsin Statutes, which provided the funds and legal authority for the Milwaukee DA’s restorative justice programming, is experimental in nature. It instructs the district attorneys of Milwaukee County and a second county chosen by the Wisconsin Department of Corrections<sup>110</sup> to establish restorative justice programs that provide certain specified services to victims and offenders, to maintain detailed records of their activities and to report them annually to the Department of Administration. The fact that the statute’s validity is limited to a period of five years is another strong indication of its experimental nature.<sup>111</sup> In other

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<sup>110</sup> The department of corrections chose the Outagamie County District Attorney’s Office (their annual report is on file with author).

<sup>111</sup> Wis. Stats. § 978.044 044 (2001) states the following:

(2) DUTIES. The district attorneys of Milwaukee county and the county selected under sub. (4) shall each assign one assistant district attorney in his or her prosecutorial unit to be a restorative justice coordinator. An assistant district attorney assigned under this subsection to be a restorative justice coordinator shall do all the following:

(a) establish restorative justice programs that provide support to the victim, help reintegrate the victim into community life, and provide a forum where an offender may meet with the victim or engage in other activities to all of the following:

1. Discuss the impact of the offender’s crime on the victim or on the community.
2. Explore potential restorative responses by the offender.
3. Provide methods for reintegrating the offender into community life.

(b) Provide assistance to the district attorney in other counties relating to the establishment of restorative justice programs, as described in par. (a)

(c) Maintain a record of all of the following:

1. The amount of time spent implementing the requirements of pars.( a) and (b).
2. The number of victims and offenders served by programs established under par. (a).
3. The types of offenses addressed by programs established under par. (a).
4. The rate of recidivism among offenders served by programs established under par. (a) compared to the rate of recidivism by offenders not served by such programs.

(3) REPORT TO DEPARTMENT OF ADMINISTRATION. Annually, on a date specified by the department of administration, the district attorneys of Milwaukee county and the county selected under sub. (4) shall each submit to the department of administration a report summarizing the records under sub. (2)( c) covering the preceding 12-month period. The department of

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words, the Wisconsin legislature did everything necessary to establish a democratic experimentalist regime with regard to restorative justice programs in the state; it placed service providers (more than one), defined their ultimate purpose (yet left it to them to devise their methods and goals) and established itself as the information-pooling central authority.

Nevertheless, the Wisconsin legislature neglected to perform one of the central duties expected of an experimentalist central authority – benchmarking best performances and encouraging its service providers to revisit their methods and goals in light of the gained collective experience. Since its establishment, the Milwaukee DA's Program has been filing its annual reports with the state Department of Administration, but has not received any feedback other than a detailed recidivism study, focused on a comparison of restorative justice and the court system rather than on comparing the two existing and active restorative justice programs. As a result, both the Milwaukee DA's Program and the second restorative justice program established by the Wisconsin legislature – in the Outagamie County District Attorney's Office - remain isolated in their efforts to improve their programs and without any feedback from their central authority.

As mentioned previously, the Midtown Impact Panels are one of the sanctions used by the Midtown Community Court, which is part of the New York State Unified Court system, and monitored by two entities: the BJA and the CCI, the New York Court system's research and development arm. Although both agencies are capable of filling the role of an experimentalist central authority, only the CCI has assumed that responsibility. It may be argued that it is only natural for the research and development arm of the state court system to monitor programs provided by its courts, which is probably true and presumably the reason for the CCI's active supervision of the Midtown Court's activities. However, it is interesting that the BJA did not assume a more active role in monitoring the development of the Community Impact Panels.

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administration shall maintain the information submitted under this subsection by the district attorney.

(4) SELECTION OF 2ND COUNTY. The department of corrections shall select a county other than Milwaukee county in which restorative justice services are to be provided under sub. (2).

(5) EXPIRATION. This section does not apply after June 30, 2005.

It is important to note that this statute was an experiment limited in time and scope which was not extended. However the statute remains a poignant example of how Wisconsin engaged in such an experiment through legislation.

The BJA is part of the Office of Justice Programs in the United States Justice Department. Its stated mission is “to provide leadership and services in grant administration and criminal justice policy development to support local, state, and tribal justice strategies to achieve safer communities.”<sup>112</sup> Its goals are “to (1) reduce and prevent crime, violence, and drug abuse and (2) improve the functioning of the criminal justice system. To achieve these goals, BJA programs emphasize enhanced coordination and cooperation of federal, state, and local efforts.”<sup>113</sup> Since the BJA’s primary goal is to reduce crime, one would assume that reports prepared by BJA-funded programs, such as the Midtown Court, would demonstrate their achievements in crime reduction. Since improving the functioning of the criminal justice system is a stated goal, one would expect to find data pointing to the connection between the BJA-funded program and an increase in the efficiency and effectiveness of its local criminal justice system. However, the Midtown Community Court’s reports include none of the above. Instead, they describe their activities, provide basic data about them and portray the Court’s goals for the next six months. Moreover, the Project Director for the Midtown Community Court insists on a non-quantitative report and intentionally refrains from conducting recidivism studies or monitoring the impact of her programming on the criminal justice system. For her, it is the qualitative aspect of the Impact Panels, community outreach and mediation that make the difference, and she fears that quantitative assessments of these programs might shift the focus from their real contribution and purpose.

That said, an effective way for the BJA to assess whether Impact Panels, for example, promote the goals of reducing and preventing crime and improving the criminal justice system is by taking a more active role. It can require more detailed and specific qualitative reports, which emphasize the connections between methods used and results achieved. It can compare the methods employed by the Midtown Community Court in Manhattan with those used by other problem-solving, community based, federally funded entities that strive to achieve similar goals, assess whether Community Impact Panels are effective and suggest possible changes if applicable. The fact is that it does not do any of this, and other than providing the funding and collecting the bi-annual re-

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<sup>112</sup> See *BJA Website*, <http://www.ojp.usdoj.gov/BJA/about/aboutbja.html> (last visited Nov. 11, 2006).

<sup>113</sup> *Id.*

ports, it does not assist the Midtown Court in its experimental learning process.

On the other hand, the CCI does act as an experimentalist central authority and provides the Midtown Court with the much needed feedback and best practice information. It closely monitors the various activities of the Midtown Court and within it the Impact Panels, compares those activities and the results they produce with information collected from other comparable entities, develops best practice standards for its supervised entities and assists them in improving their programs. The CCI is a fully experimentalist central authority. Its problem from a restorative justice standpoint, as mentioned above, is that it predefined a general purpose for its service providers, namely, to promote problem-solving community-based courts, not restorative justice.

#### F. Can the Wrinkles Be Ironed Out?

It is apparent, then, that the four restorative justice programs examined in this article lack certain traits and means necessary for establishing a fully operational experimentalist regime in the area of restorative justice. However, these deficiencies relate only to two of the five elements necessary for a fully experimentalist regime, namely the transparency requirement and the existence of an experimentalist central authority. Amending these deficiencies is well within reach, especially with regard to the demand for full transparency. All four programs already keep a detailed record of their activities and file various reports to their sponsoring institutions. True, not all of the necessary information is collected or reported, but putting new recording and reporting processes in place is merely a technicality. In fact, in programs like the one in Prince William County or the Midtown Impact Panels, all of the necessary components already exist; they just require certain additions and adjustments.

The second missing element – an experimentalist central authority – is harder to overcome for several reasons. First, it is beyond the control of the restorative justice programs. It requires that another entity, in many cases a large and bureaucratic one, adopt new ways of operating that may require additional funding. It is not a secret that large organizations are reluctant to initiate such changes. Second, it may require finding an additional entity better fit to perform the role of an experimentalist central author-

ity or to assist the existing central authority in performing its new role; either way is not a simple task. For example, if Polk County, Iowa or Prince William County, Virginia are too small to provide ongoing experimentalist evaluation of their restorative justice programs (this may be true simply due to the fact that their jurisdictions are not large enough to occupy two separate “competing” restorative justice programs), it may be necessary for them to transfer the information they collected to a third entity with access to information gathered by other restorative justice programs and the means and knowledge to derive best practice standards out of the aggregated data. As exemplified by the CCI’s supervision of the Midtown Impact Panels or by the Chicago community police example, this entity need not be a state government. In other words, it is not the size of the entity that counts, but rather its qualifications, access to information and willingness to act as an experimentalist central authority.

So how can this missing element be dealt with in practice? Although the four restorative justice programs cannot force their superiors to change, they can do a lot to promote necessary changes in their supervising organizations. For example, Vickie Shoap, the coordinator of the Prince William County Program, and other restorative justice practitioners and scholars in Virginia established a state parent organization to assist them with their day-to-day work. The organization’s board of directors conducts monthly meetings in which different issues are discussed, from general policy and initiative development (such as state legislation that would regulate referrals, confidentiality of the process and more) to specific discussions on problems encountered by the different programs in Virginia. Aware of their need to create an experimentalist regime to evaluate and assist their work, this parent organization can demand that their sponsoring agencies provide their restorative justice program with a comprehensive evaluation that includes comparison with other programs. It is difficult to imagine a flat rejection to a request for enhanced transparency.

Moreover, this organization can recommend agencies or entities that can serve as experimentalist central authorities if their direct sponsors lack the ability to do so. If a county or other local sponsor wishes to take on the role of an experimentalist central authority despite its disadvantages, the organization can assist it by providing information on other programs and other localities in the state of Virginia engaged in restorative justice initiatives. This can enable two or more separate counties to collaborate and pool in-

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formation about their restorative justice programs, in order to refine their evaluation mechanisms and improve the quality of service they provide. With information about other restorative justice initiatives within Virginia, the options available to local entities with restorative justice programs are only limited by their imagination and willingness to adopt a different governing approach.

Another option is to allow an external entity to either take the place of the central authority or work in conjunction with it. This is the case with the Midtown Impact Panels that are monitored and supervised by two entities: a somewhat dormant sponsor and an active specialist research and development agency. The Prince William County Program, for instance, which deals exclusively with juvenile offenders, can be supervised by the county board of directors with the assistance of the United States Department of Justice through the Balanced and Restorative Justice Project (BARJ). This project, which began as a national initiative of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in 1993, provides “training and technical assistance and develop[s] a variety of written materials to inform policy and practice pertinent to the balanced approach mission and restorative justice.”<sup>114</sup> The BARJ guide is explicitly intended “to assist juvenile justice professionals in implementing a BARJ approach in their work,”<sup>115</sup> and provides these professionals with key characteristics of different possibilities for appropriate practices, examples from existing successful programs, an outline of common problems faced in attempting to implement the model, a list of possible allies for implementation, a description of the roles for juvenile justice professionals, and most importantly (for the purposes of this article), the expected outcomes and guidance for measuring outcome.<sup>116</sup> In addition, the BARJ project has supported exchanges between managers and senior staff in different jurisdictions in order to enable information sharing between programs and has assisted various restorative justice programs in their learning process and improvement.<sup>117</sup>

The BARJ is an example of an external agency that can assist central authorities by providing them with the necessary information for a workable experimentalist regime. It is knowledgeable

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<sup>114</sup> SHAY BILCHIK, GUIDE FOR IMPLEMENTING THE BALANCED AND RESTORATIVE JUSTICE MODEL, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, at xi, (Dec. 1998), available at: <http://www.ncjrs.org/pdffiles/167887.pdf> [hereinafter BARJ GUIDE].

<sup>115</sup> *Id.* at 1.

<sup>116</sup> *Id.* at 2.

<sup>117</sup> See, e.g., *id.* at 3.



about the restorative justice paradigm, it has access to information regarding the methods and results of a wide variety of programs across the United States, it has the proven knowledge and ability to assess that information and derive best practice standards and it is geared toward sharing its knowledge with individual programs and assisting in their development.

On the other hand, the BARJ project is limited in the assistance it can provide agencies and institutions that wish to operate restorative justice programs as experimentalist entities. First, it is restricted to programs that operate within the juvenile justice system and does not deal with adult offenders, such as the Milwaukee and Polk County DAs' Programs. Second, it is not available to *any* restorative justice program, but only to those that wish to implement the "Balanced and Restorative Justice Model." Admittedly, this model is very similar to the restorative justice paradigm described in this paper. However, there is some disagreement among restorative justice scholars as to whether the two models are different or the same.<sup>118</sup> For those that argue that "Balanced and Restorative Justice" differs from the pure restorative justice philosophy, any assistance from the BARJ project would be deemed inappropriate and counterproductive.<sup>119</sup> Third, regardless

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<sup>118</sup> See, e.g., the debate between Paul McCold and the BARJ project principal investigators Gordon Bazemore and Mark Umbreit in Paul McCold, *Paradigm Muddle: The Threat to Restorative Justice by Its Merger with Community Justice*, 7 CONTEMP. J. REV. 13 (2004). McCold argues that the BARJ model is theoretically based on the community justice philosophy but employs restorative justice methods to achieve its goals. In the article, McCold demonstrates various differences between BARJ goals and typical results and restorative justice objectives and practices); Gordon Bazemore & Mara Schiff, *Paradigm Muddle or Paradigm Paralysis? The Wide and Narrow Roads to Restorative Justice Reform (or, a Little Confusion May Be a Good Thing)*, 7 CONTEMP. J. REV. 37 (2004). The authors answer McCold's critique of BARJ and argue that not only does BARJ not contradict the restorative justice paradigm, but it in fact contributes to the implementation of restorative justice in the criminal justice system and promotes the premises of restorative justice); Mark Umbreit, Robert B. Coates & Betty Vos, *Restorative Justice versus Community Justice: Clarifying a Muddle or Generating Confusion?* 7 CONTEMP. J. REV. 81 (2004). The authors provide their response to McCold's article, and point out that there is ambiguity and disagreement in the way restorative justice scholars and practitioners consider different concepts common to community justice and restorative justice. The authors argue that while it is important to protect the underlying principles of restorative justice, there may be a variety of practices and processes designed to achieve and fulfill those principles, and not merely one correct way of practicing restorative justice.).

<sup>119</sup> As argued by McCold, *id.* (contending that the merger of community justice with restorative justice subjects the latter to the limitations of the former, hence belittling restorative justice); see also Heather Strang, *The Threat to Restorative Justice Posed by the Merger with Community Justice: A Paradigm Muddle*, 7 CONTEMP. J. REV. 75 (2004). Strang, an important Australian restorative justice scholar, singles out community justice as a uniquely American paradigm, and argues that while the efficacy of restorative justice has been measured empirically

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of any differences in philosophy, the BARJ project is primarily intended to assist juvenile justice professionals to implement new restorative justice programs in their system. It is not structured or intended to provide ongoing, systematic evaluation and assessment of existing restorative justice programs.

A different option, more suitable for both the Milwaukee and Polk County DAs' Programs, could be the American Prosecutors Research Institute (APRI), the nonprofit research, training and technical assistance affiliate of the National District Attorneys Association (NDAA).<sup>120</sup> Although APRI is not currently engaged in research and development of restorative justice programs for adults, it provides training and guidance for juvenile prosecutors in implementing restorative justice interventions within their justice systems.<sup>121</sup> In order for APRI to assist prosecutors in functioning as experimentalist central authorities, it needs to broaden its interest to include adult restorative justice interventions and expand its activities from basic research and training to collecting and maintaining data on the restorative justice programs with which they come in contact. However, this does not require APRI to exceed its stated goals or to invest in an entirely foreign area. APRI is already involved in the implementation of restorative justice programming in prosecutor's offices. Asking it to assist prosecutors in the evaluation of these programs is in fact asking it to assist in examining the outcomes of methods it endorses and recommends, which should be in its best interest as well.

The BARJ and APRI are only examples of external agencies already invested in the practice of restorative justice, with relatively easy access to information regarding different restorative justice programs, which can help local entities to operate an experimentalist regime. These external agencies do not necessarily need to be committed to the democratic experimentalist model, nor are they required to be great believers in the restorative justice paradigm. All they are asked to do is to share information they already have, regarding programs they already promote, with local

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over time, there is insufficient evidence regarding the effectiveness of community justice. She also raises some concerns regarding the justification for BARJ and its preferment of the community over the victim.

<sup>120</sup> See generally <http://www.ndaa-apri.org/>.

<sup>121</sup> See, e.g., APRI's "JumpStart Training and Recourse Manual" which includes a separate chapter about the restorative justice theory, the different restorative justice models, their benefits and risks and recommendations for implementation. STEPHANIE EMMONS, *RESTORATIVE JUSTICE, JUMPSTART MANUAL*, available at <http://www.ndaa-apri.org/>.

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criminal justice agencies guided by them, so that restorative justice initiatives can be held accountable.

## V. THE DIFFICULTY OF COMPARING RESTORATIVE JUSTICE PROGRAMS

It is evident, then, that restorative justice is theoretically compatible with the democratic experimentalism model and that restorative practices can relatively easily become part of an experimentalist regime. However, the match is premised on a problematic assumption. A full experimentalist system requires its central authority to hold service providers accountable through best-practice standardization, which is based on the comparison of methods and results reported by comparable service providers. Theoretically, this simply requires the comparison of similar restorative justice program. Unfortunately, finding comparable restorative justice programs may not be as easy as first seems. A good example of this difficulty is found in a related criminal justice innovation briefly discussed in this article – problem-solving community courts. As mentioned previously, the community court model seeks to involve residents and communities in the court system’s efforts to combat ‘quality of life’ problems.<sup>122</sup> As with drug courts (a specific form of a problem-solving court), the community court model “resonate[s] with the ‘democratic experimentalism’ model. . . advanced by Dorf and Sabel.”<sup>123</sup>

Community courts are often local subsidiaries of a centralized court system. Some experiment with innovative sanctioning procedures, some emphasize collaboration with residents of the community in which the court is located, and many are assisted by some kind of central authority. The New York Midtown Community Court is an example of such a court. As experimentalist entities, their evaluation process should be based on a comparison with other comparable service providers. But what does that group include? One might argue that since community courts are first and foremost courts, they should be compared with other traditional courts. However, as Victoria Malkin concludes based on a close

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<sup>122</sup> See Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1573-1574 (2003) (providing a brief description of the premises of the problem-solving community court model).

<sup>123</sup> *Id.* at 1587.

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examination of community courts in action, “the reorganization of the court transforms the [community court] judge into a powerful community figure whose role transcends that of a traditional judge. . . Given the novel agendas pursued by such courts, I argue that the accountability and success of locally situated courts may no longer be adequately measured in terms of traditional courtroom statistics.”<sup>124</sup> Ruling out the latter as comparable entities restricts an evaluator of a community court solely to other community courts. The problem is that empirical studies show that community courts are an “amorphous group, consisting of a wide variety of operational models.”<sup>125</sup> Moreover, their goals also differ substantially due to the different meaning attributed to the concept of “quality of life” in the different communities.<sup>126</sup> On the one hand, this should not come as a surprise in an experimentalist regime which encourages its service providers to determine their methods and goals themselves. In fact, it may be an indication of the truly experimentalist nature of the system. On the other hand, these differences impede comparisons between different community courts, rendering them close to impossible.

It also seems near impossible to benchmark effective and successful practices when comparing eleven community courts that do not share a thing other than their title and a few abstract notions.<sup>127</sup> How can service providers that do not look alike, do not act alike and that strive to achieve different goals even be compared? As mentioned above, accomplishing such a task is highly problematic.

Based on the comparison of the restorative justice programs described in this article it may be argued that an attempt to compare restorative justice programs is bound for the same fate. For one, all four programs are organizationally different: the Milwaukee DA’s Program is a separate program within a prosecutor’s office; the Prince William Program is part of a court. This difference alone undoubtedly influences the evaluation mechanisms of these two restorative justice programs, as well as their ability to implement change and innovation. The Polk County DA’s Program and the Midtown Impact Panels are not even programs per se; the latter is a specific sanction in a community court and the former is a

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<sup>124</sup> *Id.* at 1577.

<sup>125</sup> *Id.* at 1574 (describing a BJA workshop intended for community court personnel in which the eleven different community courts represented were found to differ both in the way they were organized and in their programming.).

<sup>126</sup> *Id.* at 1575, 1593.

<sup>127</sup> *Id.* at 1574.

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complementary procedure added to the traditional criminal justice intervention through a prosecutor's office.

Secondly, the programming of all four programs is entirely different. The Milwaukee DA's Program is strictly for adults and is based on an innovative model combining elements from the group conferencing and circle models. The Prince William County Program is strictly for juvenile offenders and includes VIPs - a distinctive process absent in all of the other programs and generally unique among pre-sentencing restorative justice programs in the United States. The Midtown Impact Panels apply only to "quality of life" offenders while the Polk County DA's program is mandatory for all offenders in the county, including those guilty of murder and rape, as long as their victims are interested in the process.

The trouble is that these disparities are typical of restorative justice practices in general. An international survey that limited itself to the examination of restorative justice conferencing programs found that different programs vary greatly even in the way they define their own processes. A simple example of this diverse-ness is that the survey found "in excess of 50 different names for 'conferencing' practices."<sup>128</sup> Many other differences among presumably comparable programs were found in the survey, such as different referral criteria, different structuring, different objectives and more. Even the APRI guide for implementating restorative justice programming for juvenile offenders urges prosecutors who are considering using these programs to "carefully consider" the unique needs of their communities, victims and offenders and only then to adapt programs that fit those needs.<sup>129</sup>

Comparing the Milwaukee DA's Program with its "sister program" in Outagamie County<sup>130</sup> provides another example of the vast differences between restorative justice programs. Even though both programs were created by the same Wisconsin statute and for the same stated purposes, they barely have anything in common. While the Milwaukee DA's Program operates through the CCPs and the Neighborhood Initiative, the Outagamie County DA's Program takes an entirely different approach. One of its activities, referred to as the "Community Court Program," deals with young adults (ages 17-24 years old). In this program, community members serve as "judges" and determine the conditions to be im-

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<sup>128</sup> See Nixon et. al., *supra* note 57, at 20.

<sup>129</sup> See Emmons, *supra* note 121, at 7.

<sup>130</sup> *Supra* note 110.

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posed on offenders in pre-charging deferred agreements. Another activity the Outagamie County DA's Program performs is victim-offender mediation (referred to as "victim-offender conferencing"). Agreements reached in this process are "incorporated into the sentencing recommendation by the state and often stipulated to by the defense."<sup>131</sup> In addition, Outagamie County DA's Program engages in Impact Panels in different types of offenses, such as drunk driving and certain domestic violence offenders. The County is considering broadening the scope of cases referred to Impact Panels to include certain drug offenses and more. Finally, the Outagamie County DA's Program has designed "fast track programs" which expedite court proceedings for first time domestic violence and drug offenders and enter them into rehabilitative treatment programs.<sup>132</sup>

Interestingly, not only are the two Wisconsin programs different in their programming and processes but their different structuring indicates an entirely different perception of the restorative justice theory in general. True, in both cases individuals are empowered, but in a very different way. In Milwaukee, victims, offenders and community members agree together on the sentence. In Outagamie County, offenders agree to allow community members to determine their punishment. In Milwaukee, restorative justice means the active involvement of citizens in proceedings; in Outagamie County it also means speedy court proceedings which with the exception of their pace, are identical to the traditional justice system and are based on the traditional paradigm of criminal justice adjudication.

With such differences, what is there to compare? How can one program learn from the other if each views the restorative justice paradigm and its values so differently? The answer is that it is these very differences that make comparisons so important and so beneficial for the evolving practice of restorative justice. Many prominent restorative justice advocates recognize the important role of peer review and deliberation regarding different approaches to restorative justice and the role it should play within the criminal justice system as essential for the development of the restorative justice paradigm.<sup>133</sup> As evident from the four case studies

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<sup>131</sup> OUTAGAMIE COUNTY DISTRICT ATTORNEY'S OFFICE, RESTORATIVE JUSTICE REPORT (pursuant to Wis. Stats. 978.044(3)), at 3 [hereinafter OUTAGAMIE 2003 REPORT].

<sup>132</sup> Based on the OUTAGAMIE 2003 REPORT. *Id.* at 2-7.

<sup>133</sup> See Braithwaite, *supra* note 37, at 573, 575-76 (stressing the importance of an on-going process of standardizing restorative justice programs through a deliberative process of consensus

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reviewed in this article, these different approaches certainly exist, but there is little peer review and practically no standardization of restorative justice practices. Yet it is only through comparison and standardization that David Lerman, the Milwaukee DA's Program Coordinator, would be able to assess whether his idea of victim and offender empowerment is correct and whether his CCPs are indeed the best possible restorative justice process. Such comparisons would force restorative justice practitioners to revisit their methods and goals in light of constantly evolving restorative justice standards. If restorative justice proponents want their paradigm to be taken seriously and want it to be adopted by the criminal justice system, they must set basic standards for the practice of restorative justice and must encourage the comparison of different programs, as difficult as it may be.

#### CONCLUSION

Restorative justice started in the mid-seventies and early eighties as an experiment intended to examine the results of bringing victims and offenders together in the aftermath of crime. The positive results led to the development of a new paradigm, offering an alternative approach to the current criminal justice system. In time, the restorative justice paradigm and the different practices it produced became increasingly familiar to criminal justice practitioners, scholars and lay citizens; today restorative justice is regarded as a 'movement' and considered as a feasible alternative to criminal adjudication in appropriate cases. Restorative justice practices, which were formally endorsed by the European Union's Committee of Ministers and the American Bar Association, are now found in almost every state in the United States and in many local jurisdictions around the country. Today, they are regarded as much more than a mere experiment, and are expected to complement the criminal justice system in previously unaddressed areas, such as serving victims, changing offenders' thinking patterns and utilizing existing resources within the community.

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building as opposed to predetermined regulation, and emphasizing the value of diverse approaches and ideas in improving the realization of the restorative justice ideal); *see also* Umbreit et. al., *supra* note 118, at 87-88 (acknowledging the need for further development of the restorative justice model, and stressing the necessity of "remaining open to new possibilities and to new ideas.").

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But how do we know whether restorative justice practices actually meet what is expected of them? Going back to Alan, how can he and his defense lawyer trust this kind of process? In order for restorative justice practices to assume their role as feasible alternatives to the criminal justice system, they must be credible; in order to achieve credibility, they must first and foremost be held publicly accountable.

This Article spotlights four fully integrated restorative justice programs and examines their structure, their activities and mainly their accountability. The good news is that all four programs seem to have implemented safeguards to help protect the fundamental rights of all participants, and that they have generally generated positive results. Victims and offenders come out of the process feeling they were treated fairly, and believing that the process was effective and that their needs were generally met. The bad news is that the evaluation mechanisms these programs employ are not sufficient and do not provide their staff with the right information regarding the methods used and the results achieved. As a result, these programs lack the ability to assess whether they are achieving their most important goals, lack the ability to learn from their own mistakes and from the experience of others and lack the ability to improve their programs. Moreover, their sponsoring institutions – courts and prosecutorial offices – are generally uninterested and incapable of truly evaluating their day-to-day activities in light of the restorative justice paradigm, leaving all four programs isolated and unevaluated. In other words, these restorative justice programs are not held accountable.

At the same time, these programs *want* to be held accountable. In this Article, I demonstrated the compatibility of these programs and the restorative justice paradigm in general with Dorf and Sabel's democratic experimentalism theory of governance. Through this system, restorative justice programs are granted the freedom to continue to set their goals and determine their methods. In exchange for this freedom, the programs are required to be transparent and to submit detailed reports to their sponsoring agency about the methods they employ and the results they achieve. The sponsoring agency, in return, is required to assess this data and compare it with other comparable restorative justice programs in order to develop best-practice standards which would then be used to evaluate the programs. This is what makes democratic experimentalism unique; it provides a mechanism for systematic program accountability, but at the same time promotes



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innovation, and constant reexamination of methods and results. Through this regime, restorative justice programs are held accountable, thus acquiring the much needed credibility necessary for their successful inclusion within the criminal justice system.

Proponents of restorative justice should be the first to demand that restorative justice programs be subject to the close scrutiny of an experimentalist governing system. I believe that such a demand will not be ill received, and can in fact prompt the criminal justice system to change in order to accommodate this request. After all, it is in the interest of each and every jurisdiction that established a restorative justice program to support the program's efforts to improve and evolve. This is all the more so if this necessitates close scrutiny and transparency. It is only by full disclosure and external monitoring that a skeptical justice system and legal academia can be convinced of the merits of restorative justice programs.

In one of his articles Braithwaite wrote: “[a]t the end of the day it is better that restorative justice learn from making mistakes than that it make the mistake of refusing to learn.”<sup>134</sup> This Article seeks to provide the restorative justice movement with an effective way of learning from mistakes, standardizing practices and establishing credibility.

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<sup>134</sup> See Braithwaite, *supra* note 37, at 575.

