

The Future of Community Justice

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In recent years, a series of crime control practices known collectively as community justice have reintroduced rehabilitation and discretion to control certain minor crimes. This parallel system for approaching minor crime has flourished, even as the mainstream criminal system faces a crisis of legitimacy. This Article examines whether we can apply aspects of the community justice movement to improve the processing of serious crime in the mainstream criminal system. It assesses current community justice practices—community prosecution, community courts, sentencing circles, and citizen reparative boards—and finds that they have structural and procedural defects that should bar their use for serious crime. However, the chief innovation of the community justice movement—localized, popular decision-making—would alleviate many of the problems facing the criminal justice system. The Article argues that it may be possible to implement the goals of community justice while avoiding the defects of the current reform initiatives by restructuring the grand jury procedure and permitting local communities to sentence offenders.

I. INTRODUCTION

At a time when most criminal courts have abandoned rehabilitation and discretionary sentencing, a series of new crime control practices known collectively as community justice have reintroduced the use of rehabilitation and discretion in the control of certain minor crimes. Community justice represents not a simple return to the rehabilitative ideal, but an approach to crime and punishment that is radically different from that of the traditional criminal justice process. Community justice initiatives—which include community prosecution, community courts, sentencing circles, and citizen reparative boards—advocate local, decentralized crime control policies generated through widespread citizen participation. They emphasize attacking the causes of crime, rehabilitating individual offenders, and repairing the harm caused by crime rather than punishing offenders according to traditional retributive or deterrent concerns. Community justice initiatives are flourishing even as the mainstream criminal system faces a crisis of legitimacy in which an unprecedented number of citizens, many of them African American males, are incarcerated for long periods¹ under a

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¹ The percentage of adults in prison grew by over 300% in the last twenty years of the twentieth century. KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 3 (2000). Almost 3% of the adult population and more than one-third of all young African American males were in custody on an average day in the 1990s. *Id.*

harsh and rigid regime that aspires to do little more than to incapacitate and warehouse offenders.²

These contradictory developments in criminal justice policy raise a number of interrelated questions: How effective are community justice institutions? Can we apply aspects of the community justice movement to improve the processing of serious crime in the mainstream criminal system? In essence, what is the future of community justice?

In this Article, I will analyze the possibility of expanding this innovative crime control approach to the mainstream criminal system, which is something the limited scholarly treatment of this reform movement has not yet done.³ I first critique current community justice practices and find that they have structural and procedural defects that should bar their use for serious crimes. However, I argue that the chief innovation of the community justice movement—localized, popular decision-making—would alleviate many of the problems facing the criminal justice system. I suggest two new practices to implement the goals of community justice while avoiding the defects of the current reform initiatives: a revitalized grand jury procedure and jury sentencing.

The mainstream criminal justice system is in crisis. The past twenty years have witnessed a revolution in sentencing severity that many criminal justice experts view as unsound and perhaps even counterproductive.⁴

² See Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice*, 90 CAL. L. REV. 1415, 1418–19 (2002) (stating that in contrast to the ambitious criminal justice agendas of the past, pessimism about our ability to change offenders has led to a view of prison as “a site of secure confinement where those whose dangerousness is unalterable can be securely held for many years”).

³ Most of the literature seeks to report the new phenomenon of community justice or to analyze a specific community justice program. See, e.g., Gordon Bazemore & Curt Taylor Griffiths, *Conferences, Circles, Boards, and Mediations: The “New Wave” of Community Justice Decisionmaking*, FED. PROBATION, Dec. 1997, at 25; Greg Berman & John Feinblatt, *Problem-Solving Justice: A Quiet Revolution*, 86 JUDICATURE 182 (2003); Jan Peter Dembinski, *Restorative Justice: Vermont State Policy*, 29 VT. B.J. & L. DIG. 39 (2004); Douglas F. Gansler, *Implementing Community Prosecution in Montgomery County, Maryland*, PROSECUTOR, July/Aug. 2000, at 30; Quintin Johnstone, *The Hartford Community Court: An Experiment That Has Succeeded*, 34 CONN. L. REV. 123 (2001); Sandy Nowack, *A Community Prosecution Approach to Statutory Rape: Wisconsin’s Pilot Policy Project*, 50 DEPAUL L. REV. 865 (2001); Janelle Smith, *Peacemaking Circles: The “Original” Dispute Resolution of Aboriginal People Emerges as the “New” Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL’Y 329 (2003). The few analytical pieces focus on only one type of community justice practice, and none of them ask how the community justice movement might be expanded to the mainstream criminal system. See Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897 (2003); 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 (2003); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL’Y 63 (2002) [hereinafter Thompson, *Courting Disorder*]; Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002) [hereinafter Thompson, *It Takes a Community*]; Devin J. Doolan, Comment, *Community Prosecution: A Revolution in Crime Fighting*, 51 CATH. U. L. REV. 547 (2002).

⁴ See KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING IN THE FEDERAL CRIMINAL COURTS 59–66 (1998); MICHAEL TONRY, SENTENCING MATTERS 98–99

The introduction of harsh determinate sentencing schemes—including sentencing guidelines, mandatory minimum penalties, and three strikes laws—has led to an explosion in the prison population.⁵ Disillusioned with the ability of penal science to rehabilitate offenders, the prison system aspires to do little more than warehouse and incapacitate law-breakers.⁶ The end result is that large numbers of citizens, a disproportionate number of them African American,⁷ are incarcerated for long periods with little hope of being reintegrated into mainstream society.⁸ Although politicians often defend these developments in criminal justice policy as a direct response to a public call for tougher punishments,⁹ there is evidence that criminal law policies do not accurately reflect public sentiment. A variety of political pathologies, some of which I describe in more detail below,¹⁰ distort the process of creating criminal laws and policies.¹¹ Harsh sentencing reforms combined with policies having a racially disparate impact, such as racial profiling and disparate sentences for crack and cocaine offenses, have severely damaged the legitimacy of the justice system, particularly in high crime communities.¹² If recent work on the relationship between law and social norms is correct, this situation will only encourage crime in these communities as lack of respect for laws and the criminal process erodes social norms of law-abidingness.¹³

(1996); Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological, and Other Non-legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 23–24 (1997).

⁵ The Federal Sentencing Guidelines, U.S. SENTENCING GUIDELINES MANUAL (2004), the federal mandatory minimums for drug crimes, 21 U.S.C. § 841 (2000), and the California three strikes law, CAL. PENAL CODE § 667 (West 1999), are among the most well-known of these sentencing schemes.

⁶ See Simon, *supra* note 2, at 1418–19.

⁷ See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004).

⁸ See Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 262 (2004) (“Political leaders no longer even operate under the pretense that the nation’s system of punishment might seek to rehabilitate the offender.”); Simon, *supra* note 2, at 1418–19 (stating that prisons aim primarily to incapacitate and warehouse offenders rather than rehabilitate them).

⁹ See, e.g., Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 199 (2004) (describing the relationship between tough-on-crime politics and sentencing reforms); Rachel A. Van Cleave, “*Death is Different, Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*,” 12 S. CAL. INTERDISC. L.J. 217, 276 (2003) (describing the politics behind the enactment of the California three strikes law).

¹⁰ See *infra* Part IV.A.

¹¹ I focus on two flaws: (1) the disjuncture between general public opinion polls and sentencing preferences in specific cases; and (2) the effective and literal disenfranchisement of inner city communities most damaged by crime and harsh sentencing policies. William Stuntz has detailed another form of political pathology in the institutional design and incentive structure that affects criminal law-making. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

¹² See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1302 (2001).

¹³ See, e.g., Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L.

The community justice movement arose in part as an attempt to combat the crisis of legitimacy facing the criminal justice system.¹⁴ Community justice reforms share two primary innovations: (1) involving citizens in the formulation of crime control policies customized to fit the needs of the local community; and (2) responding to crime by seeking to rehabilitate the offender and repair the harm suffered by the victim and community rather than by punishing the offender according to retributive or deterrent principles. Community justice programs currently operate on the fringe of the criminal justice system. They are generally limited to low-level crimes and often focus on quality of life offenses¹⁵ previously left largely unprosecuted.¹⁶ The community court concept has expanded laterally with the creation of specialized problem-solving courts such as family treatment, domestic violence, and mental health courts,¹⁷ but there is as yet no obvious movement to expand community courts or other community justice initiatives vertically to include more serious crimes that play a larger role in the criminal docket. The result is a two-tiered system in which minor and serious crimes are addressed through separate procedures with entirely different assumptions about what crime is and what punishment ought to accomplish.

There is, of course, a plausible rationale for diverting minor offenders from the traditional criminal justice process and viewing low-level crimes as problems calling for community restoration and offender treatment rather than punishment.¹⁸ But if the community justice movement aims to enhance

REV. 391, 398–402 (2000) (describing the relationship between the perceived legitimacy of the legal system and compliance with the law).

¹⁴ For a fuller discussion of factors leading to the development of the community justice movement, see *infra* Part II.A.

¹⁵ Quality of life offenses are minor offenses, such as graffiti, prostitution, panhandling, and vandalism, that create or reflect physical or social disorder. See Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 127 n.11 (2004) (defining quality of life crimes).

¹⁶ See, e.g., Johnstone, *supra* note 3, at 124 (most community courts limit jurisdiction to misdemeanors and violations of city ordinances that constitute quality of life offenses); Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of "Restorative Justice,"* UTAH L. REV. 375, 384–85 (2003) (noting that most current restorative processes, including citizen reparative boards and sentencing circles, are restricted in their authority). Although some community prosecution programs include serious crimes, see Gansler, *supra* note 3, at 30, most programs view the addressing of quality of life issues as one of their major functions. See, e.g., ROBERT VICTOR WOLF, CENTER FOR COURT INNOVATION, USING NEW TOOLS: COMMUNITY PROSECUTION IN AUSTIN, TEXAS 2 (2000), available at <http://www.communityjustice.org/pdf/austin.pdf> [hereinafter WOLF, COMMUNITY PROSECUTION IN AUSTIN] (noting that the Austin initiative provides a neighborhood-based prosecutor to focus exclusively on local safety and quality of life concerns); Doolan, *supra* note 3, at 558–59 (describing the enhancement of quality of life as a prime goal of community prosecution).

¹⁷ See Greg Berman & Anne Gulick, *Just the (Unwieldy, Hard to Gather, but Nonetheless Essential) Facts, Ma'am: What We Know and Don't Know About Problem-Solving Courts*, 30 FORDHAM URB. L.J. 1027, 1035, 1041 (2003).

¹⁸ According to this view, those who commit minor, nonviolent offenses are more amenable to rehabilitation and do not pose a sufficient risk to society to require incapacitation.

the legitimacy of the criminal justice system as a whole by fostering popular participation and making law enforcement responsive to local community needs, community justice initiatives must address the crimes that make up the mainstream criminal docket. Moreover, given that our current approach to serious crime involves the costly incarceration of large numbers of citizens and stems not from a careful strategy or penological theory but from a sense of resignation that incapacitation is our only tool to control crime, we should consider applying the new community justice approach to serious crime.

This Article explores how this might be accomplished. I conclude that the best way to introduce the community justice goal of greater citizen input into the administration of justice is not to scale up current community justice programs, but to provide for enhanced local, popular participation within existing criminal justice institutions. It is important to note at the outset that for reasons I discuss more fully below,¹⁹ my approach consciously favors the popular participation strand of community justice over its commitment to rehabilitative and reparative sentencing outcomes. My reform proposals incorporate many of the restorative features of current community justice programs,²⁰ but they are unlikely to satisfy those who view replacing punishment with restoration as the primary goal of the movement.

This Article proceeds as follows. In Part II, I discuss the rise of the community justice movement in the United States and briefly describe each of the four prominent community justice initiatives: community prosecution, community courts, sentencing circles, and citizen reparative boards. In Part III, I assess these practices and conclude that they have major structural and procedural flaws, making them inappropriate for adoption into the mainstream criminal system. In particular, they fail to live up to the ideal of fostering widespread and meaningful citizen participation in creating local criminal justice policies.

In Part IV, I ask whether the community justice movement nevertheless offers useful principles that can improve the criminal justice process.

See, e.g., Cait Clarke, *The Right to Counsel*, 27 CHAMPION 25, 27 (2003) (“Misdemeanor cases often present the best opportunity to engage in restorative justice initiatives. Rehabilitation and restitution can be most acceptable and effective for minor offenses.”).

¹⁹ See *infra* Part IV.B.

²⁰ By “restorative” features, I mean those that place an emphasis on restitution and rehabilitation over punishment and on permitting those affected by the crime to have a say in the sanction. See *infra* Part II.D (discussing the restorative justice movement). Restorative justice is thus a broader concept than reparative justice, which is sometimes used as a synonym for restorative justice, but strictly speaking refers simply to efforts to repair the harm caused by the crime through, for example, restitution or apology. See Symposium, *Association for Conflict Resolution Annual Conference 2003—The World of Conflict Resolution: A Mosaic of Possibilities, Session on Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 187, 188 (2004) (defining reparative justice); Katherine L. Joseph, *Victim-Offender Mediation: What Social and Political Factors Will Affect its Development?*, 11 OHIO ST. J. ON DISP. RESOL. 207, 216 (1996) (using restorative and reparative justice interchangeably).

The community justice approach of localized, popular decision-making would eliminate the distortion of public sentiment that mars the creation of criminal law and policies, helping to reverse the current trend toward ever-harsher policies and enhancing the legitimacy of the criminal justice system. In particular, localized decision-making has the virtue of permitting individual communities to strike their own balance between security and the social costs of harsh law enforcement policies. In this Part, I also assess the community justice movement's preference for restoration over punishment. While local citizens may well often choose restorative sanctions when given the option, I argue that it is unnecessary, and perhaps counterproductive, to endorse any single approach to crime and punishment.

Finally, in Part V, I suggest a way to adopt the localized, popular decision-making approach of the community justice movement while avoiding the flaws of current community justice programs. My proposal draws on two existing institutions with a long tradition of representing community sentiment: the grand jury and the petit jury. Under my proposal, grand and petit juries would be drawn from a smaller catchment area, typically a subsection of a city representing a rough community of interests. Reforms to the grand jury procedure would permit community members to take a more active role in individual charging decisions. Grand juries would also be used as focus groups that generate recommendations for local prosecutors regarding charging and plea bargaining policies in common case types.

The most important element in building a comprehensive community justice system is giving sentencing power to juries drawn from local communities. Jury sentencing has attracted increased scholarly attention since the Supreme Court redefined the balance of judge and jury roles in *Apprendi v. New Jersey*²¹ and its progeny.²² In this Part, I also argue that a jury sentencing regime that incorporates rehabilitative and restorative features would alleviate many of the problems associated with the current criminal justice system.

II. THE COMMUNITY JUSTICE REVOLUTION

In this Part, I discuss the rise of the community justice movement and briefly describe the four most prominent community justice practices: community prosecution, community courts, sentencing circles, and citizen reparative boards. Analysis and criticism of these practices follows in Part III.

²¹ 530 U.S. 466 (2000).

²² See *infra* notes 229–232 and accompanying text for discussion of *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court's latest statement on this question.

A. *The Rise of the Community Justice Movement in the United States*

In the last decade, community justice initiatives have spread rapidly across the United States. The nation's first community court opened in New York City in 1993.²³ A year after a 1997 preliminary impact study praised New York's Midtown Community Court for reducing crime,²⁴ community courts opened in Portland, Oregon and Hartford, Connecticut.²⁵ By 2004, ten major jurisdictions had created similar courts,²⁶ and community court experiments have continued to grow since then.²⁷ Over the past fifteen years, a similar movement to involve local citizenry in guiding prosecutorial discretion has expanded even more rapidly,²⁸ in part because a federal funding program has encouraged the adoption of community prosecution approaches.²⁹ A number of other community justice initiatives, including community-based probation programs and sentencing circles, have also been gradually gaining momentum.³⁰

A variety of developments combined to spark this community justice revolution.³¹ By the early 1990s, frustration with the apparent failure of expensive law enforcement efforts associated with the War on Drugs was

²³ James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1543 (2003).

²⁴ See MICHELE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 3 (2000).

²⁵ Johnstone, *supra* note 3, at 123.

²⁶ ROBERT V. WOLF & JOHN L. WORRALL, CENTER FOR COURT INNOVATION, LESSONS FROM THE FIELD: TEN COMMUNITY PROSECUTION LEADERSHIP PROFILES xi (2004), available at http://www.courtinnovation.org/pdf/cp_lessons_from_the_field.pdf.

²⁷ See Kaye, *supra* note 15, at 134 (noting that in 2004 more than thirty community courts were in the operation or planning stages, and describing plans to open several new courts in New York).

²⁸ Sam Skolnik, *Taking it to the Streets: DOJ Puts Big Bucks Behind Community Prosecution*, LEGAL TIMES, Feb. 8, 1999, at 2 (stating that the first community prosecution program was created in Portland in 1990).

²⁹ See *id.*; see also WOLF & WORRALL, *supra* note 26, at xi (stating that an American Prosecutors Research Institute survey found that nearly half of prosecutors' offices reported practicing community prosecution); Eric H. Holder, *Community Prosecution*, PROSECUTOR, May/June 2000, at 31 (listing a number of community prosecution programs); Thompson, *It Takes a Community*, *supra* note 3, at 323 (noting that "the phenomenon of community prosecution has taken hold in offices across the country" and that the availability of federal funding has aided in the expansion of the community prosecution movement).

³⁰ See WOLF, COMMUNITY PROSECUTION IN AUSTIN, *supra* note 16, at 3-4 (stating that Austin, Texas is experimenting with sentencing circles); Robin Campbell & Robert Victor Wolf, *Problem-Solving Probation: An Overview of Four Community-based Experiments*, TEXAS J. CORRECTIONS, Aug. 2001, at 8 (describing community probation programs in Vermont, Massachusetts, Arizona, and Oregon); Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. POL'Y 419, 438-39 (1999) (noting that a number of Minnesota communities have adopted circle sentencing).

³¹ For a description of the broad historical and cultural context of the development of community justice, see Deborah J. Chase et al., *Community Courts and Family Law*, 2 J. CENTER FOR FAM., CHILD. & CTS. 37, 39-40 (2000).

spreading.³² Drug-related arrests clogged the court system, and rising incarceration rates seemed to have little impact.³³ Residents of high crime neighborhoods ceased to view criminal justice officials and procedures as legitimate, as they watched their communities suffer both from crime and the corrosive effects of largely ineffective tough-on-crime policies.³⁴

One response to this situation was to ratchet up traditional crime and drug enforcement efforts and introduce a succession of ever-harsher sentencing schemes, including mandatory minimum penalties.³⁵ In contrast to the escalating War on Drugs, experimental approaches to crime control also began to gain support.³⁶ Specialized drug courts offering treatment in place of incarceration for drug offenders debuted in 1989,³⁷ and spread rapidly across the nation.³⁸

At the same time, politicians began to incorporate the increasingly popular “broken windows” theory of crime³⁹ into other innovations. This theory was introduced in 1982 and played a major part in the success of the community policing movement.⁴⁰ The theory posits that minor forms of disorder in a community weaken informal social controls and lead to more serious crime.⁴¹ Attention to physical signs of disorder, such as graffiti and abandoned buildings, and to quality of life offenses, such as prostitu-

³² See Thompson, *Courting Disorder*, *supra* note 3, at 68–69 (describing the growing dissatisfaction with the ineffectiveness of traditional drug enforcement measures).

³³ See *id.*; see also Morris B. Hoffman, *The Drug Court Scandal*, N.C. L. REV. 1437, 1459 (2000).

³⁴ See Fagan & Melkin, *supra* note 3, at 901–02 (stating that the community justice movement was fueled by both a public crisis in legitimacy and a sense among court insiders that rising caseloads and increasing incarceration levels suggested that the system was ineffective). For a discussion of the detrimental effects of drug enforcement measures and severe sentencing laws on inner city communities, see, for example, TODD R. CLEAR & DAVID R. KARP, *THE COMMUNITY JUSTICE IDEAL* 24, 48–50 (1999); Brown, *supra* note 12, at 1306–07; Tracy L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 205–11 (1998).

³⁵ See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 831 (2000); Hoffman, *supra* note 33, at 1459.

³⁶ See Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513 (2003) (describing the origins and development of the drug court movement).

³⁷ Dorf & Sabel, *supra* note 35, at 843.

³⁸ See Hoffman, *supra* note 33, at 1464 (stating that in 1998, 430 drug courts in forty-eight states were planned or in operation).

³⁹ See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. For an expanded version of this theory, see GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996).

⁴⁰ See Doolan, *supra* note 3, at 557 (“The ‘broken windows’ theory inspired the concept of community policing.”); Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 246–47 (2000) (“[B]roken windows especially has influenced policies of community policing.”).

⁴¹ See Wilson & Kelling, *supra* note 39, at 31–32.

tion, drug use, panhandling, loitering youths, and street vending, could help prevent community deterioration and reduce crime.⁴²

Community policing initiatives played a major role in implementing this new order maintenance approach to crime control.⁴³ Community policing programs emphasize close contact between police and the local communities they serve, decentralized decision-making, and crime prevention and proactive problem-solving rather than response and investigation.⁴⁴

The community justice initiatives of the 1990s drew on insights from drug courts, broken windows theory, and community policing in an attempt to address the crisis of legitimacy facing the criminal justice system. Proponents hoped that enlisting the support and participation of citizens would make the criminal justice process more responsive to local community needs and more effective in permanently improving the community's quality of life, rather than simply cycling recidivists through a "revolving door."⁴⁵

Although individual community justice procedures vary widely, they share a common view of crime as a problem that has its primary effects at the local community level and that should be addressed on that level as well.⁴⁶ In contrast to the increasing focus on uniformity and standardization evident, for example, in the move to determinate sentencing in the mainstream criminal system,⁴⁷ the community justice model offers decentralized decision-making power. This permits different locales to employ different policing tactics, judicial procedures, and prosecution and sentencing policies adapted to local needs.⁴⁸ Although scholars have pointed out that defining the relevant "community" is problematic,⁴⁹ community jus-

⁴² *Id.*

⁴³ See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 578 (1997) (describing the relationship between community policing and the broken windows theory of crime).

⁴⁴ See *id.* at 575–77.

⁴⁵ See Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23(2) LAW & POL'Y 1, 6 (2001), available at http://www.courtinnovation.org/pdf/prob_solv_courts.pdf.

⁴⁶ See, e.g., CLEAR & KARP, *supra* note 34, at 23–24 (defining community justice as incorporating crime prevention and justice activities that explicitly include the community in their processes, that set the enhancement of community quality of life as an explicit goal, and that focus on community-level outcomes); Thompson, *It Takes a Community*, *supra* note 3, at 323 (noting that the "common thread" of various community justice innovations is the desire for an "invigorated role for the community in defining and enforcing standards of conduct").

⁴⁷ See Michael C. Dorf & Jeffrey Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1503–04 (2003) (discussing the rise of determinate sentencing).

⁴⁸ See, e.g., CLEAR & KARP, *supra* note 34, at 26 (listing decentralized authority and accountability as elements of community justice); Thompson, *It Takes a Community*, *supra* note 3, at 323 (noting that community prosecution involves decentralization of authority and accountability).

⁴⁹ See, e.g., Jennifer Gerada Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1292 (1994) (criticizing reformers' invocation of "an undefined or nonexistent 'community'" in the context of restorative justice pro-

tice initiatives tend to operate at the level of a large neighborhood or subsection of a city.⁵⁰ Community justice reforms share two primary principles: (1) the process of generating criminal justice decisions and policies is localized and popular, with extensive citizen participation;⁵¹ and (2) the focus is on eliminating local situations that encourage crime,⁵² compensating the victim and victimized community, and rehabilitating the offender rather than inflicting punishment.⁵³

Community justice involves a conception of crime and punishment that is radically different from that of the traditional criminal justice process. The primary aim of the sanction is not to punish the offender based on retributive or deterrent principles, but to repair the harm caused by the crime and restore the victim, offender, and community. Community justice utilizes individualized, discretionary sentencing aimed at rehabilitation and reintegration in place of the determinate sentences and the focus on retribution and incapacitation that characterize mainstream criminal courts. In the traditional criminal system, “deterrence” is attempted through manipulating sanctions and raising probabilities of apprehension. Community justice, on the other hand, employs a variety of creative laws and enforcement actions, such as curfews, that defuse situations likely to lead to crime, as well as educational and employment programs that provide attractive alternatives to criminal behavior. The legitimacy created by widespread popular participation in the criminal justice process also plays a role in crime prevention, because enhanced respect for the system will, it is hoped, promote voluntary compliance with the law and help create norms of law-abidingness in the community.⁵⁴

Community justice finds support and resistance on both sides of the political spectrum. Conservatives have lauded the aggressive enforcement of quality of life offenses as a way to clean up troubled neighborhoods.⁵⁵ How-

grams); Thompson, *It Takes a Community*, *supra* note 3, at 358 (noting that “‘the’ community rarely is a single entity with static issues”); Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343 *passim*; see also CLEAR & KARP, *supra* note 34, at 130 (discussing the process of identifying the relevant community). For further discussion of this problem, see *infra* Part IV.A.

⁵⁰ See CLEAR & KARP, *supra* note 34, at 26 (stating that one of the elements of community justice is that it operates at the neighborhood level). However, some programs have a wider catchment area. The Hartford Community Court, for example, has jurisdiction over the entire city. See Johnstone, *supra* note 3, at 130.

⁵¹ See, e.g., Thompson, *Courting Disorder*, *supra* note 3, at 65–66 (noting that the community court movement seeks to give a greater voice to communities in the exercise and implementation of justice).

⁵² See, e.g., Doolan, *supra* note 3, at 560–61 (listing preventive problem-solving strategies used in community prosecution programs).

⁵³ See, e.g., Chase, *supra* note 31, at 38 (discussing community courts).

⁵⁴ See Fagan & Malkin, *supra* note 3, at 903–05.

⁵⁵ Indeed, New York City’s Midtown Community Court was part of Republican Mayor Rudolf Giuliani’s broken windows approach to crime control. See Thompson, *Courting Disorder*, *supra* note 3, at 82–84 (linking the development of the Midtown Community Court with Mayor Giuliani’s zero tolerance policy toward minor offenses).

ever, some conservatives have also criticized problem-solving courts as rehabilitation at the expense of accountability and individual responsibility.⁵⁶ To be sure, liberals have raised concerns of their own that some programs would encroach on civil liberties by encouraging arrests for minor offenses⁵⁷ and coercing offenders into guilty pleas and treatment without adequate adversarial procedures.⁵⁸ Nevertheless, many liberals have also found attractive the notion of community participation and empowerment central to the community justice movement. They have also approved of its emphasis on treatment, the provision of social services, and offender reintegration in place of incarceration. Pushed at various times by both Democrats and Republicans,⁵⁹ and widely supported by judges,⁶⁰ the community justice movement became widespread by the beginning of the twenty-first century.

B. Community Prosecution

One of the most controversial aspects of the current criminal justice system is the discretion given to prosecutors over what offenders and crimes to prosecute, charges to bring, plea bargains to make, and sentences to pursue.⁶¹ These decisions are for all practical purposes unreviewable, and, aside from periodic elections in some jurisdictions, prosecutors generally are not accountable to the citizens they serve.⁶² At its most robust, com-

⁵⁶ See GREG BERMAN & JOHN FEINBLATT, CENTER FOR COURT INNOVATION, JUDGES AND PROBLEM-SOLVING COURTS (2002), available at http://www.courtinnovation.org/pdf/judges_problem_solving_courts.pdf.

⁵⁷ See, e.g., JOHN FEINBLATT ET AL., CENTER FOR COURT INNOVATION, NEIGHBORHOOD JUSTICE: LESSONS FROM THE MIDTOWN COMMUNITY COURT 10 (1998), available at http://www.courtinnovation.org/pdf/neigh_just.pdf (listing net widening as a potential concern); Doolan, *supra* note 3, at 569 (noting that defense attorneys and skeptics argue that community justice initiatives place too much emphasis on minor crime).

⁵⁸ See, e.g., Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URBAN L.J. 955, 971–78 (2003) (discussing due process issues raised by current community court practices).

⁵⁹ In New York, for example, community courts were introduced as part of the Republican Guiliani administration's crime control policies, see Thompson, *Courting Disorder*, *supra* note 3, at 84–85, while community prosecution was championed by Eric Holder, the deputy attorney general during the Clinton administration. See ROBERT VICTOR WOLF, CENTER FOR COURT INNOVATION, NEIGHBORHOOD KNOWLEDGE: COMMUNITY PROSECUTION IN WASHINGTON D.C. (2000), available at http://www.communityjustice.org/pdf/neigh_know.pdf.

⁶⁰ The Conference of Chief Justices and the Conference of State Court Administrators recently adopted a resolution approving the growing movement of problem-solving courts. See Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URBAN L.J. 1055, 1064 (2003); see also Berman & Gulick, *supra* note 17, at 1048–49 (stating that a survey of state court judges found that a majority support problem-solving tools).

⁶¹ See, e.g., Bradford C. Mank, *Rewarding Defendant Cooperation Under the Federal Sentencing Guidelines: Judges vs. Prosecutors*, 26 CRIM. L. BULL. 399, 403–04 (1990) (listing problems arising from increasing prosecutorial discretion as a result of the guidelines).

⁶² See Thompson, *It Takes a Community*, *supra* note 3, at 328.

munity prosecution offers the possibility of permitting local citizens to influence law enforcement and charging decisions traditionally left to the prosecutor's discretion.

A wide array of initiatives and policies fall under the rubric of community prosecution.⁶³ The basic principle is partnership between prosecutor and community, created by soliciting information and advice from citizens in formulating prosecution strategies.⁶⁴ The first question is how to solicit this advice: Who is asked to participate, and how? Prosecutors, generally working in a small target area like a neighborhood,⁶⁵ have used a variety of methods, including appointing a community advisory board, attending local public meetings and events, staffing a storefront office in the neighborhood for walk-in complaints and feedback, and setting up door-to-door surveys and focus groups.⁶⁶

The next issue is more substantive: What use will the prosecutor's office make of community involvement in the process? The most common example of community participation involves soliciting assistance from citizens in identifying community problems and setting law enforcement priorities. This may be done in a relatively informal and unstructured way. For example, prosecutors meet with community leaders and hold open public meetings where residents and storeowners can express their views.⁶⁷

⁶³ See, e.g., Thompson, *It Takes a Community*, *supra* note 3, at 354 ("A wide range of programs . . . lay claim to the name 'community prosecution.'"); Doolan, *supra* note 3, at 560 (stating that community prosecution strategies vary depending on the needs of the target community).

⁶⁴ AMERICAN PROSECUTORS RESEARCH INSTITUTE, COMMUNITY PROSECUTION IMPLEMENTATION MANUAL 1 (1995), available at <http://www.ndaa-apri.org/pdf/Manual.pdf> (defining community prosecution as involving, among other things, a partnership between the prosecutor's office and the community).

⁶⁵ See Thompson, *It Takes a Community*, *supra* note 3, at 357 (noting that creation of a separate unit is the favored model for medium and large urban offices). A few offices assign all their prosecutors by neighborhoods, though even these programs select small target areas in which to concentrate their community prosecution efforts. See *id.* at 356.

⁶⁶ See, e.g., *id.* at 346 (discussing the setting up of prosecutor's offices in storefronts, police precincts, or housing projects to facilitate communication with citizens and complaint processing); ROBERT VICTOR WOLF, CENTER FOR COURT INNOVATION, BUILDING PARTNERSHIPS: COMMUNITY PROSECUTION IN INDIANAPOLIS, INDIANA 3 (2000) available at <http://www.communityjustice.org/pdf/indianapolis.pdf> [hereinafter WOLF, COMMUNITY PROSECUTION IN INDIANAPOLIS] (attending neighborhood meetings); ROBERT VICTOR WOLF, CENTER FOR COURT INNOVATION, FORGING COMMUNITY LINKS: COMMUNITY PROSECUTION IN DENVER, COLORADO 2, 4, 7 (2000), available at <http://www.communityjustice.org/pdf/denver.pdf> [hereinafter WOLF, COMMUNITY PROSECUTION IN DENVER] (holding public meetings; creating a community justice council; performing a door-to-door survey); ROBERT VICTOR WOLF, CENTER FOR COURT INNOVATION, PROBLEM-SOLVING PROSECUTORS: COMMUNITY PROSECUTION IN PORTLAND, OREGON 2 (2000), available at <http://www.communityjustice.org/pdf/portland.pdf> [hereinafter WOLF, COMMUNITY PROSECUTION IN PORTLAND] (meeting with community leaders).

⁶⁷ See WOLF & WORRALL, *supra* note 26, at 17–18 (describing regular neighborhood public meetings in Atlanta where residents can express their concerns to government representatives, including community prosecutors); *id.* at 30 (noting how the Kalamazoo community prosecutor attended community meetings and surveyed residents); *id.* at 53 (discussing regular meetings of the Portland community prosecutor with community stakeholders).

However, some programs are more formal and create a body of community representatives, usually appointed by the prosecutor, which meets regularly to make recommendations regarding law enforcement priorities.⁶⁸

While the impact of even formalized general input is hard to measure, some initiatives have focused on particular problems, and in doing so have produced tangible results. For example, in Dane County, Wisconsin, prosecutors set up a community advisory board to create charging recommendations in statutory rape cases.⁶⁹ After a series of facilitated meetings where a number of case scenarios were discussed, the board produced a document with general guidelines for prosecutors regarding the age difference between the victim and defendant necessary to warrant criminal statutory rape charges, potential mitigating and aggravating factors, and possible outcomes for defendants under twenty-one years of age.⁷⁰

In many cases, community input to prosecutors takes the form of identifying particular individuals who may be involved in illegal activity, or specific “nuisance properties” that residents believe to be centers of drug dealing, prostitution, and other quality of life offenses.⁷¹ There is nothing unusual about citizens filing complaints regarding particular individuals and specific apartments, houses, and businesses. What is new under the community prosecution paradigm is the prosecutors’ response to such complaints. Rather than simply investigating and seeking criminal charges for the alleged criminal activity, community prosecutors may target the individual or property for enforcement of civil offenses unrelated to the activity behind the complaint, such as zoning, health, and safety code violations.⁷² Prosecutors may also use unorthodox methods against individuals, such as restraining orders or civil injunctions, to keep them away from problem areas.⁷³

⁶⁸ See, e.g., WOLF, COMMUNITY PROSECUTION IN AUSTIN, *supra* note 16, at 2; WOLF, COMMUNITY PROSECUTION IN DENVER, *supra* note 66, at 4. In the Denver, Colorado community prosecution program, for instance, Community Justice Council members vote at each monthly meeting to determine the most pressing neighborhood problems. See *id.* at 5.

⁶⁹ See Nowack, *supra* note 3, at 886–90.

⁷⁰ See *id.* at 888–89.

⁷¹ See, e.g., WOLF, COMMUNITY PROSECUTION IN INDIANAPOLIS, *supra* note 66, at 4–5.

⁷² See, e.g., *id.* (describing the targeted use of civil inspections against nuisance properties). Of course, community prosecution offices also pursue traditional law enforcement methods, such as stings, in response to complaints. Community prosecution programs sometimes encourage citizens to assist in building a case against the problem individual or property by, for example, generating a “citizen driven search warrant.” See Barbara Boland, *Community Prosecution: Portland’s Experience*, in COMMUNITY JUSTICE: AN EMERGING FIELD 253, 271–72 (David R. Karp ed., 1998).

⁷³ See, e.g., WOLF, COMMUNITY PROSECUTION IN AUSTIN, *supra* note 16, at 2–3 (civil anti-gang injunction); WOLF, COMMUNITY PROSECUTION IN PORTLAND, *supra* note 66, at 4–5 (ordinance creating a drug-free zone whereby someone arrested for a drug offense within the zone can be excluded from the zone for ninety days and arrested for criminal trespass if he violates the notice of exclusion); Kurki, *supra* note 40, at 257 (restraining orders preventing individuals from entering certain areas or housing developments) (internal citations omitted); see also Gansler, *supra* note 3, at 32 (discussing revocation of individual’s bond status to remove him from the community).

Community prosecutors also involve citizens in the selection of law enforcement methods.⁷⁴ Not surprisingly, popular participation in law enforcement often results in controversial, non-traditional strategies. Thus far, community prosecution programs have led to curfew and loitering ordinances,⁷⁵ anti-gang civil injunctions,⁷⁶ and the creation of drug-free zones from which convicted drug dealers may be excluded.⁷⁷

Even in cases where community input is confined to identifying some problem of particular concern, prosecutors (perhaps empowered by a perceived mandate from the community) often deploy unorthodox methods on their own initiative to attack the problem. Several examples of these strategies have already been mentioned, such as the use of curfews, loitering ordinances, restraining orders, civil injunctions, and health and safety code and zoning enforcement.⁷⁸ Other measures include using auto forfeiture against men who patronize prostitutes,⁷⁹ asking motel owners to sign an agreement to require photo identification of all guests,⁸⁰ or training landlords to spot signs of illegal activity, evict problem tenants, and share the names of those tenants with other landlords in the area.⁸¹ The aim of all these measures is to permanently eliminate chronic, low-intensity crime where traditional law enforcement methods have failed. It is often easier, for example, to close a crack house through civil health and safety code enforcement than by staging undercover buys and prosecuting the dealer.⁸²

Supporters characterize community prosecution's unusual methods as examples of innovative approaches to crime. The community prosecution movement has spread rapidly in the past decade; while there were fewer than ten community prosecution programs in 1995, a 2000 survey conducted by the American Prosecutors Research Institute reported that nearly half of

⁷⁴ In Portland, for example, citizens in a neighborhood beset by drug crime drafted a "rescue plan" recommending greater police visibility, major police sweeps to enforce the juvenile curfew, and police visits to crack houses. See Boland, *supra* note 72, at 258.

⁷⁵ See, e.g., *id.* (juvenile curfew). For a discussion of the theory behind how curfew and loitering ordinances prevent crime, see Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 819-22 (1998).

⁷⁶ See WOLF, COMMUNITY PROSECUTION IN AUSTIN, *supra* note 16, at 2-3.

⁷⁷ See WOLF, COMMUNITY PROSECUTION IN PORTLAND, *supra* note 66, at 4-5. In theory, a local community could request even more extreme methods, such as drug testing and identification cards, see CLEAR & KARP, *supra* note 34, at 33, though these strategies would likely face stiff legal challenges. In fact, the controversial methods that have been attempted and even successfully implemented, such as Austin's civil anti-gang injunction, have generated such legal opposition that some leaders in the community prosecution movement have come to view these methods as not worth the cost and effort. See WOLF, COMMUNITY PROSECUTION IN AUSTIN, *supra* note 16, at 5.

⁷⁸ See *supra* notes 69-73 and accompanying text.

⁷⁹ See AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 64, at 55.

⁸⁰ See WOLF, COMMUNITY PROSECUTION IN PORTLAND, *supra* note 66, at 5-6.

⁸¹ See WOLF, COMMUNITY PROSECUTION IN AUSTIN, *supra* note 16, at 3 (sharing names of evicted tenants); Kurki, *supra* note 40, at 256 (training landlords and property managers).

⁸² See WOLF, COMMUNITY PROSECUTION IN INDIANAPOLIS, *supra* note 66, at 4 ("[R]epeated arrests of people for drug dealing or the execution of search warrants may have minimal impact on the activity in a drug house.").

all prosecutors' offices practice some form of community prosecution.⁸³ But as I discuss in more detail below,⁸⁴ critics have pointed out that some community prosecution tactics raise serious due process and fairness concerns.

C. Community Courts

The community court is the best known and most fully developed community justice initiative. These courts mark a return to individualized sentencing and rehabilitative approaches driven by expert social services personnel, with, in many cases, two new twists: a non-adversarial court procedure, and an emphasis on community service projects to restore the community. The irony is that these approaches have been deployed largely against activities that were not previously targeted for any significant sanction.

Community courts typically serve a neighborhood, though some operate over a wider area.⁸⁵ Quality of life offenses and criminal misdemeanors, such as low-level property crime and first time drug possession, account for most of the community courts' business.⁸⁶ Current community courts aim to replace the revolving door created by giving low-level offenders sentences of "time served" with alternative sanctions that both compensate the victimized community and attempt to help the offender address the problems that led him or her to offend.⁸⁷

In the typical community court, only defendants who plead guilty or enter a conditional plea of guilty remain within the court's jurisdiction.⁸⁸ One or more public defenders are assigned full-time to the community

⁸³ WOLF & WORRALL, *supra* note 26, at xi (citing M. Elaine Nugent & Gerard A. Rainville, *The State of Community Prosecution: Results of a National Survey*, THE PROSECUTOR, Mar./Apr. 2001); *see also* sources cited *supra* note 28.

⁸⁴ *See infra* Part III.B.

⁸⁵ *See* Johnstone, *supra* note 3, at 144 (noting that most community courts have jurisdiction over a subsection of the city, though some, such as the Hartford court, serve the entire city).

⁸⁶ *See id.* at 124. Some courts also attempt to take a holistic view of community problems by addressing related legal issues that would ordinarily be treated in different court sections—such as housing, custody, and domestic violence matters—in the same court. Fagan & Malkin, *supra* note 3, at 898. None of the community courts that have been extensively studied—the courts of Midtown Manhattan, Hartford, and Red Hook, Brooklyn—have attempted to combine criminal cases with related legal matters in a single hearing, though the Red Hook court does hear housing and family cases as well as criminal matters. *Id.* at 919 (describing the Red Hook court's jurisdiction).

⁸⁷ *See, e.g.*, MICHELE SVIDIROFF ET AL., CENTER FOR COURT INNOVATION, DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 2 (2001), available at http://www.courtinnovation.org/pdf/disp_just_loc.pdf (describing the objectives of the Midtown Community Court).

⁸⁸ Those who wish to challenge the charges are generally sent to the ordinary court system for trial. *See, e.g.*, Chase, *supra* note 31, at 41 (noting that the Midtown Community Court retains jurisdiction only over those pleading guilty). Some courts hold a small number of trials. *See, e.g.*, Johnstone, *supra* note 3, at 131 n.23 (noting that the Hartford court has held a small number of trials).

court.⁸⁹ Like drug courts, community courts tend to be less adversarial than ordinary courts, as the judge, prosecutor, public defender, and social services personnel work as a team to arrange for treatment and social services for the offender.⁹⁰ Programs range from drug treatment and prostitution protocols that require significant time in custody to walk-in youth programs, GED classes, job training, and counseling groups.⁹¹ Some offenders are required to participate in particular programs as part of their plea conditions or sentence, while others are urged to make use of these services on a voluntary basis.⁹² Court social workers also routinely use the opportunity to assist the offender in signing up for any benefits for which he may be eligible, such as welfare or public housing.⁹³

In addition to participation in treatment or other programs, the community court judge may sentence the offender to a short jail term and usually will impose a sentence of community service.⁹⁴ In keeping with the desire to foster citizen participation and to restore the community that is victimized by quality of life offenses, community service takes the form of local projects suggested by citizen groups.⁹⁵ Offenders may be dispatched, for example, to remove graffiti or to beautify a public park.⁹⁶ The local community may also play a part in the sanctioning process by participating in community impact panels.⁹⁷ In these panels, a quality of life offender, for example a “john”⁹⁸ or an individual guilty of public urination, is re-

⁸⁹ See, e.g., Johnstone, *supra* note 3, at 128 (describing the procedure in Hartford).

⁹⁰ See, e.g., Chase, *supra* note 31, at 41 (noting that social services at the Midtown court include short- and long-term substance abuse programs, housing and health care assistance, English as a Second Language and GED classes, and job training); Lane, *supra* note 58, at 960 (observing that community courts rely on a “collaborative approach”); Thompson, *Courting Disorder*, *supra* note 3, at 87 (“[T]he community court model utilizes a non-adversarial approach.”).

⁹¹ See, e.g., Fagan & Malkin, *supra* note 3, at 920–21 (observing that services at Red Hook include a GED class, a youth court, a mentoring program, job training, and counseling groups); Johnstone, *supra* note 3, at 136–39 (describing a prostitution protocol that often requires thirty to forty-five days in custody, a counseling program for “Johns,” and various youth programs at the Hartford court). The Midtown court has avoided requiring long-term custodial treatment programs that are disproportionate to low-level crimes and first-time drug offenses by developing short-term interventions, such as four-day “treatment readiness” groups. JOHN FEINBLATT & GREG BERMAN, CENTER FOR COURT INNOVATION, COMMUNITY COURT PRINCIPLES: A GUIDE FOR PLANNERS 9 (2000), available at http://www.courtinnovation.org/pdf/com_court_pncpls.pdf.

⁹² See Johnstone, *supra* note 3, at 134.

⁹³ See *id.*

⁹⁴ See, e.g., Chase, *supra* note 31, at 41 (Midtown court); Johnstone, *supra* note 3, at 134–35 (Hartford).

⁹⁵ See, e.g., Chase, *supra* note 31, at 41 (Midtown court); Johnstone, *supra* note 3, at 135 (Hartford).

⁹⁶ See, e.g., Chase, *supra* note 31, at 41 (Midtown court); Johnstone, *supra* note 3, at 135 (Hartford).

⁹⁷ See ROBIN CAMPBELL, CENTER FOR COURT INNOVATION, “THERE ARE NO VICTIMLESS CRIMES”: COMMUNITY IMPACT PANELS AT THE MIDTOWN COMMUNITY COURT (2000), available at http://www.courtinnovation.org/pdf/no_vic_crime.pdf.

⁹⁸ A “john” is a man who patronizes prostitutes.

quired to listen to members of the community describe the negative impact these actions have on the community.

In essence, the community court is a gateway to a variety of treatment and services. Many of these services, such as job training, youth programs, and counseling, are available not only to offenders but also to the community at large.⁹⁹ At least one court has a street outreach unit, which sends teams out on the streets to encourage the homeless, prostitutes, and possible drug abusers to participate voluntarily in programs at the court.¹⁰⁰ These programs are intended both to prevent crime by addressing its underlying causes and to help the court system regain respect and legitimacy among local citizens.

D. Restorative Justice Practices as Community Justice

Restorative justice is a reform movement that emphasizes restitution and rehabilitation over punishment and mandates that all those affected by the crime (the victim, offender, and in some cases a group that is supposed to speak for the relevant community) should collectively determine the sanction. Two practices generally associated with the restorative justice movement—sentencing circles and citizen reparative boards—are also forms of community justice, but I begin by discussing the restorative justice movement and its relation to community justice.

1. Restorative Justice and Community Justice

The restorative justice movement began in the United States in the late 1970s and 1980s. It grew out of a concern over the neglect of victims and what was perceived to be a counterproductive, punitive approach toward offenders in the criminal system.¹⁰¹ It is best known for its original, and still most widely used, practice: victim-offender mediation (“VOM”).¹⁰²

⁹⁹ See, e.g., Chase, *supra* note 31, at 41 (describing the Midtown court’s community outreach program); Fagan & Malkin, *supra* note 3, at 925 (noting that Red Hook services are available to neighborhood residents as well as offenders).

¹⁰⁰ See Johnstone, *supra* note 3, at 146–47 (describing the Manhattan Midtown Community Court’s street outreach program).

¹⁰¹ See, e.g., Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 58.

¹⁰² In VOM, the mediator, generally a trained volunteer, conducts a mediation session with both the victim and the offender in an attempt to create a restitution agreement. See William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior*, 1 UTAH L. REV. 137, 137–38 (2003). There are currently over 300 victim-offender programs in operation in the United States. Kurki, *supra* note 40, at 268. In the United States, most VOM programs are limited to juvenile and low-level non-violent offenses, though VOM is used for violent crimes committed by adults in some countries such as Germany and Austria. See *id.* A more recent restorative justice practice used in juvenile cases, the family group conference, includes not only victims and offenders, but also their relatives and supporters, in the sanctioning process. See Bazemore & Griffiths, *supra* note 3, at 31. Introduced in New Zealand in 1989, family

Most restorative justice advocates share the central precept that criminal adjudication should permit all those affected by a crime to collectively decide how to respond.¹⁰³

Although under this core definition any sanction supported by the stakeholders is valid, many advocates view restorative justice as encompassing a set of moral and substantive principles as well. Some view acceptance of responsibility, remorse, atonement, making amends, moral learning, forgiveness, and reconciliation as primary objectives of restorative justice.¹⁰⁴ For many scholars, restorative justice implies a rejection of punitive and retributive responses to crime.¹⁰⁵ It aims to replace incarceration with more humane (and, it is hoped, more effective)¹⁰⁶ approaches that focus on reintegrating the offender and compensating victims through financial restitution, apology, and other forms of symbolic reparations.¹⁰⁷

The terms “community justice” and “restorative justice” are sometimes treated as synonyms in the scholarly literature.¹⁰⁸ There are, however, important differences between the two movements. The core community justice principle is that there should be more local, lay participation in crime control; the core restorative justice principle is decision-making by parties with a stake in the offense, principally the victim and the offender. Thus, community justice initiatives can be characterized as fully implementing restorative justice only when they permit victims and

group conferencing is currently used in a handful of American cities. *Id.* at 27.

¹⁰³ See, e.g., John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUSTICE 1, 5–6 (1999) [hereinafter Braithwaite, *Restorative Justice*] (discussing the “shared core meaning of restorative justice”); see also John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999) (“[R]estorative justice is a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.”); David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 319–20; Erik Luna, *Introduction: The Restorative Justice Conference*, 2003 UTAH L. REV. 1, 3–4.

¹⁰⁴ See, e.g., Braithwaite, *Restorative Justice*, *supra* note 103, at 6; Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 303–04 (arguing that atonement is required to restore the victim); Luna, *supra* note 103, at 3.

¹⁰⁵ See Garvey, *supra* note 104, at 303 (noting that proponents view restorative justice as an alternative to retributive justice); Robinson, *supra* note 16, at 375 (noting the difference between restorative justice processes and the broader anti-retributivist agenda of many restorative justice proponents); cf. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205 (arguing for a procedural conception of restorative justice that permits various sanctioning theories in resolving particular cases). For some advocates, the rejection of retribution and emphasis on reconciliation and forgiveness is grounded in religious teachings. See Brown, *supra* note 49, at 1259–60 (discussing the Christian roots of victim-offender mediation); Kurki, *supra* note 40, at 264–65.

¹⁰⁶ See Olson & Dzur, *supra* note 101, at 58 (stating that “proponents of restorative justice are likely to believe that putting offenders in jails and prisons reinforces, more than deters, criminality”).

¹⁰⁷ See Luna, *supra* note 103, at 3–4.

¹⁰⁸ See Kurki, *supra* note 40, at 235–36 (noting that conceptions of restorative and community justice are sometimes used interchangeably).

offenders to participate in the sanctioning process. Conversely, restorative justice practices constitute a form of community justice only when the stakeholders affected by the crime are defined broadly enough to include the community at large. Restorative justice institutions have increasingly incorporated community participation into their sentencing processes on just this basis,¹⁰⁹ making it appropriate to consider these institutions under the community justice umbrella.

2. *Sentencing Circles*

Sentencing circles were adapted from traditional Native American dispute resolution methods for use in the Yukon Territory in the early 1980s.¹¹⁰ In the mid-1990s, Minnesota began using circle sentencing for minor, non-violent offenses in several locations, ranging from rural white communities to inner-city African American neighborhoods.¹¹¹ At least one other city, Austin, Texas, has recently experimented with forms of circle sentencing.¹¹²

A typical sentencing circle process starts with a judge referring an offender who has pleaded guilty to a crime. Generally only low-level, non-violent offenders who evince a willingness to reform their behavior are accepted into the program.¹¹³ Prior to convening a circle, both the offender and victim meet separately with members of the committee to begin discussing a plan for restitution and to form a support group of family members, friends, and neighbors.¹¹⁴ Each support group holds at least one private “healing circle” to permit the victim and offender to tell their stories in a supportive environment and to prepare them to participate constructively and effectively in the sentencing circle.¹¹⁵

The sentencing circle includes the victim, the offender, their respective supporters, community service providers, and members of the public.¹¹⁶ The judge, prosecutor, and defense counsel may also participate.¹¹⁷ The circle is moderated by a “circle keeper,” who may be the judge, a crimi-

¹⁰⁹ See *id.* at 239 (noting that restorative justice has evolved from predominantly victim-focused mediation to processes that involve families, friends, supporters, and local community members).

¹¹⁰ *Id.* at 281.

¹¹¹ *Id.*

¹¹² See, e.g., WOLF, COMMUNITY PROSECUTION IN AUSTIN, *supra* note 16, at 3–4 (stating that Austin, Texas is experimenting with sentencing circles).

¹¹³ See Smith, *supra* note 3, at 349–50; Bazemore & Griffiths, *supra* note 3, at 32; Ulrich, *supra* note 30, at 439–40; see also Kurki, *supra* note 40, at 282 (noting that eligibility for sentencing circles in the United States is typically restricted to minor crimes, often excluding violent and sexual crimes).

¹¹⁴ See Ulrich, *supra* note 30, at 440.

¹¹⁵ See *id.*

¹¹⁶ See Kurki, *supra* note 40, at 280–81.

¹¹⁷ *Id.*

nal justice professional, or a community elder.¹¹⁸ Each participant seated around the circle then speaks in turn when a feather or “talking stick” is passed to him or her.¹¹⁹ Participants are encouraged to discuss their reaction to the crime and to suggest possible solutions. The members of the circle attempt to reach consensus on a reparative and rehabilitative plan, a process that can take several hours and multiple meetings. Reparative agreements typically emphasize alternative sanctions such as community service, restitution, apology, treatment, and education.¹²⁰ If the judge does not participate in the circle, she must approve the sentence.¹²¹ If the participants, including the victim and offender, cannot agree on a plan, or if the offender fails to fulfill the requirements established by the circle, the case may be returned to the court for a traditional sentencing hearing.¹²²

3. Citizen Reparative Boards

The citizen reparative board is a relatively new form of community restorative justice. A reparative board is a panel that meets with minor offenders and sets out probation terms designed to accomplish various reparative and rehabilitative goals. Panels are comprised at least partially of local citizens who may have received some training but who are otherwise laypeople. The best-known citizen reparative board program was established statewide in Vermont in 1995.¹²³ A few individual cities have also started similar initiatives.¹²⁴

The process often starts with a referral from a judge once guilt has been determined;¹²⁵ typically only non-violent offenders are eligible.¹²⁶ An information packet is prepared for the reparative board based on interviews with the offender; this includes information about the offense, the offender’s history, and, in some programs, recommendations for particular treatment and educational programs.¹²⁷ A typical board consists of five or six trained community members, a staff coordinator, and, in some cases, the

¹¹⁸ See Ulrich, *supra* note 30, at 433 n.63.

¹¹⁹ Bazemore & Griffiths, *supra* note 3, at 26–27.

¹²⁰ Kurki, *supra* note 40, at 282.

¹²¹ See Ulrich, *supra* note 30, at 440.

¹²² See Bazemore & Griffiths, *supra* note 3, at 33.

¹²³ See, e.g., Bazemore & Griffiths, *supra* note 3, at 31 (describing the program); Olson & Dzur, *supra* note 101, at 65–68 (also describing the program).

¹²⁴ See, e.g., Christina L. Anderson, *Double Jeopardy: The Modern Dilemma for Juvenile Justice*, 152 U. PA. L. REV. 1181, 1205 n.130 (2004) (Philadelphia); Olson & Dzur, *supra* note 101, at 68–71 (describing the pilot program in Salt Lake City).

¹²⁵ Alternatively, the prosecutor and defense attorney may agree to a plea in abeyance pending completion of the program.

¹²⁶ See Olson & Dzur, *supra* note 101, at 66. If the offender refuses to participate in the program, the judge sets the probation conditions. *Id.* at 68.

¹²⁷ See *id.* at 68–69 (stating that in the Vermont program, only basic information about the offender’s history is conveyed, while in Salt Lake the offender interview is more extensive).

prosecutor and public defender.¹²⁸ At the meeting, the board discusses the crime and the harm it has caused with the offender and draws up a list of reparative and rehabilitative probation requirements, which often include community service, restitution, apology, and panel discussions with crime victims. If the victim is present at the board meeting, he or she may participate in the discussion but not in the determination of the sanction.¹²⁹ The initial meeting typically lasts less than an hour; additional meetings are often held to ensure compliance with the probation conditions and to congratulate and reintegrate offenders who have successfully completed the program.¹³⁰

It is difficult to evaluate the new community justice initiatives. It is impossible to say from the limited empirical studies available how effective these programs are at reducing crime and recidivism rates. Preliminary studies of the Midtown Manhattan community court yielded promising results in reducing quality of life crime, though it is hard to know how much of this improvement should be attributed to other factors such as the general revitalization of the midtown area in this period.¹³¹ Much more research needs to be done to determine whether community prosecution programs reduce crime and whether the use of sentencing circles or reparative boards reduce recidivism rates.¹³²

Assessment of community justice programs is further complicated by the absence of consensus on how to measure success: Improved quality of life and reduced fear of crime in target areas? Enhanced community organization and cohesion? Restorative sentencing outcomes? Reduced crime and recidivism rates? Satisfaction among program participants? A positive perception of the criminal justice system among community members?¹³³ In the next Part, I discuss flaws in current community justice programs that should bar their extension to the mainstream criminal justice system. This critique is not intended to be a comprehensive assessment of the successes and failures of current community justice programs or a statement about the advisability of expanding or reforming these initia-

¹²⁸ See *id.* at 66–67 (describing the Vermont program); *id.* at 69 (describing the Salt Lake program).

¹²⁹ In practice, victims rarely attend reparative board meetings. See Bazemore & Griffiths, *supra* note 3, at 31.

¹³⁰ See Olson & Dzur, *supra* note 101, at 67–68.

¹³¹ See Berman & Gulick, *supra* note 17, at 1038–41.

¹³² See, e.g., Kurki, *supra* note 40, at 282 (noting the absence of research on circles); see also Smith, *supra* note 3, at 365 (describing a circle sentencing program with lower recidivism rates than the typical rate). I am not aware of an empirical study of community prosecution programs' impact on crime rates. In any case, it is unclear whether the effectiveness of these programs in dealing with quality of life crimes can tell us anything about how they would fare if expanded to the mainstream system. On the theoretical level, Dorf and Sabel have suggested that the structure of experimentalist institutions such as problem-solving courts encourages continuous improvement through a process of information-pooling and self-correction. Dorf & Sabel, *supra* note 35, at 833–35.

¹³³ See Berman & Gulick, *supra* note 17, at 1037 (noting the difficulty of evaluating community court programs and listing possible metrics of success).

tives within the domain of minor crime. I am primarily concerned with the particular question of whether these programs can be scaled up for use in ordinary criminal cases.

III. CONCERNS ABOUT SCALING UP COMMUNITY JUSTICE PRACTICES

Should we expand any of the community justice practices I have just described to the mainstream criminal justice system? The short answer is no. Current community justice programs have structural and procedural flaws that prevent participation by a truly representative group of citizens and that raise serious due process concerns. As noted above, I do not offer a general evaluation of current community justice programs. Rather, I discuss potential obstacles to applying these programs to the entire criminal docket; many of the due process concerns discussed in this Part, for example, become much more disturbing in serious cases where the defendant faces severe penalties. Moreover, I focus on the failure of community justice programs to foster meaningful popular participation because I consider local popular decision-making to be the core community justice principle. But there are many strands to community justice, and for those who consider the primary goal to be promoting restorative sentencing outcomes, or simply reducing crime and fear of crime, this critique carries much less force.

A. *The Participation Problem*

Current community justice practices share a common defect: they rely on groups of volunteers that are often not representative of the community and that are prone to being dominated by a vocal and active minority. Yet community courts also suffer from the opposite problem: they tend to be expert-driven, with little opportunity for meaningful popular decision-making. As a result, community justice programs fail to achieve their aim of fostering widespread and meaningful citizen participation in law enforcement decisions.

Evidence of the “volunteer problem” comes from community policing initiatives, which use many of the same strategies to generate citizen participation as community prosecution and community courts. Studies of community policing suggest that it is difficult to generate and maintain interest and participation in crime prevention programs;¹³⁴ that attendance at meetings rarely exceeds a very small fraction of the resident pool;¹³⁵ that a

¹³⁴ See, e.g., Susan F. Bennett, *Community Organizations and Crime*, in COMMUNITY JUSTICE: AN EMERGING FIELD 31, 32 (David R. Karp ed., 1998); Randolph M. Grinc, “*Angels in Marble*”: *Problems Stimulating Community Involvement in Community Policing*, in COMMUNITY JUSTICE: AN EMERGING FIELD 167, 179 (David R. Karp ed., 1998); Kurki, *supra* note 40, at 253.

¹³⁵ See Michael E. Buerger, *A Tale of Two Targets: Limitations of Community Anti-*

small core group of community activists tend to be most active and vocal, leaving many individuals and interests underrepresented,¹³⁶ and that both nominal and active membership is dominated by homeowners and white residents in mixed areas.¹³⁷

Although community justice programs have not yet been extensively studied, there is every indication that these initiatives suffer similar defects. Like community policing, community prosecution and community court programs rely heavily on public meetings and volunteer community advisory boards that may be dominated by a small group of local activists who do not necessarily represent the views of the entire community.¹³⁸ This problem may be particularly acute in quality of life campaigns, which are often initiated and supported by local business owners keen on cleaning up the streets and making the neighborhood more inviting for customers.¹³⁹ For example, Portland's community prosecution program was launched by business leaders hoping to eliminate quality of life crimes in the downtown commercial center. The business group also paid the neighborhood district attorney's salary.¹⁴⁰ In addition, a study of the community court in Red Hook, Brooklyn, found that small groups of active, well-organized landlords, businesses, and wealthier residents repeatedly threatened to monopolize the court's limited resources for projects that would provide little benefit for the majority of the community.¹⁴¹

Ensuring widespread community participation may be particularly challenging for circle sentencing and reparative board programs. Because these programs give participants direct control over sanctioning offenders, it is crucial that the circles and boards be representative of the local community. Yet these programs (some of which were invented in highly atypical tight-knit communities such as Native American tribes) require a significant

crime Actions, in COMMUNITY JUSTICE: AN EMERGING FIELD 137, 137 (David R. Karp ed., 1998).

¹³⁶ See Grinc, *supra* note 134, at 197.

¹³⁷ See Buerger, *supra* note 135, at 137; Kurki, *supra* note 40, at 253. *But see* ARCHON FUNG, STREET LEVEL DEMOCRACY: PRAGMATIC POPULAR SOVEREIGNTY IN CHICAGO SCHOOLS AND POLICING 30–50 (1999) (finding that the community policing initiative in Chicago was largely successful in generating meaningful participation from the poor and minorities).

¹³⁸ See, e.g., Fagan & Malkin, *supra* note 3, at 943–47 (describing the difficulties faced by the Red Hook Community Justice Center in ensuring that all segments of the community were represented at public meetings); Johnstone, *supra* note 3, at 148; see also Symposium, *Alternative Approaches to Problem Solving*, 29 FORDHAM URB. L.J. 1981, 1990 (2002) (describing how the Hennepin County court “did not try to have a complete representative model” in selecting citizens for the advisory board).

¹³⁹ See John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts, and Community Compassion*, 44 ST. LOUIS U. L.J. 811, 814 (2000); Thompson, *Courting Disorder*, *supra* note 3, at 89–90 (describing how storeowners and other business interests provided the impetus for the midtown Manhattan and downtown Atlanta community courts).

¹⁴⁰ WOLF, COMMUNITY PROSECUTION IN PORTLAND, *supra* note 66, at 2.

¹⁴¹ See Fagan & Malkin, *supra* note 3, at 943–47.

and ongoing time commitment¹⁴² and encourage circle and board members to speak at hearings. These requirements may deter ordinary citizens from volunteering and attract only activists and the fortunate few with spare time for extensive volunteer activity. For example, when the Salt Lake reparative board program was created, there was such a poor volunteer response that the initial board members were chosen largely through personal contacts of the prosecutor.¹⁴³ The Vermont system faces related problems; for example, board members tend to be older and better-educated than average.¹⁴⁴ Susan Olson and Albert Dzur have pointed out that in recent years an additional problem has surfaced in the Vermont reparative board program. Citizen board members have begun to manifest signs of professionalization by holding annual conferences, setting up e-mail networks, and requesting recognition as paid officers.¹⁴⁵ Rather than providing a mechanism for popular participation in the criminal justice process, there is a danger that circle sentencing and reparative board programs will result in transferring sanctioning power to unrepresentative, unelected individuals, effectively creating “mini-judges” who have no specialized training or educational background for the job.

There is also the problem of over-reliance on experts. Of the current community justice initiatives, community court programs are most afflicted by this problem and offer the least in the way of popular participation. This is not only due to the practical difficulties of generating citizen involvement, but also because the emphasis on the role of the judge and expert social service personnel in the community court model leaves fewer opportunities for popular decision-making. One possible explanation is that citizen participation in the community court judicial process is constrained by design. Although there are advisory boards and community meetings, their activities are typically limited to suggesting community service projects for offenders and identifying problems that the police department or the community service arm of the court should address.¹⁴⁶ Once an offender is

¹⁴² At the opening of a circle, participants make a commitment to remain a part of the circle until it has completed its work, which may mean multiple meetings to reach consensus and further follow-up meetings. See Smith, *supra* note 3, at 348. Reparative board members in Vermont must receive training and attend multiple meetings for each case. *Id.*

¹⁴³ See *id.* at 83. Vermont recently began an outreach program to diversify the boards, but arguably a group as small as five or six cannot adequately represent the diverse points of view present in most communities. *Id.*

¹⁴⁴ See DAVID KARP ET AL., VERMONT REPARATIVE PROBATION YEAR 2000 OUTCOME EVALUATION FINAL REPORT 35 (2002), available at <http://www.skidmore.edu/~dkarp/Karp%20Vitaefiles/VT%20Reparative%20Evaluation.pdf>.

¹⁴⁵ See Olson & Dzur, *supra* note 101, at 85.

¹⁴⁶ See Berman & Feinblatt, *supra* note 45, at 3 (stating that the community advisory board serves as the court’s “eyes and ears,” pointing out local problems and suggesting community service projects); Fagan & Malkin, *supra* note 3, at 922 (explaining that community participation at the Red Hook Community Justice Center takes the form of identifying local problems or crime and disorder, expressing complaints about neighborhood conditions or services, and suggesting possible community service projects); Johnstone, *supra* note 3, at 149 (noting that in Hartford public participation is principally restricted to

sentenced, citizens may also participate in community impact panels.¹⁴⁷ However, apart from these vague advisory roles, the public has little input (and no direct input) into how the court approaches various types of offenses or disposes of particular cases.

The need to ensure judicial independence and neutrality is one reason for the community's limited influence over the court's operations. Individual cases are not discussed at advisory board or public meetings to avoid the appearance of partiality, and some community court planners have expressed reservations about community court judges attending meetings where neighborhood problems are discussed.¹⁴⁸ In addition, the court's focus on providing treatment and social services based on an expert evaluation of each offender's needs leaves little room for community input into the sentencing process. Although the community court model is billed as a reform that enhances popular participation, in reality the problem-solving judge and expert social service personnel retain control over most aspects of the criminal justice process.

These are the twin defects of current community justice programs: (1) there is a near-total reliance on experts in the sanctioning decision in community courts; and (2) where popular participation is used, as in various community prosecution and sentencing circle programs, the participants are hardly a fair sample of the relevant community.

B. Due Process and Fairness Concerns

Potential due process issues constitute a separate problem. Many community justice initiatives raise due process and fairness concerns that could not be tolerated when dealing with the serious crimes of the mainstream criminal system.

Some of the signature preventive strategies used by the community prosecution movement, such as curfew and loitering ordinances, civil restraining orders, and injunctions, have been met with strong opposition from civil libertarians.¹⁴⁹ Opponents argue that these tactics may violate due process and equal protection guarantees and may unduly burden citizens' rights to travel and associate freely.¹⁵⁰

local groups recommending cleanup sites for community service crews). The community advisory committees of Portland's community courts exercise considerably more power, providing input into personnel decisions at the court, and discussing sentencing guidelines. *See id.*

¹⁴⁷ *See* CAMPBELL, *supra* note 97, *passim*.

¹⁴⁸ *See, e.g.*, Berman & Feinblatt, *supra* note 45, at 11; Lane, *supra* note 58, at 972–77; Thompson, *Courting Disorder*, *supra* note 3, at 93; *see also* Johnstone, *supra* note 3, at 149 (individual cases not discussed at Midtown court advisory board meetings).

¹⁴⁹ For an overview of the case law particularly as applied to gang members, see Kim Strosnider, *Anti-Gang Ordinances after City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101 (2002).

¹⁵⁰ *See id.* at 129–33 (describing legal challenges on the grounds that these tactics vio-

Proponents often respond by pointing to community support for these measures. Tracey Meares and Dan Kahan, for example, argue that because the average inner-city resident is deeply affected by these policies, there is less need for stringent constitutional review to protect the rights of a powerless minority.¹⁵¹ Under this political process theory, courts should not second-guess a community's preferences when that community has internalized the coercive incidence of the policy in question.¹⁵² According to this view, local communities, particularly those that suffer high crime rates and high incarceration rates, should be permitted to shape their own norms and calculate the costs and benefits of extreme preventative measures.¹⁵³ However, this justification carries much less weight in light of doubts, described above, about whether the mechanisms used by community prosecution programs to gather community input are truly representative and whether community prosecution practices truly reflect the community's preferences.

The community prosecution tactic of targeting individuals and particular houses or businesses for civil enforcement and aggressive prosecution in an attempt to drive them from the neighborhood causes particular concern. One example is the Indianapolis initiative bearing the ominous title Targeting Neighborhood Troublemakers ("TNT").¹⁵⁴ Under the program, each district identifies individuals who commit "irritating misdemeanors."¹⁵⁵ When these individuals are arrested for a minor offense, prosecutors pursue higher bail and longer sentences.¹⁵⁶ Community prosecutors in Indianapolis also regularly lead sweeps in which an inspection team that includes representatives from the fire, zoning, health, and animal control departments visits houses that have drawn complaints and combs the property "looking for any violation [it] can find."¹⁵⁷ Ironically, widespread community participation in pointing out "problem" individuals and properties to be targeted may make these tactics more troubling by raising the specter of mob justice.

In the case of community courts, it is the collaborative, non-adversarial format that causes concern. Critics of problem-solving courts of all types,

lated due process, equal protection, and the right of association).

¹⁵¹ See Dan M. Kahan & Tracey L. Meares, *The Coming Crisis in Criminal Procedure*, 86 GEO. L.J. 1153, 1173-77 (1998).

¹⁵² See *id.* at 1173.

¹⁵³ See *id.*; Meares & Kahan, *supra* note 75, at 830-32.

¹⁵⁴ See WOLF, COMMUNITY PROSECUTION IN INDIANAPOLIS, *supra* note 66, at 6.

¹⁵⁵ *Id.* It is not entirely clear what constitutes an "irritating misdemeanor." The Indianapolis community prosecution supervisor states that the program is targeted at "mid-level recidivists . . . 'offenders who don't poke as high up as C felonies to get into Criminal Court, but they commit irritating misdemeanors or D felonies, the kind of things the neighbors notice.'" *Id.*

¹⁵⁶ See *id.*; see also Gansler, *supra* note 3, at 32 (stating that in Montgomery County, Maryland, community prosecutors have tried to remove individuals that "police and community members believe [are] a problem" by seeking to revoke their bond status).

¹⁵⁷ WOLF, COMMUNITY PROSECUTION IN INDIANAPOLIS, *supra* note 66, at 4.

including community courts, argue that the dilution of the adversarial process raises serious due process issues.¹⁵⁸ The public defender's new role as a member of the community court "team" working to provide treatment and services to offenders may lead her to encourage clients to plead guilty without fully investigating the possibilities for excluding the state's evidence or challenging the charges.¹⁵⁹ Defendants typically meet with social services personnel outside the presence of counsel, and may make incriminating statements that affect their sentence.¹⁶⁰ In addition, judicial independence has been called into question by the practice of permitting social service experts to recommend specific sanctions, and, in some cases, to impose requirements on the defendant that are not reviewed or approved by the judge.¹⁶¹ If these procedures are controversial in cases involving quality of life offenses, they should be unacceptable in felony prosecutions where the defendant faces significant sanctions. Moreover, while most defendants can opt out of the community court process simply by pleading not guilty,¹⁶² this choice would not be available if the community court model replaced traditional court procedures throughout the system.

Sentencing circles raise a different set of concerns. The informality and unrestricted discussion that are the hallmarks of circle sentencing procedures carry with them the possibility for abuse. A wide disparity between the ability of the victim and offender to express themselves articulately, passionately, and forcefully may lead the circle to adopt the point of view of one or other of the participants.¹⁶³ Juvenile offenders may be par-

¹⁵⁸ See, e.g., Lane, *supra* note 58, at 960.

¹⁵⁹ See, e.g., Symposium, *Impact of Problem Solving on the Lawyer's Role and Ethics*, 29 *FORDHAM URB. L.J.* 1892, 1917–22 (2002) (discussing the various ethical difficulties for defense lawyers raised by the teamwork approach, including the fact that the emphasis on moving defendants quickly into treatment makes it nearly impossible for a defender to investigate the merits of the case prior to a plea); Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 *AM. CRIM. L. REV.* 1617 (2003) (discussing problems facing defense attorneys in problem-solving contexts). *But see* William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 *AM. CRIM. L. REV.* 1595 (2003) (arguing that defense attorneys can function in a problem-solving court without compromising their ethical principles).

¹⁶⁰ See, e.g., Chase, *supra* note 31, at 42 (describing concerns about the confidentiality of pre-arraignment interviews at the Midtown court).

¹⁶¹ See, e.g., *id.* (Midtown court); Johnstone, *supra* note 3, at 134 (noting that a Hartford community court judge generally does not review or approve program requirements set by social service personnel as part of a conditional guilty plea); *see also* Lane, *supra* note 58, at 973–74 (discussing whether judicial independence is threatened when community court judges discuss research on treatment and sentencing options with social services personnel).

¹⁶² Defendants who do not plead guilty are generally sent to an ordinary court for trial. *See supra* note 88.

¹⁶³ See, e.g., Brown, *supra* note 49, at 1271 (criticizing victim-offender mediation); Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 *STAN. L. REV.* 751, 768 (2000) (discussing power and status differentials in victim-offender mediation); Kurki, *supra* note 40, at 286 (noting concerns about power imbalances in face-to-face meetings, particularly when they involve minorities and young offenders); *see also* Mark S. Umbreit & Robert B. Coates, *Multicultural Implications of*

ticularly susceptible to being dominated by adult participants in a circle; some studies of family group conferencing projects suggest that youths often contribute little to discussion¹⁶⁴ and feel that they have no influence over the outcome.¹⁶⁵ A skilled circle-keeper sensitive to these issues may help encourage a balanced discussion,¹⁶⁶ though the practice of permitting each participant in the circle to speak in turn limits the keeper's ability to influence the flow of conversation.

An objection commonly raised by critics of victim-offender mediation applies to circle sentencing as well: unfairness is likely to result when victims have an effective veto over the sanction.¹⁶⁷ Because individual victims may be more or less willing to participate in restorative processes, and more or less likely to forgive the offenders and accept alternative sanctions as part of a reparative agreement, offenders who commit similar acts may receive widely disparate sanctions. By definition, community justice tolerates inconsistency between cases where it reflects the different law enforcement needs and desires of various local communities.¹⁶⁸ Giving individual victims a veto over sentences, however, may place too much power in their hands and hinder the local community's ability to influence the criminal justice process and solve local problems.

The requirement of consensus in sentencing circles creates other dangers. Participants may pressure victims or offenders to agree to reparative plans against their will.¹⁶⁹ Victims may be pressured to forgive the offender and endorse a lenient plan before they are emotionally ready to do so.¹⁷⁰ Offenders, aware that they will likely face greater penalties in court if the circle fails, may be reluctant to speak freely and feel compelled to accept whatever sanctions their victims propose, including apology and other symbolic reparations they cannot perform sincerely.¹⁷¹ In contrast to the opti-

Restorative Juvenile Justice, FED. PROBATION, Dec. 1999, at 44, 45 (noting that differences in the cultural backgrounds and communication styles of restorative justice participants may lead to miscommunication). Some critics have also argued that racism and other forms of prejudice are more likely to be expressed in informal restorative justice settings than in formal adjudication. See Delgado, *supra*, at 766–67.

¹⁶⁴ See Kurki, *supra* note 40, at 22.

¹⁶⁵ *Id.* (noting that in New Zealand, only 34% of juveniles felt involved in the conferencing process, and only 9% thought they were able to influence outcomes); *id.* at 280 (describing a study in Canberra in which 55.9% of juveniles accused of property crimes thought they had some control over the outcome; 26.5% felt too intimidated to speak).

¹⁶⁶ See Umbreit & Coates, *supra* note 163, at 45 (discussing cross-cultural dynamics of which restorative justice practitioners should be aware when participating in circle sentencing, victim-offender mediation, or family group conferences).

¹⁶⁷ See, e.g., Delgado, *supra* note 163, at 762 (arguing that giving the victim power over sentencing leads to a “lack of proportionality and consistency”).

¹⁶⁸ See *infra* Part IV.A.

¹⁶⁹ See, e.g., Delgado, *supra* note 163, at 762.

¹⁷⁰ See, e.g., Brown, *supra* note 49, at 1274–78 (discussing this problem in the context of VOM); Delgado, *supra* note 163, at 762 (same).

¹⁷¹ See, e.g., Brown, *supra* note 49, at 1268–69 (stating with respect to VOM that offenders may feel coerced to participate and to agree to the victims' demands); Delgado, *supra* note 163, at 760 (noting that offenders are faced with the choice of cooperating in

mistic account of circle sentencing as a forum for victims, offenders, and community members to reach true consensus on a restoration plan through respectful and empathetic discussion, power imbalances among participants may create coercive encounters that offer little benefit to any of them.

IV. USEFUL COMMUNITY JUSTICE PRINCIPLES

I have tried to show that current community justice practices have defects—over-reliance on experts, reliance on non-representative slices of the relevant community, and due process problems—that should bar their expansion to the mainstream criminal system. Nevertheless, the community justice movement offers principles that might improve the criminal justice process. Given the enduring legitimacy crisis afflicting mainstream criminal administration, what positive aspects of the community justice movement can help reform the main system?

The overwhelming conceptual advantage of community justice is its emphasis on localized, popular decision-making, even if the current implementation of this principle is flawed, as described above. Involving local laypeople in charging and sentencing decisions would make the decisions more reflective of public sentiment, reverse the current trend toward ever-harsher policies, and alleviate the legitimacy crisis plaguing the system. In this Part, I discuss the virtues of localized, popular decision-making in the abstract; in the next Part, I suggest ways to implement this approach that would avoid the participation and due process problems of current community justice practices. I also argue that the second major tenet of the community justice movement—the preference for restoration over punishment—should not be grafted onto the mainstream system because it reflects one particular view of punishment that is incompatible with popular decision-making.

A. *The Virtues of Localized, Popular Decision-Making*

The major innovation of community justice is that it allows each local community to generate its own criminal justice policies through widespread citizen involvement. If this localized, popular decision-making model were successfully adopted throughout the criminal system, charging and sentencing decisions would more accurately reflect public sentiment and would enhance the public's respect for the criminal justice system, particularly in high-crime communities.

The notion of direct popular involvement in local criminal justice decisions is promising because current law enforcement and sentencing poli-

VOM or going to jail); cf. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004) (defending the usefulness of remorse and apology in the criminal law).

cies distort the public sentiment they claim to represent. Social science research suggests that the trend toward harsher sentencing policies stems from an oversimplification of public attitudes toward punishment.¹⁷² In general opinion polls, a majority of citizens regularly state that current penalties are too lenient,¹⁷³ leading politicians to enact harsher sentencing laws and prosecutors to prosecute cases more vigorously in an attempt to appear “tough on crime.” But when given detailed descriptions of specific cases, studies show that respondents often suggest sentences that are more lenient than the mandatory minimum in their jurisdiction.¹⁷⁴ This discrepancy appears to result from the lay tendency to assume that the typical fact pattern for a particular offense is far more serious than it actually is; citizens commonly believe, for example, that most burglars are armed and that more burglaries result in violence than is actually the case.¹⁷⁵ Thus, in my view the more lenient response to specific case descriptions more accurately reflects public views on punishment. Nonetheless, general opinion surveys calling for harsher penalties have informed politicians’ approach to crime. As a result, sentences have spiraled upward in a manner unrelated to true public sentiment.

Direct public participation in decision-making—lauded by proponents of community justice, even though the actual practices leave much to be desired—would reverse this disturbing trend. Permitting community members to participate directly in sentencing proceedings, as sentencing circle and reparative board programs attempt to do, would avoid the disjuncture between current sentencing policies and public opinion regarding detailed case studies. Injecting localized popular decision-making into main-

¹⁷² Douglas R. Thomson & Anthony J. Ragona, *Popular Moderation Versus Governmental Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions*, 33 *CRIME & DELINQ.* 337, 353–54 (1987); see also Adriaan Lanni, Note, *Jury Sentencing in Non-Capital Cases: An Idea Whose Time has Come (Again?)*, 108 *YALE L.J.* 1775, 1780–82 (1999).

¹⁷³ See, e.g., JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 207 (1997) (Eighty-one percent of respondents in a 1994 national poll said that sentences are not severe enough.); Loretta J. Stalans & Arthur J. Lurigio, *Lay and Professionals’ Beliefs About Crime and Criminal Sentencing: A Need for Theory, Perhaps Schema Theory*, 17 *CRIM. JUST. & BEHAV.* 333, 344 (1990) (In a 1987 test conducted in Illinois, 72% of laypeople believed judges are too lenient in sentencing burglary.).

¹⁷⁴ See, e.g., Thomson & Ragona, *supra* note 172, at 348–49 (finding that when given a description of a standard residential burglary, fewer than 7% of subjects suggested a punishment equal to or greater than the two-year minimum penalty under Illinois law); Howard A. Parker, *Juvenile Court Actions and Public Response*, in *BECOMING DELINQUENT: YOUNG OFFENDERS AND THE CORRECTIONAL PROCESS* 252, 257–61 (Peter G. Garabedian & Don C. Gibbons eds., 1970) (identifying a similar phenomenon in Washington state); Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent*, 14 *LAW & HUM. BEHAV.* 199, 206 (1990) (finding that while the majority of lay respondents stated that judges are “too lenient” in burglary cases, a majority of the respondents’ own sentencing preferences were more lenient than the required minimum sentences for residential burglary).

¹⁷⁵ See, e.g., Stalans & Diamond, *supra* note 174, at 202–07 (finding that the laypersons’ misperception that the typical burglary is more severe than is actually the case has a significant effect on their tendency to feel that the judiciary is too lenient).

stream criminal administration would eliminate the distortion of public sentiment that currently mars our general sentencing laws, guidelines, and charging policies.

General laws and policies related to criminal justice are distorted in another way that particularly affects high crime communities. Such communities are likely to have less political clout in influencing legislation, law enforcement, and charging policies, both because of reduced social capital and community organization¹⁷⁶ and, in some cases, because of the disenfranchisement of some community members with criminal records.¹⁷⁷ Yet these are the very communities that have the greatest interest in criminal justice laws and policies. They suffer disproportionately from crime and the removal and incarceration of large numbers of male community members.¹⁷⁸ The severity of the current sentencing regime has devastating effects on high-crime communities, including reduced employment opportunities, financial hardship, disruption suffered by the offender's family and children, and the erosion of social capital and organization resulting from the aggregation of these effects over the community.¹⁷⁹ Applying community justice principles to serious crimes would allow local communities to strike their own balance between safety and the social costs of harsh law enforcement and sentencing policies.¹⁸⁰ For example, some locales may prefer treatment and alternative sanctions to long prison sentences and their attendant social costs, particularly in the case of non-violent crimes.

There is a third, and related, advantage to the community justice paradigm. By giving local citizens an active role in criminal justice decisions, community justice can enhance respect for the law and the legal process. Indeed, the community justice movement arose partly in response to a perceived legitimacy crisis facing the criminal system, particularly in high-

¹⁷⁶ See CLEAR & KARP, *supra* note 34, at 42 (stating that "social disorganization theory in criminology argues that socially disorganized communities are unable to advance collective agendas").

¹⁷⁷ See Pamela S. Karlan, *Convictions and Doubts*, 56 STAN. L. REV. 1147, 1161 (2004) (stating that criminal disenfranchisement laws operate as a "collective sanction," penalizing the communities from which incarcerated prisoners come from and the communities to which they return by "reducing their relative political clout"); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 104 (2003) (stating that almost four million Americans have been stripped of voting rights because of felony convictions).

¹⁷⁸ See, e.g., Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 199–205 (1998) (noting that criminal offending and victimization are concentrated in very poor segregated neighborhoods and detailing the degradation of these neighborhoods by drug crime as well as the social disruption created by tough sentences).

¹⁷⁹ See *id.* at 207–11; Brown, *supra* note 12, at 1307.

¹⁸⁰ This argument is commonly made with respect to law enforcement methods such as curfews and anti-gang statutes. See, e.g., Meares & Kahan, *supra* note 75, at 830–32. Meares and Kahan argue that residents of the inner city see such law enforcement techniques "as tolerably moderate alternatives to the draconian prison sentences." *Id.* at 830. Permitting local communities to have direct input into sentencing permits them to avoid such a Faustian bargain.

crime communities.¹⁸¹ Community justice initiatives—particularly community prosecution programs and community courts—sought to restore faith in legal institutions by making prosecutors and justice officials more accessible and by providing opportunities for community members to participate in setting local law enforcement priorities.¹⁸² However, because these initiatives are currently restricted to minor crimes and quality of life offenses, their ability to foster public respect for criminal laws and policies is limited. Targeting panhandlers or prostitutes may reduce fear of crime in troubled neighborhoods by removing visible signs of disorder, but it does little to solve the broader crisis of legitimacy arising from the harsh practices of the mainstream criminal system. Involving local residents in policies and decisions about serious crimes would do far more to create respect for the law and criminal process in high crime communities. Furthermore, if recent work on the relationship between law and social norms is correct, the public perception that the law and the system are legitimate will reduce crime by increasing voluntary compliance with the law, enhancing cooperation with law enforcement, and creating social norms of law-abidingness in troubled communities.¹⁸³

Having discussed the advantages of popular participation in criminal administration, what are the disadvantages? There are three potential objections to the community justice movement's localized, popular decision-making model: (1) ordinary citizens lack the expertise required to make sentencing decisions and policies; (2) there are disparities in how different locales respond to similar offenses, which violates the principle of equality before the law; and (3) the effects of crime are not limited to a localized community.

The objection that citizens are unqualified to determine sentencing policy carries little force because current policies are driven by politics and public opinion rather than expert criminology. Beginning in the 1970s, frustration with the failure of penal science to rehabilitate offenders led to a shift away from expert-driven, indeterminate sentencing to a variety of determinate sentencing schemes including mandatory minimum penalties, guidelines, and the abolition of parole.¹⁸⁴ Punishment decisions were transferred from judges and criminal justice professionals to politically driven legislatures and sentencing commissions. Contemporary sentencing decisions are not expert determinations that reflect a coherent or scientific approach to crime. They represent merely the attempt of legislatures and agencies to translate public sentiment into practice and to create uniform penalties throughout the system.¹⁸⁵ Given the abandonment of scientific pe-

¹⁸¹ See *supra* Part II.A.

¹⁸² See Fagan & Malkin, *supra* note 3, at 901–02.

¹⁸³ See *supra* note 13 and accompanying text.

¹⁸⁴ See, e.g., MICHAEL TONRY, SENTENCING REFORM IMPACTS 6–9 (1987); Beale, *supra* note 4, at 24.

¹⁸⁵ See Lanni, *supra* note 172, at 1779 (describing the political nature of legislatures

nology, ordinary citizens are just as qualified to make sentencing determinations as legislatures or agencies. In fact, as I argued above, direct involvement of local citizens in sentencing policies would result in a less distorted expression of public sentiment than the current system of legislatively and administratively enacted penalties.

Critics might also object that decentralization leads to unfairness as different communities adopt disparate approaches to prosecuting, charging, and sentencing similar offenses. Under this view, localized decision-making represents a step backward from determinate sentencing reforms that encouraged a more uniform treatment of offenses. However, the determinate sentencing movement has failed to live up to its promise of generating fair penalties. Strict sentencing laws simply shift power and discretion from the sentencing judge to prosecutors, whose decisions are less transparent but still likely to create disparity in outcomes for similar cases, both within and between districts.¹⁸⁶ Moreover, academics and judges have argued that the rigidity of sentencing guidelines and other determinate schemes is unfair because it ignores important differences between cases.¹⁸⁷ Some disparity between local communities in the approach to crime under a community justice regime may be worth the benefits of transparent, flexible policies tailored to local needs and accurately reflecting public sentiment.

The third criticism of decentralization is that it is difficult, if not impossible, to define the “local community” in such a way that does not exclude individuals and communities affected by any given crime.¹⁸⁸ In metropolitan areas, it is not unusual for individuals to live, work, and play in several different geographical areas.¹⁸⁹ Focusing on individuals who live in a particular neighborhood may exclude people who have a legitimate

and sentencing commissions).

¹⁸⁶ See, e.g., *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 971–72 (9th Cir. 2000) (noting disparities in charging policies for illegal reentry cases between the Central and Southern California U.S. Attorney’s offices); Barkow, *supra* note 177, at 75–76 (noting that studies “on race and capital sentencing have found even greater disparities in the exercise of prosecutorial discretion than in jury discretion”); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 202–03 (1991) (finding significant disparities in federal prosecution rates among blacks and whites under the Federal Sentencing Guidelines); Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 181–86 (1987) (finding that race was a factor in charging decisions in Los Angeles County).

¹⁸⁷ See KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES AND THE FEDERAL COURTS* 11–14, 82–85 (1998); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1739 (1992); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 858–61 (1992).

¹⁸⁸ For a critique of various methods of defining a community for the purpose of local self-government, see Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371 (2001).

¹⁸⁹ See *id.* at 421.

stake in the law enforcement policies of that neighborhood.¹⁹⁰ Many community justice programs already use an expansive definition of community that includes residents and stakeholders, such as non-resident business owners. A detailed discussion of how to define the local community for the purposes of making law enforcement decisions is beyond the scope of this Article, but it is possible to imagine a community of interests that might include individuals who work, own property, or spend significant time in the area.¹⁹¹

A related criticism is that decentralization of criminal justice policies is inappropriate because crime in one “community” is likely to affect other communities. This “boundary problem”¹⁹² is inherent in any system in which states have differing substantive criminal laws and districts use differing charging and law enforcement practices. To be sure, this potential problem is exacerbated by neighborhood-level decentralization, but it is a question of degree, rather than of kind.¹⁹³ In my view, neighborhoods would be better off in a regime that permits local autonomy—even if that autonomy is limited somewhat by spillover effects from other communities—than they are in the current system, which effectively disenfranchises those communities hardest hit by crime.

The community justice movement thus offers a promising new approach to criminal decision-making. Giving local communities control over charging and sentencing decisions would reduce the disjuncture between criminal laws and policies and true public sentiment, empower communities that suffer the most from crime and the effects of crime, help restore faith in the troubled criminal justice system, and foster compliance with the law.

B. Should Restoration Replace Punishment?

The second major characteristic of the community justice movement is its emphasis on crime prevention, offender rehabilitation, and compensation for individual victims and the victimized community, as opposed to punishment based on retribution or incapacitation. Although imprisonment is not incompatible with community justice, treatment and alternative sanctions such as restitution and community service are its preferred responses to crime. Should this restorative approach be expanded to the more serious crimes of mainstream criminal courts?

¹⁹⁰ See *id.* at 420–21 (criticizing a “residence-based account of local governance”).

¹⁹¹ See *id.* at 462–63 (discussing the concept of a “localism of interests”).

¹⁹² See *id.* at 374 (discussing the boundary problem in local government law more generally).

¹⁹³ Those greatly troubled by this problem—especially as it applies to gun possession crime that can arguably be effectively addressed only on a national level—might support decentralization solely of state law crimes.

There is an inherent tension between the two chief tenets of community justice. As the crimes at issue become more serious, the emphasis on restorative punishments is likely to be at odds with another basic principle of community justice—local lay decision-making. Restoration entails endorsing a particular philosophy of punishment rather than permitting local communities to construct their own responses to crime. This potential conflict between community preferences and the restorative approach does not arise in current community justice programs because they are limited to minor, non-violent offenders. Incapacitation is not an issue and the menu of alternative sanctions available is sufficient to ensure these offenders receive their just desert.¹⁹⁴ Indeed, quality of life offenses typically receive more stringent sanctions in a community justice regime than under the traditional system, where such offenders often receive time served, if they are prosecuted at all.¹⁹⁵

If the community justice paradigm were applied to the mainstream criminal system, the commitment to restoration and rehabilitation over punishment likely would be at odds with local community sentiment in at least some cases. Studies have shown, for example, that public opinion tends to be much more punitive with regard to violent than nonviolent crimes.¹⁹⁶ It is unrealistic to expect citizens to subordinate notions of just desert and incapacitation in all cases, and it may be inappropriate for them to do so. A common criticism leveled against the restorative justice movement is that it fails to articulate a coherent theoretical justification for abandoning the traditional purposes of criminal law, particularly just deserts and incapacitation.¹⁹⁷

In recent years, some scholars who support restorative justice have attempted to find a place for traditional notions of punishment and a variety of sanctioning theories within the restorative framework.¹⁹⁸ Community justice practices that enforce a strict restorative sentencing philosophy by, for example, limiting the available sanctions or entrusting the sentencing decision entirely to a judge, risk undermining the legitimacy of the system if sentences diverge too widely from community sentiment. It is not clear that restorative sanctions such as rehabilitation or restitution

¹⁹⁴ See Robinson, *supra* note 16, at 384–85 (stating that in their current form, restorative justice processes are consistent with doing justice).

¹⁹⁵ See Berman & Feinblatt, *supra* note 45, at 7–8, 13–14.

¹⁹⁶ See FRANCIS T. CULLEN ET AL., *Public Opinion About Punishment and Corrections*, in CRIME AND JUSTICE 59 (Michael Tonry ed., 2000).

¹⁹⁷ See, e.g., Brown, *supra* note 49, at 1297 (criticizing VOM for rejecting retribution and incapacitation); Delgado, *supra* note 163, at 761 (arguing that VOM leaves society's need for retribution unsatisfied); Robinson, *supra* note 16, at 379–81 (2003) (criticizing the restorative justice movement for giving restorative justice priority over deterrence and incapacitation and for barring punishment based on justice).

¹⁹⁸ See Garvey, *supra* note 104, at 305 (arguing that the victim cannot really be restored without punishment); Luna, *supra* note 105, at 205 (arguing for a procedural conception of restorative justice that permits various sanctioning theories in resolving particular cases).

could repair the harm suffered by a community that believes punishment is necessary in some cases.

This is not to say that the public would be unreceptive to adopting a restorative approach in many cases. A 1996 national poll found that citizens view community service and restitution as effective methods of crime control.¹⁹⁹ Many studies indicate that when presented with a choice between prison, no prison, and a variety of restorative options such as drug treatment, restitution, community service, and supervised probation for nonviolent offenders, the public favors the alternative sanctions over prison.²⁰⁰ And, as argued above, there is reason to believe that popular participation in sentencing decisions would result in more lenient outcomes than the current sentencing regime.²⁰¹

Still, it seems clear enough that *requiring* exclusively restorative punishments for major crimes would not be viewed as a legitimate system of punishment by most people in the United States. So long as local communities have meaningful restorative options when making sentencing decisions and policies, there is no need to endorse any one approach to crime and punishment.

V. A COMMUNITY JUSTICE SYSTEM: PUTTING PRINCIPLES INTO PRACTICE

To this point I have argued that community prosecution, community courts, and restorative sentencing procedures have, despite their conceptual advantages, major practical weaknesses that prevent their adoption as a means of dealing with serious crime. However, there is a way to adopt the localized, popular decision-making approach of the community justice movement without incurring its practical disadvantages, particularly the problem of ensuring representative citizen participation. Rather than rely on volunteers and open community meetings that are often dominated by small interest groups, a community justice system could make use of two existing institutions with long traditions of representing the community: the grand jury and the petit jury.

Grand and petit juries drawn from a small catchment area representing the local community could be used to provide input into charging, sentencing, and policy-making for crimes committed in that community. Both the grand and petit juries could be drawn from a geographical area similar to current community court jurisdictions (that is, a large neighborhood or

¹⁹⁹ See CULLEN, *supra* note 196, at 46.

²⁰⁰ See *id.* at 40–53 (discussing studies and noting that drug treatment receives less public support than other alternative sanctions); Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15 (citing other studies); cf. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (arguing that the public does not view fines and alternative sanctions as sufficient to express moral condemnation in response to a crime).

²⁰¹ See *supra* Part IV.A.

subsection of a city). To be sure, drawing the boundaries of each local “community” would not be a clear-cut process.²⁰² A detailed discussion of how to define a community for these purposes is beyond the scope of this Article, but it is worth highlighting one potential issue. In smaller communities, many potential jurors may know the victim or the defendant well. It is not obvious that knowledge of the parties should disqualify a juror from participating in the sentencing decision; after all, sentencing circles purposely include individuals who know the parties. But jurors who know the parties well should not be permitted to make decisions regarding guilt (petit jurors) or probable cause of guilt (grand jurors) because they may be unduly prejudiced by information about the victim or defendant. Such jurors may, for example, be aware of a defendant’s prior convictions. For this reason, individuals who know the parties well should be excluded from service as grand jurors and petit jurors in both the guilt and sentencing phases.²⁰³

Community involvement through mandatory participation on grand and petit juries would eliminate many of the concerns about representativeness that plague current community justice programs. Of course, the current system of calling and seating jurors is far from perfect, and much could be done to enhance the representativeness of these bodies.²⁰⁴ Nevertheless, my proposed approach would be superior to the use of unrepresentative volunteers in current community justice programs and would draw on an established procedure to create a body representing a cross-section of the community. Community justice reforms may also be more appealing if implemented through the well-known and respected institution of the jury, rather than through unfamiliar procedures such as sentencing circles, whose unusual features such as the “talking piece” and “circle keeper” may be met with skepticism in some quarters. Perhaps most importantly, the history and tradition of the jury as the protector of the people against the unjust use of government power furthers the community justice movement’s goal of enhancing the legitimacy of the criminal system.²⁰⁵

In this Part, I discuss how the grand and petit juries can be used to implement the principles of community justice. Through a revised grand

²⁰² For more detailed discussion of this issue, see *supra* Part IV.A.

²⁰³ I suspect, but cannot prove in the absence of data, that communities will rarely be unable to empanel grand or petit juries for this reason. If such cases do arise, a different venue could be chosen that resembles the victim community as closely as possible in terms of crime rates and demographic and socioeconomic characteristics.

²⁰⁴ Discussion of the various proposals to reform the jury selection process is beyond the scope of this Article. See, e.g., Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 706–08 (1998); Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704 (1995); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353 (1999) (proposing applying electoral districting to jury selection); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993).

²⁰⁵ See, e.g., Barkow, *supra* note 177, at 48–65.

jury procedure and the use of grand jurors as focus groups, citizens can offer input into both specific charging decisions and general prosecution policies. In these areas, the community will likely have a direct impact only in controversial cases. Jury sentencing offers a far more potent mechanism for active community involvement in the criminal justice process.

A. Charging Decisions and Policies

In this Section, I discuss the role a reformed grand jury drawn from the local community might play in a community justice system.

1. The Grand Jury and Individual Charging Decisions

Permitting the community to decide whether a particular defendant should be prosecuted is precisely the function of the grand jury in our current system. Although nominally charged with evaluating whether there is probable cause to believe that the defendant committed the crime, commentators have recognized that the grand jury's more fundamental role is to make a non-legal judgment about whether the prosecutor's decision to bring the case is appropriate.²⁰⁶ In practice, however, grand jurors in most jurisdictions almost never exercise their power to screen charging decisions. The grand jury is often criticized as a mere "rubber stamp" for prosecutors' determinations.²⁰⁷ In the federal system, for example, grand juries generally refuse to indict in fewer than one percent of cases.²⁰⁸

Grand jury docility results from the non-adversarial nature of the process, in which the prosecutor presents a quick, unchallenged summary of the evidence pointing toward guilt, often through a single law enforcement witness. Though a wide variety of procedural reforms have been proposed that, taken together, would greatly alleviate this problem,²⁰⁹ the value of each additional procedural requirement must be carefully weighed lest the grand jury hearing become a "mini-trial."²¹⁰ Still, a few minor procedural reforms would greatly enhance the grand jury's ability to provide meaningful local community input into individual charging decisions.

The first required change does not involve the grand jury hearing itself. For the grand jury to act as a meaningful check on prosecutors' de-

²⁰⁶ See Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 307–310 (1995); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 46 (2002). This power is sometimes described as "grand jury nullification," but as Professor Simmons points out, *id.* at 46–47, jurors do not violate the law when they exercise this function.

²⁰⁷ See, e.g., Leipold, *supra* note 206, at 264; cf. Simmons, *supra* note 203, 33–34 (arguing that New York state grand juries refuse to indict about 10% of the time).

²⁰⁸ Leipold, *supra* note 206, at 274.

²⁰⁹ See, e.g., Simmons, *supra* note 206, at 17–29.

²¹⁰ See *United States v. Calandra*, 414 U.S. 338, 349–50 (1974); Leipold, *supra* note 206, at 273.

isions, a grand jury indictment must be required. In addition, a prosecutor who fails to obtain an indictment must not be permitted simply to resubmit the case to a new grand jury.²¹¹ Permitting a prosecutor to resubmit a case to multiple grand juries increases the chances that a docile grand jury will rubber stamp a prosecution. Only four states impose both these restrictions; in all other states and in the federal courts, prosecutors may either resubmit failed cases or avoid the grand jury altogether.²¹²

Second, the defendant should have a right to testify at the hearing.²¹³ Defendant testimony would promote community input into the policy decisions driving the prosecutor's choice of charges. The testimony would give the grand jury more contextual information about the circumstances of the crime and the offender to help them evaluate whether the proposed charges are appropriate. In practice, few defendants will exercise this right.²¹⁴ This change will only be implicated in marginal cases where the defendant believes he can persuade the jury that the prosecutor is acting unfairly or overzealously in bringing the charges,²¹⁵ i.e., precisely the cases where the local community may want carefully to review the prosecutor's charging decision. Ric Simmons provides an example of such a case from New York City, one of the few states that permits defendant testimony.²¹⁶ The defendant in the case was charged with bribery of a police officer. The defendant, who had no prior record, was arrested for possession of a small amount of marijuana and offered the officer fifty dollars for a Desk Appearance Ticket ("DAT"), which would have allowed him to be released immediately. Although the facts of the case were not in doubt, the defendant testified at the grand jury hearing, explaining that he had never been arrested before, was terrified of spending the night in jail, and that other arrestees told him that it was common practice to pay for a DAT. The grand jury refused to indict. Though rare, this is precisely the kind of case for which defendant testimony would be invaluable.

The most important reform is to provide an independent attorney for the grand jury. In the past, scholars have proposed this modification on the theory that the lawyer would counteract the prosecutor's dominance and provide independent counsel on the legal question of probable cause facing the grand jurors.²¹⁷ From a community justice perspective, however, a

²¹¹ See Simmons, *supra* note 206, at 17–20.

²¹² See *id.* at 19–20, 71. The Fifth Amendment grand jury right does not apply to the states. *Hurtado v. California*, 110 U.S. 516 (1884). Those states that do not require a grand jury right in their constitutions could introduce such a requirement in their codes of criminal procedure.

²¹³ See Simmons, *supra* note 206, at 23–24.

²¹⁴ See *id.* at 37–38 (noting that few defendants will testify because anything the defendant says in the grand jury can be used against him at trial, testifying at the grand jury reveals the defense strategy to the prosecution, and some prosecutors refuse to plea bargain with defendants who testify at the grand jury).

²¹⁵ *Id.* at 23.

²¹⁶ See *id.* at 39.

²¹⁷ See Leipold, *supra* note 206, at 313.

grand jury attorney could serve an entirely different function. One of the difficulties with the indictment process is that the jurors are generally given the choice whether or not to indict the defendant on the charges presented. Except in marginal cases where the grand jurors believe that the defendant should never have been prosecuted, they are unlikely to return a no bill if they believe the defendant should be prosecuted, even if they think that the prosecution's particular choice of charges is excessive. An independent attorney can inform the grand jury of available lesser charges in such cases. Under this approach, the grand jury procedure would be transformed from a review of the prosecutor's proposed charges to a more interactive process permitting grand jurors to participate in formulating the charges. The notion of the grand jury rather than the prosecutor formulating charges is not a new one. The grand jury's traditional powers included issuing charges not proposed by the prosecutor, though this power of presentment is no longer used.²¹⁸ Giving the grand jury its own attorney could revive this grand jury function.

It is vital that the grand jury attorney be truly independent from the prosecutor's office. Perhaps the grand jury counsel could be nominated or appointed by the local bar association. Short terms of service could also help preserve independence and prevent the creation of a new power center unaccountable to the people.

These reforms would help make the grand jury more independent, giving voice to local community sentiment without appreciably diminishing the grand jury's efficiency. Of course, even with these reforms, the grand jury would most likely have an impact only in cases where it is clear from the barest outline of the case that the charges may be inappropriate or excessive. Cases involving charges that are inherently controversial, such as low-level drug possession, might be especially amenable to careful grand jury review. But in the vast majority of cases, the grand jurors will not have enough information about the offender and the details of the case to participate meaningfully in the charging decision. Nor should they: presenting the grand jury with all the information that might factor into the decision whether and how to charge would result in a lengthy process replicating a trial.

For the same reason, it would be impractical to require grand or petit juries to sign off on plea agreements. In addition to the necessity of presenting the grand jury with substantial information about the offender and crime, which would detract from the efficiency of plea bargains, there are other reasons not to present bargains for popular approval. Bargains often take into account factors like the likelihood of conviction at trial and the usefulness of a defendant's cooperation in another prosecution that would be very difficult for a jury to weigh.

²¹⁸ See Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 57 n.304 (2004).

Giving the defendant a right to testify and providing the grand jury with an independent attorney would allow the grand jury to take a more active role in reviewing charging decisions. But even these reforms are likely to have an impact primarily in cases involving controversial charges or egregious prosecutorial abuse.

2. *The Grand Jury and General Charging and Bargaining Policies*

The grand jury can also serve as a more representative version of the community advisory board commonly used in community prosecution programs. My proposal here is that prosecutors use grand juries not merely as indictment machines, but as focus groups to set policing and prosecution priorities for the neighborhood. Grand juries could be convened periodically for this purpose rather than to decide individual cases. These grand juries could also provide general recommendations for charging and bargaining policies in common types of cases. Community-based charging guidelines are particularly helpful for controversial crimes, such as quality of life, statutory rape, or nonviolent drug offenses, because the grand jury can assist the prosecutor in determining what sorts of cases the local community considers worthy of prosecution. Where, however, the question is not whether to charge but what to charge and what outcome to pursue in plea bargaining, as is the case in most serious state criminal cases, general policy recommendations can quickly become swallowed up in the myriad variables of each individual case.²¹⁹

We should not underestimate the importance of citizen participation in charging decisions and policy-making under a community justice regime, even if community influence is largely limited to controversial cases. Given the failure of general criminal laws and policies to reflect accurately public sentiment, particularly in high crime communities, the number of “controversial” cases may be significant. Moreover, in a world of guilty pleas, the grand jury as focus group or judicial body may be the only mechanism to ensure that charging policies do not deviate too much from local community opinion.

B. Determining the Sanction

Devising a mechanism for direct popular participation in the sanctioning decision is far simpler than arranging for meaningful citizen involvement in the charging and bargaining process. I propose permitting a jury drawn from the local community to sentence offenders.

²¹⁹ Indeed, even in the Wisconsin community prosecution program providing charging guidelines for statutory rape, the community advisory board noted the difficulty in drafting general guidelines and “strongly encouraged prosecutors to evaluate cases individually” in making charging decisions. Nowack, *supra* note 3, at 886.

In the past few years, the role of the jury in non-capital sentencing has become the subject of scholarly debate in the wake of a series of Supreme Court decisions reexamining the traditional division of labor between judges and juries in the criminal process.²²⁰ In *Apprendi v. New Jersey*,²²¹ the defendant pled guilty to possession of a firearm under a statute that carried a prison term of five to ten years; the judge at sentencing found that the crime was racially motivated and imposed a twelve-year sentence under a statute providing for enhanced sentences for hate crimes.²²² The Supreme Court struck down the sentence and held that the Sixth Amendment jury trial right requires that any fact other than recidivism that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.²²³

One way to satisfy the requirements of *Apprendi* while maintaining statutory or guidelines-based aggravating factors is to have a bifurcated trial in which a separate jury takes over the function formerly performed by judges of trying facts related to sentencing factors.²²⁴ In fact, when the Court struck down a sentence under the Washington state sentencing guidelines in *Blakely v. Washington*,²²⁵ it noted that the state of Kansas had successfully created such a bifurcated scheme in response to *Apprendi*.²²⁶ *Apprendi* and *Blakely* raised the prospect of jurors engaging in some sentencing activities, and scholars soon began to debate whether jurors should be permitted not only to decide facts relevant to sentencing but to make the sentencing decision itself.²²⁷ In an order issued soon after *Blakely*, Senior District Judge Jack Weinstein suggested that the “use of a jury on sentencing issues of fact—and perhaps on severity—is consistent with history, practice, and the inherent role of federal courts and juries.”²²⁸ However, under the Supreme Court’s recent decision in *United States v. Booker*,²²⁹ juries will not play a role in sentencing under the federal sentencing guidelines as they currently stand: the Court explicitly found that Congress intended that the judge alone make sentencing decisions.²³⁰ Rather than leave it to Congress to fashion a solution, the Court opted to reconcile the

²²⁰ See, e.g., Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 377–81 (2003); Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004); Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about Apprendi*, 82 N.C. L. REV. 621 (2004); see also Lanni, *supra* note 172 (advocating jury sentencing prior to the *Apprendi* decision).

²²¹ 530 U.S. 466 (2000).

²²² *Id.* at 470–71.

²²³ *Id.* at 490; see also Barkow, *supra* note 177, at 38–43 (summarizing *Apprendi* and its progeny).

²²⁴ See *Blakely v. Washington*, 124 S. Ct. 2531, 2556 (2004) (Breyer, J., dissenting).

²²⁵ 124 S. Ct. 2531 (2004).

²²⁶ See *id.* at 2541; see also *id.* at 2556 (Breyer, J., dissenting).

²²⁷ See *supra* note 220.

²²⁸ *United States v. Khan*, 325 F. Supp. 2d 218, 232 (E.D.N.Y. 2004).

²²⁹ 125 S. Ct. 738 (2005).

²³⁰ *Id.* at 759.

guidelines and the jury trial right by making the guidelines advisory for judges.²³¹ *Booker* makes it unlikely that jury sentencing will be the preferred method of bringing existing determinate sentencing schemes into compliance with *Apprendi*. Nevertheless, the basic principle that comes out of this line of cases—that any sentence must be “authorized” by the jury through its verdict²³²—supports the idea that the jury rather than the judge should have the power to determine criminal sanctions.

The scholarship thus far has not addressed the notion that jury sentencing can further the goals of the community justice movement by providing for localized decision-making. Rather, scholars have supported jury sentencing through arguments based on deliberative democratic theory,²³³ constitutional law,²³⁴ and public policy.²³⁵ Here I discuss the advantages of jury sentencing as a mechanism for implementing community justice.

Jury sentencing would avoid many of the pitfalls of current community justice programs. Jurors are more representative than volunteer participants in sentencing circles and reparative boards, and they bring to juries a certain legitimacy as the traditional voice of the community. A system whereby a jury deliberates on the penalty following an adversarial sentencing hearing would also avoid the due process concerns that arise from the informality of current community justice practices.

Many of the restorative features of current community justice programs could be incorporated into a jury sentencing framework. As with community courts, treatment and social services could be available on-site to both offending and non-offending members of the community. Victims could be permitted to testify, and jurors could be given the option to participate in victim impact panels. Social workers could meet with the defendant prior to sentencing and provide the jury with a needs assessment, which could include suggestions of particular treatment, education, and community service programs. In this way, a jury sentencing regime need not completely forego the benefits of professional experience and expertise.

Jury sentencing would also alleviate the political distortions that produce ever-harsher general sentencing laws unrelated to true public sentiment in individual cases.²³⁶ Juries would permit a more humane and indi-

²³¹ *Id.* at 764.

²³² *See id.* at 769; *Blakely*, 124 S. Ct. at 2538.

²³³ *See Iontcheva, supra* note 220, at 343–53.

²³⁴ *See Hoffman, supra* note 220, at 968–85.

²³⁵ *Id.* at 992–1002.

²³⁶ *See supra* Part IV.A. An initial review of the jury sentencing statistics in Kentucky, Virginia, and Arkansas discussed by Nancy King and Rosevelt Noble might suggest that jury sentencing would result in harsher rather than more lenient penalties. *See King & Noble, supra* note 220, at 907, 923, 939 (finding that in Kentucky, jury sentences were more severe than sentences imposed by a judge after a plea, and that in Virginia and Arkansas jury sentences in drug cases were higher than bench sentences). But on closer examination, these statistics do not shed light on how juries would sentence under my proposal. In Kentucky, jury sentences were compared to plea sentences that reflect a plea dis-

vidualized assessment than the current rigid determinate sentencing regime. This reform might have its greatest impact on high-crime communities by allowing local representatives to weigh the need to punish offenders and provide security against the devastating social effects of severe sentencing policies. Placing the power to sanction directly in the hands of local citizens would obviate the need for divisive strategies like race-based nullification.²³⁷ It would also change the perception (and reality) that criminal justice policies are largely imposed on underrepresented inner city communities by middle-class politicians and citizens who may have a radically different experience of crime and law enforcement.²³⁸

Jury sentencing may have the additional virtue of indirectly reigning in abusive prosecutorial charging policies. As William Stuntz has pointed out, because many federal and state criminal codes include multiple overlapping statutes that cover similar offenses, “defendants who commit what is, in ordinary terminology, a single crime can be treated as though they committed many different crimes—and that state of affairs is not the exception, but the rule.”²³⁹ Prosecutors may, and regularly do, threaten to bring multiple charges, thereby elevating the defendant’s potential sentencing exposure under the relevant guidelines or statutory sentencing range and increasing the pressure to plead guilty.²⁴⁰ In a jury sentencing regime, the jury would not have direct control over the sentence where the defendant pleads guilty pursuant to a plea agreement. In the five existing jury sentencing states and in most academic reform proposals, the defendant is always permitted to waive jury sentencing with the permission of the prosecution and the court.²⁴¹ Nevertheless, prosecutors and defendants could

count, not to sentences imposed by a judge after trial; these statistics do not compare the severity of sentencing by judges and juries. *See id.* at 907. The difference in drug cases in Virginia may be due to the fact that juries are in many cases bound by a minimum penalty that does not bind the judge and is actually above the advisory sentencing guidelines used by judges. *See id.* at 911. Additionally, in Arkansas, jury sentences are not significantly harsher than those meted out by judges, except in drug cases. Comparative judicial leniency in drug cases may result from the fact that judges but not juries have access to treatment and other alternative sentencing options. *See id.* at 931, 939 (noting that some alternative sentencing options in Arkansas are not available after a jury trial and that the sentencing differential was not significant for offenses such as robbery, battery, and rape). Because it would be a vital part of a community justice jury sentencing regime to ensure that juries are aware of and can make use of potential therapeutic and restorative sanctions, the statistics from these states are not predictive of sentences under my proposed reform.

²³⁷ *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (proposing jury nullification in non-violent crimes).

²³⁸ William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998) (describing how drug law enforcement differs by race and class); *see also* Meares & Kahan, *supra* note 75, at 832 (noting that opposition to curfews often comes from white suburban communities whose experience of crime is very different from that of inner-city residents who support these policing methods).

²³⁹ *See* Stuntz, *supra* note 11, at 519.

²⁴⁰ *Id.* at 519–20.

²⁴¹ *See* Hoffman, *supra* note 220, at 1006 (discussing state schemes, some of which permit waiver even without the prosecution’s consent); *see also* Iontcheva, *supra* note 220, at 377 (supporting waiver only with consent of the prosecution); Lanni, *supra* note 172, at

bargain in the shadow of the jury's anticipated sentencing decision. A jury is unlikely to find a significantly different sentence for what appears to be a single crime simply because the prosecutor chooses to bring multiple overlapping charges for the same conduct. Thus, jury sentencing would indirectly inhibit prosecutors from pressuring defendants into pleading guilty by stacking or manipulating charges to increase exposure beyond what is reasonable. In this way, jury sentencing may compensate somewhat for the practical limitations on citizen involvement in the charging process described above.

What would a jury sentencing regime look like? Most proposals favor a bifurcated trial in which jurors could hear evidence related to the defendant's character and criminal record only at the sentencing phase.²⁴² As with community courts, social services personnel could evaluate defendants and inform jurors about potential treatment programs and alternative sentencing options. Features that would guide or limit the jury's discretion could also be introduced to combat the two potential dangers of jury sentencing: disparity and prejudice.²⁴³

One might expect that jury sentencing presents a danger of disparity because different juries may react very differently to similar cases. In fact, studies suggest that lay intuitions of blameworthiness and justice are remarkably consistent, even across a variety of demographic variables.²⁴⁴ As one scholar notes, sentencing by a group of ordinary citizens is more likely to reflect the shared views of the community than a single sentencing judge.²⁴⁵

Nevertheless, general agreement as to the seriousness of the offense and blameworthiness of the defendant does not necessarily translate into consistency in sentences. For ordinary citizens with no sentencing experience, there is no obvious metric for translating a particular level of blameworthiness into a term of years or an amount of community service. This problem could be alleviated by informing sentencing jurors of the historical range of sentences imposed for similar crimes and defendants with a similar criminal history.²⁴⁶ This information would help jurors gain perspective on the individual case before them, and would promote consistency by providing different juries the same point of departure in simi-

1802 (supporting waiver); *cf.* Hoffman, *supra* note 220, at 1007 (doubting the usefulness of waivers, even with the consent of the prosecution).

²⁴² *Id.* at 1004–05; Iontcheva, *supra* note 220, at 366–70; Lanni, *supra* note 172, at 1802.

²⁴³ Professor Lillquist criticizes jury sentencing based on the argument that it would result in more convictions because of a variety of cognitive effects. Lillquist, *supra* note 220, at 623–24. However, these effects are largely eliminated by bifurcating the hearing into guilt and punishment phases, which is the standard approach to jury sentencing.

²⁴⁴ See PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

²⁴⁵ Robinson, *supra* note 16, at 382.

²⁴⁶ *Cf.* Iontcheva, *supra* note 220, at 365–72 (recommending that jurors receive information about average verdicts).

lar cases. Statistical information would be drawn from the local community jurisdiction since the goal is to reduce disparities between different juries within the community, not between communities.²⁴⁷ It is important to give jurors a sentencing range based on past cases rather than an average sentence so jurors will not become anchored to the average sentence, but will instead consider a wide range of options based on the defendant's particular circumstances.²⁴⁸

Disparity in a jury sentencing regime could arise not just from differences between juries, but also from juror prejudice. This danger is particularly acute if a defendant from one community commits a crime in another community, especially if most members of the victim community are of a different race than the offender. In such cases, statutory maximum penalties and judicial review of sentences that the judge deems disproportionately severe could safeguard against disparate sentences.

What about the case where disparate juror leniency seems to be motivated by improper considerations, such as when a Park Avenue jury inexplicably gives a white defendant a much more lenient sentence than the community sentence given to members of other racial groups for the same offense? Should the judge be able to override the jury and impose a higher sentence? Community justice principles suggest that local citizens should always be permitted to exercise leniency and choose alternative and restorative sanctions, even in serious cases. Nevertheless, to reduce the danger of racism in sentencing, a judge should be permitted to override a lenient sentence, but only in extreme cases. The test should not be whether the judge deems the sentence disproportionate to the charges, since communities are free to give lenient sentences to counteract the effects of high levels of incarceration. Instead, the jury's sanction must be significantly different from the typical sentence given in similar cases. Moreover, a judge's override would be appropriate only in cases in which the lenient sentence is not supported by evidence in the record, such as victim testimony or recommendations by social service personnel for restorative or alternative sanctions.

In this Part, I have sketched out a community justice system that provides for local, popular participation in the mainstream criminal justice system and avoids the problems associated with current community justice practices. The crux of the reform is a grand jury and petit jury drawn from the local community. By expanding the role of each of these bodies in the ways that I described—that is, by giving the grand jury some practical control over charging decisions and policies and by empowering the

²⁴⁷ For discussion of the criticism that a community justice approach will lead to disparity between locales, see *supra* notes 187–193 and accompanying text.

²⁴⁸ See Iontcheva, *supra* note 220, at 370 (discussing the potential “anchoring effect” of an average sentence).

petit jury to sentence—power would shift significantly from the prosecutors' office to two truly representative and admired institutions.

VI. CONCLUSION

The community justice initiatives have flourished within their niche dealing with quality of life and minor crimes. Perhaps the movement will continue to expand in new cities and states, but I have tried to show that extending community justice practices to the serious criminal docket is unlikely and unwise. Sentencing circles, reparative boards, community courts, and community prosecution groups are coalitions of the willing with neither the resources nor the representative legitimacy required to dole out serious punishment, particularly in light of the due process problems inherent in the informality of these community justice practices.

These problems, were they insurmountable, would be a great pity, since our system for dealing with major crime is badly in need of flexibility and legitimacy. But the basic principle of community justice—local, popular participation in all aspects of the administration of justice—can be readily advanced by existing institutions: the grand jury and the petit jury. Grand and petit jurors drawn from the local community would be far more representative than the volunteers in community justice programs. A series of reforms would transform the grand jury procedure from a passive rubber stamp of the prosecutor's charges to an interactive process that permits the jury to suggest alternative charges. Grand juries convened as focus groups would also provide more generalized input into charging policies. Perhaps most importantly, the jury would be permitted to decide the sanction through procedures that encourage, but do not mandate, restorative and rehabilitative sentencing outcomes. This approach would alleviate some of the distortions in the current process of generating sentencing laws and law enforcement policies, and would permit local communities, particularly those that suffer from high crime rates, to strike their own balance between security and the social costs of stringent sentencing laws.

In the end, today's penal science has made no dent in the mystery of just punishment. If it is to be a matter of intuition, the only fair questions are whose intuitions, and on what basis those intuitions should be formed. Community justice has shown us the value of returning these decisions to the local community one case at a time.

