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### Community Accountability

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# Community Accountability

*M. Eve Hanan\* & Lydia Nussbaum\*\**

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## INTRODUCTION

“Community accountability” is a phrase commonly used by transformative and restorative justice practitioners. Yet the meaning of both

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“community” and “accountability” are far from stable and clear. This Essay offers some preliminary thoughts on the contextual nature of “community accountability” based on the authors’ ongoing research into the ways in which transformative and restorative justice advocates conceptualize and implement alternatives to legalism and punishment.

At the outset, we note that transformative and restorative justice practices differ in important ways. Borrowing the taxonomy of abolitionist and transformative justice practitioner Mariame Kaba, transformative justice consists of free-standing efforts to address violence at the social and individual level without engaging the criminal or juvenile legal systems. Restorative justice, on the other hand, usually functions adjunctive to criminal systems, providing case-by-case alternatives to standard procedures such as sentencing.<sup>1</sup> For example, a community group might use transformative justice to address a harm that occurred within their group without ever involving police or other authorities. A school or juvenile court might use restorative justice to divert a young person from expulsion or prosecution.

In using the word “community,” advocates of transformative and restorative justice may mean very different things. In the transformative justice context, invoking the terminology of “community” appears to reflect careful and deliberate efforts to create strong norms, relationships, and resources that reduce violence and support non-state methods of resolving conflicts and redressing harm.<sup>2</sup> In contrast, when restorative justice practitioners use the term “community,” they refer to the people responsible for or affected by a harmful incident, all of whom may be involved in a discussion about what should happen to repair the harm.

These different uses of the term “community” demonstrate that it is an indistinct term consisting of multiple “fractured” meanings and dimensions.<sup>3</sup> It can refer to a shared location in time and space, a societal structure, feelings toward cultural symbols, or an emotional sense of belonging.<sup>4</sup> “Community” therefore exists as both *object* and *objective*: a thing, a place or unit of social organization, and also a quality, a “variable” that can differ by degree or serve as a characteristic of other things.<sup>5</sup>

Although they are vague and undefined, terms like “community” and “community-based” have come to serve as default terminology for referring to the local level. This heuristic device can be useful in policy-making

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1. MARIAME KABA, WE DO THIS ‘TILL WE FREE US 148, 148-49 (Tamara K. Nopper ed., 2021).

2. See *infra* text accompanying note 64.

3. ALBERT HUNTER, *Conceptualizing Community*, in HANDBOOK OF COMMUNITY MOVEMENTS AND LOCAL ORGANIZATIONS IN THE 21ST CENTURY 3 (R.A. Cnaan & C. Milofsky, eds. 2018).

4. *Id.* at 8-9; see also Martin Mulligan, *On Ambivalence and Hope in the Restless Search for Community: How to Work with the Idea of Community in the Global Age*, 49 SOCIO. 341, 347 (2015) (discussing the emotional allure of belonging to a community).

5. HUNTER, *supra* note 3, at 4.

as a way to express values that are people-centered and participatory or to promote a grassroots policy approach that should be informed by the needs of the people on the ground.<sup>6</sup> Additionally, when “community” is allowed to be a fuzzy or open-ended term—to be dynamic rather than static—it creates the possibility for people to identify and to coalesce around new norms and collective identities. In the modern world, communities are “now chosen, changeable, and fluid” and they allow people to organize themselves and advance shared interests.<sup>7</sup>

In addition to its creative potential, practitioners of transformative and restorative justice hope that the “community” will protect against punitiveness. Both transformative and restorative justice advocates point to the strength of community processes and norms as a safeguard against overly harsh treatment of individuals who have harmed others. They posit that the limits to what a “community” will ask of the perpetrator will derive from “community” norms and a democratic or consensus process. Yet the reliance on community for substantive and procedural limits is problematic. First, the community may be ill-defined; second, even where there is a defined community, it is not clear that community norms or commonalities will establish limits; and, finally, even where there is a defined community that does in fact set limits, it is not certain that those chosen limits will align with values deeply ingrained in wider society, such as human rights or freedom from cruel and unusual punishment.

Likewise, the meaning of the word “accountability” varies depending on context. For some, the term “accountability” references a collective responsibility for creating the social conditions that lead to violence in the first place. For others, the term is used to describe the individual accountability required of a person who causes harm to others. This individual accountability sometimes takes the form of an orchestrated encounter, a moment of reckoning in which a person faces (literally) those who they have harmed. And, at other times, individual accountability means the outcome or result of this encounter, such as taking ownership of one’s actions by acknowledging their harmful impact or agreeing to taking steps to repair the harm and make amends.

The ambiguity inherent to words like “community” and “accountability” offers a way to disengage from society’s existing, broken systems and opens the door to generating new norms. Indeed, we see these words as poised to be imbued with fresh meaning derived from the ethical, epistemic, and practical work of groups exploring or offering alternatives to criminal and juvenile legal systems. The ambiguity itself is an essential

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6. Alexandra Titz et al., *Uncovering ‘Community’: Challenging an Elusive Concept in Development and Disaster Related Work*, 8 *SOCIETIES* 71, 71 (2018).

7. Simon Green, *Getting a Sense of Community*, in *CRIME, COMMUNITY, AND MORALITY* 126, 138 (2014).

characteristic of the world-building abolitionists perform in the transformative justice arena.

Yet, ambiguity and instability in language can be dangerous. One danger is that new terms like “accountability” may obscure the fact that *nothing* substantial has changed. New principles and practices could replicate objectionable practices in criminal and juvenile systems. Another danger is that when an ambiguous term like “community” becomes a heuristic device, its use enables value-based assumptions based on romantic or nostalgic notions that communitarianism is an inherent good and that “community” is a font of moral authority.<sup>8</sup>

This Essay takes a close look at how the idea of community accountability is used in current transformative and restorative justice efforts, situating the concept within the history of delegalization, or a collection of different efforts to reclaim conflict resolution and public safety from the state. In fact, these efforts to reclaim the authority and means of redressing harm from legal systems may track earlier efforts to reclaim dispute resolution from the state. In Part I, we situate both transformative and restorative justice movements in the history of delegalization while noting essential differences between the objectives of these two reform movements. In Part II we analyze the phrase “community accountability” in transformative justice and restorative justice, respectively, and identify potential benefits and harms.

## I. TRANSFORMATIVE AND RESTORATIVE JUSTICE: DIFFERENT APPROACHES TO DELEGALIZATION

Delegalization has been a recurring reform movement, with shifting objectives and political motivations, continually present throughout American history.<sup>9</sup> Both transformative and restorative justice can be seen as part of this history. They are responses to criticisms that the criminal and juvenile legal systems are too intrusive and harsh, and that they target Black and brown people, poor people, and people with disabilities in devastating ways. Both transformative and restorative justice also respond to dissatisfaction with the state response felt by some people victimized by violent crime. While both transformative justice and restorative justice movements share an aim of delegalization and utilize relational language, they start from different points and have very different orientations to the state and its legal system.

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8. See generally Robert Weisberg, *Restorative Justice and the Danger of “Community”*, 2003 UTAH L. REV. 343 (2003).

9. CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 36 (1985) (“Known as delegalization, the reforms emphasize the need to shift our resources and approach away from formal, adversary proceedings and toward informalism and mediation” and describing earlier delegalization reforms in 1846 and 1851 (conciliation procedures) and the Freedman’s Bureau).

There are two primary vectors to the delegalization reform movements to which (we argue) transformative justice and restorative justice belong. The first vector seeks to break the state's monopoly on dispute resolution and to reclaim for private citizens the authority for maintaining social order—this is an objective for transformative justice activists. Rather than turning to the state for direction on substantive rights and responsibilities or for procedure, disputants use their own values and established norms to address disputes and resolve conflicts. The second vector of the delegalization reform movement focuses on creating space within existing state institutions (e.g., courts) for less formal, adversarial processes and is therefore understood as a kind of judicial reform—it is within this vector that modern restorative justice programs align. Disputants still go to court and may still be arguing about legal rights and obligations determined by the state, but they do so in a setting free of the state's strict procedural rules governing dispute processing. In a court-connected restorative process, for example, there are no prescribed, formal rules about who may speak, in what order, what topics are considered relevant to the discussion, or how allegations should be authenticated with evidence. The participants form the content of the discussion, develop the terms of any agreement, and then voluntarily consent to be bound to those terms.

#### A. TRANSFORMATIVE JUSTICE IN THE ABOLITION MOVEMENT

Transformative justice has been developed by prison and police abolitionists who view “police and I.C.E. as sites where enormous amounts of violence take place and as systems that were created to be inherently violent in order to maintain social control.”<sup>10</sup> Although the idea of prison abolition had been building throughout the 1970s and 1980s as a critical component of Black radical thought, the movement to abolish prisons consolidated in 1997 in Berkeley, California, with the convening of Critical Resistance. Notably, women of color who had first-hand experience as the targets of policing, prosecution, and punishment—Dr. Angela Davis, Rose Braz, and others—led the political and intellectual vanguard of prison abolition and the search for alternatives. The foundational text emerging from the early years of prison abolition is Dr. Angela Davis's book, *Are Prisons Obsolete?*

The task of the new abolitionists was both analytic and creative. Analytically, the movement sought to define and critique criminal systems, referring to them broadly as the “prison industrial complex.” Creatively, the new abolitionists began imagining ways of addressing violence and other forms of interpersonal harm that would not rely on the violent power of the

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10. Mia Mingus, *Transformative Justice: A Brief Description*, LEAVING EVIDENCE (Jan. 28, 2023, 12:01 PM), <https://leavingevidence.wordpress.com/2019/01/09/transformative-justice-a-brief-description/> [<https://perma.cc/2PBY-PJ7U>].

state's criminal apparatuses. What, they asked, should be the response to interpersonal violence? Any approach should promote accountability for the person who caused harm, healing for the person harmed, and a general assurance of safety for the community at large. The result was the transformative justice movement. Abolitionist Mia Mingus defines transformative justice in the following way:

Transformative Justice (TJ) is a political framework and approach for responding to violence, harm and abuse. At its most basic, it seeks to respond to violence without creating more violence and/or engaging in harm reduction to lessen the violence. TJ can be thought of as a way of “making things right,” getting in “right relation,” or creating justice together. Transformative justice responses and interventions 1) do not rely on the state (e.g. police, prisons, the criminal legal system, I.C.E., foster care system (though some TJ responses do rely on or incorporate social services like counseling); 2) do not reinforce or perpetuate violence such as oppressive norms or vigilantism; and most importantly, 3) actively cultivate the things we know prevent violence such as healing, accountability, resilience, and safety for all involved.<sup>11</sup>

Although the activist groups and organizations working in transformative justice are too numerous to mention, two groups have been particularly prominent in developing the conceptual framework for community accountability: *Incite! Women of Color Against Violence* and *Creative Interventions*.<sup>12</sup> Rather than rely on state authorities to “manage everyday violence and oppression,” organizers in these groups seek to “engage community members in building the critical consciousness and tools . . . to create communal collective support, intervention, accountability, prevention, and transformation.”<sup>13</sup>

Because transformative justice is generally free-standing and autonomous rather than adjunctive to state apparatuses, we argue that it should be understood as part of a broader history of delegalization, or efforts to reclaim conflict resolution from the state. Delegalization has been a recurring reform movement, with shifting objectives and political motivations, continually present throughout American history—and this history contains

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11. Mingus, *supra* note 10.

12. See INCITE!, <https://incite-national.org> [<https://perma.cc/A3VT-H5KS>]; see CREATIVE INTERVENTIONS, <https://www.creative-interventions.org> [<https://perma.cc/S7TY-KCL3>].

13. ANN RUSSO, FEMINIST ACCOUNTABILITY: DISRUPTING VIOLENCE AND TRANSFORMING POWER 90 (2018).

patterns that are important for transformative justice advocates to consider.<sup>14</sup> Jerold Auerbach, in *Justice Without Law?*, catalogues various examples of groups that explicitly rejected state rule of law “in favor of alternative means for ordering human relations and for resolving the inevitable disputes that arose between individuals.”<sup>15</sup>

Beginning as early as the colonial period and through the founding of the United States, Puritans, Quakers, Mormons, and other Christian utopians developed their own, autonomous, non-governmental forms of dispute resolution.<sup>16</sup> A shared communal ideology was the basis for resolving interpersonal disputes as well as those relating to land ownership, commerce, debts and trespass.<sup>17</sup> Disputes were settled between the disputants themselves or mediated or arbitrated by selected third-parties whose “decisions, rooted in community consensus, were rarely challenged.”<sup>18</sup> Throughout the 19<sup>th</sup> and early 20<sup>th</sup> centuries, immigrant groups such as Chinese people in San Francisco, Scandinavian people in Minnesota and North Dakota, and Jewish people in New York, established internal systems for addressing (and redressing) disputes arising within their communities through procedures like conciliation, mediation, and arbitration.<sup>19</sup> During the Progressive Era, business and commercial communities organized around Chambers of Commerce or self-contained trade associations, thereby excising their disputes from the state legal system and applying their own, internal mechanisms for resolving disputes according to established trade customs.<sup>20</sup> Most recently, the modern alternative dispute resolution (ADR) movement, which emerged, in part, out of the civil rights movement, was fueled by the notion that community empowerment could be achieved by wresting control and responsibility for dispute settlement away from the state and giving it back to the citizens.<sup>21</sup> For example, the American Friends Service Committee offered one proposal for citizen dispute settlement that drew upon African tribal practices: its underlying principle was the idea that disputes were “a form of property that ‘should belong to the community rather than

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14. HARRINGTON, *supra* note 9.

15. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 4 (1983).

16. *Id.* at 25.

17. *Id.*

18. *Id.*

19. *Id.* at 6 (“Among the most committed practitioners of non-legal dispute settlement were immigrant ethnic groups . . . some newcomers from other cultures and traditions tried to place their disputes as far beyond the reach of American law as possible.”); *see also* Colleen M. Hanycz, *Whither Community Justice?: The Rise of Court-Connected Mediation in the United States*, 25 WINDSOR Y.B. ACCESS JUST. 167, 178 (2007) (explaining that historic delegalization efforts in the U.S. existed in places where there was cultural homogeneity and little individual variation in what constitutes community values and morality).

20. AUERBACH, *supra* note 15, at 107-08.

21. AUERBACH, *supra* note 15, at 116-17; *see also*, Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 204-08 (2022) (describing the abolitionist objectives of early alternative dispute resolution proponents in the 1970s).



the formalized judicial system.”<sup>22</sup> Neighborhood Justice Centers and Community Boards developed as “locally based and locally responsive tribunals” that could “promote the democratization of justice.”<sup>23</sup> Thus, the aims of transformative justice, as articulated by the modern abolitionist movement, which is to develop alternative interventions for responding to harm that are self-reliant and do not involve the state or its institutions, belongs to this long lineage of delegalization efforts.

Auerbach makes several important observations about the persistent tensions between courts and their alternatives that offer a valuable lesson for transformative justice advocates. Notably, the ability for immigrant communities to exercise autonomous control over dispute settlement, to be able to act according to their social norms without interference or oversight from the state, was critical for “preserving communal values from the corrosive effects of assimilation”<sup>24</sup> and for avoiding state legal institutions that were “overtly biased against them or, at best, indifferent to their distinctive values.”<sup>25</sup> Yet, simultaneously, an individual’s ability to access the state legal system and to assert legal rights symbolized equality, legitimacy and acceptance in American society. Existing beyond the reach of the state meant, on the one hand, that groups could retain their distinctive identities and order themselves according to shared values and, on the other hand, that they were denied the protection of the rule of law. Many groups could not survive this dilemma of belonging, which, in turn, leads to a second lesson: time and time again, throughout American history, the hegemony of the state legal system won out. Auerbach notes that, after the American Civil War, “[t]he legal system, which ultimately was the arm of the state, discouraged autonomous pockets of resistance to its processes.”<sup>26</sup> For racial and ethnic minority groups and for businesses and mercantile associations, the “[l]aw was one of the primary instruments of acculturation; its rapid extension . . . was a national imperative”<sup>27</sup> and a means to quell racial discord and class warfare.<sup>28</sup> “Until the Civil War alternative dispute settlement expressed an ideology of community justice. Thereafter, as it collapsed into an argument for judicial efficiency, it became an external instrument of social control.”<sup>29</sup>

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22. AUERBACH, *supra* note 15, at 117.

23. *Id.* at 116.

24. *Id.* at 70.

25. *Id.* at 6.

26. *Id.*

27. AUERBACH, *supra* note 15, at 6.

28. *Id.* at 57.

29. *Id.* at 57-58 (using the example of the Freedmen’s Bureau, the government agency created to facilitate the transition of millions of people out of slavery and into freedom, to illustrate how the government utilized alternative methods for dispute resolution as a new mechanism for exerting social control).

More generally, the transformative justice movement embodies the same self-help traits that have been essential to the survival of groups excluded from political and legal power, those for whom justice was an unlikely result of police interactions or court proceedings. Conflicts and injuries that might otherwise be reported to the police and resolved in criminal court are instead handled within the neighborhood, organization, or family. This is not to say that nonstate approaches to addressing conflict and harm are preferable to state approaches, or vice versa. Rather, we acknowledge the reasons for ongoing efforts to find nonstate alternatives to unjust legal systems while acknowledging the challenges such movements face.

#### B. RESTORATIVE JUSTICE AS A JUDICIAL REFORM PROJECT

Restorative justice is a moral philosophy, initially articulated by Howard Zehr, that considers how to respond to wrongdoing.<sup>30</sup> Like transformative justice, restorative justice values relationships and the potential for individuals to create justice together, according to their shared norms. A crime or wrongdoing is “a wound in the community, a tear in the web of relationships” that affects not just those who are harmed but all those around them.<sup>31</sup> Zehr famously contrasted the retributive and restorative approaches to wrongdoing by noting that, instead of asking what law was broken, who broke the law, and how they should be punished, a restorative approach asks what is the harm that was done, how that harm can be repaired, and who is responsible for the harm.<sup>32</sup>

Today, restorative justice is often used to describe a collection of programs that are attached to criminal and juvenile systems and used in response to an individual, criminal act.<sup>33</sup> We therefore limit our discussion of restorative justice to those programs that are used as a diversion from, or supplement to, criminal and juvenile systems. These programs may be offered by free-standing organizations that work with police, prosecutors, and courts, to divert cases or as a supplement to the sentencing process. Some programs are embedded in existing legal institutions, like the restorative justice program in the juvenile division of the U.S. Attorney’s Office in

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30. Zehr is an important figure in restorative justice literature but he is not its progenitor; rather, restorative justice is a modern amalgam of spiritual philosophies, indigenous practices, ideologies, and political movements; see Lydia Nussbaum, *Realizing Restorative Justice*, 69 HASTINGS L.J. 583, 623–628 (2018).

31. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 28–31 (2015) (also noting that “a harm to one is a harm to all”).

32. *Id.*

33. *Restorative Justice? What’s that?* ZEHR INST. FOR RESTORATIVE JUST., <https://zehr-institute.org/what-is-rj/> [<https://perma.cc/D8TY-5ZH3>] (last visited Mar. 1, 2023).

D.C.<sup>34</sup> Because restorative justice programs work primarily in partnership with, or sometimes within, state institutions, we situate it on the second delegalization vector of judicial reform.

Following the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, sponsored by the American Bar Association and various judicial organizations and featuring U.S. Supreme Court Chief Justice Warren Burger and leaders from legal academia,<sup>35</sup> the American legal system underwent profound changes. From neighborhood tribunals for small claims, to “multi-door” courthouses where disputes were matched to the appropriate dispute resolution process,<sup>36</sup> to “problem-solving” or specialty courts,<sup>37</sup> judicial reformers have sought both to improve the quality of justice provided by courts, to make courts more humane and accessible, and to make the work of case management more efficient.

You can think about restorative justice like court-annexed mediation, with similar issues of annexation. When a non-legal, alternative process becomes adjunct to formal litigation, translational and operational challenges emerge. Many free-standing, non-profit mediation programs that work with courts may have to adapt their language and vocabulary (participants become “parties,” a memorandum of understanding becomes a “settlement agreement”) as well as their orientation to the parties and their dispute (no longer facilitating communication exchange or working toward mutual understanding but instead facilitating settlement negotiations).

In the restorative justice context, consider the example of a juvenile court that contracts with a non-profit organization to provide restorative justice services. Judges in the court refer cases to the non-profit organization, which, in turn, convenes a restorative process that includes the accused young person, the individuals directly harmed by the young person’s behavior, and other people impacted by the incident. But, again, vocabulary is important. When this description is conveyed back to actors within the legal system—judges, prosecutors, public defenders—the restorative process becomes an alternative to sentencing. In such a case, the young person is the defendant, the individuals harmed become the victims, and the ancillary support people are “the community.”

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34. *Restorative Justice Program*, OFF. OF THE ATT’Y GEN. FOR THE DISTRICT OF COLUMBIA, <https://oag.dc.gov/public-safety/restorative-justice-program> [https://perma.cc/PZ4Q-MR7Y] (last visited Mar. 1, 2023).

35. THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979).

36. Frank E. A. Sander, *Varieties of Dispute Processing*, 70 FED. RULES. DECISIONS 111 (1976).

37. *Problem-Solving Courts/Specialty Courts*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Advocacy/Policy-Priorities/Supporting-Community-Inclusion-and-Non-Discrimination/Problem-Solving-Courts-Specialty-Courts> [https://perma.cc/7PDC-AH5V] (last visited Mar. 1, 2023).

Both transformative justice and restorative justice movements should be understood as delegalization projects but with different targets. By placing these movements within this larger history, and in turn learning from successes and failures of the past, reform advocates and movement activists can take steps to bolster their work. One area that we believe needs greater attention and reflection by both transformative and restorative justice advocates is the notion of “community accountability.”

## II. COMMUNITY ACCOUNTABILITY

### A. COMMUNITY ACCOUNTABILITY IN TRANSFORMATIVE JUSTICE

The phrase “community accountability” was adopted by the prison abolitionists of the 1990s who developed theoretical and practical approaches to addressing violence without state involvement through policing, prosecution, and prisons. The idea of accountability has at least two aspects: first, collective accountability for creating the conditions that promote violence or disregard the needs of people who have been harmed by violence, and second, individual accountability for actions that cause harm. Ann Russo explains that “community accountability envisions community members (e.g., friends, family, coworkers, peers, neighbors) collectively responding to violence by cultivating communal healing and accountability rather than punishment and shame.”<sup>38</sup> At the same time, accountability “may include engaging with those who have caused harm to take responsibility, to make things right, and transform themselves and their actions.”<sup>39</sup>

#### 1. Community Accountability and World-Building

At its best, the phrase “community accountability” can serve as a touchstone in the creative process of developing new principles and processes for addressing harm. For creative purposes, this multiplicity of meanings signifies dynamism and growth. Early uses of the word “accountability” in activist circles include the statement of the Combahee River Collective, a Black feminist organization that called upon white feminist organizations to be accountable for their racism. The Collective stated, “Eliminating racism in the white women’s movement is by definition work for white women to do, but we will continue to speak to and demand accountability on this issue.”<sup>40</sup>

Feminist movements continue to discuss accountability as a reflective practice, a means by which their members consider their complicity in other

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38. Russo, *supra* note 13, at 90.

39. *Id.*

40. Combahee River Collective, *The Combahee River Collective Statement*, BLACK PAST (Apr. 1977), <https://www.blackpast.org/african-american-history/combahee-river-collective-statement-1977/> [<https://perma.cc/SYJ6-Z8VW>].

forms of oppression. In *Feminist Accountability*, for example, Russo reiterates the need to ensure that a progressive group is not engaging in forms of exclusion or oppression, stating, “the most important lesson I have learned is that our praxis often reproduces the very power dynamics that we are seeking to transform.”<sup>41</sup> Russo goes on to argue that activists should “take accountability for the impact of the ways we imagine, embody, and live the world that we envision for a future not yet here.”<sup>42</sup>

Transformative justice practitioners use this intentional and self-reflective notion of “community accountability” as a touchstone for developing ways to respond to violence without relying on state institutions. According to Mia Mingus,

Most TJ interventions involve a community accountability process, where a few members of the community work directly with the person who harmed to take accountability for the harm they’ve caused. This process, in the best-case scenario, works so that the person who caused harm understands their actions and the impact they had on the survivor(s) and others involved, apologizes, makes amends, repairs damage caused by their actions and—most importantly—works to change their behavior so that the harm doesn’t happen again.<sup>43</sup>

In terms of collective responsibility, the abolitionist seeks to create communities which do not reproduce violence but, instead, engage in self-reflection about how the social context contributes to violence. A widely used resource for transformative justice and community accountability is the Creative Interventions Tool Kit.<sup>44</sup> Here, “community accountability” is used in two ways—collective responsibility for ameliorating the conditions that permit violence and the individual responsibility of the perpetrator of violence.<sup>45</sup> The Tool Kit states that “communities are accountable for sometimes ignoring, minimizing or even encouraging violence” by failing to set norms or by failing to protect community members.<sup>46</sup>

Indeed, practitioners of transformative justice take seriously their collective responsibility for ameliorating the conditions that lead to violence.

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41. RUSSO, *supra* note 13, at 1.

42. *Id.* at 2.

43. Mingus, *supra* note 10.

44. *Creative Interventions Tool Kit: A Practical Guide to Stop Interpersonal Violence*, CREATIVE INTERVENTIONS 4 (2012), available at <https://www.creative-interventions.org/wp-content/uploads/2020/10/CI-Toolkit-Final-ENTIRE-Aug-2020-new-cover.pdf> [<https://perma.cc/HWN2-AL3A>] (stating “community-based intervention to interpersonal violence is an approach based upon the ideas and work of many individuals and organizations thinking about developing similar approaches to violence.”).

45. *Id.*

46. *Id.* at § 1, 32.

Incite! Women of Color Against Violence offers four actions that constitute this type of community accountability:

- (1) Create and affirm values & practices that resist abuse and oppression and encourage safety, support, and accountability;
- (2) Develop sustainable strategies to address community members' abusive behavior, creating a process for them to account for their actions and transform their behavior;
- (3) Commit to ongoing development of all members of the community, and the community itself, to transform the political conditions that reinforce oppression and violence;
- (4) Provide safety & support to community members who are violently targeted that respects their self-determination.<sup>47</sup>

This capacious idea of community accountability is epistemically rich in its ambition and ambiguity. It resonates with abolitionist Ruth Gilmore's claim that, to abolish criminal systems, we must "change everything," including our understanding of our responsibilities to one another.<sup>48</sup> It resonates with Lauren Berlant's "alternative world-building," the work that disenfranchised and marginalized communities must do to carve out a space to live and interact with safety and dignity.<sup>49</sup> Indeed, much of the literature about collective accountability can be seen as the germination of ideas about how to conceptualize justice, fairness, and right relations outside of the shadow of state systems. Community accountability might mean, for example, refraining from categorizing people as good victims and bad offenders.

## 2. The Ambiguity of "Community"

Of course, collective notions of accountability run into questions of what is meant by "community." Many disciplines wrestle with the question of what makes a community a "community"—indeed, the field of sociology emerged out of this very query—but there does appear to be consensus that the term is fuzzy, amorphous, and multi-dimensional.<sup>50</sup> To illustrate the

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47. INCITE!, *Community Accountability: How Do We Address Violence Within Our Communities?* (last visited Feb. 27, 2023), <https://incite-national.org/community-accountability/> [https://perma.cc/26PH-EK5N].

48. See RUTH WILSON GILMORE, *CHANGE EVERYTHING: RACIAL CAPITALISM AND THE CASE FOR ABOLITION* (Naomi Murakawa, Haymarket Books 2023).

49. See LAUREN BERLANT, *ON THE INCONVENIENCE OF OTHER PEOPLE* (Duke University Press 2022).

50. Anthropologists like Benedict Anderson and Anthony Cohen developed "imagined communities" as the theoretical model for national communities—how individuals who had no shared personal or social or geographic connection could, nevertheless, have the same sense of belonging. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON*

challenge of coming up with a definition, consider the United National High Commission for Refugees' good-faith effort:

“Community” can be described as a group of people that recognizes itself or is recognized by outsiders as sharing common cultural, religious or other social features, backgrounds and interests, and that forms a collective identity with shared goals. However, what is externally perceived as a community might in fact be an entity with many sub-groups or communities. It might be divided into clans or castes or by social class, language or religion. A community might be inclusive and protective of its members; but it might also be socially controlling, making it difficult for sub-groups, particularly minorities and marginalized groups, to express their opinions and claim their rights.<sup>51</sup>

While no established definition of the term “community” exists, academics identify multiple (always multiples of three!) dimensions.<sup>52</sup> Colin Bell, Howard Newby, and David Lee describe three levels or types of community: 1) a territorial, geographic area or locality; 2) the interconnected institutions and social system within that area; and 3) a sense of identity or belonging between individuals that does not rely on geographical relationships.<sup>53</sup> Peter Willmott's triptych typology of community is slightly different. Willmott describes a *territorial community* (geography, people who live in a particular area); an *interest community* (a set of people with something in common other than territory, usually an element of their identity, such as the Jewish community or Black community or gay community); and an *attachment community* (a kind of attachment to other people or to a place).<sup>54</sup> Anthropological literature on community highlights that “communities have boundaries, indeed must have boundaries to define themselves, meaning that strong communities will have very well-defined membership which excludes those who do not fit in, and therefore has

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THE ORIGINS AND SPREAD OF NATIONALISM (Verso 2016); ANTHONY COHEN, *SYMBOLIC CONSTRUCTION OF COMMUNITY KEY IDEAS* (Routledge 2001).

51. U.N. High Commissioner for Refugees (UNHCR), *A Community-Based Approach in UNHCR Operations*, UNHCR 14 (Jan. 2008), <https://www.unhcr.org/47f0a6712.html> [<https://perma.cc/WNB8-UTRA>] [hereinafter UNHCR].

52. George A. Hillery, *Definitions of Community: Areas of Agreement*, 20 RURAL SOCIO. 111 (1955) (analyzed 94 different definitions of community and identified three main categories: community as locality, community as a local social system; community as a type of relationship).

53. See generally COLIN BELL & HOWARD NEWBY, *COMMUNITY STUDIES: AN INTRODUCTION TO THE SOCIOLOGY OF THE LOCAL COMMUNITY* (1971); DAVID LEE & HOWARD NEWBY, *THE PROBLEM OF SOCIOLOGY* (1983).

54. PETER WILLMOTT, *Introduction to POLICING AND THE COMMUNITY* 1, 2 (Peter Willmott, 1987).

implications for the political and communitarian commitment to community as the basis for restoring civil society.”<sup>55</sup>

As Albert Hunter notes, even with these neat typologies, community is a fractured concept. For example, the geographic, territorial, or, what he terms, “ecological” dimension of community can mean a co-presence in time or space of any kind (it could be a city block or a virtual community on the internet or the International Brotherhood of Electrical Workers) and, in addition, of any duration (Woodstock or Burning Man or motorcyclists at Sturgis or multi-generational members of the 3rd U.S. Infantry Regiment dating all the way back to 1784).<sup>56</sup> Hunter also notes that the social structure dimension of “community” depends upon a wide array of interpersonal networks and social ties that can be open or closed, sparse or dense, and also mediated by a variety of institutions—stores, churches, schools, volunteer groups, professional associations—that “operate as nodes of interaction and both form and are formed by these interpersonal networks.”<sup>57</sup> Finally, the third, cultural-symbolic construction of a “community” is enormously complex because it reflects not only an individual’s psychological commitment and emotional attachment to a particular identity and culture, a commitment that can differ in intensity from person to person, but also individuals can identify as members of different (and sometimes contradictory) communities, altogether rendering the notion of a coherent, defined, bounded, and shared community identity even fuzzier when aggregated into a collective.<sup>58</sup>

Community, therefore, can mean different things to different people. It can be concrete or ethereal or both. It can derive from a physical location, a shared place in time, a commitment to moral values, a collective identity, or a feeling of connection to a person, place, or thing. It is simultaneously determined by environmental context and by individual identity and emotional attachments. “Community” is something that requires effort and resources to create, construct, maintain, and sustain. And, as the UNHCR definition of community signals, “community” can also be authoritarian, exclusionary, and conformist.<sup>59</sup> Rather than pursue romantic or nostalgic notions of community, Hunter cautions us “to maintain a healthy ambivalence or skepticism” about community; it is not safe to assume that “community” is an “unabashed ‘good’, positively valued, whose loss whether historical or personal is lamented,” as “communities may form that are

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55. GREEN, *supra* note 7, at 126.

56. HUNTER, *supra* note 3, at 8.

57. *Id.* at 9.

58. *Id.* (explaining that identity can be reflected as the “merged identity of the self with the community or alienation from it, and varying degrees of commitment and loyalty to the community.”). See also Terri Mannarini & Angela Fedi, *Multiple Senses of Community: The Experience and Meaning of Community*, 37 J. CMTY. PSYCH. 211 (2009).

59. UNHCR, *supra* note 51, at 14.



antithetical to other values and to other groups.”<sup>60</sup> It is also risky to assume that “community” can stand-in or serve as short-hand for those values that are people-centered, morally justified, and inherently “good.”<sup>61</sup>

Our aim here is not to correct for this vagueness and ambiguity—on the contrary, as discussed above, we believe that an element of open-ended ambiguity is ultimately beneficial because it leaves room for creativity, growth, and new possibilities for the kind of alternative world-building projects that transformative justice movements engage. In fact, we already see this creative approach to community-building in transformative justice projects such as the Bay Area Transformative Justice Collective, which, after struggling to find traction with the term “community,” instead chose the language of “pods” to describe this collection of people who would “turn to each other for support around violent, harmful, and abusive experiences, whether as survivors, bystanders, or people who have harmed.”<sup>62</sup> We highlight these fractured meanings of “community” to caution against relying on the term as a heuristic, without reflection on a community’s context, understanding who is and is not within the boundaries of its collective identity (or identities), and identifying the values or norms the community espouses and whether those values are antithetical to other values and other groups.

### 3. Efforts to Eschew Punishment in Favor of Individual Accountability

Within the transformative justice context, community accountability can also signify the community’s efforts to hold an individual responsible for the harm that they caused. In this usage, community accountability refers to the delegalized response to the actions of a person deemed responsible for an incident of harm. Importantly—and in contrast to the criminal legal system—although the transformative justice community holds the individual “accountable,” the community must not punish or destroy. As Russo puts it,

Rather than pushing for punishment, incarceration, and banishment of the person who causes harm, or minimizing, denying, victim blaming, and abandoning the person who has been harmed, community accountability and transformative justice approaches lead us to rethink accountability and justice in ways that strive to build and deepen

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60. HUNTER, *supra* note 3, at 19.

61. Titz, *supra* note 6.

62. Mia Mingus, *Pods and Pod-Mapping Worksheet*, in BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT 119, 119-20 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, eds. 2020) [hereinafter *Pods and Pod-Mapping Worksheet*].

individual and community accountability in the face of violence.<sup>63</sup>

One might ask what types of actions constitute accountability. In response, transformative justice practitioners decline to set established procedures or substantive requirements, relying instead on the wisdom of the “community” to establish accountability practices. This approach is consistent with the creative benefits of ambiguity in that it leaves room for new ways of doing things. At the same time, the transformative justice literature offers concrete suggestions for accountability. The Creative Interventions Tool Kit, for example, sets forth a “staircase of accountability” that the person who caused the harm should ascend in order to take accountability. The Tool Kit calls on the person who caused the harm to:

1. Stop the immediate violence
2. Recognize the violence
3. Recognize the consequences (for others)
4. Make repairs for the harm
5. Change so you don’t do it again
6. Become a healthy member of your community<sup>64</sup>

This vision of “accountability” requires many things of the person who caused the harm, including desistance, admission, acceptance of responsibility, rehabilitation, and some form of repair. Mia Mingus offers a similar, four-part framework of accountability: self-reflection, apology, repair, and changed behavior.<sup>65</sup> Accountability thus involves categories of actions familiar to the maintenance of good relationships outside of legal constructs. If one person wrongs another in any close relationship, we would expect the person to reflect on and acknowledge their actions, apologies, make things right, and do better next time. In this sense, the accountability model appears to reject legalism—especially the punishment model of criminal systems—in favor of a return to first principles of human decency.

Although they are meant to offer a delegalized response to interpersonal harm, the accountability steps seem in danger of slipping into the established requirements of criminal systems. In particular, “recognizing the harm” is a lot like “acceptance of responsibility” in criminal systems and “make repairs for the harm” looks a lot like modes of punishment in criminal systems. These two categories of accountability are discussed below.

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63. RUSSO, *supra* note 13, at 98.

64. *Creative Interventions Tool Kit*, *supra* note 44, at § 1, 33.

65. Mia Mingus, *The Four Parts of Accountability & How to Give a Genuine Apology*, LEAVING EVIDENCE (Dec. 18, 2019, 7:48 AM), <https://leavingevidence.wordpress.com/2019/12/18/how-to-give-a-good-apology-part-1-the-four-parts-of-accountability/> [https://perma.cc/RUG3-EC9A].

a. *Accountability as Taking Responsibility*

The transformative justice frameworks of accountability require acknowledgment of wrongdoing and acceptance of responsibility. Some models, like Mingus’s framework mentioned above, require apology.<sup>66</sup> In this sense, accountability closely tracks the idea of “acceptance of responsibility” in criminal sentencing. While defendants in criminal and juvenile cases have a constitutional right against self-incrimination, they are encouraged to confess to criminal acts, apologize, and express remorse. Indeed, the Federal Sentencing Guidelines recommend reduced sentences for defendants who accept responsibility.<sup>67</sup> Examples abound in state criminal codes and case law of the value that sentencing judges place on the defendant’s apology and remorse.<sup>68</sup> Given that criminal systems value apology and acknowledgment of one’s actions, the question is whether transformative justice practitioners mean something different.

One possibility is that accountability in transformative justice should be voluntarily given rather than coerced out of fear of punishment. Kaba gestures to this, stating that accountability requires “that internal resource that allows you to take responsibility for harms that you commit against yourself and other people.”<sup>69</sup> Mingus emphasizes the “need to move away from ‘holding people accountable’ [to] *support[ing] people to proactively take accountability for themselves.*”<sup>70</sup> In other words, in a free-standing program designed to redress harm and resolve conflicts, there would be no need for pressuring people to be accountable. They would willingly participate in the process, acknowledging the harm they caused and making amends.

b. *Accountability Distinguished from Punishment*

Perhaps the broadest claim of transformative justice is that accountability is not punishment. The Tool Kit, for example, acknowledges that accountability is “linked to punishment” in the minds of some people, but takes pains to distinguish “responsibility and change.”<sup>71</sup> The person who caused harm may face nonpunitive “consequences,” but not punishment. The Tool Kit attempts to draw the line between punishment and consequences: “When their violence causes [people who have harmed others] to lose something, it is important not to protect them from ever having to feel

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66. Mingus, *supra* note 65.

67. U.S. SENT’G COMM’N, USSG § 3E1.1, GUIDELINES MANUAL (2022).

68. See generally SUSAN BANDES, *Remorse and Judging*, in *REMORSE AND CRIMINAL JUSTICE: MULTI-DISCIPLINARY PERSPECTIVES* (Steven Tudor ed., 2021); see also M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 313-14 (2018).

69. KABA, *supra* note 1, at 47.

70. *Pods and Pod-Mapping Worksheet*, *supra* note 62.

71. *Creative Interventions Tool Kit*, *supra* note 44, at § 4F, 3.

regret, sadness, fear, or loss. Again, these are not necessarily punishments. These are the possible human costs for causing harm and suffering.”<sup>72</sup> The Tool Kit makes a second distinction between accountability and punishment based on the intent of the community, stating that accountability is “driven by connection and care rather than fear and anger alone.”<sup>73</sup>

Insofar as accountability is defined as “not punishment,” the transformative justice conceptualization of accountability oversimplifies what criminal and juvenile systems claim as their goals. Criminal and juvenile sentencing is not exclusively retributivist. It may be that all criminal and juvenile sentencing decisions have the effect of punishing their targets. But it is also accurate to say that criminal and juvenile system actors *intend* things other than retributive punishment in at least a segment of their cases. Traditional criminal sentencing theory has purposes other than retribution. Sentencing may be intended to serve the purpose of some sense of public safety by placing restrictions on the defendant. Typically called “incapacitation,” this goal of sentencing may mean something less than imprisonment. Incapacitative punishment includes restrictions on professional licenses to engage in a trade or a locking device on a car to prevent drunk driving. Likewise, traditional sentencing may be intended to deter the defendant from reoffending. And, most importantly, traditional sentencing may serve the purpose of rehabilitation, such as when a trial judge sentences the defendant to drug treatment or to a parenting class.

Make no mistake—a criminal sentence that imposes mandatory drug treatment is fundamentally coercive, and properly considered punishment. But the example demonstrates that the line between accountability and punishment cannot be drawn by the intent of the person imposing or requesting the outcome. The judge who imposes mandatory drug treatment intends rehabilitation, not retribution. Indeed, the judge may specifically use the language of accountability and repair when explaining the sentence. The stated goals of juvenile systems are even more closely aligned to the accountability language of transformative justice practitioners. In juvenile court, the child is adjudicated as “responsible” and rehabilitation is the stated goal of sentencing. Moreover, traditional criminal and juvenile sentencing often requires restitution payments to the victim of the crime. Restitution is designed to make the victim whole and to make the defendant directly accountable to the person harmed by their actions. These aspects of criminal sentencing complicate the conceptualization of an accountability-punishment dichotomy in transformative justice.

In sum, the array of sentencing goals and mechanisms in criminal and juvenile systems demonstrate complex efforts to change behavior, promote some idea of public safety, and provide redress to the person harmed. The

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72. *Id.* at § 4F, 23.

73. *Id.* at § 4F, 3.

intent is not purely punitive in the retributivist sense. This is not to take away from critiques of the destruction wrought by criminal and juvenile systems, but only to point out that defining accountability as “not punishment” may be a difference without a distinction. Repair in transformative justice cannot be so clearly distinguished from criminal punishment.

c. *Punitive Outcomes and Their Limits*

Some proponents of community accountability and transformative justice recognize the risk that accountability practices will become punitive and search for limiting principles. In the workplace sexual harassment context, for example, transformative justice practitioner Amanda Aguilar Shank admits to being “troubled by the lack of options we have for exercising accountability.”<sup>74</sup> Shank notes that “firing and excluding people who harass is a practice that mirrors the ultimately ineffective approach of the criminal justice system,” but struggles to think of alternatives.<sup>75</sup>

Excluding and firing people may have the unintended consequence of reducing the likelihood that others who cause harm will voluntarily participate in a community accountability process. Without the coercive power of the state, transformative justice relies on the willingness of people who have caused harm to come forward, take responsibility for their actions, and voluntarily participate in the process. Yet, if the community banishes the person or destroys their reputation in some way, it is unlikely that others will step forward. One community accountability practitioner notes, “[i]f we are ever to see the dream of transformative justice become a widespread reality, we must collectively resist the culture of disposability that says that people who have done harm are no longer people, that they are ‘trash,’ that they must be ‘canceled.’”<sup>76</sup>

Indeed, the abolitionist literature contains sophisticated reflections on the nature of punishment and the danger of punishing people under the banner of accountability. Author and activist adrienne maree brown, analyzes “call outs and cancellations” as a form of punishment.<sup>77</sup> In her book, brown explores the idea of punitiveness as much broader than criminal or juvenile sentencing. Punishment happens through “isolating and picking off individuals.”<sup>78</sup> She points to instances in which someone was banished from the activist group—a form of punishment—and that banishment was mischaracterized as giving someone “room to grow.”<sup>79</sup> Reflecting on the use of accountability language as a cover for punitiveness, brown observes,

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74. *Pods and Pod-Mapping Worksheet*, *supra* note 62, at 39.

75. *Id.*

76. *Pods and Pod-Mapping Worksheet*, *supra* note 62, at 75.

77. ADRIENNE MAREE BROWN, *WE WILL NOT CANCEL US* 40 (AK Press ed., 2020).

78. *Id.* at 8.

79. *Id.* at 45.

“We call it ‘transformative justice’ when we are throwing knives and insults, exposing each other’s worst mistakes, reducing each other to moments of failure. We call it ‘holding each other accountable.’”<sup>80</sup> Indeed, as early as 2003, Incite! published a working document to reflect on these questions. It reads, in part,

If we do not rely on the state to adjudicate cases of gender violence, then how do we ensure justice and fairness before holding perpetrators accountable? How do we ensure that we do not turn into vigilante groups? If we do develop processes to judge cases within a community context, will we just replicate a mini version of the oppressive state apparatus within our communities?<sup>81</sup>

Part of the struggle in drawing a line between accountability and punishment is the prominent role of the person who was harmed—the victim or survivor—in transformative justice. In the community accountability practices of Philly Stands Up, the survivor’s “[d]emands are the central document in our accountability process.”<sup>82</sup> But there are no clear limits on what a person who has been harmed might want to ask of the perpetrator. In sum, then, accountability easily elides with punishment because of (1) the fuzziness of accountability measures, (2) the ease with which a person can be excluded from a given community, and (3) the prominent role of the victim or survivor in suggesting the accountability measures that should be taken by the person who caused the harm.

Community accountability advocates in the transformative justice space seem to advocate three types of limits or litmus tests for ensuring the accountability is non-punitive. First, and perhaps most importantly, they appear to be advocating for what Judith Resnik calls “the anti-ruination principle.”<sup>83</sup> The requests made of the person who caused the harm should not ruin the person through exile, loss of livelihood, or other forms of civil death. For example, brown argues, transformative justice should “respond not with rejection, exile, or public shaming, but with clear naming of harm; education around intention, impact, and pattern breaking; satisfying apologies and consequences; new agreements and trustworthy boundaries; and lifelong healing resources for all involved.”<sup>84</sup> This anti-ruination principle seems promising if it is accompanied by the type of sophisticated analysis

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80. *Id.* at 68-69.

81. INCITE!, *Community Accountability Working Document* (Mar. 5, 2003), <https://incite-national.org/community-accountability-working-document/> [<https://perma.cc/7CB6-B3XB>].

82. *Pods and Pod-Mapping Worksheet*, *supra* note 62, at 95.

83. Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People’s “Ruin”*, 129 *YALE L.J.* 365, 369 (2020).

84. BROWN, *supra* note 77, at 11.

that brown conducts into the depth of the injuries inflicted through exclusion and shaming.

Second, community accountability advocates appear to be arguing for an intent-based test. Accountability requires reflection on whether one intends to punish or to hold accountable. Kaba and Herring, for example, acknowledge the desire to punish a person who has harmed others, but caution that the intent behind holding a person accountable must be devoid of the desire to punish.<sup>85</sup> Kaba acknowledges the desire for vengeance, observing that it is “[v]ery hard to think of what else to do when violence or harm occurs in the world but to punish.”<sup>86</sup> Likewise, the punitive impulse of the victim or survivor cannot dominate the accountability process. Kaba suggests that victim or survivor’s desire for vengeance must not drive the community’s response to the person who caused the harm. While feelings of vengeance are understandable, Kaba writes, “We shouldn’t codify our personal feelings of vengeance to apply to the entire world.”<sup>87</sup> Third, and closely related to the intent-based principle, is the role of the community in ferreting out punitive intent. There is a sense that the community—through its norms and processes—will simply not allow accountability to deteriorate into destructive punishment. The community itself is the protection against punitiveness.

Despite these excellent analytical tools—an anti-ruination principle and an eschewal of punitive intent, and community norms—Kaba’s distinction between punishment and accountability collapses in her fictional account of “another world where punishment is not part of the glue that holds society together.”<sup>88</sup> In an imagined extraterrestrial community called “Small Place,” an outsider from earth kills a community member.<sup>89</sup> The perpetrator remained in the community and participated in circles where memories and grief were shared so that the perpetrator could learn about the impact of her crime. Next, the community of Small Place learned more about the perpetrator’s life and actions. Community members were asked to empathize with the killer and to examine their own emotions of rage, jealousy, and so forth.<sup>90</sup>

But Kaba’s story takes a punitive turn. She writes, “When circles have been exhausted, the killer is taken to the ocean, tied up and dropped in the water. This empathy ceremony takes place in front of the entire community. The immediate family members of the victim are given the opportunity of saving the life of the killer or letting them drown.” The perpetrator must “take the place of the person killed” and “pay a debt for the life taken for

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85. KABA, *supra* note 1, at 133.

86. *Id.* at 150.

87. *Id.* at 52.

88. KABA, *supra* note 1, at 157.

89. *Id.* at 159-61.

90. *Id.* at 162.

however long the harmed parties deem necessary, but they do so within the community, living as integrated members.” Ultimately, after almost drowning, this perpetrator was spared. Kaba concludes, “Vengeance is not justice.”<sup>91</sup>

Although the family of the deceased chooses not to act on vengeance, the story is unnerving because, without defined limits on what can be done in the name of accountability, it is up to the community members to determine what to do. In Kaba’s story, the safeguard against a death sentence is the inculcation of transformative norms in the community. The family of the murder victim decides to reject death as punishment but only after a mock execution manufactured by, and therefore presumably sanctioned by, the community.

Thus, the protection against harsh punishment is envisioned as trust in mental state of the people asking for repair and accountability. Through the inculcation of community norms, the family that gets to decide whether the killer drowns should be oriented toward repair and away from vengeance, disposed toward equanimity and not furious rage. Likewise, in describing the stance of non-punitive accountability, brown suggests that the community act toward the person who caused harm in the same manner that a loving parent approaches a child. Brown urges us to “find the gentle parent inside of us who can use the voice of accountability, while also bringing curiosity—‘Why did you cause harm? Do you know? Do you know other options? Apologize.’”<sup>92</sup> In this sense, accountability may not be a mock execution by drowning, but it is the “parent’s voice of discipline.”<sup>93</sup> Of course, this places the person who caused harm in the role of a child, which may be an injustice of another kind, or—at the very least—be reminiscent of the juvenile system’s doctrine of *parens patriae*.

Despite these cautions, we are currently seeing widespread efforts to reconceptualize accountability without punishment. The drive to root out the vengeful impulse finds purchase with philosopher Martha Nussbaum, for example.<sup>94</sup> In her discussion of accountability and sexual assault, she draws a line between the retributivist urge to see someone suffer for the harm they caused and the desire to hold people accountable for their actions and seek some sort of forward-looking justice. In a chapter titled, *The Vices of Victimhood*, she recounts the plot of Euripides’s *Hecuba*, in which Hecuba, the queen of Troy, becomes consumed with vengeance when Polymestor kills her child.<sup>95</sup> Hecuba is damaged, and the damage compromises her moral compass. From here, Nussbaum analyzes whether retributivism is a

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91. *Id.* at 162.

92. BROWN, *supra* note 77, at 59.

93. *Id.*

94. MARTHA C. NUSSBAUM, *CITADELS OF PRIDE: SEXUAL ASSAULT, ACCOUNTABILITY, AND RECONCILIATION* 54 (W.W. Norton & Co. ed., 2021).

95. *Id.* at 42.



“burdened virtue” or no virtue at all.<sup>96</sup> Initial anger at a person who causes harm may spur necessary action, Nussbaum concludes, but “the wish for payback, for commensurate pain to befall the aggressor,” is both dangerous and lacking in virtue.<sup>97</sup> Like the transformative justice advocates, Martha Nussbaum’s view of accountability is closely aligned with the intent of the person seeking redress. Nevertheless, she admits that it can be “very difficult to distinguish a strong demand for justice from retributive anger seeking primarily to inflict pain.”<sup>98</sup>

As noted above, transformative justice practitioners may rely on the wisdom of the community to ensure that accountability is not punitive. Indeed, it is impossible to overstate that transformative justice distinguishes accountability from punishment through the norm-generating process of community-building. Kaba’s foundational book on transformative justice and abolition, for example, titles an entire section, *Accountability is Not Punishment*.<sup>99</sup> Kaba explains that accountability varies depending upon the context in which the harm takes place. She later explains that she only facilitates transformative justice processes in her “communities,” and without pay.<sup>100</sup> In other words, the strength of *her* particular community and *her* particular role within the community is what ensures that accountability does not turn into harsh punishment.

But, as discussed above, “community” is a fractured concept and should not be used reflexively as a stand-in for moral authority and inherent “goodness.” Any group that seeks to reclaim power to hold individuals accountable to the state must, in advance, build consensus around norms and shared values for the individuals making up the collective. Without this consensus building, the community’s norms will not be clear and explicit enough to serve as a backstop against punitiveness. And, further, embarking on a delegalization project without clarity about what alternative norms will apply in this alternative world runs the risk of defaulting to, or reproducing, the familiar, existing norms of the state’s punitive legal system—the very outcome transformative justice seeks to avoid.

## B. COMMUNITY ACCOUNTABILITY IN RESTORATIVE JUSTICE

Restorative justice advocates use the phrase “community accountability” in ways that are similar to, but less capricious than, its use by transformative justice advocates. As a result, a great deal of the above analysis applies to restorative justice, but with key differences discussed in this section.

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96. *Id.* at 51.

97. *Id.* at 54.

98. *Id.* at 226.

99. KABA, *supra* note 1, at 131.

100. *Id.* at 155.

### 1. “Accountability” in Restorative Justice Partnerships with Legal Systems

A thorough discussion can be found in Danielle Sered’s article titled, *Accounting for Violence*.<sup>101</sup> Sered is the founder of Common Justice, an organization in Brooklyn, New York, that provides restorative justice services as part of diversion and mitigation options for eligible youth in the area. Common Justice offers an alternative to incarceration for cases involving “violent felonies in adult courts.”<sup>102</sup> This is a remarkable and ambitious mandate, given that most restorative justice groups secure partnerships to divert juvenile cases, and often only the least serious juvenile cases.

According to its website, “Common Justice develops and advances solutions to violence that *transform the lives* of those harmed and foster racial equity without relying on incarceration.”<sup>103</sup> The organization seeks to “build practical strategies to hold people accountable for harm, break cycles of violence, and secure safety, healing, and justice for survivors and their communities.”<sup>104</sup> Here, accountability is framed as an individualized, personal responsibility. What accountability means, however, is explicitly turned over to participating “communities.” The website states:

Common Justice knows that communities impacted by crime and violence—including crime survivors—have the power and right to define for themselves what produces safety, what constitutes accountability, and what facilitates healing.<sup>105</sup>

In her article, *Accounting for Violence*, Sered elaborates on how accountability works within the framework of restorative justice diversion programs. As in the transformative justice literature, accountability in restorative justice is portrayed as an alternative to retributive punishment. Whatever accountability is, Sered wants to say emphatically that it is not retribution, or causing “suffering at the expense of change.”<sup>106</sup> Instead, she arranges her discussion of accountability into a series of principles, the first

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101. DANIELLE SERED, ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION 29 (2017), available at <https://d3n8a8pro7vnm.cloudfront.net/commonjustice/pages/82/attachments/original/1506608259/accounting-for-violence.pdf?1506608259> [<https://perma.cc/4U7T-VCZ3>] [hereinafter ACCOUNTING FOR VIOLENCE].

102. *Our Work*, COMMON JUSTICE (last visited Feb. 26, 2023) [https://www.commonjustice.org/our\\_work](https://www.commonjustice.org/our_work) [<https://perma.cc/V2YU-THKX>] [hereinafter COMMON JUSTICE].

103. COMMON JUSTICE, *supra* note 102.

104. *Id.*

105. *Id.*

106. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION AND A ROAD TO REPAIR 95 (2019) [hereinafter UNTIL WE RECKON].

of which states that any alternative to incarceration should be “survivor-centered.”<sup>107</sup> According to Sered, survivors often want a chance to be heard, to ask questions and receive answers. They want a sense of control, repair, and assurance that the person will desist from harming others.<sup>108</sup> “The fundamental need for safety should not be equated with an appetite for incarceration.”<sup>109</sup> Even if they think they want it, Sered argues, they often find it does not deliver the relief and satisfaction they imagined.<sup>110</sup>

Sered’s second principle for criminal reform is that “Responses [S]hould be [A]ccountability-[B]ased.”<sup>111</sup> The five key elements of accountability are (1) acknowledging the harm; (2) acknowledging the impact of the harm; (3) expressing remorse; (4) repair; and (5) desistance from further harm.<sup>112</sup> These elements can be put in roughly two buckets: acknowledgement of harm and repair. Insofar as accountability means an acknowledgment of harm, restorative justice envisions authentic, volunteered confessions and a sincere appreciation of the impact of the harmful acts. The person who caused harm is not passively judged as guilty, but instead actively admits wrongdoing. As discussed above, this language of accountability in restorative justice mirrors the language of accountability in juvenile systems as well. In criminal and juvenile systems, defendants are rewarded for guilty pleas and expressions of remorse.

A second aspect of accountability, according to Sered, is that the defendant is accountable specifically to the person harmed.<sup>113</sup> She contrasts this view of accountability with prisons, stating, “no one in prison is required to face the human impact of what they’ve done” or to “come face-to-face with the people whose lives are changed as a result of their decision.”<sup>114</sup> At first blush, it seems that Sered believes that the victim or survivor should define accountability through their requests for repair. But, reading on, it becomes clear that Sered is not envisioning an accountability system driven by the needs and desires of victims. Indeed, survivors may want retribution that the criminal system actors would deem unfair. Sered shares her observation that, even when survivors think they want retribution, they often find it does not deliver the relief and satisfaction they imagined. As a result, Sered believes that crime survivors should not have “unmitigated control” over what happens: “The criminal justice system maintains a responsibility to safety, justice, and human dignity that it

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107. ACCOUNTING FOR VIOLENCE, *supra* note 101, at 9.

108. *Id.* at 12-13.

109. *Id.* at 13.

110. *Id.*

111. *Id.* at 17.

112. ACCOUNTING FOR VIOLENCE, *supra* note 101, at 17.

113. *Id.*

114. *Id.* at 18.

should uphold even when those interests run contrary to survivors' desires."<sup>115</sup>

In restorative justice, then, the limit on what might be asked of a person in the name of "accountability" appears to be the legal limits on punishment set by the criminal or juvenile system in which the restorative justice program operates. This is a startling conclusion, given that restorative justice—like transformative justice—critiques the destructive process of stigmatizing and punishing the defendant. Ultimately, the idea of accountability in restorative justice collapses into the same conceptual world of criminal and juvenile systems. Consider, for example, a diversion program in which the state conditions dismissal of the case on the defendant or juvenile respondent's successful completion of conditions agreed to in the restorative justice meeting. These accountability measures set in the restorative justice proceeding become enforceable judicial orders.

Even the word accountability is used in the juvenile context. The federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) provides accountability block grants for programs that hold youth accountable for delinquent behavior through the imposition of graduated sanctions.<sup>116</sup> The OJJDP defines accountability as follows:

Accountability means holding a juvenile who has violated the law responsible for this behavior by imposing consequences commensurate with the seriousness of the offense and the youth's prior criminal history. These sanctions can include restitution, community service, victim-offender mediation, intensive supervision, house arrest, or confinement.<sup>117</sup>

Indeed, in its examples of the types of programs that can receive an accountability block grant, the OJJDP specifically refers to restorative justice.<sup>118</sup> Sometimes, the word accountability is part of the restorative justice process, such as the OJJDP's example of "Accountability Conferences" in South Dakota.<sup>119</sup>

Moreover, to persuade juvenile and criminal systems to refer cases to restorative justice, its proponents may point out the conceptual harmony

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115. *Id.* at 15.

116. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, JUVENILE ACCOUNTABILITY INCENTIVE BLOCK GRANT BULLETIN 1 (Apr. 2003).

117. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, JUVENILE ACCOUNTABILITY BLOCK GRANTS PROGRAM (Oct. 2009), <https://www.ojp.gov/pdffiles1/ojjdp/226357.pdf> [<https://perma.cc/5466-EW76>].

118. *Id.*

119. *Juvenile Court – Delinquent and Child in Need of Services (CHINS) Cases*, STATE OF N.D. CT., <https://www.ndcourts.gov/other-courts/juvenile-court/delinquent-unruly> [<https://perma.cc/XZ7Q-EW6K>] (last visited Mar. 1, 2023).

between restorative and criminal justice. Restorative justice does not let offenders off lightly but instead is billed as being *even more* demanding than conventional criminal legal sentencing. Sered argues, for example, that a face-to-face confrontation with their victim is the toughest thing a defendant could be asked to do.<sup>120</sup> Indeed, accountability in restorative justice represents a commitment to the “values” of the criminal system, including “answering to crime survivors” and “taking accountability seriously.”<sup>121</sup>

It is easy to see how the language of transformative justice’s accountability—with its thoughtful, iterative process of considering the collective responsibility for violence and imagining non-state responses—is dramatically compromised in the restorative justice context. In practical terms, this means that the juvenile sentenced by a judge may face identical consequences to the juvenile in a restorative justice (sentencing) process, with both processes claiming to be aimed at accountability rather than punishment.

## 2. “Community” in Restorative Justice Partnerships with Legal Systems

The question, then, is whether the restorative justice version of “community” sets any guidelines for, or limits on, what a juvenile might be asked to do to repair the harm and be held accountable. In other words, are there strong, clear, protective community norms in restorative justice? Often, the answer to this question seems tautological: the community participates in the restorative justice process and the community defines and limits what is asked for in the name of accountability; the community sets the norms.

The problem with this answer is that, for many of these state-adjunct or court-annexed restorative justice programs, the community element is thin, if it exists at all. There are a few troubling consequences that stem from a restorative justice process that lacks a substantial or authentic community component.<sup>122</sup> First, those programs that call themselves “restorative” but have no one who can stand in to represent “the community” are, we argue, not restorative at all. Instead, they function as informal criminal sentencing procedures that might use restorative vocabulary but still maintain the punitive and retributive substance of the state criminal legal system (perhaps giving new meaning to the phrase “community theater”).

Second, for those restorative justice programs that have some community element, albeit a limited one, we note some additional concerns. Characterizing crimes as “harms to community” opens up a new category for

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120. ACCOUNTING FOR VIOLENCE, *supra* note 101, at 18.

121. *Id.* at 31.

122. Richard Delgado sounded this alarm more than twenty years ago; see, Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751 (2000).

prosecution, extending state punitive power into new realms (e.g., permitting prosecution of non-criminal acts such as littering, excessive noise, or requiring parents of “troublesome” children to attend parenting classes).<sup>123</sup> Another critique, building on the above discussion of community as a fractured concept, is that where state-adjunct or court-annexed restorative programs do attempt to incorporate “community presence,” their approach to community is rife with assumptions: they may assume the existence of a community or shared link, when in fact none may exist or at least not in the form imagined. They may also assume that a community, “is predisposed to act in a positive manner towards offenders.”<sup>124</sup> Here, again, we see the problem of relying upon “community” as a false heuristic for human-centered and imbued with moral authority or, as Simon Green writes, that “draws on a notion that communities are good, healthy and helpful social institutions whose participation will simultaneously enhance criminal justice processes and bolster shared values.”<sup>125</sup> Finally, there is the danger that state-adjunct or court-annexed restorative programs effectively co-opt communities into making sentencing decisions for the state, what Green calls “restorative sentencing.” Green warns that state-adjunct restorative justice programs do “not mean that the state has relinquished authority but that it exercises this authority in a new, more discreet, fashion. The focus on community therefore fulfils a function beyond any straightforward crime control activity; it is also the means of governing society”<sup>126</sup>—the state, by embracing the communitarian spirit of restorative justice, remolds “community *as* crime control.”<sup>127</sup>

## CONCLUSION

Both transformative and restorative justice advocates demonstrate a keen understanding of the various injustices and harms caused by U.S. criminal and juvenile systems. The transformative justice work of abolitionists demonstrates creativity, self-reflection, and potential, particularly in its commitment to human dignity and its rejection of stigma and ruination that often flow from the binary construct of victim/offender. Restorative justice, in turn, continues to ameliorate harsh outcomes in criminal and juvenile cases by providing opportunities to divert cases from criminal court.

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123. SIMON GREEN, *COMMUNITY, CRIME AND MORALITY* 145 (Routledge, 2014) (describing the UK’s Crime and Disorder Act of 1998 that included harm to the community as a sanctionable offense and giving examples of newly expanded subjects for prosecution).

124. *Id.* at 144.

125. GREEN, *supra* note 123, at 147-48.

126. *Id.* at 147.

127. *Id.*

The caution offered in this Essay, however, is about reliance on ambiguous notions of community accountability. The idea of community accountability does not free alternative processes from conventional notions of punishment nor does it keep alternative processes from becoming punitive or ruinous to the person accused of committing an act of harm.

One caution is that the concept of “community” is slippery. In system-annexed restorative justice programs, the idea of community is easily co-opted by system actors, if authentic community presence even exists at all. In transformative justice, in contrast, the idea of “community” signals a careful effort to build new worlds outside of criminal systems by people with a desire for shared norms, values, practices. But we cannot assume that the community’s norms and deliberative process are an unalloyed good that can be trusted to define “accountability” and safeguard against punitiveness. Furthermore, the history of delegalization efforts contains important lessons about the potential pitfalls of using community to set responses to, and impose limits on, state violence.

The other caution is that the attempt to dichotomize accountability and punishment breaks down upon closer examination. At its best, accountability language gestures to the notion that there should be a limit to what happens to someone who causes harm. This limit can be described as an anti-ruination principle—no throwing away people, no ruining people. Yet, in the transformative justice context, as many abolitionist activists have pointed out, people are sometimes excluded and stigmatized under the banner of “accountability.” And, in restorative justice processes, accountability sounds and looks like the goals and outcomes of criminal and juvenile systems, at least in terms of their rehabilitative efforts.

Ambiguity in language can be generative, but it can also gloss over sticky issues. As interest in both transformative and restorative justice continues to grow, it is the authors’ hope that their practitioners and legal academics will take seriously the risk of glossing over the thorny issues that accompany efforts to set new norms, define community, and to find real alternatives to ruinous punishment.