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Hannah Walker
Elisabeth Haub School of Law at Pace University

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Unspoken Immunity and Reimagined Justice: The Potential for Implementing Restorative Justice and Community Justice Models in Police-related Shootings

*Hannah Walker**

On July 6, 2016, Philando Castile was shot to death during a routine traffic stop outside of Falcon Heights, Minnesota.¹ As Officer Jeronimo Yanez approached Castile's vehicle, Castile's girlfriend began to live stream the encounter on her smart phone.² The graphic footage that followed demonstrates the brutal reality Castile faced as a black man approached by an armed police officer. During the 62-second traffic stop, Castile produced his insurance card and disclosed that he was lawfully carrying a firearm.³ Yanez immediately shouted, "Don't pull it out!"⁴ Castile and his girlfriend assured Yanez that he was not

* J.D. Candidate, December 2017, Elisabeth Haub School of Law at Pace University; Master of Women's History, December 2017. I would like to thank Professor Lyde Cullen Sizer for providing me with the freedom and encouragement to formulate my initial thoughts on this issue. Her guidance continually challenged me to strive for precise prose. In addition, I would like to thank Professor Michael B. Mushlin, whose incredible insights into prison reform sparked my academic and legal interest in prison abolition. To all who have remained by my side through the challenges of law and graduate school (and life), I am eternally grateful.

1. See Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile Is Charged With Manslaughter*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html>.

2. *Id.*

3. *Id.*

4. *Id.*

reaching for his gun.⁵ Before Castile could retrieve his wallet, which contained his driver's license and permit to carry, Yanez fired seven rounds at close distance into Castile.⁶ As Castile lay dying in his car, he reiterated, "I wasn't reaching for it."⁷ When paramedics positioned his body into the ambulance, they discovered a .40-caliber semiautomatic handgun in the pocket of his shorts; the gun was unloaded.⁸ Officer Yanez was subsequently indicted and charged with second-degree manslaughter.⁹ His case is pending as of publication of this Note.

Castile's death is one of 963 fatal shootings caused by police in 2016.¹⁰ In New York alone, there have been seventeen reported deaths connected to either police shootings or police conduct.¹¹ People of color are disproportionately affected by police violence, constituting just under half of the 990 deaths in 2015.¹² In 2015, seventeen officers were charged with a crime in the aftermath of their shootings.¹³ Ten out of the seventeen

5. *Id.*

6. Capecchi & Smith, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *See Fatal Force*, WASH. POST,

<https://www.washingtonpost.com/graphics/national/police-shootings-2016/> (last visited Mar. 21, 2017). This number is based on news reports, public records, social media, and other sources. *See id.* *The Washington Post* has actively tracked police-related shootings since 2015. For a detailed database of these shootings, see *id.*

11. *See id.* For a potentially more encompassing, albeit grassroots, accounting of the number of people who have been killed by police violence from 2013-2017, see KILLED BY POLICE, <http://www.killedbypolice.net> (last visited Mar. 21, 2017). According to this community-based record, 1153 people were killed by police or while in police custody in 2016, twenty-six in New York alone. *Id.*

12. *See* Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/> ("Although black men make up only 6 percent of the U.S. population, they account for 40 percent of the unarmed men shot to death by police [in 2015]."). *See also* Kimberly Kindy & Kennedy Elliott, *2015 Police Shootings Investigation*, WASH. POST (Dec. 26, 2015), <https://www.washingtonpost.com/graphics/national/police-shootings-year-end/>.

13. *See* Brandon Ellington Patterson, *Here Are All of the Cops Who Were Charged in 2015 for Shooting Suspects*, MOTHER JONES (Dec. 17, 2015, 7:00 AM), <http://www.motherjones.com/politics/2015/12/year-police-shootings>.

cases involved some form of video recording, either from body cameras or smart phones.¹⁴ Of those charged, one officer pled guilty;¹⁵ six officers' cases are currently pending;¹⁶ four resulted in a mistrial¹⁷ or dismissal;¹⁸ four resulted in a conviction;¹⁹

14. *Id.*

15. See Tom Jackman, *Ex-Fairfax Officer Adam Torres Pleads Guilty to Manslaughter in Shooting Death of John Geer*, WASH. POST (Apr. 18, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/04/18/ex-fairfax-officer-adam-torres-pleads-guilty-to-manslaughter-in-shooting-death-of-john-geer/>.

16. See Holly Zachariah, *Ex-Pike County Deputy Set for Murder Trial*, COLUMBUS DISPATCH (Jan. 8, 2017, 12:01 AM), <http://www.dispatch.com/content/stories/local/2017/01/08/ex-pike-county-deputy-set-for-murder-trial.html>; *UPDATE: Bonding out process slows for 2nd Marksville officer accused of killing 6-year-old boy*, KATC.COM (Jan. 21, 2016, 12:06 PM), <http://www.katc.com/story/31015195/second-marksville-officer-posting-bond-following-shooting-death-of-6-year-old-boy>; Steven Schmadeke, *Chicago Cop Indicted on 6 Murder Counts in Laquan McDonald Slaying*, CHICAGO TRIBUNE (Dec. 16, 2015, 8:32 PM), <http://www.chicagotribune.com/news/local/breaking/ct-jason-van-dyke-indicted-laquan-mcdonald-met-20151216-story.html>; Therese Apel, *Pike County deputy indicted on manslaughter charge*, THE CLARION-LEDGER (Sept. 10, 2015, 3:05 PM), <http://www.clarionledger.com/story/news/2015/09/10/pike-county-deputy-indicted-manslaughter/72016014/>; Newsadmin, *"Unnecessary Shooting": Bolivar County Deputy Indicted, Family, NAACP React*, NEWSMS (Mar. 30, 2015), <http://newsms.fm/unnecessary-shooting-bolivar-county-deputy-indicted-family-naacp-react/>.

17. See Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html>; Leon Neyfakh, *After Jury Deadlocks, Prosecutor Announces Second Trial for Police Officer Who Shot Sam DuBose*, SLATE (Nov. 22, 2016, 2:13 PM), http://www.slate.com/blogs/the_slatest/2016/11/22/in_sam_dubose_case_former_university_of_cincinnati_police_officer_ray_tensing.html (demonstrating mistrial); Rebecca Hersher, *Albuquerque Police Shooting Trial Ends In A Hung Jury*, NPR (Oct. 12, 2016, 11:48 AM), <http://www.npr.org/sections/thetwo-way/2016/10/12/497660078/albuquerque-police-shooting-trial-ends-in-a-hung-jury> (stating that the results for two officers was a mistrial).

18. See Amanda Batchelor, *Broward Sheriff's Deputy Peter Peraza Cleared of Manslaughter Charge*, ABC LOCAL NEWS 10 (July 28, 2016, 9:22 AM), <http://www.local10.com/news/broward-sheriffs-deputy-peter-peraza-cleared-of-manslaughter-charge> (demonstrating dismissal).

19. See Scott Daugherty & Jonathan Edwards, *Ex-Portsmouth Officer Stephen Rankin Gets 2 ½ Years, won't remain free during appeal*, THE VIRGINIAN-PILOT (Oct. 12, 2016), http://pilotonline.com/news/local/crime/ex-portsmouth-officer-stephen-rankin-gets-years-won-t-remain/article_2e1fd228-4716-5c48-8cb7-e2aab14e5448.html (showing conviction); Jesse Paul, *Attorneys for ex-Rocky Ford police officer convicted of murder seek acquittal or new trial*, THE DENVER POST (Sept. 1, 2016, 3:40 PM), <http://www.denverpost.com/2016/09/01/james-ashby-rocky-ford-seeks-acquittal-new-trial/>; Ralph Ellis et al., *Ex-Oklahoma Deputy Robert Bates*

and one resulted in an acquittal.²⁰ Thus, out of the 990 deaths that occurred in 2015, criminal charges were brought in only 1.7% of incidents, and a scant 0.4% resulted in a conviction of any kind.²¹ From these numbers, one can draw two interdependent conclusions: 1) the criminal legal system²² is operating exactly how it is designed to operate when encountering police defendants; and 2) the structure of the criminal legal system fails to provide an adequate remedy for those communities left reeling in the wake of a shooting.

In this Note, I aim to analyze the limitations of the criminal legal system when faced with cases of police-related shootings. Specifically, I will discuss two instances of police (mis)conduct that captured the attention of the nation in the past three years: the non-indictment of Cleveland Police Officer Timothy Loehmann and the conviction of NYPD Officer Peter Liang. First, by assessing the circumstances and responses to those two cases, I will argue that the criminal legal system is inherently incapable of responding to and remedying the violence that occurs in situations laced with power, privilege, and emotional trauma. Second, I will engage in an analysis of the growth of restorative justice and community justice practices within the United States in the last forty years in an attempt to expand on the current discussion surrounding police-related shootings. Finally, I will assess the potential value of utilizing restorative justice practices, grounded in a community justice model, in situations of police-related

Guilty of Killing Unarmed Suspect, CNN (Apr. 28, 2016, 7:46 AM), <http://www.cnn.com/2016/04/27/us/tulsa-deputy-manslaughter-trial/> (showing conviction); Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), <http://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html>.

20. See Matt Miller, *Jury Acquits Hummelstown Police Officer Lisa Mearkle of all Charges*, PA. PENN LIVE (Nov. 5, 2015, 2:42 PM), http://www.pennlive.com/midstate/index.ssf/2015/11/mearkle_verdict.html.

21. It must be noted that in two of the cases brought in 2015, officers were charged in connection to incidents that occurred in 2013 and 2014. This fact results in a slight inflation in the calculations of the total percentages.

22. I use this term to challenge the unconscious and misplaced employment of “justice” terminology in discussions of the criminal legal system’s function in the United States.

violence. The foundation of this Note is rooted in the recognition that attendant issues of power are necessarily bound up in any discussion of interactions between marginalized communities and actors of state-backed power. Therefore, my focus on police violence in marginalized urban communities necessitates an awareness and engagement of the discourses of power, both between individuals and social systems. Furthermore, I wish to remain cognizant of the impact of these power differentials on cross-community dialogues.

I. Situations of Police-Related Violence

A. Non-Indictment of Timothy Loehmann

The criminal legal system's institutionalized protections of state-backed actors was on full display in the case of Timothy Loehmann, the rookie police officer who shot and killed 12-year-old Tamir Rice. On November 22, 2014, Loehmann responded to a 911 dispatch in which the caller stated that someone was waving around what appeared to be a gun in a park near a recreation center in Cleveland, Ohio.²³ The caller said that the person was "probably a juvenile" and that the gun was "probably fake."²⁴ However, the initial 911 dispatcher failed to pass on these critical facts to the dispatcher who contacted Loehmann.²⁵ When Loehmann arrived at the location, his vehicle unintentionally skidded approximately twelve feet closer to Tamir, who was near a gazebo across from the recreation center entrance.²⁶ At this point, Loehmann

23. See Timothy J. McGinty, Cuyuhoga Cty. Prosecutor, *Cuyahoga County Prosecutor's Report on the November 22, 2014 Shooting Death of Tamir Rice*, OFF. OF THE PROSECUTING ATTY 2-3, http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%202012-28a.pdf (last visited Apr. 5, 2016).

24. *Id.*

25. *Id.*

26. *Id.*

shouted at Tamir, “[S]how me your hands[!]”²⁷ Approximately two seconds after exiting his vehicle, Loehmann fired two successive shots at Tamir, striking him in the abdomen.²⁸ Tamir immediately collapsed.²⁹ In the aftermath of the shooting, Loehmann’s partner, Frank Garmback, attempted to stop Tamir’s sister from running to her brother’s body.³⁰ When his sister “refused” to calm down, Garmback placed her in the police car.³¹ Emergency medical personnel responded within ten minutes, and Tamir was taken to the hospital.³² During the course of the evacuation, Tamir’s mother was forced to choose between accompanying Tamir in the ambulance or remaining with her daughter and other son, who were still detained in the police vehicle.³³ Despite undergoing surgery for the life-threatening injuries he received, Tamir died several hours later.³⁴

A grand jury was convened to establish whether Loehmann’s actions were justified, thereby obviating any basis on which criminal charges could be brought.³⁵ After an extensive investigation, the grand jury determined that Loehmann’s actions were reasonable in light of the information he knew at the time of the encounter.³⁶ The Prosecutor then recommended that no charges be brought against Loehmann.³⁷ Loehmann remains on restricted duty,³⁸ and as of this Note, disciplinary charges have been brought against both Loehmann

27. *Id.* at 6.

28. McGinty, *supra* note 23, at 4.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See Amended Complaint at ¶ 89, *Winston v. Loehmann*, 2015 WL 1322663 (N.D. Ohio Jan. 30, 2015) (No. 1:14-cv-02670).

34. McGinty, *supra* note 23, at 5.

35. See Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0.

36. See *id.*

37. McGinty, *supra* note 23, at 70.

38. Williams & Smith, *supra* note 35.

and Garmback.³⁹

The Cuyuhoga County Prosecutor's final report highlights the way in which Fourth Amendment jurisprudence has developed to protect police officers from liability when responding to potentially dangerous situations, even when those situations are escalated, not deescalated, by police presence. It is well established that deadly force is authorized when police have "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."⁴⁰ The reasonableness of the officer's actions must be judged subjectively through the perspective of the officer at the moment of the encounter, not in hindsight.⁴¹ The Sixth Circuit has established three non-exhaustive factors in determining whether the officer's actions were reasonable: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight."⁴² A reasonable belief may also include a mistaken belief,⁴³ and "that the fact it turned out to be mistaken does not undermine its reasonableness as considered at the time of the acts."⁴⁴ In sum, officers' conduct

39. See Tribune News Sources, *Disciplinary charges brought against 2 Cleveland cops in Tamir Rice fatal shooting*, CHICAGO TRIBUNE (Jan. 14, 2017, 12:49 AM), <http://www.chicagotribune.com/news/nationworld/ct-tamir-rice-cleveland-police-disciplinary-charges-20170113-story.html>.

40. State v. White, 29 N.E.3d 939, 952 (Ohio Sup. Ct. 2015) (citations omitted).

41. See *Graham v. Connor*, 490 U.S. 386, 395 (1989).

42. *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006).

43. Thus, Loehmann's mistaken belief regarding Tamir's dangerousness becomes legally justifiable.

44. *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008). In cases not dealing with police defendants, however, mistaken belief may only be used as a defense if it negates the requisite element of mental intent. See, e.g., *United States v. Mardirosian*, 602 F.3d 1, 8 (1st Cir. 2010). Thus, if a person is charged with a specific intent crime, such as assault or murder, such a defense is inapplicable. See, e.g., *United States v. Lamott*, 831 F.3d 1153, 1156 (9th Cir. 2016). The Ninth Circuit in *Lamott* stated:

In a crime requiring "specific intent," the government must prove that the defendant subjectively intended or desired the proscribed act or result. By contrast, a general intent crime requires only that the act was volitional (as opposed to accidental), and the defendant's state of mind is not otherwise relevant. The practical difference between the

is given wide deference in determining the reasonableness of their actions, and courts are hesitant to second-guess officers' decisions made while in the field.⁴⁵

In its recommendation against bringing criminal charges, the Prosecutor's report includes one telling statement:

We are mindful of the profound impact that any police use of deadly force has on the community, and we are acutely aware of the pain and suffering experienced by the family of the a 12-year-old boy whose life was so abruptly ended. *But justice requires a thorough and evenhanded examination [of] facts and law.* In this case, there is no basis to charge a criminal offense.⁴⁶

Assuming that the circumstances surrounding Tamir's death sufficiently fall within the reasonableness exception to the Fourth Amendment deadly force jurisprudence, I would like to step outside that legal framework and engage in an inquiry into how the criminal legal system has foreclosed the possibility of individual and community rehabilitation in the aftermath of a violent act, partially by employing such language as "justice."

The Prosecutor's statement that "justice requires a thorough and evenhanded examination [of] facts and law"⁴⁷ frames "justice" in such a way as to decontextualize the facts of the incident by looking towards applicable law. In order to be held criminally liable, a person's conduct must initially fall within the definition of a "crime." In the case of police-related shootings, a person's otherwise criminal conduct may be justified, thereby effectively decriminalizing what the legal

two is that certain defenses, like factual mistake . . . can negate culpability for specific intent crimes but not for general intent crimes.

Id. (internal citations omitted).

45. *See* Vaughan v. Cox, 343 F.3d 1323, 1331 (11th Cir. 2003).

46. McGinty, *supra* note 23, at 70 (emphasis added).

47. *Id.*

system has agreed is a “crime.” Hence, in Fourth Amendment deadly force jurisprudence, the murder of Tamir can be justified by the reasonableness of Loehmann’s actions, *in light of how Loehmann himself perceived the situation*. Instead of applying the reasonableness standard employed against non-police defendants,⁴⁸ this specialized standard gives police officer-defendants almost exclusive power to present their perceptions of reality as fact, thereby ignoring the realities of others involved in the shooting. This footwork under the Fourth Amendment prevents an assessment of justice from the standpoint of the needs of those injured and the obligations of those who caused the injury. The criminal legal system’s insistence on “justice” as a neutral objective (something that is always already prefixed) instead of an active inquiry (something which people create in encounters with one another) precludes any imaginative engagement with what other forms justice might actually take.

Loehmann’s non-indictment reflects the first impediment injured victims face in receiving any form of community-sanctioned closure through the criminal legal system. The reasonableness exception legitimizes the conduct of police—in their role as state actors—and legitimizes the system itself. In the criminal legal system, there is no place for a nonconforming reality: there is no place for *our* reality, one in which power and privilege knit together the fabric of everyday interactions. The law defines the experience, not vice versa. In the end, if the criminal legal system does not recognize the conduct as criminal, the injured party is precluded from seeking a remedy through that legal avenue. Loehmann’s non-indictment

48. This reasonableness standard is starkly different from the reasonableness standard employed with police defendants. In non-police-related cases, the defendant’s actions are judged by a solely objective standard. *See* RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (AM. LAW INST.1965). For instance, in a negligence action, the fictitious “reasonable person” is someone “who is never negligent, and whose conduct is always up to standard.” *Id.* Furthermore, “The standard which the community demands must be an objective and external one” *Id.* This changes the court’s analysis of the defendant’s behavior, and effectively holds the defendant to a higher standard of care.

reflects the criminal legal system's inability, and unwillingness, to provide a method of relief for injuries that are, by design, beyond its scope of reach. Because justice is framed as immutable and predetermined within the criminal legal system, it becomes necessary for parties to seek resolution elsewhere.

Thus, in January 2015, Tamir's mother, father, and step-father initiated a separate § 1983 civil suit against the City of Cleveland and the two police officers, alleging, among other claims, excessive force, deliberate indifference to Tamir's medical needs, and intentional and negligent infliction of emotional distress.⁴⁹ In February 2016, a federal judge denied the Defendants' motion for judgment on the pleadings regarding the Plaintiff's deliberate indifference to medical needs and the intentional infliction of emotional distress claims.⁵⁰ In March, the parties agreed to enter settlement talks, and on April 25, 2016, the City of Cleveland settled the lawsuit for \$6 million dollars, allocated to Tamir's estate, mother, and sister.⁵¹ An attorney for the city stated that Loehmann and his partner still maintained their actions were "legally reasonable' under all the circumstances . . . That having been said, the officers recognize the value of early legal resolution to allow some healing to begin."⁵²

The criminal legal system's limited perspective of "justice" is one reason why Tamir's family sought a remedy through another legal avenue. Although the family received financial compensation in exchange for a statement of non-liability by

49. See Amended Complaint at ¶¶ 30, 49, 53, *Winston v. Loehmann*, 2015 WL 1322663 (N.D. Ohio Jan. 30, 2015) (No. 1:14-CV-02670).

50. See *Winston v. City of Cleveland, et al.*, No. 1:14-CV-2670, 2016 WL 397972, at *4 (N.D. Ohio Feb. 2, 2016).

51. Order Approving Settlement at ¶¶ 1, 2(A)-(C), *Winston v. City of Cleveland et al.*, No. 1:14-CV-02670 (N.D. Ohio Apr. 25, 2016), <https://assets.documentcloud.org/documents/2811539/Tamir-Settlement.pdf>.

52. Eric Heisig, *Attorney for Officers in Tamir Rice Shooting Issues Statement about \$6 Million Settlement*, CLEVELAND.COM (Apr. 25, 2016, 4:49 PM),

http://www.cleveland.com/court-justice/index.ssf/2016/04/attorney_for_officers_in_tamir.html.

Loehmann,⁵³ the consequences of Tamir's death do not stop at a civil payout. Indeed, the civil legal system faces the same difficulties as the criminal legal system in addressing the original harm, Tamir's death, and the emotional fallout from that loss. By focusing less on restorative justice, parties may "win" in court, but receive little emotional satisfaction or recognition of their initial injury. Under a restorative theory of justice, which takes into account who has been hurt, what are their needs, and whose obligation is it to fulfill those needs,⁵⁴ Loehmann's denial of liability prevents communal healing. Indeed, it may serve to widen the growing rift between police officers and the communities they serve.

The limitations of the criminal legal system have been widely criticized by social activists and community members in the wake of Loehmann's non-indictment. In response to the grand jury's determination, the social justice organization, Black Lives Matter, released a statement condemning the Prosecutor's handling of case and called for a federal investigation into Loehmann's involvement in Tamir's death.⁵⁵ Frustration was also voiced by Representative Marcia Fudge, who asserted that the grand jury might have come up with the right decision, "[b]ut all of the process around it makes all of us question the fairness."⁵⁶ The Reverend Jawanza Colvin, a pastor at a Cleveland church who had signed an affidavit calling for the arrests of Loehmann and Garmback, said that the non-indictment had long been anticipated.⁵⁷ Summarizing the local community members' feelings about the process, he stated, "The fact that we are not surprised . . . is in and of itself an indictment of the culture of the criminal justice system."⁵⁸

53. *Id.*

54. See Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 258 (2005).

55. See *Black Lives Matter Network Statement on #JusticeforTamirRice*, BLACK LIVES MATTER (Dec. 30, 2015), <http://blacklivesmatter.com/black-lives-matter-network-statement-on-justicefortamirrice/>.

56. Williams & Smith, *supra* note 35.

57. *Id.*

58. *Id.*

Colvin's statement pointedly addresses an issue that is skirted in discussions of these shootings: the intersections between police-related shootings and mass incarceration cannot be so easily overlooked.⁵⁹ Police officers are civilians who straddle the interstice between life outside the criminal legal system and life within it. Their presence in certain communities is a source of comfort and security. In others, they act as the funnel's tip into the vast criminal legal system.⁶⁰ Police officers are overwhelmingly white,⁶¹ and even in police forces that are racially diverse, such as in New York City, only 54% of black residents approve of the force's performance.⁶² As actors of the criminal legal system, they

59. I draw much of my analysis of mass incarceration from civil rights legal scholar, Michelle Alexander, and her groundbreaking research into the ways in which the criminal legal system has been coopted and transformed into a racial caste-making system. Thus, the following analysis is heavily dependent on Alexander's argument that modern black criminality was created in the 1980s during the start of the War on Drugs, and the image of the "criminalblackman" in social and political commentary is as pervasive, if not more so, than thirty years ago. *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (The phrase "criminalblackman" is attributable to legal scholar Kathryn Russell.). Although perhaps controversial to some, Alexander's book should be required reading for anyone working within the criminal legal system. *See also* KATHRYN RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* (1988).

60. *See* ALEXANDER, *supra* note 59, at 136 (arguing that routine stops by police often result in minor arrests for marijuana possession, which are then recorded on the defendant's criminal record as a drug arrest, without specifying the substance or charge. Those with a criminal record are then subjected to a vast system of second-class citizenship, in the form of legalized employment, housing, and voting discrimination. *Id.*).

61. *See Local Police Departments, 2013: Personnel, Policies, and Practices (Executive Summary)*, BUREAU OF JUST. STATISTICS 1 (May 2015), https://www.bjs.gov/content/pub/pdf/lpd13ppp_sum.pdf (finding that in 2013, 27% of police officers were members of minority groups, whereas 73% were white).

62. *See* Victoria Bekiempis, *The New Racial Makeup of U.S. Police Departments*, NEWSWEEK (May 14, 2015, 11:18 AM), <http://www.newsweek.com/racial-makeup-police-departments-331130>. To complicate the matter further, there is statistical evidence that black police officers engage in the same discriminatory practices as their white counterparts, thereby casting a color-blinding shadow over what constitutes traditional "racist" behavior. *See, e.g.,* Ivan Y. Sun & Brian K. Payne, *Racial Differences in Resolving Conflicts: A Comparison Between Black and White Police Officers*, 50 CRIME & DELINQUENCY 516, 531 (2004), <http://journals.sagepub.com/doi/pdf/10.1177/0011128703259298> (finding that "[b]lack officers are more coercive than their White counterparts in responding to conflicts").

unconsciously assist in the shaping of criminality in mainstream discourse. It is well documented that police disproportionately target black and brown young men,⁶³ and an interaction with a police officer and a young man of color is fraught with racial implications.⁶⁴ The criminal legal system's ascription of criminality onto black and brown bodies is due, in large part, to the disproportional rates at which black and brown boys and men are intercepted by police. Hence, the mainstream face of most crime is black and poor.

When a police officer comes into contact with the criminal legal system as a defendant, our understandings of criminality undergo a strange transmutation. Due to the defendant's social status as a police officer, the image simply does not look right. We crash into an assumption that police officers cannot engage in criminal activity, precisely due to their positions of power. Thus, the legal reasonableness standard is employed to at once justify the officer's actions, while tilting the gaze of the

63. For a broad survey of these studies, see ALEXANDER, *supra* note 59, at 132-36. For a New York City-specific report from the Attorney General's Office regarding New York City's use of "stop and frisk" practices, see OFFICE OF THE ATT'Y GEN. OF N.Y. STATE, *Report on the New York City Police Department's 'Stop and Frisk' Practices* 94-95 (1999), http://oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf. The Report found that:

blacks comprised 25.6% of the City's population, yet 50.6% of all persons "stopped" were black. Hispanics comprised 23.7% of the City's population yet, 33.0% of all "stops" were of Hispanics. By contrast, whites comprised 43.4% of the City's population, but accounted for only 12.9% of all "stops." Thus, blacks were over six times more likely to be "stopped" than whites in New York City, while Hispanics were over four times more likely to be "stopped" than whites in New York City.

Id. (internal citations omitted).

64. See ALEXANDER, *supra* note 59, at 136. Alexander wrote:

Ultimately, these stop-and-frisk operations amount to much more than humiliating, demeaning rituals for young men of color, who must raise their arms and spread their legs, always careful not to make a sudden move or gesture that could provide an excuse for brutal—even lethal—force. Like the days when black men were expected to step off the sidewalk and cast their eyes downward when a white woman passed, young black men know the drill when they see the police crossing the street toward them; it is a ritual of dominance and submission played out hundreds of thousands of times each year.

Id.

criminal legal system away from an unintended target. The difficulty of prosecuting a defendant police officer may indicate an uncomfortable, but documented, reality: that the primary goal of the criminal legal system is not to deliver justice as we conceive of the term. Instead, it is designed to selectively prosecute and convict young black and brown men, and increasingly women, thereby channeling them into the sweeping arms of mass incarceration, and subjecting them to various forms of state surveillance and disenfranchisement.⁶⁵ In sum, a defendant police officer's confrontation with the criminal legal system hints at the insidious racial tensions built into our punitive system of justice. Thus, despite its insistence on evenly distributing justice, the criminal legal system is an inadequate medium to address the emotional damage that is incurred as a result of systematic and structural race, class, and gender inequities. These failures flame the volatile discourses of police-related shootings, racial inequities, and mass incarceration.

65. See ALEXANDER, *supra* note 59, at 58. Alexander stated:

More than 2 million people found themselves behind bars at the turn of the twenty-first century, and millions more were relegated to the margins of mainstream society, banished to a political and social space not unlike Jim Crow, where discrimination in employment, housing, and access to education was perfectly legal.

Id.

Moreover, it is imperative to keep in mind that this analysis may be further deconstructed to highlight the disproportionate impact on transgender and gender non-conforming black and brown folks. See Jerome Hunt & Aisha C. Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth: An Overview of the Experiences of LGBT Youth in the Juvenile Justice System*, CTR. FOR AM. PROGRESS (June 29, 2012, 9:00 AM), <https://www.americanprogress.org/issues/lgbt/reports/2012/06/29/11730/the-unfair-criminalization-of-gay-and-transgender-youth/>. The article states:

Gay, transgender, and gender nonconforming youth are significantly over-represented in the juvenile justice system—approximately 300,000 gay and transgender youth are arrested and/or detained each year, of which more than 60 percent are black or Latino. Though gay and transgender youth represent just 5 percent to 7 percent of the nation's overall youth population, they compose 13 percent to 15 percent of those currently in the juvenile justice system.

Id.

Undeniably, Tamir's death stands as a reminder that the injured party's needs are not the focus of the criminal legal system. A case arising out of New York addresses this issue and raises the question: how can justice be served when the injured party's specific vocalized needs are overlooked by the prosecution?

B. Conviction of Peter Liang

On November 20, 2014, Akai Gurley was shot and killed by NYPD Officer Peter Liang while he was patrolling the Brooklyn public housing complex, where Gurley was visiting his girlfriend.⁶⁶ According to grand jury testimony of Police Officer Shaun Landau, Liang's partner that night, the two officers were investigating the eighth floor stairwell when Liang fired a shot into the darkened stairwell.⁶⁷ Immediately after the shot was fired, Landau heard footsteps running down to the fifth floor stairwell.⁶⁸ In the moments after the shooting, Liang repeatedly stated that the gun had fired accidentally and expressed concern that he would be fired over the incident.⁶⁹ Per NYPD protocol, which mandates that officers must report when a weapon is discharged, Landau told Liang he should call the sergeant on duty to inform him what had happened.⁷⁰ Liang argued with Landau for approximately two minutes, during which time Gurley lay injured on the stairwell below.⁷¹

Melissa Butler, Gurley's girlfriend, was with him at the time and proceeded to seek help from neighbors on the fourth floor.⁷² Butler called 911 and was instructed by an EMS

66. People's Memorandum of Law Opposing Defendant's Motion to Dismiss the Indictment at 1, *People v. Liang*, 2015 WL 11216477 (N.Y. Sup. Feb. 10, 2015) (No. 99882014), <https://assets.documentcloud.org/documents/2110003/people-v-liang-memorandum.pdf> [hereinafter Memorandum of Law].

67. *Id.* at 4.

68. *Id.* at 5.

69. *Id.*

70. *Id.*

71. Memorandum of Law, *supra* note 66, at 5.

72. *Id.* at 7.

operator to perform CPR on Gurley.⁷³ After Liang and Landau argued, they proceeded down the stairwell and heard Gurley on the fifth floor landing.⁷⁴ Although both Liang and Landau had received CPR training during their time at the Police Academy, neither officer provided any assistance to Butler.⁷⁵ At his trial, Liang testified that he “thought [Butler] was more qualified than [him].”⁷⁶ Throughout the incident, neither officer requested an ambulance.⁷⁷ Several minutes after the initial shot was fired, the lieutenant on duty received a report that a man was shot at the housing complex.⁷⁸ It was not until the lieutenant arrived that an ambulance was requested.⁷⁹ Gurley was pronounced dead at the hospital, nearly an hour after he was shot.⁸⁰

A grand jury indicted Liang in February 2015 on several charges, including manslaughter in the second degree, assault in the second degree, reckless endangerment, and official misconduct.⁸¹ After forgoing a bench trial, an unusual move for an indicted police officer, Liang’s three-week jury trial concluded in February 2016.⁸² The jury returned a guilty verdict on two counts, finding Liang guilty of felony manslaughter in the second degree and official misconduct.⁸³

73. *Id.* at 9.

74. *Id.*

75. *Id.* at 10.

76. Sarah Maslin Nir, *Officer Peter Liang, on Stand, Breaks Down as He Recalls Brooklyn Killing*, N.Y. TIMES (Feb. 8, 2016), <http://www.nytimes.com/2016/02/09/nyregion/officer-peter-liang-in-emotional-testimony-describes-the-night-of-a-fatal-shooting.html?action=click&contentCollection=N.Y.%20%2F%20Region&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.

77. *Id.*

78. Memorandum of Law, *supra* note 66, at 11.

79. *Id.* at 12.

80. *Id.* at 13.

81. Indictment at 2-3, *People v. Liang*, 2015 WL 11216477 (N.Y. Sup. Feb. 10, 2015) (No. 99882014).

82. *See* Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), <http://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html>.

83. *See* *People v. Liang*, No. 99882014, 2016 WL 3949829, at *1, *5 (N.Y. Sup. Ct. Apr. 19, 2016) (denying defendant’s Motion to set aside the verdict as to the finding of Official Misconduct and granting the defendant’s Motion to set aside the finding of Manslaughter in the Second Degree).

Judge Danny K. Chun reduced the guilty verdict of manslaughter in the second degree to criminally negligent homicide, finding the evidence insufficient to sustain a manslaughter verdict.⁸⁴ Liang was subsequently fired from the NYPD.⁸⁵ The maximum prison time Liang faced was twenty-five years; however the Kings County District Attorney's Office announced it would not seek prison time "[b]ecause the incarceration of the defendant is not necessary to protect the public, and because of the unique circumstances of this case."⁸⁶ Instead, the District Attorney recommended that "justice [would] best be served . . . if the defendant is sentenced on the manslaughter count to five years of probation."⁸⁷ For the misdemeanor offense of official misconduct, the District Attorney requested a concurrent sentence of three years of probation and five hundred hours of community service.⁸⁸

Gurley's family, initially relieved that a conviction had been attained,⁸⁹ issued a statement denouncing the District Attorney's sentencing recommendations, stating their outrage.⁹⁰ In the statement, the family expressed frustration with the "inadequate" recommendation, stating "Officer Liang was convicted of manslaughter and should serve time in prison for his crime. This sentencing recommendation sends the message that police officers who kill people should not face serious consequences."⁹¹ Liang was sentenced on April 19, 2016 to three year to five years for official misconduct and five years probation and 800 hours of community service for

84. *Id.* at *5.

85. Alan Feuer, *Prosecutor Won't Seek Prison for Peter Liang, Ex-Officer Convicted in Killing*, N.Y. TIMES (Mar. 23, 2016), <http://www.nytimes.com/2016/03/24/nyregion/prosecutor-wont-see-prison-for-peter-liang-ex-officer-convicted-in-killing.html>.

86. *Sentencing Letter, Kenneth P. Thompson, Kings County Brooklyn District Attorney* (March 22, 2016), <https://www.scribd.com/doc/305852165/Liang-Sentencing-Letter>.

87. *Id.*

88. *Id.*

89. *See* Nir, *supra* note 82 ("Ms. Petersen [a relative of Gurley] said she was moved that the jury had convicted a police officer, adding that the guilty verdict was an outcome 'that has not come down in how long?'").

90. *See id.*

91. Feuer, *supra* note 85.

criminally negligent homicide.⁹² He will not spend any time in prison.

Liang's indictment and subsequent conviction stand in stark contrast to Loehmann's non-indictment in Ohio. Key differences may explain the results in these two cases of police-related shootings. First, Liang was not shielded by the Fourth Amendment's deadly force protections.⁹³ The grand jury indicted Liang for manslaughter in the second degree, for which the prosecution was required to establish that Liang "recklessly cause[d] the death of another person."⁹⁴ According to New York Penal Law, "[a] person acts recklessly with respect to a result or to a circumstance . . . when he is aware of and consciously disregards a substantial and unjustifiable risk"⁹⁵ The jury concluded there was no legal justification to obviate Liang's intentional actions; Gurley had not threatened Liang with deadly force,⁹⁶ nor was Liang in the process of arresting Gurley.⁹⁷ The strength of Liang's case, therefore, rested on whether he acted recklessly in the face of a known risk. Unlike in Loehmann's case, Liang's conduct did not justify an excuse as to his culpability. Because Liang was outside the protection of the Fourth Amendment, he was subjected to the full weight of the criminal legal system's punishing forces. However, the District Attorney's recommendations against prison time and Liang's light sentence highlight again how police officers remain outside of the traditional bounds of the sanctioning mechanism of the criminal system.

92. See Certificate of Disposition Indictment at 1, *People v. Liang*, 2016 WL 3949826, at *1 (N.Y. Sup. Ct. July 18, 2016) (DKC) (No. 09988-2014).

93. Presuming the Fourth Amendment exception was triggered by Liang's "seizure" of Gurley when he was shot, it is indisputable from the facts that no probable cause existed for the stop. Liang's actions, therefore, would be viewed as unreasonable under the Fourth Amendment, and the exception for deadly force would not apply.

94. N.Y. PENAL LAW § 125.15(1) (McKinney 2016).

95. N.Y. PENAL LAW § 15.05(3) (McKinney 2016).

96. See N.Y. PENAL LAW § 35.15(2)(a) (McKinney 2016) (setting forth circumstances where deadly force may be authorized by self-defense).

97. See N.Y. PENAL LAW § 35.30(1) (McKinney 2016) (explaining circumstances where police officer may use deadly force in connection to an arrest).

The second difference between these two cases has sparked much debate in social justice activist circles and beyond. Loehmann is a white man in a Mid-western state. Liang is a Chinese-American man in New York City. Indeed, many social commentators have stated that the cases' differing outcomes reflect, more than anything else, racial division in the United States.⁹⁸ These commentators argue that Liang has become a "scapegoat" for the issue of police brutality and police shootings.⁹⁹ In an age where violent interactions with police are caught on camera with frightening regularity, these arguments seem to suggest that Liang's conviction was intended to quell the growing tide of discontent and quench the blood thirst for those who have called for increased police accountability.

Discussions of policing and race provide a vehicle for broaching broader topics such as power and privilege. This re-centering of race within a conversation of racialized police brutality is imperative, if only to highlight the ways in which every individual encounter is sutured to wider systems of oppression. The ways in which social identities interact with one another on a day-to-day basis are drawn into sharp relief when juxtaposed against a backdrop of intensified political issues. Those commentators raise specific concerns regarding the public's response to police-related shootings, and remind us of the continued need to remain alert to the ways in which identity and politics are enmeshed in murky situations where dichotomous lines between black and white are blurred. Liang's race cannot be overlooked in the context of the conversation surrounding whose power is legitimated by the criminal legal system, and it may indeed have had an unquantifiable influence on the outcome of his case.

The debate regarding the impact of Liang's race in his

98. See Vivian Yee, *Indictment of New York Officer Divides Chinese-Americans*, N.Y. TIMES (Feb. 22, 2015), <http://www.nytimes.com/2015/02/23/nyregion/in-new-york-indictment-of-officer-peter-liang-divides-chinese-americans.html>.

99. See *id.*

conviction, indeed the debates arising out of many police-related shootings, have a tendency to obfuscate a central issue. How do families and communities reckon with the aftereffects of police violence? The criminal legal system espouses a specific type of remedy: the state will fight to bring criminally liable people to justice and will seek the sanction it believes is best suited to the pursuit of justice. The District Attorney's determination that justice does not require Liang to serve a prison sentence sheds light on an inherent structural deficiency within the criminal legal system: the prosecution is not working for the interests of the injured party involved. The criminal legal system operates to turn injuries against an individual into injuries against the state. The prosecution's duty, therefore, lies in furthering the best interest of the state, emphatically *not* those of the injured party. When the interests of the state and the injured party differ, the prosecution's role as protector of state interest effectively silences any voice the injured party may possess. The very party whose experiences provided the basis for the criminal prosecution is ignored, condescended to, and elided.

Liang's conviction and sentence illuminate another bar for injured parties in receiving "justice" within the criminal legal system: even if someone's conduct is found to be criminal, the injured party still lacks agency to determine the proper remedy for the original harm, once again precluded from receiving relief. In light of the difficulties of receiving closure and healing from the traditional criminal legal system's framework of adversarial justice, I would like to turn now to an exploration of the ways in which two alternative theories of justice—restorative and community—may provide practical strategies for addressing situations of police violence.

II. Working within the Concepts: The Elusivity of Restorative Justice and Community Justice

A. Defining the Language

Before we can determine whether restorative justice practices within a community justice model may be useful in the context of police-related violence, these key terms must be defined. This process presents difficulties, however, as these concepts defy easy categorization. Since the birth of modern restorative justice practices in the early 1970s,¹⁰⁰ restorative justice scholars and practitioners have emphasized one criterion. A key component of this practice's potential utility within the criminal legal system is the fluidity inherent in the definition of "restorative justice practices." At once a practice as much as a theoretical framework, restorative justice attempts to shift the legal and social paradigm from a focus on retributive "eye-for-an-eye" justice, to an emphasis on the *process* of healing for all parties involved in an injury.¹⁰¹ Indeed, restorative justice recognizes that "crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in search for solutions which promote repair, reconciliation, and reassurance."¹⁰² Therefore, restorative justice includes a myriad of practices, the focus of which rests in answering three key questions: "(1) Who has been hurt?; 2) What are their needs?; and 3) Whose obligations are these?"¹⁰³

Most restorative justice practices focus on the individual offender and victim, while the community is oftentimes viewed

100. See Tina. S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J. L. & POL'Y 301, 306 (2007), http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1220&context=law_journal_law_policy.

101. See, e.g., HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1990).

102. See *id.*

103. See Umbreit et al., *supra* note 54, at 258.

as a secondary victim to the harm. Community justice, in turn, shifts focus away from the individual actors and instead attempts to address the overall harm suffered by the community.¹⁰⁴ In this way, community justice may include such practices as community prosecution, community courts, and community policing. Although community justice and restorative justice are linked in some essential theoretical aspects, community justice may not always incorporate restorative justice's emphasis on the continued process of healing. Likewise, restorative justice does not necessitate an inquiry into the harms suffered by the community at large. The criminal legal system has taken up and engaged with each model differently; at times, community justice has perpetuated inequities within the criminal legal system by focusing disproportionate surveillance on communities of color. At other times, well-intentioned advocates within the criminal legal system have ineffectively implemented restorative justice practices, at the cost of victims.

B. The Growth of Justice Frameworks

Restorative justice and community justice practices are deeply embedded within Western society, although the historical roots have been hidden under our current emphasis on retributive justice. According to Elmar Weitekamp, restorative justice practices date as far back as pre-state societies.¹⁰⁵ Within certain societies, restitution as a remedy was often employed for property claims, as well as for personal injury claims.¹⁰⁶ As Western communities became more

104. See Leena Kurki, *Restorative and Community Justice in the U.S.*, 27 CRIME & JUST. 235, 244 (2000).

105. See Elmar G. M. Weitekamp, *The History of Restorative Justice*, in A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT 112 (Gerry Johnstone ed., 2003).

106. See *id.* at 111-14. Although these practices were ostensibly restorative because they were individual-focused, they were based on an eye-for-an-eye model that had little interest in addressing emotional harm. See *id.* The restorative justice models focused on holistic emotional trauma used today actually stem from indigenous cultures, particularly the Maori people

centralized through a system of feudal ownership, injuries against individuals were consolidated into injuries against the state, and these individual models of justice shifted.¹⁰⁷ As Weitekamp states:

This decline in the victim's role in settling disputes signified an important change in the nature of social control. As the leader or the state became the central leader for settling disputes, he or it took this role away from the clans or kinship, thus making a restorative justice approach impossible. Responsibilities became increasingly individualized rather than collective, thus making more abstract the obligation to conform to social rules.¹⁰⁸

This increased collectivization of personal harms created the basis on which our contemporary criminal legal system was formed. As society moved further away from restorative justice practices, the state increased its power over individuals and their injuries, and in turn increased its power to discipline and incarcerate those who violated state obligations and laws. Today, the victim in a criminal case is not a party to the proceeding, and therefore has effectively no power over the course or outcome of that criminal proceeding.¹⁰⁹ Therefore, the individual victim in her criminal legal case is essentially replaced by the state, and the desires and needs of the state stand in for the needs of the actual injured party. Because the state assumes the role of the victim in these cases, certain forms of justice that have potential restorative possibilities for the individual victim—including financial compensation for an injury—become coopted by the state.

of New Zealand. *See id.* at 114.

107. *See id.* at 117.

108. *Id.*

109. As exemplified by the elision of Gurley's family in the determination of Liang's sentence.

This trend towards diminishing the victim's role and agency in a criminal act held sway until the late 1960s, when the contemporary restorative justice movement found support from both victims' rights advocates and the restitution movement. Both of these groups focused on achieving a different form of justice through reparations and compensation programs instead of incarceration.¹¹⁰ Victims' rights advocates in the 1970s began to recognize how cooption of victimhood by the state negatively impacted the actual victim's ability to receive justice, and looked increasingly towards variations on these old forms of restorative justice to re-center the victim's experiences and needs.¹¹¹ At first, practitioners faced resistance by the criminal legal system; restorative justice was considered an "easy way out" for presumably hardened criminals.¹¹² Fears of increased recidivism rates and widening social control over misdemeanors fueled anti-restorative justice sentiment.¹¹³ However, from the late 1980s to the early 1990s, restorative and community justice advocates continued to push for more inclusion within the traditional criminal legal field.¹¹⁴ Accelerating rates of incarceration, coupled with the increased financial costs of the criminal legal system, changed attitudes regarding the role of the criminal legal system, and professionals within the community were subsequently more willing to embrace new guiding methodologies.¹¹⁵

Today, the most common forms of restorative justice practices include victim-offender mediation, reparation boards, group conferencing, and peace circles.¹¹⁶ The criminal legal system has incorporated each of these models to varying degrees, and each places a different emphasis on the

110. See DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES 25 (2005).

111. See *generally id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. This same period exhibited the growth of a nation-wide interest in multiculturalism and political correctness, which perhaps contributed to the willingness of practitioners to adapt ostensibly indigenous justice models.

116. See Umbreit et al., *supra* note 54, at 269-70.

importance of community involvement within the healing process. The victim-offender model involves either direct or indirect communication between the victim of the harm and the offender; although victims can choose to meet with the person who harmed them, they may also choose to meet with another person who has committed a similar harm against another individual.¹¹⁷ This latter practice is less common, however, and arguably less effective. One of the best measures of whether participants will view their experiences with restorative justice as positive is whether or not the offenders acknowledge the damage that was created by their actions towards the victim.¹¹⁸ Therefore, if the crucial direct communication between the two parties is interrupted, it may negatively affect the process of healing.¹¹⁹ Overall, the victim-offender model has been utilized and assimilated into the criminal legal system, particularly within the context of juvenile justice cases.¹²⁰

The three other types of restorative justice practices place more emphasis on the role of the community within the healing process, and recognize to a greater degree the impact of community on both the victim and offender.¹²¹ Reparation boards, group conferencing, and peace circles work extensively with the offender to determine what sanctions are appropriate for the specific context in which the harm took place.¹²² By focusing on the offender's relationship to the community, these types of practices highlight the relational justice dimensions of restorative justice. Relational justice theories suggest that the rate of crime is directly proportional to the extent to which our interpersonal relationships are distant and damaged.¹²³ Because these key interpersonal relationships create social

117. *See id.* at 269.

118. *See id.* at 273.

119. *See id.*

120. *See id.* at 263.

121. Umbreit et al., *supra* note 54, at 276.

122. *See generally id.*

123. *See* Michael Schluter, *What is Relational Justice?*, in A RESTORATIVE JUSTICE READER, *supra* note 106, at 306.

accountability and a sense of morality, crime results from a breakdown of these relationships.¹²⁴ Of additional importance is the idea that:

even in those cases where the offender does not personally know the victim, a relationship can be said to exist by virtue of their being citizens together, bound together by rules governing social behavior. Crime is only secondarily to be regarded as an offence against the state and its laws.¹²⁵

The focus on the relationship between the victim and the offender, within a community setting, is therefore essential to complete healing after a harm is committed.

Some victims' rights advocates argue, however, that this heightened focus on the offender ignores the victim's role in the healing process.¹²⁶ Without re-centering the victim's experience, these advocates counter, practitioners of restorative justice are not adequately answering the basic underlying questions of restorative justice: who has been hurt, what are their needs, and whose obligations are those to fulfill them?¹²⁷ This dialogue reflects an overall debate within the field: whether and to what extent restorative justice practices may be used to combat systemic, rather than merely individual, damage. An emphasis on communities and offenders is necessary to promote sustained systematic change by reducing the social pressures—such as poverty, systemic racism, and gender oppression—that contribute to the offender's undesirable individual behaviors.

Restorative justice practices that focus on the community, therefore, tend to assimilate more readily within the sub—and, to some extent, separate—field of community justice.

124. *See id.*

125. *Id.* at 309.

126. *See Umbreit et al., supra* note 54, at 260.

127. *See id.* at 258.

Community justice may be defined as those practices that include an emphasis on and dedication to community participation when an individual harm is committed within the boundaries of a given population. For several reasons, this theory of justice has assumed a larger role within the traditional criminal legal field; community courts and community policing integrate smoothly into the criminal legal system's overall objective of determining what wrong has been committed, and who should be punished for that wrong.¹²⁸ Likewise, with the realization that the community plays a vital role in reducing crime and restoring interactions across diverse social networks, community justice offers a helpful framework in which to employ specific restorative justice theories. Although restorative justice practices have gained widespread acceptance within the criminal legal field, community justice can form a useful starting place from which these practices may originate. Because community justice focuses less on the process of healing between the individual offender and victim, and commits energy to interrogating larger societal issues, employing restorative justice practices within a community justice model may provide a more effective and malleable system of justice than merely relying on restorative justice or community justice practices alone.

Community justice, like restorative justice, has its basis in traditional forms of collective and clan-based justice models; the Maori people of New Zealand have long used restorative justice techniques such as group mediation and victim-offender mediation in resolving disputes.¹²⁹ As with restorative justice, the search for alternative methods of practicing criminal justice gained traction in the late 1970s. However, it was not until the early 1990s that the first community court in the United States

128. Indeed, in her recommendations for dismantling the system of mass incarceration, Alexander noted that the rhetoric of community justice often fails short of its goals. *See* ALEXANDER, *supra* note 59, at 233 (“Law enforcement must adopt a compassionate, humane approach to the problems of the urban poor—an approach that goes beyond the rhetoric of ‘community policing’ to a method of engagement that promotes trust, healing, and genuine partnership.”).

129. *See* Weitekamp, *supra* note 105, at 114.

was established.¹³⁰ Created in Manhattan in 1993, Midtown Community Court grew out of a movement funded by business owners and other prominent community members to clean up parts of Times Square.¹³¹ These community organizers, along with defense and prosecution attorneys, were frustrated at what they perceived to be a flaw within the criminal legal system; judges who saw repeat offenders for petty theft, prostitution, and loitering were forced to either “walk” the offenders, without subjecting them to further jail time, or sentence them to disproportionate jail time.¹³² At the same time, the area around Times Square was in the midst of a tourist and economic boom, and the preponderance of low-level offenses reflected poorly on the businesses located there. To combat this inadequacy within the criminal legal system, Midtown Community Court was created to allow judges the option to sentence these low-level offenders to various other punishments and programs, including community service and court-ordered drug rehabilitation.¹³³ Judges were also encouraged to include victim-offender mediation and group mediation restorative justice practices within certain sentencing protocols.¹³⁴ According to Michele Sviridoff, an advocate of Midtown,

The Midtown Community Court was designed to do substantially more than replicate the routine case processing of low-level crimes in a neighborhood-based setting. It was established to help solve problems that were specific to the Court’s Midtown location . . . The goal . . . was “to make justice constructive, visible, and efficient—and, above all, to make it responsive and meaningful to victims, defendants and the

130. See MICHELE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 4 (2000).

131. See *id.* at 4-6.

132. See *id.* at 5.

133. See *id.*

134. See *id.*

community.”¹³⁵

The court also provided access to other social services within the courthouse, and many envisioned it as an eventual “one-stop shop” of sorts for those in desperate need of assistance.¹³⁶

Midtown’s focus on community required increased participation from business owners and other members of the community who were initially skeptical of the new approach embraced by Midtown.¹³⁷ Community members were encouraged to engage in the criminal process once they brought complaints against specific offenders. This, in turn, required higher levels of neighborhood involvement. After two years, many local residents indicated they were pleased with the changes they saw within the Times Square area, citing specifically a decrease in visible sex work and vandalism.¹³⁸ Still, the court had its dissenters, primarily defense attorneys who feared that these forms of alternatives to incarceration would increase the social net of control around an already over-policed and vulnerable population.¹³⁹ The case studies of Midtown in the early 1990s reflect an optimism that was present throughout much of this period; with new perceived possibilities, community organizers believed that the criminal legal system could be reformed and restructured to accommodate changing societal attitudes regarding the goals of the criminal legal system. Midtown highlighted how an engaged community could alter the path of those ensnared within the criminal legal system. With a decreased emphasis on retributive incarceration, Midtown also demonstrated how restorative justice techniques, such as group mediation and victim-offender mediation, could be employed within a

135. SVIRIDOFF ET AL., *supra* note 130, at 2.

136. *Id.* at 105-06.

137. *See id.* at 145.

138. *Id.*

139. *See* John Feinblatt et al., *Neighborhood Justice at the Midtown Community Court*, in CRIME AND PLACE: PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION 87 (1998).

community justice framework.

Community courts like Midtown were not the only type of community justice employed in the early 1990s. Community courts arose concurrently with an increased emphasis on another form of community justice: community policing. Community policing, oftentimes called “broken windows” policing, emphasized the idea that petty crimes, such as vandalism and loitering, were symptomatic of dangerous underlying criminal behavior, and therefore required more aggressive policing than previously employed.¹⁴⁰ This form of policing differed from previous approaches as it required increased community involvement; local residents were urged to engage with police officers who patrolled their neighborhoods, and police officers were encouraged to open channels of communication with community organizers and leaders.¹⁴¹ However, with an increased focus on those communities with higher levels of low-level offenses came the attendant over-monitoring of poor, primarily black and brown communities. This over-policing of petty crimes in turn led to higher levels of racial profiling, specifically within New York City. The NYPD’s use of the “stop and frisk” policy is an extension of this type of community policing, and presents a cautionary warning that not all community justice models may incorporate or find support in restorative justice methodologies.

As Midtown community court and specific forms of community policing demonstrate, community justice may be employed to the detriment of certain communities who long suffer the harms of the criminal legal system. Without a continued emphasis on the underlying healing goals of restorative justice, community justice practices may perpetuate individual acts of violence against members of the community. In addition, these practices may maintain systematic violence through over-policing and surveillance, leading to a specific community’s overrepresentation within the criminal legal

140. *See* Kurki, *supra* note 104, at 246-47.

141. *See id.*

system. In light of the warnings provided by past experiments with restorative justice and community justice models, it is imperative to address the potential dangers that could befall those applying restorative justice techniques in a community justice framework to situations of police-related shootings.

III. Framing the Contemporary Conversation: Utilizing Restorative Justice and Community Justice in Police-Related Shootings

A. Yes, but What Would it Look Like?: Citizen-Driven Community Models

In order to effectively employ restorative justice techniques within a community justice model in the context of police-related shootings, several key components are necessary: 1) accountability of all participants; 2) contextual analysis of the needs and obligations of all parties involved; 3) transparency of proceedings; and 4) an underlying understanding of and appreciation for the healing process involved. Citizen complaint boards, as an oversight mechanism for police conduct in New York City, may provide a helpful framework to begin formulating a procedural model in which police-related shooting incidents could proceed.¹⁴² In New York City, the Civilian Citizen Complaint Review Board works with local residents in disputes involving police officer conduct.¹⁴³ Primarily focused on citizen complaints of excessive force or inappropriate remarks, the Board's investigative process provides an opportunity for face-to-face mediation meetings between the officer and the citizen; during this mediation, both parties are allowed to express their versions of the dispute in the attempt to reach a mutual understanding.¹⁴⁴ Mediation is

142. See *Civilian Complaint Review Board: Mediation*, NYC.Gov, <http://www1.nyc.gov/site/ccrb/mediation/mediation.page> (last visited Feb. 26, 2017).

143. See *id.*

144. See *id.*

not available for all disputes, however, specifically if the incident involved physical injury or property damage.¹⁴⁵ Additionally, if a citizen decides to pursue mediation through the complaint board, later legal or disciplinary action against the officer is not permitted.¹⁴⁶ This model, therefore, may be inappropriate for situations of police-related shootings.

The Vermont Reparations Board, on the other hand, involves volunteer citizens who determine the sentence of a convicted offender.¹⁴⁷ Although this encourages involvement of citizens within the criminal legal system, as we have seen, the power of the community may be circumscribed in the context of police-related shootings. Specifically, in order for volunteer citizens to have the power to sentence a person, that person must first be adjudicated guilty. As was the case in Loehmann's non-indictment, police officers are authorized to use deadly force under threat of violence to themselves or others. Thus, police officers whose actions are justified by this legal defense never come before a sentencing community: they have committed no legal wrong. Therefore, no sentence may be imposed on them. The legal defense that saves them from criminal culpability effectively bars traditional criminal or civil legal recourse for injured community members. However, if some form of community justice could occur outside the existing criminal legal system, reparations boards—like the one practiced in Vermont—could provide a credible framework in which to apply restorative justice practices.

B. Grounding Principles: Applying Theory to Practice

Prior to the application of any model in police-related shootings, however, two potential questions must be addressed in turn. The first involves the inherently murky definition of

145. *Id.*

146. *Id.*

147. See *Vermont Dep't of Corrections: Facts and Figures 2006*, VT. DEP'T OF CORR. (Dec. 1, 2006), <http://doc.vermont.gov/justice/restorative-justice/better-communities>.

“community,” and the limitations of working within that framework. Who determines what constitutes a community, and how does varying access to social power affect the interactions between overlapping and discrete communities? Secondly, in situations where individual violence and systematic violence coalesce—as frequently occurs in the context of police-related shootings—how does one navigate the nuanced and layered differences of individual and community power within the practice of mediation? Without recognizing these two underlying tensions in the application of restorative justice and community justice, any proposed solution handling the aftermath of a police-related shooting will fall short of its goal to heal and strengthen affected populations.

Restorative justice and community justice scholars at times clash as to the proper definition of community. According to Paul McCold and Benjamin Wachtel,

In [community justice], community has often been equated with neighborhood. In restorative justice literature, community is often indistinguishable from society. These ways of defining community have significant consequences for these new justice initiatives. Not only do they affect the way in which these approaches are designed and implemented, but they may cause confusion about underlying values and may [undermine the] goals of community justice.¹⁴⁸

There is a concrete danger in relying on the language of community; communities are necessarily defined in opposition to each other. Framing community in such a way ignores the fact that people who make up a given community may come from a myriad of different populations. Additionally,

148. Paul McCold & Benjamin Wachtel, *Community is Not a Place: A New Look at Community Justice Initiatives*, in A RESTORATIVE JUSTICE READER, at 294.

particularly in urban environments, a single geographic location may be made up of several discrete, but overlapping, neighborhoods. Community justice's definition of community relies on a specific spatial location and may, therefore, create difficulties in the application of its theory of justice. Indeed, one may ask how may justice be broadly achieved when justice itself is bound up in the ways in which different communities define it? One way to reconcile this dilemma is to utilize the inherent definitional fluidity of "community." In the age of globalization and the Internet, community connections may flow through nontraditional veins. In turn, ideas of justice may overlap and morph into models contextualized to a particular community. Perhaps recognizing the amorphous nature of community is the most effective way of mitigating the "danger of community."

Once the fluid nature of community is recognized, the complexities of a given community can be more freely analyzed and contextualized. Therefore, implementation of restorative justice practices within a community justice framework requires a contextual analysis of the needs of all the parties involved. This contextual analysis must be attuned to the social and political forces that impact each discrete community's access to social resources. Awareness and appreciation of the ways in which systemic oppressions are channeled through such social identities as race, class, gender, and disability is necessary in order to ensure that varying power differentials within communities are not made invisible. Community justice is focused on giving voice to the power of those oppressions in the context of an individual wrong. Indeed, individuals who commit crimes are frequently acting under the pressures of these oppressions. Situations of police-related shootings offer an opportunity to practice and employ this form of structural analysis.

In the application of restorative justice practices such as mediation, however, differing levels of individual power may pose more of a difficulty than seemingly ambiguous ideas of structural oppressions. Specifically, police officers presumably

have the full backing of state authority and power.¹⁴⁹ The communities and individuals who have been harmed by the officer's actions are oftentimes victims of the aforementioned structural oppressions; people with mental illnesses and communities of color are overrepresented in police-related shootings.¹⁵⁰ If group mediation is employed as a restorative justice practice, the police officer can embody both the state and the individual harm suffered by the community; this in turn makes cross-dialogue difficult, if impossible. Differentials of power may impact how a given community responds to mediation, and may also impact how the community mediator responds to each party in turn. Therefore, as is necessary in addressing systematic oppressions in discussing cross and inter-community engagement, recognition of the ways in which social identities impact individual interactions is essential in carrying out restorative justice within a community justice framework.

149. The Fourth Amendment jurisprudence previously discussed is a clear example of the ways in which police officers are exempted from criminalized conduct. The nature of the job provides one explanation for this exemption. For an interesting discussion of the officer's role in initiating problematic encounters, see *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996). The Seventh Circuit in *Plakas v. Drinski*, quoted in the *Dickerson* case, stated:

The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

Id. (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994)).

150. Kindy et al., *supra* note 12.

IV. Conclusion: Expanding the Framework, Expanding the Possibilities

Situations of violence leave ripples of destruction in their wake. After instances of fatal police shootings—like those of Philandro Castile, Tamir Rice, and Akai Gurley—communities and individuals are left without public recognition of their emotional injuries, and are given little recourse for criminal or civil remedies. In the context of police-related shootings, the conversation is oftentimes bound up in frenetic discussions of guilt and innocence, justifiability and over-aggression. Removed from these broad analyses, one question is often never addressed: What takes place after the storm? Once the harm is done, how does a community respond and grow? The wealth of restorative justice literature may provide useful bedrock upon which to build and assemble a carefully constructed response to a highly contextualized and sensitive issue. The limitations on restorative justice, from its de-emphasis on community involvement and systematic oppressions, may be balanced by employing a community justice framework. Indeed, community justice's own pitfalls—an unwillingness to focus on individual harms to the detriment of individual participants and its easy cooption into problematic usage by the current criminal legal system—are leveled when restorative justice theories are underscored and emphasized. The possibilities of employment in police-related shootings must be carefully weighed and contextualized. Each community will approach recovery differently; therefore, individual remedies must be tailored to the needs of the specific individual and affected community. As a leader in restorative justice practices, Howard Zehr, stated, “[b]efore we dream too grandly, then, we have an obligation to think through implications carefully. We must be as literate as possible about the dynamics of change and we must project how our dreams

can go wrong.”¹⁵¹ This obligation is no more urgent than in the difficult context of providing individual and community closure in the wake of violent police encounters.

151. ZHR, *supra* note 101, at 222.