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Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions

BY JOAN W. HOWARTH*

INTRODUCTION

Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace.¹

How should we respond to young people, gang members, terrorizing a neighborhood in this way? San Jose prosecutors responded by obtaining and enforcing a broad injunction against the Varrio Sureno Treces and Varrio Sureno Locos gangs and their

* Professor of Law, Golden Gate University. I thank Ayana Cuevas (UC Davis, 2000) for excellent research assistance, Christine Pagano and Maria Ontiveros for helpful comments on an earlier version of this work, and the faculty at the William S. Boyd School of Law, UNLV, for a thoughtful discussion of many of these ideas. This project was finished while I was the Scholar in Residence at the Boalt Center for Social Justice, an opportunity for which I am very grateful.

1. People *ex rel.* Gallo v. Acuna, 14 Cal. 4th 1090, 1100 (1997) (describing the Rocksprings neighborhood of San Jose and justifying the anti-gang public nuisance injunction ordered to protect the residents of Rocksprings), *cert. denied sub nom.* Gonzalez v. Gallo, 521 U.S. 1121 (1997).

members, based on the finding that the gangs' activities constituted a public nuisance to the people of Rocksprings.² California prosecutors have sought such anti-gang public nuisance injunctions since 1987.³ Their constitutionality was in doubt for ten years until *People ex rel. Gallo v. Acuna*,⁴ in which the California Supreme Court upheld the injunction imposed to protect the residents of Rocksprings. The California court found that the needs of a community overtaken by criminality justified bypassing the criminal justice system.⁵ The *Acuna* opinion champions the anti-gang injunction as a lawful and important means to hold the gang members accountable and restore community to Rocksprings.

This Article critiques anti-gang public nuisance injunctions through the lens of restorative justice principles. The rhetorical justification for anti-gang injunctions is strikingly similar to the rhetoric of the restorative justice movement. Restorative justice rests on the tenets that any crime is injurious, and that the best response is one that heals the injuries caused to the victim, the community, and the offender.⁶ The anti-gang public nuisance injunctions share

2. See *id.* The two targeted gangs were variously known as Varrío Sureño Town, Varrío Sureño Treces (VST), or Varrío Sureño Locos (VSL).

3. See Christopher S. Yoo, *Comment, The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U.L. REV. 213, 215, 217 (1994); see also *infra* text accompanying notes 50-93.

4. 14 Cal. 4th 1090 (1997).

5. For commentary on *Acuna*, see Raffy Astvasadoorian, Note, *California's Two-Prong Attack Against Gang Crime and Violence: The Street Terrorism Enforcement and Prevention Act and Anti-Gang Injunctions*, 19 J. JUV. L. 272 (1998); Rebecca Allen, Note, *People ex rel. Gallo v. Acuna: (Ab)using California's Nuisance Law to Control Gangs*, 25 W. ST. U. L. REV. 257 (1998); Terence R. Boga, Note, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R. - C.L. L. REV. 477 (1993); Bergen Herd, Note, *Injunctions as a Tool to Fight Gang-related Problems in California after People ex rel Gallo v. Acuna: A Suitable Solution?*, 28 GOLDEN GATE U. L. REV. 29 (1998); Edson McClellan, Casenote, *People ex rel. Gallo v. Acuna: Pulling in the Nets on Criminal Street Gangs*, 35 SAN DIEGO L. REV. 343 (1998); Julie Gannon Shoop, *Gang Warfare: Legal Battle Pits Personal Liberty Against Public Safety*, 34 TRIAL 12 (Mar. 1998); Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409 (1999); Mindy Yaeger, Note, *People ex rel. Gallo v. Acuna: Cities Allowed a New Weapon in Their Arsenal for the Crackdown on Gangs*, 19 WHITTIER L. REV. 595 (1998); Randall Kennedy, *Guilty by Association*, AM. PROSPECT, May-June 1997, at 66; Daniel J. Sharfstein, *Gangbusters: Enjoining the Boys in the 'Hood*, AM. PROSPECT, May-June 1997, at 58; see also Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1173-76 (1999) (citing *Acuna* as an example of constitutional interpretation successfully acknowledging community needs through contextual "Tailoring").

6. The Office of Juvenile Justice of the Department of Justice sets out the principles

significant similarities with typical restorative justice programs: both are deviations from traditional criminal court (or even juvenile court) models; both privilege participation of affected communities; both reconceive lawbreaking as injury; and both, at least in theory, are based on notions of redress of those injuries. Further, both provoke serious opposition from civil libertarians.⁷ Fundamentally, though, the anti-gang public nuisance injunctions undermine the promise of restorative justice as deeply as they weaken traditional rights-based protections, and the betrayal of the goals of restorative justice may be of even greater consequence.

Part I of this Article describes the fundamental principles of restorative justice, referencing some specific projects, to introduce the vocabulary and values of restorative justice. Part II describes anti-gang public nuisance injunctions. Part III critiques the anti-gang public nuisance injunctions using the restorative justice lens. Building on that critique, Part IV describes restorative justice for Rocksprings. Part V begins an argument for a Restorative Constitution, whereby constitutional protections—re-imagined as affirmative, community-based values, rather than merely defensive individual-based rights—can accommodate and even embrace restorative justice goals, themes, and programs.

I. Restorative Justice

Restorative justice is a modern movement⁸ with ancient roots⁹

of restorative justice as follows:

“Crime is injury. Crime hurts individual victims, communities, and juvenile offenders and creates an obligation to make things right. All parties should be a part of the response to the crime, including the victim if he or she wishes, the community, and the juvenile offender. The victim’s perspective is crucial to deciding how to repair the harm caused by the crime. Accountability for the juvenile offender means accepting responsibility and acting to repair the harm done. The community is responsible for the well-being of all its members, including both the victim and the offender.”

OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DEP’T OF JUSTICE, GUIDE FOR IMPLEMENTING THE BALANCED AND RESTORATIVE JUSTICE MODEL 5 (1998); *see also infra* text accompanying notes 8-49 (describing restorative justice programs and principles).

7. *See, e.g.,* Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994) (libertarian critique of some restorative justice programs); Werdegar, *supra* note 5 (libertarian critique of anti-gang public nuisance injunctions).

8. *See* Gordon Bazemore, *Beyond Retribution: Creative Retribution, in* RESTITUTION IN CRIMINAL JUSTICE (J. Hudson & B. Galaway eds., 1975) (crediting Albert Eglash with having introduced the term “restorative justice”); Gordon Bazemore, *Communities, Victims, and Offender Reintegration: Restorative Justice and Earned*

and adherents around the globe.¹⁰ Restorative justice advocates invite us to reject the basics of the criminal justice adversarial system, of crime as violation of law, and of the fundamental distinctions between criminal and civil law.¹¹ According to John Braithwaite, the core values of restorative justice are “healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends.”¹² Braithwaite describes restorative justice as “a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.”¹³ As so described, restorative justice is the most hopeful, least cynical, and least co-opted aspect of the victims’ right movement.¹⁴ Braithwaite

Redemption, in CIVIC REPENTANCE, at 85 n. 14 (Amitai Etzioni ed., 1999).

9. See Elmar G. M. Weitekamp, *The History of Restorative Justice*, in RESTORING JUVENILE JUSTICE 75, 102 (Lode Walgrave & Gordon Bazemore eds., 1999).

10. See, e.g., Douglas B. Ammar, *Forgiveness and the Law – A Redemptive Opportunity*, 27 FORDHAM URB. L. J. 1583 (2000) (discussing restorative criminal defense practice); Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651 (2000) (advocating for restorative justice by prosecutors); Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235 (2000) (describing roots, practices, and evaluations of restorative justice programs in the U.S., Australia, New Zealand, and elsewhere); David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why is It so Hard To Find?*, 27 FORDHAM URB. L.J. 1663 (2000) (advocating for restorative justice by prosecutors); David M. Lerman, *Restoring Dignity, Effecting Justice*, 26 HUM. RTS. Q. 20, 20-21 (Fall 1999) (describing successful restorative justice processes in Minnesota, Wisconsin, and Iowa); Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 706-15 (1999) (optimistic assessment of “circles,” non-punitive model of restorative justice for U.S. and Canada).

11. See Gordon Bazemore in CIVIC REPENTANCE, *supra* note 8, at 45; Gordon Bazemore & Mark Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime*, 41 CRIME & DELINQUENCY 296, 298 (1995) (“A restorative model would expand less punitive, less costly, and less stigmatizing sanctioning methods by involving the community and victims in sanctioning processes, thereby elevating the role of victims and victimized communities and giving priority to reparation, direct offender accountability to victims, and conflict resolution.”).

12. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 5 (1999).

13. John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

14. For leading discussions of victims’ rights in criminal proceedings, see Lynne Henderson, *Crime & Punishment: Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596 (1996), reviewing GEORGE FLETCHER, WITH JUSTICE FOR SOME: VICTIMS’ RIGHTS IN CRIMINAL TRIALS (1995); Lynne Henderson, *The Wrongs of Victims’ Rights*, 37 STAN. L. REV. 937 (1985). For a description of restorative justice as an outgrowth of the victims’

and Philip Pettit explain that the remedy to the problem of victim irrelevance in criminal prosecutions would seem to be to give back to the victim the particular crime.¹⁵ In restorative justice principles, both the victim and the offender are necessary participants in a process of making amends.¹⁶ Thus restorative justice is directly at odds with the adversary system; a system to find or construct common ground is not an adversary system.

Restorative justice programs address a variety of criminal behaviors around the globe. Noteworthy processes identified as restorative justice initiatives include the Truth and Reconciliation Commission in South Africa,¹⁷ victim-offender mediation and reconciliation programs in the United States and elsewhere,¹⁸ Navaho Peacemaking,¹⁹ and family conferences in the United States, Canada, and New Zealand.²⁰ Within United States legal systems, restorative

rights movement, see Brown, *supra* note 7.

15. John Braithwaite & Philip Pettit, *Comment: Republican Criminology and Victim Advocacy*, 28 L. & SOC'Y REV. 765, 771 (1994).

16. Cf. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1016 (1999) ("an apology is a 'commodity' which only the offender can produce"; the 'market' for apology is monopolistic—the injured party cannot get that apology elsewhere. The same applies to forgiveness: It is a commodity best obtained from the injured party.”).

17. See, e.g., Abdullah Omar, *Truth and Reconciliation in South Africa: Accounting for the Past*, 4 BUFF. HUM. RTS. L. REV. 5, 14 (1998) (identifying Commission as restorative justice project); see generally Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUST. 47, 49 (1997) (analyzing Truth and Reconciliation Commission).

18. See MARK UMBREIT, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (1994).

19. See Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297 (1999/2000); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999) (placing Navajo Peacemaking within restorative justice); Robert Yazzie & James W. Zion, *Navajo Restorative Justice: The Law of Equality and Justice*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 69 (Burt Galaway & Joe Hudson eds., 1996) [hereinafter INTERNATIONAL PERSPECTIVES] at 157, 160 (describing traditional Navajo law as “a healing process that either restores good relationships among people or, if they do not have good relations to begin with, fosters and nourishes a healthy environment.”). For a caution about transferring Navaho Peacemaking principles or practices to non-Indian systems, see Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003 (1997).

20. See, e.g., Mark Umbreit & Howard Zehr, *Restorative Family Group Conferences: Differing Models and Guidelines for Practice*, FED. PROBATION (Sept. 1996); Frederick W.M. McElrea, *The New Zealand Youth Court: A Model for Use with Adults*, in INTERNATIONAL PERSPECTIVES, *supra* note 19, at 69. For discussions of specific restorative justice projects, see Curt Taylor Griffiths, *Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities*, 20 INTER'L. J. OF COMP. AND APPLIED CRIM. JUST. 195 (1996); Gord Richardson, Burt Galaway & Michelle Joubert, *The*

justice principles have been translated into program initiatives primarily in the juvenile justice context.²¹ Juvenile justice appears to be a prime site for restorative justice experiments because of the now diminished but still relatively greater emphasis on rehabilitation of juvenile offenders, and the associated hope of preventing juveniles from becoming entrenched in the criminal justice system.²²

Juvenile justice conferencing in New Zealand provides a model of restorative justice with particularly widespread acceptance and influence. In this model, once wrongdoing is admitted, a conference is convened, generally moderated by a police officer, with both the offender and the victim. Each of the major participants, the offender and the victim, is invited to bring to the conference the people most able to provide support. In other words, family or friends of both participate. Conferencing has succeeded in spite of strong resistance from lawyers, and has gained equally strong support from the police. The offender hears directly from the victim about the injury the offender has caused and what is needed to make amends. The “community” is represented not only by the police officer, but also by the people brought to the conference by both the victim and the offender. When conferencing works, the presence of the victim’s supporters enables the victim to confront and communicate with the offender, and the presence of the offender’s supporters enables the offender to accept responsibility and be held accountable for not only the original injury, but whatever restorative remedy is agreed upon.²³

Proponents of restorative justice make both moral and pragmatic

Restorative Resolutions Project: An Alternative to Incarceration, *id.* at 209; Barry Stuart, *Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System*, *id.* at 291.

21. See, e.g., Bazemore & Umbreit, *supra* note 11; Amanda Paye, *Communities Taking Control of Crime: Incorporating the Conferencing Model into the United States Juvenile Justice System*, 8 PAC. RIM L. & POL’Y J. 161 (1999). For an excellent introduction to the use of restorative justice for crime committed by juveniles, see OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PLANNING, DEP’T OF JUSTICE, *BALANCED AND RESTORATIVE JUSTICE FOR JUVENILES: A FRAMEWORK FOR JUVENILE JUSTICE IN THE 21ST CENTURY* (August 1997) [hereinafter *FRAMEWORK*].

22. See *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* (G. Bazemore & L. Walgrave eds., 1999); Gordon Bazemore, *Three Paradigms for Juvenile Justice*, in *INTERNATIONAL PERSPECTIVES*, *supra* note 19, at 37; Brown, *supra* note 7, at 1265 n. 70; Frederick W. M. McElreas, *The New Zealand Youth Court: A Model for Use with Adults*, in *INTERNATIONAL PERSPECTIVES*, *supra* note 19, at 69. *But see* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1095 (1995) (cautioning that restorative justice might be simply the “latest fad” in juvenile justice).

23. See Braithwaite, *supra* note 12, at 15-17; McElreas, *supra* note 22, at 69.

arguments for it. Many argue that restorative justice is more effective in making us safe from violence than current regimes of retribution.²⁴ John Braithwaite points out that “the research literature of victimology instructs us that it is incorrect to expect that tougher sentences will leave crime victims, the police, or citizens any more satisfied with the justice system.”²⁵ On a more theoretical level, some proponents claim that restorative justice addresses deconstructionist critiques of justice by recognizing the offender and the victim in their individuality.²⁶ Important, and strong theoretical support for restorative justice comes from republican²⁷ and communitarian²⁸ thinkers.

Braithwaite has argued that “[r]estorative justice became a global social movement in the 1990s as a result of learning from indigenous practices of restorative justice the ways in which individualistic Western victim-offender mediation was impoverished.²⁹ Braithwaite suggests that the “radically communitarian” traditions of the New Zealand Maori and North American Native people lead to more effective restorative practices,³⁰ that “material reparation [is] much less important than emotional or symbolic reparation,”³¹ and that justice must be “intertwined with love and caring.”³²

Liberal, feminist, and critical race critics, however, express

24. For discussions of the theoretical underpinnings of the efficacy of restorative justice, see, e.g., Braithwaite, *supra* note 13, at 1737-1742; see also John O. Haley, *Apology and Pardon: Learning from Japan*, in CIVIC REPENTANCE, *supra* note 8, at 97 (discussing role of apology in reducing Japan's crime rate since World War II).

25. Braithwaite, *supra* note 13, at 1737 (citing Julian V. Roberts & Loretta J. Stalans, *Crime, Criminal Justice, and Public Opinion*, in THE HANDBOOK OF CRIME AND PUNISHMENT 31, 47-50 (Michael Tonry ed., 1998)).

26. See, e.g., Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 J. OF L. & SOC'Y 237, 241 & n. 18 (1998).

27. See, e.g., JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

28. See, e.g., Bazemore, *Civic Repentance*, in CIVIC REPENTANCE, *supra* note 8, at viii (“My main thesis is that we should adopt the religious concept of repentance into our civic culture.”); *id.* at vii (“the lack of opportunities for full restoration [for offenders] exacts social costs.”).

29. Braithwaite, *supra* note 13, at 1743.

30. Braithwaite, *supra* note 13, at 1743-44.

31. Braithwaite, *supra* note 13, at 1744. Braithwaite asserts that “[v]ictims often wanted an apology more than compensation. Forgiveness from their families was often more important to the restoration of offenders than anything else.” *Id.*

32. Braithwaite, *supra* note 13, at 1744. Braithwaite and Philip Pettit describe “alternative model accountability conferences” as appropriate whenever criminal defendants “decline to deny” their guilt. Braithwaite & Pettit, *supra* note 15, at 771.

reservations about restorative justice models. They charge that the informality of typical restorative justice programs can eliminate crucial rights,³³ reinforce pre-existing subordinating relationships,³⁴ insidiously enlarge the reach of the state,³⁵ dangerously reduce the protection of the state,³⁶ reproduce inequality of results,³⁷ and obscure systemic contexts and causes for the offense.³⁸ Rather than healing the victim as promised, restorative justice processes can pressure victims to forgive their attackers too easily,³⁹ causing further victimization, including violence.⁴⁰ These concerns are grounds for

33. See, e.g., Jenny Barga, *Kids, Cops, Courts, Conferencing and Children's Rights – A Note of Perspectives*, 2 AUSTRALIAN J. OF HUM. RIGHTS 209 (1996); Brown, *supra* note 7, at 1287-91 (discussing absence of such protections as right of confidentiality and right to counsel); J. Stubbs, 'Communitarian' Conferencing and Violence Against Women: A Cautionary Note, in WIFE ASSAULT AND THE CANADIAN CRIMINAL JUSTICE SYSTEM 260 (Mariana Valverde, L. MacLeod & K. Johnson, eds., 1995); Daniel W. Van Ness, *Legal Issues of Restorative Justice*, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 263 (G. Bazemore & L. Walgrave eds., 1999); K. Warner, *The Rights of the Offender in Family Conferences*, in FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? (C. Alder & J. Wundersitz eds., 1994).

34. See, e.g., Stephen Hooper & Ruth Busch, *Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea*, 4 WAIKATO L. REV. 101 (1996).

35. See, e.g., George Pavlich, *The Power of Community Mediation: Government and Formation of Self-Identity*, 30 L. & SOC'Y REV. 707, 711 (1996) ("explor[ing] mediation as a governmentalization (cf. expansion) of state dispute resolution" and noting that critics of community mediation charge that it "actually expand(s) and intensif(ies) state control" in a particularly "insidious" way because "on the surface, [it] appears to be a process of retraction") (citing Boaventura de Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, in THE POLITICS OF INFORMAL JUSTICE, VOL 1: THE AMERICAN EXPERIENCE 262 (Richard L. Abel ed., 1982)).

36. See, e.g., Brown, *supra* note 7; Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751 (2000).

37. See, e.g., Evelyn Zellerer, *Community-Based Justice and Violence against Women: Issues of Gender and Race*, 20 INTER'L. J. OF COMP. & APPLIED CRIM. JUST. 233, 236 (1996) (arguing that community-based justice programs need to be assessed in terms of inclusion of women, safety and protection of women, and power and control).

38. See, e.g., Coker, *supra* note 19, at 38-73; Paul McCold, *Restorative Justice and the Role of Community*, in INTERNATIONAL PERSPECTIVES, *supra* note 19, at 85, 89; see also John Braithwaite, *Restorative Justice and Social Justice*, 63 SASK. L. REV. 185, 188 (2000) (noting that "[o]nce colonialism, slavery, and immigration has ruptured the lives of Indigenous peoples, all forms of justice, including the most plural forms of restorative justice, serve as a threat to social justice for First Nations . . .").

39. See, e.g., Coker, *supra* note 19, at 85-88 (describing what she calls the "cheap-justice problem"); see generally ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 51(1999) (noting emptiness of race apologies which rest on "inadequate acknowledgements or have no material effect on the participants' relationship").

40. See, e.g., Coker, *supra* note 19, at 80-82 (describing women injured immediately

caution, but not rejection, of restorative justice approaches. Surely most of the same objections are valid challenges to current criminal and juvenile justice systems; the anti-gang public nuisance injunctions are reminders of the vast difference between the theoretical rights of our current system and the reality of implementation.

Further, restorative justice offers potentially significant responses to several important critiques of current criminal justice practices.⁴¹ Three particular points support a hopeful exploration of restorative justice. First, restorative justice might offer a practical program to dislodge some harmful but deeply entrenched socially constructed identities of criminals and communities. Policies about crime and punishment are influenced by powerful but ambiguous ideas about community and individual responsibility, both of which are deeply class-based and racialized. Socially constructed knowledge about the individual who is the criminal and the community that deserves protection are bounded by largely unspoken class, gender, and race identities.⁴² For example, the anti-gang injunctions target Latino and African-American young people, subjecting them to guilt based on group association and identifying them as distinct and separate from the deserving community. In this, the anti-gang public nuisance injunctions ratify and reinforce class- and race-based constructions of crime and community.⁴³

Meaningful restorative justice offers at least the possibility of cracking through entrenched racialized barriers to justice. Restorative justice programs use case-by-case identification and involvement of and engagement by the truly relevant communities, the people closest to the victim and to the offender. In this way restorative justice programs disperse power to outsider communities,

after Peacemaking).

41. See, e.g., Angela P. Harris, *Criminal Justice As Environmental Justice*, 1 J. GENDER RACE & JUST. 1, 28 (1997) (suggesting a transformative environmental justice approach to criminal justice in part because the civil rights approach, with its principled focus on individual defendants, “does not address the very real toll that crime takes on neighborhoods and families”).

42. See, e.g., Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER, RACE & JUSTICE 97, 102-14 (1997) (discussing widespread associations of Black men with criminal behavior); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997) (criticizing generalized suspicions linking men of color to crime); KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MICROAGGRESSIONS* (1998) (criticizing widespread associations of blacks with lawbreaking).

43. See, e.g. MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995).

and acknowledge and build upon the complex identities of specific individuals and communities. These aspects of restorative justice directly challenge the racialized and class-based social constructions of crime and criminals that inform so much of current criminal and juvenile justice law and policy.

Second, restorative justice offers the possibility of feminist re-visioning of crime and punishment.⁴⁴ Specifically, restorative justice principles are consistent with the insights of relational feminism, because they build on the goal of reinforcing positive connections between individuals and communities rather than reinforcing the isolated individualism of traditional liberal legal thought.⁴⁵ Certainly feminist interventions in criminal justice have not always relied on restorative justice principles,⁴⁶ and, feminists are among those raising cautions about potential dangers of restorative justice.⁴⁷ In spite of those warnings, I join those feminists intrigued by the possibilities of restorative justice.⁴⁸

Third, today's criminal justice system is so far removed from

44. See, e.g., Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 WASH. & LEE L. REV. 431, 433 (1994) ("If crime and justice system policies in the United States are to move from a largely penalizing, criminalizing, and warehousing model to a more humane system that envisions welfare, restoration, and reintegration as its principles, then we must radically reconfigure conceptions of manhood and masculinity").

45. E.g., Coker, *supra* note 19, at 34 (noting the "relational justice" foundation of Navajo Peacemaking); Braithwaite & Pettit, *Republican Criminology*, *supra* note 32, at 771 (suggesting consistency between ethic of care and restorative justice conferencing); see also Linda Ross Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1515, 1517 (2000) (assuming that the wrong of harm is "the breaking of trust with one's community and the injury to the victim as a community member"); *id.* at 1520 (noting that "the basic public trust is necessary for simply leaving the house in the morning").

46. See, e.g., Braithwaite & Pettit, *Republican Criminology*, *supra* note 15, at 770 n. 1 (commenting that the "women's movement is becoming a less retributive, less stigmatizing social movement"); Kathleen Daly, *Men's Violence, Victim Advocacy, and Feminist Redress*, 28 L. & SOC'Y REV. 777 (1994) (reminding of multiplicity of feminisms).

47. See, e.g., Stubbs, *supra* note 33, at 260.

48. See, e.g., Kathleen Daly, *Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice*, 17 INT'L J. SOCIOLOGY L. 1 (1989); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 803-04 (2000); Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 981 (1998). The connections between restorative justice and republican principles (see BRAITHWAITE & PETTIT, *supra* note 27) and Habermas' theories of democracy and discourse (see JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., MIT Press 1996); cf. Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33 (1996)) are also intriguing.

goals of justice and safety that fundamental change is required. Restorative justice offers such a deep rethinking. The court in *Acuna* was willing to jettison cherished individual rights to uphold creative responses to aid a community overtaken by crime. Perhaps the same openness to creativity can be brought to restorative justice principles and programs. Its central role for the victim, combined with concern for the offender, brings restorative justice support from all sides of the political spectrum, which might mean that restorative justice is both transformative and feasible.⁴⁹

II. Anti-gang Injunctions

Although anti-gang public nuisance injunctions cry out for criticism on standard civil liberties grounds⁵⁰ and as a racialized anti-crime strategy,⁵¹ my critique here is based on the principles of restorative justice. Inspection of the anti-gang injunctions using restorative justice principles underscores the fundamental differences between restorative justice methodologies and principles, and traditional individual rights-based civil liberties and constitutional

49. See Braithwaite, *Utopian*, *supra* note 13, at 1745-46 (suggesting that the effectiveness and increased satisfaction from restorative justice conferencing offer the promise of a truly feasible transformation, even in conservative, punitive cultures); Francis T. Cullen, Bonnie S. Fisher, & Brandon K. Applegate, *Public Opinion about Punishment and Corrections*, 27 CRIME & JUST. 1, 47 (2000) ("there is beginning to be evidence that restorative justice is favored by the public"); *id.*, at 45 ("[R]esearch shows that sanctions with a restorative quality are strongly embraced by citizens").

50. See, e.g., Boga, *supra* note 5, at 494-502 (arguing that anti-gang injunctions violate First Amendment rights of association and free assembly); McClellan, *supra* note 5, at 373-78 (arguing that anti-gang injunctions must be limited to individuals actively participating or with specific intent to participate in unlawful gang activities); Werdegar, *supra* note 5 (arguing that injunctions are unconstitutional on vagueness, guilt by association, and procedural due process grounds in addition to being of limited usefulness); Yaeger, *supra* note 5, at 641 (suggesting that anti-gang injunctions should be geographically limited) & 648-651 (suggesting that anti-gang injunctions must be limited to individuals who have committed acts deemed to be public nuisances). But see Gregory S. Walston, *Taking the Constitution at its Word: A Defense of the Use of Anti-gang Injunctions*, 54 U. MIAMI L. REV. 47 (1999) (defense of constitutionality of anti-gang injunctions by California Deputy Attorney General).

51. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1138 (1998) (identifying anti-gang injunction as "battlefield for Anglos and Mexican Americans to fight for status in the U.S. social hierarchy"); Gary Stewart, Note: *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249 (1998); cf. Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999) (charging anti-gang loitering ordinances reinforce the social meaning of communities of color as law-breakers).

claims.

Attorneys in the office of Los Angeles City Attorney James Hahn invented the anti-gang public nuisance injunction, and filed the first such action, *People v. Playboy Gangster Crips*, in Los Angeles Superior Court in 1987.⁵² The injunction sought against the Playboy Gangster Crips was not only the first, but perhaps also the most expansive anti-gang public nuisance action attempted. The named defendants against whom the injunction was sought were “Playboy Gangster Crips, an unincorporated association” and “DOES 1 through 300, inclusive.”⁵³ The injunction was sought against “the defendant unincorporated association and all of its members, agents, servants, employees, and representatives, and all persons acting in concert with them.”⁵⁴ The order prosecutors wanted would have applied to several square miles near La Cienega Boulevard in Los Angeles, and would have prevented any two of those unidentified three hundred people from being in public together in that area, including in public hallways.⁵⁵ Any of the three hundred defendants who were minors were to be ordered not to “loiter” anywhere in public between sunset and sunrise unless accompanied by a parent, guardian, or a spouse over the age of twenty-one.⁵⁶ No matter what their age, defendants would violate the proposed order by being in public anywhere in the area of the injunction for more than five

52. See *People v. Playboy Gangster Crips*, No. WEC 118860 (L.A. County Super. Ct., filed Oct. 26, 1987); Aaron Curtiss, *West Side gang members claim crackdown violates their rights*, L.A. HERALD EXAM., Nov. 15, 1987, at A1; Paul Feldman, *City Attorney to Ask Tight Restrictions on Crips Gang*, L.A. TIMES, Nov. 5, 1987, Pt. 2, at 1; James Hahn, *New methods needed to defeat gangs*, L.A. HERALD EXAM., Nov. 23, 1987. As a Staff Attorney for the ACLU Foundation of Southern California, I represented the ACLU in its legal and public opposition to the injunctions. See, e.g., Paul Feldman, *Court Rejects City Attorney's Bid to Curb Westside Gang's Movements*, L.A. TIMES, Nov. 6, 1987, Pt. 2, at 1.

53. Complaint, *People v. Playboy Gangster Crips*, No. WEC 118860 (L.A. County Super. Ct. filed Oct. 26, 1987).

54. Preliminary Injunction (Proposed), *People v. Playboy Gangster Crips*, No. WEC 118860 (L.A. County Super. Ct.).

55. The proposed injunction included the following order: “a. Do not congregate in groups of two or more upon any public street, avenue, alley, park, public place or place open to public view or in any public hallway or public passageway at any time of the day or night.” *Id.* at 2.

56. *Id.* (“b. If you are a person of under the age of 18 years, do not loiter about any public street, avenue, alley, park or other public place between the time of sunset and the time of sunrise of the following day, unless accompanied by your parent or legal guardian having legal custody and control of your person or your spouse over the age of twenty-one years.”).

minutes,⁵⁷ attending a party with other gang members that was audible outside the apartment or residence where the party was being held,⁵⁸ or failing to carry government-issued identification at all times.⁵⁹

In addition to seeking prohibitions against a number of specific law violations⁶⁰ and a general prohibition against any lawbreaking,⁶¹ the prosecutors also included within the proposed order a provision preventing any of the three hundred Doe defendants from refusing consent to any personal or vehicle search or seizure.⁶² The prosecutors sought to prohibit a variety of nuisance activities, from littering⁶³ to blocking ingress and egress.⁶⁴ The order sought also would have prevented graffiti by prohibiting the possession of markers and paint,⁶⁵ and prevented drug trafficking by prohibiting the

57. *Id.* (“c. Do not remain upon any public street, avenue, alley, park or other public place or in any place open to public view or in any public hallway or public passage way for more than five minutes at any time of the day or night.”).

58. *Id.* (“d. Do not be present at, or participate in, any party where other gang members are present and which is audible beyond the confines of the apartment or residence where the party is located.”).

59. *Id.* (“v. Do not fail to carry valid photo identification issued by the California Department of Motor Vehicles or any other governmental agency.”).

60. *E.g., id.*, at 2 (“e. Do not enter or be present upon the private property of another without permission”); at 3 (“h. Do not fire or discharge, or cause to be fired or discharged, any pellet gun, starter pistol or firearm of any type at any time of the day or night”); at 4 (“k. Do not damage or deface, or cause others to damage or deface, by spray painting or otherwise, public property or private property not owned by you”; “n. Do not use or possess or consume an alcoholic beverage on any public street, avenue, alley, park, public place or place open to public view or in any public hallway or public passageway at any time of the day or night”); “r. Do not urinate or defecate upon any public street, avenue, alley, park or other public place or in any place open to public view or in any public hallway or public passageway.”).

61. *Id.* (“w. Do not violate any law.”).

62. *Id.* (“x. As a showing of good faith compliance with the provisions of this order, do not refuse to consent to any search of your person or vehicle or to seizure of any contraband as defined by this order when requested by any peace officer or probation officer.”).

63. *Id.* at 5 (“s. Do not litter, or cause other persons to litter, upon any public street, avenue, alley, park or other public place or in any place open to public view or in any public hallway or public passageway.”).

64. *Id.* (“q. Do not block the free egress or ingress to or from any street, driveway, sidewalk, house, building, vehicle or other place.”).

65. *Id.* at 4 (“l. Do not possess on your person or in a vehicle upon any public street, avenue, alley, park, public place or place open to public view or in any public hallway or public passageway at any time of the day or night any paint or any marker with an application surface greater than one quarter (1/4) inch.”).

possession of drugs⁶⁶ or communications equipment,⁶⁷ the approaching of cars,⁶⁸ or any welcoming of short-term visitors.⁶⁹ Thus the prosecutor's idea was to use the civil law of public nuisance abatements to effectively criminalize the low-level, annoying behaviors of gang members.⁷⁰ In this, the public nuisance anti-gang injunction is consistent with other "broken windows"⁷¹ or public order policing and prosecutorial initiatives, including Chicago's broad anti-loitering ordinance struck down by the Supreme Court in *City of Chicago v. Morales*.⁷²

The civil liberties problems with the anti-gang public nuisance injunctions are obvious. Without waiting to be asked, and, indeed, without ever meeting any of the Playboy Gangster Crips, the ACLU intervened on their behalf. The ACLU sought to limit the reach of the injunction to individuals specifically named as defendants and shown to have been served, sought to limit the activities prohibited under the injunction to activity that was already unlawful, and argued that any defendant in the proceedings on the granting of injunctive relief had a right to counsel, including the appointment of counsel upon a showing of indigency.⁷³ The trial court agreed with each of the

66. *Id.* ("m. Do not use or possess or provide to any other person any narcotic or controlled substance or related paraphernalia or poison.").

67. *Id.* at 3-4 ("j. Do not possess on your person or in a vehicle upon any public street, avenue, alley, park or other public place or in any place open to public view or in any public hallway or public passageway any remote communication device including, but not limited to, any walkie-talkie, paging device, or portable, remote or car telephone.").

68. *Id.* at 3 ("f. Do not approach the driver or passenger of any vehicle.").

69. *Id.* at 5 ("u. Do not have more than one (1) visitor at your residence within a twenty-four (24) hour period who remains less than ten (10) minutes, except public employees, utility service personnel or delivery persons from lawful businesses.").

70. Commentary on *People v. Playboy Gangster Crips* includes Boga, *supra* note 5, at 478-79; Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 744 & n. 19; Debra R. Schultz, Comment, "*The Right to be Let Alone*": *Fourth Amendment Rights and Gang Violence*, 16 W. ST. U. L. REV. 725, 733-34 (1989); Stewart, *supra* note 51, at 2264; Woo, *supra* note 3, at 217-219; Mark Thompson, *A Gangland Nuisance*, CAL. LAW. (Jan-Feb. 1988) at 21.

71. *James Q. Wilson & George L. Kelling, Broken Windows*, THE ATLANTIC MONTHLY, (Mar. 1982) at 29 (advancing highly influential claim that eliminating relatively minor signs of neighborhood disorder deters more serious crime); see, e.g., *Kurki, supra* note 10, at 238 (describing influence of Wilson and Kelling's "broken windows" theory).

72. 527 U.S. 41 (1999).

73. See *People v. Playboy Gangster Crips*, No. WEC 118860 (L.A. County Super. Ct.). Subsequently an appellate court has ruled that appointment of counsel is not required in these injunction proceedings. See *Iraheta v. Superior Court of Los Angeles County*, 70 Cal. App. 4th 1500 (1999). In *Iraheta* prosecutors filed a civil lawsuit seeking an injunction to abate a public nuisance naming the 18th Street Gang, 92 individuals, and 200 "Doe"

ACLU arguments, and issued an injunction limited in those ways. In these circumstances, both the ACLU and the City Attorney's office claimed victory, and the anti-gang public nuisance injunction was virtually dead for the next five years.⁷⁴

In 1992, a spate of California cities attempted to revive and expand the anti-gang public nuisance injunction, and found greater judicial receptiveness.⁷⁵ Probably the most expansive was the twenty-two point preliminary injunction issued in *People v. Blythe Street Gang*, which named a 350-person gang as defendant and covered an 180-block area.⁷⁶ The most important of these injunctions, however, was sought by prosecutors in San Jose and eventually upheld by the California Supreme Court in *People ex rel. Gallo v. Acuna*.⁷⁷

From *Playboy Gangster Crips* to *Acuna*, the pattern for these cases was the same: prosecutors prepared a case for a preliminary injunction based on scores of declarations from police officers and residents who reported the criminal activity of gang members terrorizing the people of the neighborhood. In *Acuna*, the California Supreme Court relied on forty-eight declarations to find that San

defendants (*id.* at 1502), and alleging that the defendants "waged a gang war, including engaging in drug dealing, shootings, robberies, drinking and urinating in public, threatening residents, vandalizing and defacing with graffiti public and private property, trespassing on property, and other injurious activities against the residents." *Id.* at 1502-03. The court found no right to counsel, holding that "the purpose of these proceedings is not to punish petitioners. Rather, the purpose of these proceedings is to protect the rights of people residing and working in the target areas. . . ." *Id.* at 1512.

74. See Paul Feldman, *Judge OK's Modified Measures to Curb Gang*, L.A. TIMES, Dec. 12, 1987, Pt. 2, at 3; Paul Feldman, *Judge Raps City Atty.'s Bid to Neutralize Gangs*, L.A. TIMES, Dec. 11, 1987, Pt. 2, at 3; Paul Feldman, *City Attorney Modifies Plan to Control Street Gangs*, L.A. TIMES, Nov. 24, 1987, Pt. 2, at 3; see also Woo, *supra* note 3, at 219 (noting the five year gap before next anti-gang injunction, but assessing it as a surprise in light of the "success" of the Playboy Gangster Crips injunction). In spite of the very limited nature of the uncontested injunction, the City claimed that the injunction changed the neighborhood dramatically. See, e.g., *Westside Gang Crime Off*, L.A. TIMES, June 2, 1988, at 2, 3 (home ed.) (reporting 30% reduction in gang-related crime after Playboy Gangster Crips injunction). The effectiveness of these injunctions as crime reduction tools is in dispute, however. Many prosecutors claim that each has been a tremendous success, but some evidence suggests otherwise. See ACLU FOUNDATION OF SO. CAL., FALSE PREMISE, FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH (1997) (providing data supporting claim that the Panorama City anti-gang injunction simply moved the criminal activity, without reducing it).

75. For fuller descriptions of the anti-gang injunctions, see Boga, *supra* note 5, at text accompanying notes 1-31; Stewart, *supra* note 51, at 2264-68; Werdegar, *supra* note 5, at 415-418; Woo, *supra* note 3, at 219-221.

76. N. LC 020525 (Cal. Super. Ct. Los Angeles County Apr. 27, 1993) (modified order for preliminary injunctions), described in Werdegar, *supra* note 5, at 415 & n. 34.

77. 14 Cal. 4th 1090, 1100 (1997).

Jose's Rocksprings neighborhood was "an urban war zone."⁷⁸ The *Acuna* trial court had issued a twenty-four paragraph injunction against thirty-eight defendants,⁷⁹ prohibiting a wide range of activity within the four-block Rocksprings neighborhood -- including fighting, trespassing, public urinating, littering, and public possession of hammers, nails, screw drivers, pagers or beepers.⁸⁰ Upon interlocutory appeal, the court of appeal, invalidated fifteen of the twenty-four provisions as being unconstitutionally vague or overbroad, leaving only provisions that enjoined conduct defined as crimes under the California Penal Code,⁸¹ essentially repeating the guarded and critical *Playboy Gangster Crips* judicial response. The City sought California Supreme Court review of only two of the contested provisions, the one that prevented any of the named defendants from being in public with any other defendant or member of the targeted gang,⁸² and the one that enjoined defendants from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to [the neighborhood] known to have complained about gang activities."⁸³ The California Supreme Court's enthusiasm for the public nuisance injunction suggests that the City could have been much more ambitious in the provisions it took to the Court. The majority endorsed the injunction, rejecting First Amendment arguments based on freedom of association,⁸⁴ overbreadth,⁸⁵ and vagueness⁸⁶ claims.

Notwithstanding the *Acuna* majority opinion, and the spread to other states of anti-gang public nuisance injunctions,⁸⁷ the individual

78. *Id.* at 1101.

79. *Id.*

80. *Acuna*, 14 Cal. 4th at 1135 n. 3 (Mosk, J., dissenting).

81. *Id.* at 1101.

82. *Id.* Paragraph (a) enjoined defendants from "Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant . . . or with any other known 'VST' (Varrío Sureño Town or Varrío Sureño Treces) or 'VSL' (Varrío Sureño Locos) member." *Id.*

83. *Id.* at 1118.

84. *Id.* at 1111.

85. *Id.* at 1114.

86. *Id.* at 1118-19.

87. See Chris Fiscus, *Phoenix Aims to Break Gangs' Grip: Calif. Shows Way to Bar Menacing Street Gatherings*, ARIZ. REPUBLIC, May 23, 1998, at A1; John W. Gonzalez, *Judge Limits Suspects with 'Gang Injunction'*, HOUSTON CHRON., Aug. 1, 1998, at 1. The Los Angeles City Attorney's office claims to have received inquiries about the anti-gang injunctions from prosecuting agencies in Illinois, Texas, Arkansas, Florida, and Arizona.

rights flaws in the concept are obvious. The central principle of being held responsible for one's own acts, the centerpiece of our constitutional system of criminal procedure, is noticeably absent.⁸⁸ The injunction is justified on the basis of many serious crimes allegedly committed by members of the gangs; those serious crimes are used to inhibit the freedom of all the alleged members of the gang, without any evidence tying the individual controlled by the injunction to the specific criminal activity justifying the injunction. In *Acuna*, for example, the court found that "murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson and theft are commonplace,"⁸⁹ but the injunction reaches people who are suspected gang members, whether or not they have any record of arrest or conviction,⁹⁰ and whether they are suspected of committing the acts that constitute a public nuisance. As noted by the dissenting justices, the injunctions rest on extremely expansive notions of guilt by association.⁹¹ A person can be identified as a gang member simply by having been observed twice in the presence of other identified gang members; Justice Mosk noted that Los Angeles law enforcement officials have identified 47 percent of the African American men between the ages of twenty-one and twenty-four as suspected gang members, using similar criteria.⁹²

The injunctions also take advantage of the lower burden of proof in a civil action and the lack of criminal procedural protections for the defendant. A civil defendant has no right to appointed counsel, and proof beyond a reasonable doubt is not required. By its terms, the injunction implicates fundamental rights of association and expression, and suggests vagueness and overbreadth problems as well.⁹³

But restorative justice, not those glaring individual liberties issues, is my concern here. The anti-gang injunctions offer surface consistency with the principles of restorative justice, but

McClellan, *supra* note 5, at 359.

88. See *Acuna*, 14 Cal. 4th 1090, 1145-47 (Mosk, J., dissenting).

89. 14 Cal. 4th at 1100.

90. See 14 Cal. 4th at 1146 n. 11 (Mosk, J., dissenting).

91. See *id.* at 1129-32 (Chin, J., concurring and dissenting); *id.* at 1142-47 (Mosk, J., dissenting).

92. See *id.* at 1133 n. 1 (Mosk, J., dissenting).

93. See also *In re Englebrecht*, 67 Cal. App. 4th 486 (1998) (upholding association limitations of anti-gang injunction on basis of *Acuna* but striking down as overbroad provision that prohibited gang members from using pagers or beepers within two-square mile area).

fundamentally operate in a way that undermines the values and promise of restorative justice. That betrayal may be even more damning than the substantial civil liberties defects in the public nuisance injunctions.

III. Restorative Justice Critique of Anti-gang Injunctions

The anti-gang injunctions appear similar to restorative justice programs in the explicit involvement of the community, the active role of the victims, the understanding of a crime as an injury, and the underlying willingness to circumvent established criminal justice process.

A. Presence of the community

A restorative justice perspective assumes that crime causes injury to the community. Restorative justice programs rely on collective, community responsibility for responses to lawbreaking in part to repair the breach to the community that perhaps preceded and certainly was worsened by the crime. The “community” is as present in the *Acuna* Court’s justification for the arguable civil liberties infringements of the anti-gang injunctions as it is in the aspirations of restorative justice. In *Acuna*, the California Supreme Court reminded us, “[i]t is precisely this recognition of—and willingness to vindicate—the value of community and the collective interests it furthers rather than to punish criminal acts that lies at the heart of the public nuisance as an equitable doctrine.”⁹⁴ The court recognized the collective participation in the public nuisance injunction: “[t]he public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century.”⁹⁵

Successfully giving voice to community concerns would be a significant strength of an anti-gang injunction. The complaint in *Acuna* attached forty-eight declarations about the criminal activity in the Rocksprings neighborhood of San Jose.⁹⁶ The *Acuna* court affirmed that “the interests of the community are not invariably less

94. *Acuna*, 14 Cal. 4th at 1109.

95. *Id.* at 1103; see also Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1160-61 (1998) (referring to anti-gang injunctions as examples of “community policing”).

96. *Acuna*, 14 Cal. 4th at 1100.

important than the freedom of individuals.”⁹⁷ At this level of generality, such sentiments are hard to dispute.⁹⁸ The *Acuna* court, however, promoted a notion of community safety and individual liberties as directly in conflict, as warring combatants in a winner-take-all contest.⁹⁹ The *Acuna* court found the freedom of alleged gang members to be directly contrary to the freedom of innocent members of the community, observing: “[t]o hold that the liberty of the peaceful, industrious residents of Rocksprings must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitutional and the whole of its sense.”¹⁰⁰ This view of the community and gang members as easily separated and in complete opposition is a dangerously over-simplified understanding of gang presence; it is inconsistent with the reality of most gang members, who have multiple family and institutional ties to the communities of their own and nearby neighborhoods. The complex relationships of gang members within their communities is one reason that law enforcement against gang crimes is so difficult.

The *Acuna* court upheld an injunction that had the purpose of banishing the gang members from the streets of the neighborhood, literally removing them from the community.¹⁰¹ Indeed, the only clearly delineated aspect of the community invoked in *Acuna* is that it does not include the gang members. The injunction made real in physical, spacial terms the separation of the gang members from the community. The *Acuna* court’s simplistic and adamant separation of suspected gang members from the community is especially troubling given the racial and class basis of the identity of the group being cast

97. *Id.* at 1102.

98. Indeed, similar statements are used to justify restorative justice programs in the face of civil liberties objections.

99. *But see, e.g.,* JOHN BRAITHWAITE, REGULATION, CRIME, AND FREEDOM 63 (2000). Braithwaite challenges this offset: “The republican does not struggle politically for a world in which shaming is used in a way that trades a reduction in freedom for a reduction in crime. Such a trade-off manifests a liberal way of thinking about crime. The republican struggles for a world where shame is used both to increase freedom and to reduce crime. The widespread liberal belief that a high crime rate is a price we pay for free society, that freedom and crime are locked into some hydraulic relationship, is wrong.” *Id.*

100. *Acuna*, 14 Cal. 4th at 1125.

101. *See* Boga, *supra* note 5, at text accompanying notes 60-61 (“The removal of gang members from their own neighborhood streets represents a literal example of this metaphorical sanitization of the public realm.”).

out, suspected gang members.¹⁰²

Restorative justice principles, by contrast, build the relationship between the community and the offender, rather than casting the offender aside. The community is present by the involvement of people close to the victim, and of people close to the offender. This is a much more complex notion of community, for several reasons. First, in direct contrast to the exclusionary vision of community in *Acuna*, restorative justice principles recognize the offender's place within a community, and attempt to restore that place.¹⁰³ Next, the restorative justice conferences create new, concrete, albeit temporary communities, by bringing together interested people to address the problems caused by the wrong-doing. Finally, the restorative process can create relationships between the offender and the victim, and between their respective supporters, and in that way build new, more lasting communities. The creation of these purposeful communities might be especially important in the context of broken or enfeebled communities, such as those plagued by rampant gang violence.¹⁰⁴

B. Victim Control

In the restorative justice model, the victim of crime and members of the community are actively engaged in the process of restoring justice. Even within their limited constructions of community, the anti-gang injunctions promise to deliver greater victim control than criminal processes can. The use of a civil action based on declarations of specific injuries from many community members is quite a different foundation and justification for action than the typical criminal complaint. Recognizing the crime as an injury and giving voice to the victim might be the rhetoric and formality of the public nuisance injunction, but the reality is quite different. Although voices of the victims and the community are used to justify the injunction,

102. See *Acuna*, 14 Cal. 4th at 1130 (Chin, J., concurring and dissenting) (“[The] court cannot enjoin all Mexican-Americans because some Mexican-Americans contribute to the public nuisance in Rocksprings.”); *id.* at 1132 (Mosk, J., dissenting) (“Montesquieu, Locke, and Madison will turn over in their graves when they learn they are cited in an opinion that does not enhance liberty but deprives a number of simple rights to a group of Latino youths who have not been convicted of a crime.”).

103. E.g., BRAITHWAITE, REGULATION, *supra* note 99, at 287 (“The separation of the denounced person must be terminated by rituals of inclusion that place him, even physically, inside rather than outside”).

104. See, e.g., BRAITHWAITE, REGULATION, *supra* note 99, at 332 (“In the alienated urban context where community is not spontaneously emergent in a satisfactory way, a criminal justice system aimed at restoration can construct a community of care around a specific offender or a specific victim who is in trouble. . . .”).

they are not in any sense controlling the action. For example, of the scores of declarations supporting the injunction in *Acuna*, the only ones that linked the crime alleged to the targeted gangs were two declarations from police officers.¹⁰⁵ The anti-gang public nuisance injunctions are formally civil, but effectively criminal proceedings; prosecutors, and not victims, initiate and ultimately control the case. The injunction can give the prosecutor the ability to pursue rough justice,¹⁰⁶ but those remedial choices are not in the hands of the victims, or the community.

C. Crime as Injury

Restorative justice responds to the crime as an injury to be healed. The anti-gang public nuisance injunctions treat crimes as injuries to be remedied; the nuisance to the community is the injury created by the gang members' lawbreaking. Anti-gang injunctions are thus formally based on recognizing the injury--the public nuisance--caused by the criminal activity. But the anti-gang injunctions operate by converting that injury to the community into another crime, namely the violation of the injunction. The remedy for the public nuisance is that individual gang members can be arrested for violating the terms of the injunction, subjecting them to misdemeanor criminal contempt.¹⁰⁷

The original serious criminal offenses (murder, robbery, and so on) are converted into an injury (public nuisance), which is used to justify restrictions on activity that, when violated, create new, lesser level crimes. The result is that the gang members suspected of participating in murders, robberies, and other serious crimes are arrested for being in the presence of other gang members, having beepers, and other non-criminal activity.

These new, low-level violations are understood and treated as crimes, not injuries. In fact, any injuries inherent in the violations are

105. *Acuna*, 14 Cal.4th at 1131 (Chin, J., concurring and dissenting). *But see* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 669-70 (1997) (in analysis supporting relaxation of vagueness requirements generally, praising injunctions as consistent with new policing in their requirement of police interaction with community members to obtain affidavits).

106. *See* McClellan, *supra* note 5, at 355 (describing Los Angeles assistant city attorney who seeks "creative" punishments, such as community service, completion of drug or alcohol rehabilitation, or requiring the achievement of a general equivalency diploma, for injunction defendants who have not previously been incarcerated).

107. *See* CAL. PEN. CODE, § 166 (Deering 2000).

often so attenuated as to be virtually non-existent. What is the injury from having two gang members together in a car, or walking down the street? Who is the victim? Who is the victim from the defendant's possession of a beeper? The anti-gang public nuisance injunction creates more violations without addressing the original, serious crimes. The police presence is extended, and the government has further mechanisms of control, at least in theory. But the criminal problem has been treated as an injury in only the most formal and temporary sense. The fundamental restorative project of repairing injuries has been easily lost.

D. Holding the Offender Accountable

The central theme of restorative justice is healing injury by holding the offender accountable to make amends for the injuries he or she has caused. In theory, the anti-gang public nuisance injunctions hold gang members responsible for the injuries caused to the community by the gang's activities. The *Acuna* court justified the breadth of the injunction by noting, "Freedom and responsibility are joined at the hip."¹⁰⁸

But the rhetoric of accountability masks the opposite in the anti-gang injunctions. From a restorative justice perspective, the problem with the anti-gang injunction is not that gang members are being held responsible for being members of a gang identified with destructive behaviors. Gang members should be held accountable for those choices and actions. The accountability problem with the anti-gang injunction is much deeper; the gang members are not really held responsible for anything significant. The litany of murders, robberies, and assaults combining to place the neighborhood under siege is used to justify dramatic steps to limit the freedom of the gang members. But the only accountability built into the injunction is making suspected gang members responsible for trivial (at least as compared to the justificatory crimes) violations.

The anti-gang public nuisance injunctions are promoted as an aggressive new weapon in the war against gangs, but fundamentally they are an admission of defeat.¹⁰⁹ From a restorative justice perspective, a crucial weakness in this scheme is that the entire process never holds anyone accountable for the serious crimes that in fact are causing injuries. The gang member who has (at least in

108. *Acuna*, 14 Cal. 4th at 1102.

109. This is the anti-gang equivalent of convicting Al Capone on income tax evasion, except that income tax evasion was a preexisting, serious crime.

theory) participated in murder is arrested for being present with other gang members. No one is held accountable for the earlier, provoking crimes.¹¹⁰ Gang members who are indeed responsible for serious crimes are not held accountable for them. Suspected gang members who are not responsible for serious crimes are blamed equally for them, and arrested for behavior that can be entirely innocent. In either case, the goals of true accountability or individual responsibility are sacrificed to temporary incapacitation or disruption through removal into the incarceration system.

The injunction is a symbolic message of removal from the community. As a method of accountability, it is ineffective because the sanctions are more like harassment. The provisions of the injunction upheld in *Acuna* prohibited suspected gang members from hanging out with their friends¹¹¹ or “annoying” people in the neighborhood known to have complained about them.¹¹² Declaring certain people out of the community, and then removing them for a short time for violating an injunction, combines the harshness of punitive expulsion from the community with virtually no accountability.

The relatively trivial nature of the basis for the arrest is not likely to imbue the alleged gang member, whether a serious offender or relatively innocent peripheral member, with acknowledgement of any injury caused.¹¹³ In contrast, by being held personally responsible for redressing the injuries he or she has caused, an offender in a restorative justice process is less likely to “displace remorse for the

110. See FRAMEWORK, *supra* note 21, at 12 (asking, as part of the project of “rethinking the business of juvenile justice”: “If the goal of sanctioning is to send messages to offenders about the consequences and harm caused to others by crime, why are sanctions so unrelated to the offense itself and why is the sanctioning and rehabilitative process so detached from victims and the offender’s community?” (drawing on Bazemore and Washington, *Charting the Future of the Juvenile Justice System: Reinventing Mission and Management*, 68 SPECTRUM, THE JOURNAL OF STATE GOVERNMENT 51 (1995))).

111. See *Acuna*, 14 Cal. 4th at 1110 (par. (a) of injunction prohibited “Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant . . . or with any other known VST or VSL member.”).

112. *Id.* at 1118 (par. (k) of injunction enjoined defendants from “confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons or visitors to Rocksprings . . . known to have complained about gang activities.”).

113. Gary Stewart makes this point about the anti-gang injunctions by quoting Malcolm W. Klein, *Street Gangs and the Juvenile Justice System in the 1990s*, 23 PEPP. L. REV. 860, 863 (1996), asking, “[d]oes he say, ‘Oh my goodness gracious. I have been deterred,’ or does he say, if you will pardon the language, ‘Motherfuckers couldn’t hold the homey.’ Of course, he says the latter.” Stewart, *supra* note 51, at 2278.

action into resentment of the punishment.”¹¹⁴ In addition, the goal of healing the injury to the community goes largely unmet if the original offense is unaddressed.

E. Circumvention of Criminal Justice Protections

Critics of restorative justice are appropriately wary about the potential loss of criminal procedural protections, but *Acuna* reveals that fundamental procedural protections are already drastically diminished, at least for some. In *Acuna* the majority of the California Supreme Court willingly jettisoned fundamental individual rights in the furtherance of arguably minimal benefits to the community. Such an emphatic and untroubled balancing suggests that the *Acuna* majority placed remarkably little value on the freedoms at stake.¹¹⁵ The stunningly light weight given to the civil liberties issues is surely related to the particular context of *Acuna* and other anti-gang public nuisance injunctions, young men and some women of color suspected of gang membership. *Acuna* might suggest that the racialized and class-based divisions of our society are so imbedded in the individual rights-based, adversarial criminal justice system that the “individual” being protected is too easily understood to be both “other” and undifferentiated, and thus not truly worthy of constitutional protection. Individual rights are easily stripped from suspects perceived mainly on the basis of a frightening group identity.¹¹⁶ In *Acuna*, the community got little in return. Most restorative justice programs also replace or circumvent ordinary criminal justice procedures. The question is, what replaces those protections, and what is gained?

IV. Restorative Justice for Rocksprings

What would restorative justice for Rocksprings look like? The

114. Hudson, *supra* note 26, at 241.

115. See also *City of Chicago v. Morales*, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting) (arguing that the anti-loitering ordinance should have been upheld, since the “minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets”). But see Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000) (finding that the empirical data does not suggest poor urban blacks are prepared to waive constitutional rights in order to reduce crime).

116. See, e.g., Howarth, *supra* note 42 (discussing, for example, the incompatibility of imposed identity of Black gang member and innocence); Roberts, *supra* note 51, at 801 (criticizing a racialized dichotomy in judicial decisions separating categories of the law abiding and lawless).

picture of Rocksprings painted in *Acuna* is a neighborhood under siege from gang members engaged in violent, lawless, battles with other gangs and with the police. The gang members arguably control the neighborhood more than do the police. The anti-gang injunction strategy attempts to eviscerate the gang control by holding all gang members responsible for all injuries caused by the gang. Easily identifiable activity, such as possession of beepers or association with other gang members, becomes the basis for an arrest. The reach of the police is thereby extended to peripheral gang members, and to less serious activity. The hardcore gangsters and the peripheral hangers-on are all controlled by the limiting injunction.

What does the gentle theorizing of restorative justice have to say about restoring peace to an "urban war zone"¹¹⁷ like Rocksprings? Restorative justice would use a variety of mechanisms to empower community engagement with the identification, prevention, and response to criminal injuries. As to crimes that have been committed, the goal of accountability assumes, as a threshold matter, that even the most limited restorative justice process would be based on identification of the specific individuals responsible for any particular injury. Although claims are made that restorative justice can be useful for identifying crime and assigning guilt,¹¹⁸ more modest claims limit restorative justice mechanisms to offenders who have been found guilty or who are willing to admit responsibility.¹¹⁹ Assuming that the identified offender and victim choose¹²⁰ to participate in a restorative justice process, under the a conferencing model, the victim and perpetrator would each bring a group of people most able to support them for a face-to-face meeting.

For any of the Rocksprings injuries, the two groups would come from different neighborhoods, as the gang members were identified as coming from outside Rocksprings.¹²¹ The group could include, for

117. *Acuna*, 14 Cal. 4th 1090, 1100.

118. See Braithwaite, *supra* note 12, at 15-16 (suggesting potential benefit of restorative justice processes for factfinding even without clear admissions of guilt).

119. Under current systems, the vast majority of offenders plead guilty in exchange for some benefit, usually a lesser sentence. See Nancy Jean King, *The American Jury*, 62 LAW & CONTEMP. PROB. 41, 141 (1999). King uses figures showing that only 3-10% of felony cases go to trial, and of those, more than one-third are adjudicated by a judge without a jury. *Id.* See also George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000). Many restorative justice programs offer the possibility of alternatives to incarceration as an incentive to acknowledge guilt.

120. Many issues of coercion are inherent here, of course. See Brown, *supra* note 7, at 1265-72; Delgado, *supra* note 36, at 760-61.

121. The gang members targeted by most of the public nuisance injunctions live in the

example, the victim with a spouse and a friend and the offender with a parent and a teacher, or an uncle and a neighbor.¹²² The victim would have an opportunity to tell the perpetrator the impact of the lawbreaking and ask him or her to make amends. The perpetrator, in front of a community of people who cared about him or her, would be asked to take responsibility for the injuries inflicted and for making amends.¹²³ The exact process by which the perpetrator would make amends would be negotiated by those present.

We might conclude that such a meeting, in isolation, in a community with such terror and lawlessness, would offer no security to the victim. Surely that is true.¹²⁴ Any effective restorative justice program in this context would have to include opportunities for community members to work together to reduce the grip of the gang-related drug trafficking and resultant violence. Social and political movements—separate from the state—would have to be built to create social disapprobation, or shame in Braithwaite's terms, for harmful gang activity.¹²⁵ A community movement bringing restorative justice principles to preventive programs would provide context and visibility beyond the individual meetings or conferences occasioned by discrete incidents of law-breaking.¹²⁶

Although the context is very different, similar goals animated a set of self-regulatory programs in Australia by local citizens and pub and club owners designed to reduce violence associated with the pubs and clubs.¹²⁷ As described by John Braithwaite, the bartenders were

neighborhoods to which the injunctions apply.

122. For a detailed description of such a conference, *see* BRAITHWAITE, *supra* note 99, at 317-19.

123. The conferencing model potentially avoids many of the important limitations of one-on-one victim-offender mediation, such as those delineated in Delgado, *supra* note 36, at 759-71.

124. Without the context of a coherent vision and implementation of restorative justice, the benefits of isolated or peripheral restorative justice programs will be limited. *See* Charles Tracy, *Associate Editor's Editorial: The Promises and Perils of Restorative Justice*, 42 INT'L J. OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 275 (1998) (sermonizing against cooptation of restorative justice goals into dominant values through subsidiary projects in danger of being overwhelmed by adversarial context).

125. BRAITHWAITE, *supra* note 99, at 75 ("the republican pursues the objective of reducing crime with more of an eye to community organization than to criminal enforcement").

126. *See* BRAITHWAITE, *supra* note 99, at 57-94 (discussing need to support social movements with egalitarian criminal justice agendas).

127. Braithwaite, *supra* note 13, at 1737 (citing Ross Homel *et al*, *Preventing Alcohol-Related Crime Through Community Action: The Surfers Paradise Safety Action Project*, in 7 CRIME PREVENTION STUDIES 35 (Ronald V. Clarke ed., 1997)).

taught peaceable techniques for defusing violence, responsible serving practices to reduce drunkenness, and other measures.¹²⁸ During the project, assaults were reduced to less than half of previous levels, but returned to normal when the project's funding ended and ordinary policing techniques returned.¹²⁹ The community engagement – including civilian responsibility for prevention and non-adversarial violence reduction interventions – proved quite effective for general deterrence and incapacitation goals.

Although Rocksprings' gang violence is certainly a different problem than bar brawls, the concept of widespread community peacekeeping training and interventions could be transferred to communities being overtaken by gang violence. In its very persistence and growth, gang crime reminds us of the human search for belonging and community. The gang is itself a community, albeit often a frightening, lawbreaking, violent, community. More importantly, gang violence is perhaps the most disturbing and frightening in our society today.¹³⁰ Applying restorative justice principles to entrenched gang violence is using a hard case to put forth a bold version of restorative justice. Even if restorative justice conferences are not suitable for homicides, the majority of identified gang members are responsible for relatively less serious criminal activity. Using restorative justice to address injuries caused by gang members could help restorative justice to redirect criminal and juvenile justice policy, not just become the less punitive alternative for the most privileged, least frightening, offenders.¹³¹

Even if we can begin to imagine a restorative justice approach to gang violence in Rocksprings, can we imagine such an approach within constitutional principles?

128. *Id.*

129. *Id.*

130. Criminologist Jerome Miller points out that “[p]oliticians and human-service professionals alike periodically call the public’s attention to this ostensibly more unfeeling, cold, and dangerous young offender who now stalks our streets.” JEROME MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 37-38 (1996); see also Howarth, *Representing Black Male Innocence*, *supra* note 42, at 112 (discussing widespread image of gang members as ‘new breed’ of amoral animal).

131. See Brown, *supra* note 7, at 1282-85; Delgado, *supra* note 36, at 767-68; Tracy, *supra* note 124 (arguing for transformative restorative justice, not peripheral alternative programs).

V. A Restorative Constitution

What would a Restorative Constitution look like? Is it possible for our Constitution to offer the protection of restoration? As John Braithwaite counsels, "If we take restorative justice seriously, it . . . means transformed foundations of criminal jurisprudence and of our notions of freedom, democracy, and community."¹³² Does our Constitution permit this transformation? Restorative justice principles are assumed by most United States observers to raise substantial and perhaps insurmountable constitutional concerns.¹³³ Any such accommodation requires breaking down the severely individualistic, oppositional mode of constitutional criminal procedural protection. The constitutionalized adversary system would have to become the constitutionalized restorative system. A Restorative Constitution would mean fundamental restructuring of constitutional frameworks for the roles of the offender, the victim, and the community consistent with restorative justice principles.

A. The Accused: Restorative Liberty of Accountability

The looming problem with a Restorative Constitution is the potential loss of constitutional protections for the accused. Those constitutional protections operate within the adversary system, protecting the accused from the most powerful adversary, the state. The constitutional protections fall within two main categories, the right to equal treatment, and the right to liberty-based procedural fairness. Restorative justice implicates both.

1. Equality

The state today is supposed to provide some protection against private bias.¹³⁴ Any system of justice that allows individual victims to control the response to their injuries invites enormous differences in punishment for apparently identical criminal behavior. The inconsistency of individualized justice raises Eighth Amendment proportionality¹³⁵ and Fourteenth Amendment equal protection¹³⁶

132. Braithwaite, *supra* note 12, at 2.

133. *E.g.*, Brown, *supra* note 7, at 1288-92; Delgado, *supra* note 36, especially at 760.

134. *E.g.*, Brown, *supra* note 7, at 1288; Delgado, *supra* note 36, at 759-60.

135. *See Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (plurality opinion) (holding that the Eighth Amendment forbids extreme sentences that are "grossly disproportionate" to the crime).

136. *See Williams v. Illinois*, 399 U.S. 235 (1970) (holding that extending prison sentence of convicted criminal unable to pay fine violates the Equal Protection Clause).

concerns. We can also easily understand that restorative justice could yield to or even expand ever-present racial, class, or other types of biases.¹³⁷ Under a regimen of restorative justice conferences, for example, different offenders who have committed acts that would be classified as the same crime can receive very different responses and demands from the victims. Given that racial and class-based inequality in the criminal justice system is one motivation for a turn toward restorative justice, questions about the potential inequalities of restorative justice require a strong answer.

One answer is that robust equality should take account of differences in the circumstances of criminal offenses.¹³⁸ The impact of criminal behavior—the injury caused—can be vastly different even for acts constituting the same criminal offense. Equality based on identical punishment for identical offenses rests on the fiction that any aggravated assault reflects the same culpability or causes identical harm, or that every three-year prison sentence imposes identical hardship.¹³⁹ Certainly, too, even the most rigid systems of determinate sentencing, for example, are easily understood to embody class- and race-based biases of the legislators or prosecutors; the gross disparities in sentences between crack and powder cocaine famously exemplify blatant inequality embedded in apparently neutral rules.¹⁴⁰ Ultimately, though, the only way to ensure that the informal community mechanisms of restorative justice do not re-create or even magnify private biases is to provide oversight of their results. Records must be maintained, and individual agreed-upon atonement activities would need to be rejected if they are unusually onerous. In setting up restorative justice processes, the state has an obligation to

137. See, e.g., Delgado, *supra* note 36, at 767-68. Victims privileged by class or race, for example, could impose elevated demands, especially on offenders without those privileged identities.

138. See, e.g., MICHAEL TONRY, SENTENCING MATTERS 13-16 (1996).

139. Martin Wright makes this point, but in a way that arguably reflects class- or race-bias, an easy failing when attempting to compare and contrast the relative hardship to differently situated offenders of identical sentences. See MARTIN WRIGHT, RESTORING RESPECT FOR JUSTICE: A SYMPOSIUM 147 (1999); see also Delgado, *supra* note 36 (warning about such bias).

140. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM. L. REV. 13 (1998); Richard Dvorak, *Cracking the Code: 'De-Coding' Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & LAW 611 (2000); see generally BRAITHWAITE, *supra* note 99, at 60 (“[E]ven though the policy of just deserts is based on equal punishment for equal wrongs and republicanism is not, it is republicanism that in practice can deliver more egalitarian punishment practices. Because just deserts tend to be successfully imposed on the poor and unsuccessfully on the rich. . .”).

enforce protections against gross disproportionality or ratification of personal prejudice.¹⁴¹ In the same way that ordinary retributive criminal sanctions provide a backdrop for motivating an offender to engage in restorative justice programs,¹⁴² ordinary governmental guarantees of equal protection should be fully applicable to vitiate any restorative justice proceeding infected by gross disproportionality or identified bias.¹⁴³

2. Liberty

The Constitution invites and at least partially enables the accused to take on the role of adversary against the state, but it needs fundamental reorientation to require or even support the role of making amends. In its emphasis on an offender making amends to his or her victim, restorative justice assumes that the offender is guilty. Thus, restorative justice programs generally should not be used when guilt is at issue. Most criminal defendants, however, plead guilty to something.¹⁴⁴

Consider the person who is in fact guilty of the charges against him or her. What does the Constitution offer that person? The accused's constitutional rights are the rights to resist the efforts of the

141. For a description of research needed to investigate bias in restorative justice programs, see Mara F. Schiff, *Restorative Justice Interventions for Juvenile Offenders: A Research Agenda for the Next Decade*, 1 WEST. CRIMINOL. REV. 1, 11 (1998) [online at <<http://wcr.sonoma.edu/v1n1/v1n1.html>> (visited Nov. 23, 2000)]; see also Delgado, *supra* note 36, at 774 (urging critical oversight of restorative justice projects to reduce bias); see generally Luke McNamara, *Appellate Court Scrutiny of Circle Sentencing*, 27 MANITOBA L. J. 209 (2000) (describing Canadian appellate review of restorative justice circles).

142. See, e.g., BRAITHWAITE, *supra* note 99, at 81 (“[I]t would not serve the objective of parsimonious punishment to abolish imprisonment altogether as a sentence for assault. . . . [A] consequence of throwing away the big stick is that middle-sized sticks would be used more often.”); *id.* (“[C]redible criminal enforcement capability strengthens the hand of communitarian crime control; it does not supplant it.”).

143. Braithwaite acknowledges, “[w]hile it is a myth that centralized state law enabled greater consistency and lesser partiality than community-based restorative justice, it is true that abuse of power always was and still is common in community justice.... [S]tate oversight of restorative justice in the community can be a check on abuse of rights in local programs. . . .” *Id.* at 334.

144. The vast majority of criminal cases are plea-bargained, through formal or informal negotiations within the constraints of the legal system. See Fisher, *supra* note 199; King, *supra* note 119, at 141. In other words, to protect themselves, criminal defendants admit wrong-doing, waiving many of their constitutional rights. The constitutional rights become, thereby, bargaining chips, in an individual's fight against the state (the community). This suggests that the vast majority of criminal cases could be appropriate for restorative justice, even if limited to cases in which criminal defendants admit guilt.

state to deprive him or her of liberty.¹⁴⁵ The constitutional procedural protections in a very real sense offer the accused the opportunity to try to avoid responsibility.

Under our current procedures, the accused is defensive and isolated. From the moment of being charged by “the People,” the accused is granted defensive rights in an adversarial relationship against the community. Our current criminal and juvenile justice systems allow great integrity, resistance, and isolation. The right to remain silent,¹⁴⁶ the due process right to be acquitted unless found guilty beyond a reasonable doubt,¹⁴⁷ and the panoply of constitutional criminal protections are extreme manifestations of the right to be left alone. The accused’s liberty is understood as the negative freedom not to be controlled by the state.

The Constitution is defensive, creating a protective shield around an individual. In that sense, the autonomy values of the individual are well-protected. The accused criminal is solitary, responsible only to himself or herself. Even Gary Gilmore’s mother had no standing to challenge Utah’s execution of him, to which he submitted voluntarily, because she was a stranger to the proceedings.¹⁴⁸ The criminal defendant is the hyper-rugged individualist, although, ironically, the flesh and blood person is easily obscured behind the rampant individualism of universally-held individual rights.

The accused can stand apart, distant from the process as he or she is being expelled from the community. Our ordinary criminal procedures push suspects into the freedom that comes from being forced into isolation in the name of individual rights. The rights of juveniles as currently understood render them especially isolated, adjudicated in private and secret proceedings. Accountability to the victim and to the harmed communities is directly contrary to the privacy—and isolation—of current juvenile processes.

The isolated trickster of current constitutional criminal procedure is not the only concept of an autonomous person we can imagine. Strip away entrenched concepts of the accused’s constitutional protections lying primarily in the opportunity to

145. On this negative liberty of dominant constitutional interpretation, *see, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); David Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 109-10 (1994).

146. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966).

147. *See e.g., In re Winship*, 397 U.S. 358 (1970) (applying the due process requirement of proof beyond a reasonable doubt to juvenile delinquency adjudications).

148. *See* Ann Althouse, *Standing in Fluffy Slippers*, 77 VA. L. REV. 1177 (1991).

attempt to avoid responsibility.

The tired concept of autonomous individuals fundamentally needing and seeking a state of separation from others ignores the equally central human goal of being connected. Feminist scholars, including, most prominently in the legal academy, Robin West, offer the central insight that perhaps a human struggle to be in relationship is as great a need for full personhood as the liberal concept of the right to be left alone.¹⁴⁹ To be fully human is to be in relationship. We are trying to be connected. Perhaps in the context of wrongdoing, being connected is being accountable.

What would restorative liberty look like? The fundamental fairness principle of due process could be understood to be the fundamental fairness of not isolating the accused from the community, but instead offering the chance to be held responsible and to make amends. Any meaningful restorative justice process engages the offender instead of expelling him or her. In many ways, the individual accused loses the right to isolation, but instead is compelled into accountability to his or her victim and community. This can be deeply invasive and demanding. But it is the kind of demand we make of people with whom we have some sort of relationship. It is the kind of demand that we make of ourselves. Belonging in a community means some amount of acknowledgement and even respect for others.¹⁵⁰ Personhood means being responsible to the community in which one lives. Autonomy need not mean being alone.¹⁵¹ Being responsible to others for one's own actions is a crucial part of autonomy.¹⁵² Being responsible is part of growing up.¹⁵³

149. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 28 (1988) (“Women’s concept of value revolves not around the axis of autonomy, individuality, justice and rights, as does men’s, but instead around the axis of intimacy, nurturance, community, responsibility and care.”); *see generally* ROBIN WEST, *CARING FOR JUSTICE* (1997).

150. *See* Cohen, *supra* note 16, at 1012 (“Respect for others would seem to require that when an offender has hurt someone, she should apologize to the extent that she feels at fault.”).

151. *See, e.g.*, GRACE CLEMENT, *CARE, AUTONOMY, AND JUSTICE* (1996). “[A]utonomy cannot be achieved individually. In fact, we *learn* to become autonomous, and we learn this competency not through isolation from others, but through relationships with others. An individual’s autonomy is nurtured through the care of others.” *Id.* at 24.

152. “In taking responsibility for one’s decisions, one is autonomous.” *Id.*; *see also* Cohen, *supra* note 16, at 1021. “Within many religious and ethical systems, offering an apology for one’s wrongdoing is an important part of moral behavior, as is forgiving those who have caused offense.” *Id.* (footnote omitted).

153. *Cf.* Cohen, *supra* note 16, at 1010 (noting that attorneys rarely counsel their clients to apologize, but “[i]f apology is often in the best interest of children, could it often

When something has gone wrong, when we have failed, when we have injured someone else, suppressing that is a sign of bad mental, emotional, and moral health. But the constitutional protections of the criminal adversary system offer the defendant denial and suppression. We might prefer community and accountability to isolation and denial.¹⁵⁴ Is there any such thing as liberty in the protection of being held accountable? In a sense, it is the liberty interest in being respected. It is the liberty interest in being seen, and recognized as ourselves. It is the liberty interest in being understood to be a member of the community.¹⁵⁵

Although this vision of the liberty in relationship, responsibility and restoration is utterly contrary to current constitutional criminal procedures, our Constitution provides several potential sources for its support. Perhaps restorative justice requires a re-emphasis on the meaning and primacy of the first three words of the Constitution, "We, the People," as articulating a group identity and commitment to community that is the foundation of all that follows. The republican foundations of our constitution—especially the republican emphasis on engaged deliberation—support the Restorative Constitution.¹⁵⁶ Almost hidden behind the prominent isolated and individualistic defensive rights of constitutional criminal procedure are several significant guarantees of connection between the accused and his or her community, including the Fifth Amendment right to indictment by a Grand Jury for capital or infamous crimes and the Sixth Amendment rights to a public trial and an impartial jury. Interestingly, by its literal language the Sixth Amendment Confrontation Clause guarantees the right of an accused "to be confronted with the witnesses against him," language that in some ways suggests the confrontation with the victim that is the heart of restorative justice conferences.¹⁵⁷

be in the best interest of adults?").

154. Cf. Cohen, *supra* note 16, at 1022 (stating that the "spiritual and psychological benefits [of apologizing] may be central to a client's well-being, especially in the long run" (footnote omitted)).

155. Cf. Currie, *supra* note 145, at 867-68 (discussing arguments for defining positive liberty); WEST, *supra* note 145, at 149-51 (promoting First Amendment protection of communication, not expression, as protecting community, not individual values).

156. See BRAITHWAITE & PETTIT, *supra* note 27; BRAITHWAITE, *supra* note 99, at 57-85.

157. U.S. CONST. amend VI. One of the most significant modern aspects of the Confrontation Clause is the right of the accused to confront his or her accusers through cross-examination. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974). But the language of the Sixth Amendment is focused more clearly on the witness confronting the defendant, not

Liberty-based concepts of personhood and individuation might also provide some way to recognize the potential freedom and liberty in being personally accountable, and challenged to offer redress, in the service of community. In contrast to the constitutional criminal protections that permit the accused to remain and hidden and removed, the Eighth Amendment requirement of individualized consideration of a capital defendant prior to imposition of a death sentence¹⁵⁸ promotes an unusually prominent and robust concept of the personhood of the criminal defendant. In *Woodson v. North Carolina*,¹⁵⁹ the Court held that North Carolina's mandatory capital sentencing scheme violated the Eighth Amendment in part because of "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."¹⁶⁰ *Woodson* thus stands as a monument against faceless, undifferentiated defendants.

But the *Woodson* principle of individuation is recognized in the context of a capital defendant's right to be presented as a full human being in order to convince a jury to spare his life. My argument moves in the opposite direction. Is there an interest of an accused in being considered as a full human being for reasons other than to reduce punishment? Is it possible to conceive of protecting personhood by holding a criminal defendant accountable? Is it an aspect of liberty to be held accountable for the injuries one inflicts, rather than to be removed from the community? Conceiving of such a liberty interest is almost, but not quite, impossible. Developing that conception of liberty will be the key to making the Restorative

the defendant challenging the witness.

158. See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

159. *Id.*

160. *Id.* at 303. "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.* at 304. In *Lockett v. Ohio*, 438 U.S. 586 (1978), following *Woodson*, the Court held, "the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in the country." *Id.* at 602. "[W]here sentencing discretion is granted, it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant—if not essential—to the] selection of an appropriate sentence....'" *Id.* at 602-03 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

Constitution real.

B. The Victim: Given a Restorative Voice

A crime is a public wrong, which is understood to mean that the victim has no formal place in criminal law. The Constitution as currently conceived offers nothing to the victim of crime. The interests of the community, including the victim, are represented by the state, or "The People."

The Restorative Constitution could draw on the work of theorists who argue for a Constitution of affirmative duties, including the duty to protect individuals not just from the harms inflicted by the state, but also from harms inflicted by private entities.¹⁶¹ In the criminal adversary system, rights of victims are non-existent in part because they are directly opposed to the constitutionally-protected rights of the criminal defendant, and in part because the victim is legally a stranger to the proceedings.

A restorative process in which the offender and the victim are not completely or finally in opposition permits the victim a role and authority without necessarily diminishing the rights of the offender. Indeed, restorative justice processes can be understood as a collaboration between the victim and the offender and their respective supporters. In this context, acknowledging the interests of the victim strengthens rather than hurts the offender.

The structure of an adversarial contest between the state and an accused requires that the victim be an outsider to the process. Communitarian and relational goals suggest that leaving the victim at the periphery is a serious weakness of our adversarial criminal justice system, that the community should take seriously the injury to the victim, and that the state should not completely appropriate the injury for societal goals. Restorative justice programs delegate substantial authority to the victim to propose conditions by which the offender may make amends. Of course, any delegation of authority to victims to impose sanctions runs counter to our deeply held concepts of the value of "neutral," disengaged decisionmakers.¹⁶² The tradition of neutral, professional decisionmakers is especially entrenched in juvenile courts, where judges, not juries, choose the controlling story. We trust neutral, distanced decisionmakers, especially in juvenile court, but perhaps engaged decisionmakers could offer better

161. See, e.g., Robin West, *Constitutional Skepticism*, 72 B.U. L. REV. 765 (1992).

162. See Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1381.

outcomes in certain circumstances. Restorative justice offers the promise of presenting both victim and offender as complex individuals with multiple identities and valuable community ties.¹⁶³

C. The Community: Embodied and Empowered

Our Constitution embodies liberal notions of individual rights and autonomy values, with recognition of group rights or community values noticeably absent, especially within the context of criminal procedure. Restorative justice has a goal of involving members of the community in understanding and redressing the harm caused by criminal acts. But what is the community we are talking about?¹⁶⁴ The unformed notion of the community is probably the most romanticized aspect of restorative justice,¹⁶⁵ and perhaps of our current criminal justice strategies as well.¹⁶⁶ Defining the relevant community with some precision and giving it real authority is surely the key to nonsubordinating¹⁶⁷ and effective¹⁶⁸ restorative justice. A

163. See, e.g., Coker, *supra* note 19, at 67 (“Peacemaking does not demand that women choose their identity as ‘battered women’ over other competing identities.”); Meyer, *supra* note 45, at 1524 (stating that the victim’s forgiveness requires that “the victim herself be a member of the community”).

164. See Brown, *supra* note 7, at 1292 (challenging victim offender mediation as invoking the interests of undefined or nonexistent communities); Harris, *Environmental Justice*, *supra* note 41, at 1 (invoking model of environmental justice engagement with community; questioning the location or identification of “community”).

165. Donna Coker asks aptly, “[w]hy is it that we trust communities in the context of restorative justice processes to invalidate the social beliefs that underpin battering behavior more than we trust other community representatives like judges, police, and juries?” Coker, *supra* note 19, at 96-97. Kathleen Daly asks “whether victim advocacy as a vision of bottom up social transformation of law and social institutions will inevitably fall victim to a more conservative law-and-order victim-centered advocacy.” Daly, *supra* note 46, at 780; see Stuart A. Scheingold, Toska Olson, & Jana Pershing, *Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State’s Community Protection Act*, 28 LAW & SOC’Y REV. 729 (1994) (using Washington data to suggest inconsistencies between victims’ goals and reintegrative principles).

166. See, e.g., Acuna, 14 Cal. 4th 1090, 1102-03 (justifying anti-gang public nuisance injunction on the basis of protection of “the community”).

167. See, e.g., Coker, *supra* note 19, at 97 (suggesting that community engagement, coupled with acknowledgement of community responsibility, could provide context and process for addressing structural disparities in power of participants in Peacemaking); Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L. REV. 391, 410 (2000) (citing evidence of restorative justice programs facilitating “microcommunity building”).

168. See, e.g., Brown, *supra* note 7, at 1292 (arguing that mediation works best in stable social systems such as village and pastoral societies); Coker, *supra* note 19, at 98 (noting the normative community for Navajo Peacemaking is relatively clear); McCold, *supra* note 38, at 91 (arguing that the nature of the community in restorative justice processes is always “depend[ent] on the nature of the conflict”); McCold, *supra* note 38, at 92

concrete, authoritative role for members of diverse and diffused communities is especially important in light of the racialized criminal justice system.¹⁶⁹ A process that enables those closest to the crime, both through proximity to the victim and proximity to the offender, to participate in shaping the state's response, moves the role of the community from the purely rhetorical to the real.

In abstract terms, typical juvenile and criminal justice mechanisms are located within communities, both in terms of geography and of constitutional structure and justification. The community is represented in criminal justice through the range of normal democratic mechanisms that control the government. The police powers of the state rest in part upon the obligation to protect the community, and our justice systems are justified by the need to meet that goal. The fundamental concept of a crime as a public--not personal--wrong means that some concept of community animates criminal and juvenile proceedings. The "community" is well represented in theory, by not only the prosecutor, but also the judge and the jury—all different embodiments of the state.

The accused is at risk of being cast out of the community; thus the community is understood to be in opposition to the accused. The community is present in this very negative, exclusionary sense, as an entity that, manifested by the prosecutor, representing the People, is known to be judging and attempting to expel the accused. In some sense, then, the community is well represented under the current system.

In other ways, the community is absent. The community is either narrowly represented by the state's representatives—prosecutor and judge and perhaps jurors—or by broad, ungrounded references to "the People." The exact membership of "the People" is unclear; in literal terms, "the People" seems to include everyone in the jurisdiction except the accused, who is the formal adversary of the People. This formal structure undermines the community involvement that might otherwise be found from the presence of a

(focusing on "local community"); McCold, *supra* note 38, at 94-95 (focusing on community responsibility). *But see* Martha Minow, *Between Intimates and Between Nations: Can Law Stop the Violence?*, 50 CASE W. RES. 851, 865 n. 54 (2000) (noting that "the presence of a sufficiently coherent and engaged community to have the capacity to reintegrate a wrongdoer" is "precisely what is lacking" in "many circumstances of contemporary violence").

169. *Cf.* Roberts, *supra* note 51, at 821 (noting that an important part of Black liberation is an "increase [in] Black citizens' participation in constructing responses to crime"); *id.* at 801 (criticizing the false dichotomy between law-abiding and lawless, and the notion that police can tell them apart).

victim, or a family member of the accused. As discussed above, in formal terms the victim is simply a member of the People, as is, for example, the accused's mother. The very abstract nature of the community's presence, mediated by formal state structures, erases a meaningful sense of community from criminal and juvenile justice systems.

Any movement away from our current criminal justice mechanisms, with these highly formal and diffused notions of community, toward a system of concrete community presence through the actual participation of community members, raises potential constitutional concerns. The community is represented in restorative justice programs by the moderator or mediator, by both the victim and the accused, and by supporters of both. Although nobody elected any of them to have any crime response function, the constitutional issue of formal authority is easily answered by routine mechanisms of delegation, such as through legislation authorizing restorative justice programs.

The concrete community engagement in restorative justice processes also has constitutional support in the structural themes of deliberative democracy.¹⁷⁰ The jury is the symbol of democracy within the criminal justice system, but most adults accused of crime today never see a jury,¹⁷¹ and juvenile courts protect youthful offenders by eliminating juries.¹⁷² Restorative Constitutional processes arguably promise nothing less than to make republicanism real,¹⁷³ and to replenish deliberative democracy for communities, victims, and offenders.

Conclusion

My willingness to risk much potential procedural protection in

170. Cf. AKIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) (calling for interpretation of the Fourth, Fifth, and Sixth Amendments in light of the structure of the Constitution as a whole).

171. Nancy King reminds us that "for most defendants, the jury, if not irrelevant, is at least inaccessible." King, *supra* note 119, at 141. Only 3-10% of felony cases go to trial, and of those, more than one-third are adjudicated by a judge without a jury. *Id.*; see also Fisher, *supra* note 119, at 857 ("Bloodlessly and clandestinely, [plea bargaining] has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

172. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (denying to juveniles any constitutional right to jury trials in delinquency proceedings, relying on the purported differences between juvenile courts' treatment and criminal courts' punishment).

173. See generally BRAITHWAITE & PETTIT, *supra* note 27.

the name of restorative justice is based, in part, on the recognition that the actual protections of our individual rights systems are illusory for many Americans.¹⁷⁴ The *Acuna* decision upholding the anti-gang public nuisance injunction in Rocksprings supports my skepticism about unequal access to constitutional rights. Like many other judicial decisionmakers, members of the California Supreme Court believe that they know who is in the community, and who is in the gang. Race, gender, and class form the basis of that knowledge. Those constructed group identities are so strong that even in the context of a constitutional system relentlessly based on defensive individual rights, the *Acuna* decision sacrifices the right to be held accountable for one's own acts in the name of the needs of "the community." The frightening group identity of gang members seems to wipe out entitlement to ordinary individual rights.

In many ways, the anti-gang public nuisance injunction is an extreme example of an attempt to control violence through the formal power of law. The injunction claims to punish and reduce gang criminality by making virtually any activity by gang members illegal. The legal document defining the gang to be a public nuisance as a matter of law exalts the formality of law over practical reality. Restorative justice relates to the law in the opposite direction. Restorative justice starts with the injuries and the people involved, and shifts the ground of engagement away from the formal processes of law. The risks in such a shift are high. But the current criminal and juvenile justice systems are seriously destructive of the interests of the victims, the communities, and the offenders. Restorative justice offers the possibility that We, the People, can do better.

174. See Delgado, *supra* note 36, at 771-72.

