Roger Williams University Law Review

Volume 9 | Issue 1 Article 10

Fall 2003

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Confronting the Neighbors: Community Impact Panels in the Realm of Restorative Justice and Punishment Theory

Imagine a student, arrested for violating an open container law, appearing before a judge at a community court in Manhattan expecting, at worst, to pay a fine for her offense. Her hopes to pay and go home are shattered as the judge hands down the sanction. No fine for this student. Rather, she will confront a community impact panel, where members of the community will describe the harmful effect her conduct caused the community. In response, she will have an opportunity to offer an explanation for her actions.

Community impact panels are one of the latest innovations in community justice.[1] As with any nascent phenomenon, the panels raise many unanswered questions. Their attempt to effectuate certain theories of punishment in low-level, quality-of-life crimes is facilitated by the notion that the community as a whole is the victim in crimes such as public urination, prostitution, vandalism, and violation of open container laws.[2] Typically, these are crimes that are generally misunderstood to be victimless crimes.[3]

Beyond providing the community with a voice in the criminal process, community impact panels, as a form of punishment, have

1. Robin Campbell, *'There Are No Victimless Crimes': Community Impact Panels at the Midtown Community Court*, CENTER FOR CT. INNOVATION 1, 3 (2000), *available at* http://www.courtinnovation.org/pdf/no_vic_crime.pdf; *see also* Claire Osborn, *Police Survey East Austin Residents Before Rounding up Drug Suspects*, AUSTIN AM.–STATESMEN, Oct. 27, 2001, at B3, *available at* 2001 WL 4585381; Katherine van Wormer, *Restoring Justice*, USA TODAY, Nov. 1, 2001, at 33.

2. Campbell, *supra* note 1, at 3.

3. A victimless crime is one "that is considered to have no direct victim . . . ." BLACK'S LAW DICTIONARY 378 (7th ed. 1999).

the inherent goal of combating recidivism. One expectation is that offenders will be less likely to repeat an offense because they will be more aware of the consequences felt by the community. The extent, however, to which the panels further certain theories of punishment should be limited, because an overextension of their breadth carries the significant risk of transforming an effective low-level crime sanction into a form of cruel and unusual shame punishment.

Using the Midtown Community Court in Manhattan as a case-study, this Comment examines community impact panels in the perspectives of restorative justice and punishment theory. The initial portion of this Comment addresses the lack of victim rights and victim participation within the prevailing criminal justice system. Part II follows with a description of community impact panels and an examination of their roots within the victims' rights movement, the community justice movement, and modern restorative justice trends. Noting the dearth of available data regarding the effectiveness of impact panels, part III of this Comment deals with recidivism goals and victim and offender satisfaction. An analysis of the two will help predict whether community impact panels will be a successful punishment for low-level, quality-of-life crimes. Part IV analyzes impact panels under each relevant theory of punishment in order to gauge their effectiveness. If aggressive measures are taken to achieve deterrence and retribution results, impact panels may effectively become shame sanctions. Consequently, potential Eighth Amendment challenges could arise.

Finally, the conclusion sets forth suggestions and warnings that should be considered to ensure the integrity of community impact panels as an effective, restorative punishment for crimes affecting the quality of life in communities across the country.

I. VICTIM PARTICIPATION AND RESTORATIVE JUSTICE

A. *Victim Participation*

The prevailing approach to criminal justice provides little, if any, opportunity for active victim participation in the judicial

process.[4] This, however, has not always been so.[5] Private prosecutions were widespread during colonial times, giving victims the active role of prosecuting their offenders on their own.[6] Over time, crimes were increasingly perceived as acts against the state.[7] Ultimately, state prosecution replaced private[8] and victims became "passive entities" who were precluded from the decision-making process and often left uncompensated for the harm they suffered.[9]

In present day criminal law, victims enjoy only a limited amount of rights and participation in the criminal process.[10] They, like anyone, may report criminal activity and sit as witnesses at trial. In some jurisdictions, victims are allowed to participate in the sentencing procedure as well.[11] As a result, "the criminal system leaves their often life-altering experiences unacknowledged because fundamental rights such as notice of criminal proceedings, the right to be present at proceedings, and the right to be informed when one's offender is released or has escaped from prison have no constitutional guarantee."[12] Advocates of victims' rights complain of a criminal system concerned with the rights of the accused while diminishing the role of the victim.[13] Understandably, there is growing recognition that the current criminal process is

4. Mike Niemeyer, *A Preliminary Study of a Large Victim Offender Reconciliation Program,* FED. PROBATION, Sept. 1996, at 30.

5. Rachel K. Hong, *Nothing to Fear: Establishing an Equality of Rights for Crime Victims Through the Victims' Rights Amendment,* 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 209 (2002).

6. *Id.*; *see also* Paul G. Cassell, *Balancing the Scales of Justice: The Case for the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1380 n.24 (1994) (citing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 21, 29-30 (1993)) (explaining that the colonists brought the practice of private prosecution from England to the New World).

7. Niemeyer, *supra* note 4, at 30.

8. Hong, *supra* note 5, at 210.

9. Niemeyer, *supra* note 4, at 30.

10. *Id.*

11. Aileen Adams & David Osborne, *Victims' Rights and Services: A Historical Perspective and Goals for the Twenty-First Century*, 33 MCGEORGE L. REV. 673, 676 (2002).

12. Hong, *supra* note 5, at 211.

13. *Id.* at 210; *see also Senators Join Push for Victims' Rights Amendment*, SAN ANTONIO EXPRESS-NEWS, Apr. 2, 1998, at 10A, *available at* 1998 WL 5085843 ("Advocates for victims' rights complain that their concerns and needs often are overlooked or ignored by a justice system they believe gives more rights to defendants.").

both ineffective and outdated.[14] Today, these concerns influence the shaping of the criminal process where widespread changes share the "cornerstone objective" to address victims' concerns.[15]

Perhaps, one of the most aggressive Congressional attempts to pacify victims' rights activists has been the pursuit of a Victims' Rights Amendment. On July 7, 1998, a proposed Victims' Rights Amendment to the United States Constitution was approved by the judiciary committee, but never endorsed by the entire Senate.[16] Despite a recognized necessity for victims' rights legislation, there has been significant debate over whether the amendment would actually be beneficial to victims' needs in its proposed construction.[17] Nonetheless, the apparent ambitions for the proposed amendment represent a growing recognition of the necessity for greater victim awareness and participation.[18]

B. *Restorative Justice*

Restorative justice offers a new approach to criminal law that favors increased victim participation in the criminal process.[19] Unlike other justice rationales, restorative justice addresses so-called victimless crimes. Within the dimensions of restorative justice lies the notion that all crimes are acts against individual victims, the community at-large, or both. According to this theory,

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14. Niemeyer, *supra* note 4, at 30.

15. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.4(k), at 39 (3d ed. 2000).

16. *See* S. Rep. No. 105-409, at 38 (1998); S.J. Res. 44, 105th Cong. (1998); *see also* Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment,* 78 N.C. L. REV. 371, 371-72 (2000).

17. Mosteller, *supra* note 16, at 372-74 (describing the proposed Victims' Rights Amendment as poorly crafted legislation that will not meet the goals articulated in its terms).

18. The proposal of an amendment indicates recognition that one is needed.

19. Conrad DeFiebre, *A New Justice: Programs Bring Criminals, Victims Together to Heal, Make Amends*, STAR TRIB. (Minneapolis-St. Paul), Sept. 21, 1994, *available at* 1994 WL 8458945.

the term victimless crime is a fiction.[20] Restorative justice responds to the offender as well as the victimized community.[21]

Theoretically, restorative justice recognizes that crime necessarily creates a relationship between the victim and the offender, where the response, behavior, and attributes of one affects the other.[22] Therefore, the restorative justice model differs from the traditional criminal approach by focusing on the parties affected by a crime, rather than the crime itself.[23] This all-inclusive approach appeases victims' rights advocates by affording victims greater participation in the criminal process. Essentially, restorative justice aims to *restore* the relationship between victims and their offenders.

Community impact panels comport with restorative justice rationale by empowering the community, the victim in low-level, quality-of-life crimes, with a more active role in the processing of its offenders.[24] Although there are numerous programs that operate within the restorative justice model, the following discussion focuses primarily on community impact panels. The panels and other initiatives, such as victim-offender mediation, conflict resolution, circle sentencing, and family group conferencing, share the common objectives that define restorative justice.[25]

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20. Mark S. Umbreit et al., *Directory of Victim-Offender Mediation Programs in the United States*, CENTER FOR RESTORATIVE JUST. & PEACEMAKING, at vii (2000), *available at* http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/96521-dir_victim-offender/welcome.html.

21. Nancy Lucas, Note, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 HOFSTRA L. REV. 1365, 1370-71 (2001).

22. Caroline G. Nicholl, *Community Policing, Community Justice, and Restorative Justice: Exploring the Links for the Delivery of a Balanced Approach to Public Safety*, WASHINGTON DC: U.S. DEPARTMENT OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, at 91 (1999), *at* http://www.cops.usdoj.gov/Default.asp?Item=290.

23. *Id.* at 92.

24. Campbell, *supra* note 1, at 2.

25. David M. Altschuler, *Community Justice Initiatives: Issues and Challenges in the U.S. Context*, FED. PROBATION, June 2001, at 28.

II. COMMUNITY IMPACT PANELS

Court congestion is a universally understood problem. As a result, low-level crime hardly ever receives meaningful attention.[26] Courts are generally too preoccupied with more serious offenses.[27] Low-level offenders often "slip through the cracks," and many cases are dismissed.[28] The result is an ineffective criminal justice system where community members are left vulnerable to burdens on the quality of life in their neighborhoods.[29] Community impact panels were designed as a sanction to address crimes such as public urination, public drinking, violation of open container laws, and vandalism, all of which affect the quality of life in a community.[30] The sanction typically targets first-time offenders whose conduct is too minor to warrant a full day of community service, but too serious to release them with a fine.[31]

The Midtown Community Court in Manhattan employs community impact panels as a combatant to quality-of-life offenses in and around Times Square.[32] With funding from the U.S. Department of Justice, the panels debuted as a sanction for the court in 1999.[33] Armed with the philosophies of restorative justice, impact panels attempt to restore the quality of life in the community by giving the community a voice in the judicial process.[34] The panels allow community representatives to participate in the criminal system.[35] The panels facilitate restoration of the relationship between the offender and the victimized community.

Restoration is accomplished by allowing the community members to describe the impact that certain criminal conduct has on their quality of life in the neighborhood, while reciprocally afford-

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26. Devin J. Doolan, Jr., Comment, *Community Prosecution: A Revolution in Crime Fighting*, 51 CATH. U. L. REV. 547, 547-48 (2002); Susan P. Weinstein, *Community Prosecution: Community Policing's Legal Partner*, FBI LAW ENFORCEMENT BULL. (Fed. Bureau of Investigation, Quantico, VA.), Apr. 1998, at 19, 20.

27. *See* Doolan, *supra* note 26, at 547-48.

28. Campbell, *supra* note 1, at 2; *see also* Doolan, *supra* note 26, at 547-48.

29. Weinstein, *supra* note 26, at 19.

30. *Id.*

31. Campbell, *supra* note 1, at 3.

32. *Id.* at 2.

33. Nicholl, *supra* note 22.

34. Campbell, *supra* note 1, at 2.

35. *See id.*

ing offenders an opportunity to explain their conduct and address any issues or concerns.

A. *The Framework of Community Impact Panels*

One significant goal of the community impact panel is to inform offenders of the impact that their conduct had on the community, in the hope that this "heightened awareness will guide their future behavior."[36] A second goal, which in fact facilitates the first, is to empower the victimized community members through increased participation in the processing of low-level crimes. The opportunity to express their feelings to the offenders accomplishes these goals.[37]

Each panel consists of one or more offenders, community members, a trained facilitator, and an out-of-uniform police officer.[38] The members of the community are volunteers, and are encouraged to attend only one or two panels in order to keep the attitudes and voices fresh and, over time, incorporate a greater number of community members.[39] Before the session begins, the community members attend a one-hour training and orientation session managed by the court facilitator.[40] Aware of the inherently unpredictable nature of conversation, the facilitator prepares the community members by providing tips for diffusing anger and using non-judgmental language.[41] Likewise, offenders must attend a training and orientation session before the panel begins.

Offenders appear before the community impact panel as a result of either a judge's initial determination or a court-approved plea-bargain. Each offender has usually been summoned to appear in court, where the judge determines if the impact panel is the appropriate sanction for the charged offense.[42] The judge considers the severity of the offense and the likelihood that the impact panel

36. *Id.* at 6.
37. *See id.*
38. *Id.* at 3; *see also Community Impact Panels,* Community Justice Exchange, *at* http://www.communityjustice.org/exchange.asp (To reach this source, follow these steps: click on "Best Practices," then "what works," and finally "community impact panels.") (last visited Oct. 12, 2003) (on file with author).
39. Campbell, *supra* note 1, at 9.
40. *Id.* at 3.
41. *Id.* at 9.
42. *Id.* at 3.

will have a positive effect on the offender's future behavior.[43] Additionally, community impact panels are often one alternative during plea negotiations.[44] Occasionally, as an incentive to take the plea, the case may be dismissed six months after panel attendance if the offender is not re-arrested.[45] Once an agreement is reached between the parties, the court must determine whether the panel is an appropriate punishment.[46]

The integration of a police officer adds an important perspective to the conversation. The officer is able to share various techniques the police employ to combat the particular crimes at issue, giving the community members an understanding of how the police operate to address certain problems within the community.[47] To alleviate concerns that the presence of the officer would "intimidate offenders and inhibit their candor," or divert the conversation entirely, the officer attends the panels out of uniform.[48] It is, however, questionable whether the mere plain clothes of the officer mollifies the effect of the officer's presence.

Perhaps most important to the successful implementation of the panels is the role of the trained facilitator or mediation specialist. The court's community mediation specialists fashion the panels to deliver a positive experience for all particpants.[49] Skilled facilitators are essential to ensure that both sides maintain attitudes of respect.[50] Stuart Sears, a trained facilitator who coordinates the project at the Midtown Community Court, has found the program to be more successful when the community members are not overly judgmental of the offenders.[51] Furthermore, when the community members are less judgmental, the offenders tend to contribute more.[52] According to Sears, "If what you want is respect

43. *Id.* at 3, 6; *see also Community Impact Panels*, *supra* note 38.
44. Campbell, *supra* note 1, at 3; Eric Lane, *Due Process and Problem Solving Courts*, 30 FORDHAM URB. L.J. 955, 978 (2003).
45. Campbell, *supra* note 1, at 4.
46. *Id.*
47. *Id.* at 7.
48. *Id.*
49. *Id.* at 6; Lane, *supra* note 44, at 978.
50. Campbell, *supra* note 1, at 6.
51. *Id.*
52. *Id.*

for your neighborhood, you can help that process out by giving some respect up front."[53]

Although the composition of the community impact panel is designed to lessen tension, ambivalence between community members and the offender may inevitably exist during the session. Understandably, there will be instances where differing ideals and morals collide. Allowing community members to describe the negative impact a particular offense has on their quality of life may clear up any misconceptions held by the offenders.[54] Similarly, giving offenders an opportunity to explain their conduct may well dissolve any undue characterization of the offender. The value of this mutual understanding between victims and offenders is quite significant.[55]

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53. *Id.*

54. *Id.* at 5.

55. The following is an excerpt of an early impact panel at the Midtown Community Court. The offender here was a male who was cited for soliciting prostitution.

> *Male community member* (addressing offenders): "Think about your neighborhood. Imagine that wherever you live, you walk out to the driveway to get your mail from your mailbox with your six-year-old niece and there's a guy [engaged in a sex act] in a car right in front of your house. How do you explain that to a kid?"
>
> *Female community member*: "I would just like to add that Manhattan is no different from any other town or village or city, that it is a network of small neighborhoods and communities that are struggling against many, many odds to raise their families."
>
> *Offender*: "I wouldn't let the fact that 100 percent of us are from out of town skew you. I think Manhattan people are using the prostitutes, too. They just don't get themselves caught; they have apartments, so they go inside."
>
> *Female community member*: "That's another conversation. This is about misconduct in community space, which has a huge adverse impact — littering and condoms in the morning, and all that really great stuff we see on the way to work."
>
> *Male community member*: "I have no problem with people having sex with whomever they want to have it with, if the place and time [are appropriate]. But this really happened: When my niece was in town, I walked down from my apartment with her and there was prostitute activity going on right in front of the door. I don't know what effect it will have on her over time. When she grows up I'm sure she will learn to understand. But it kind of put a damper on our evening, you know, trying to explain what that was all about."
>
> *Female community member*: "Do you really perceive that there are

B. *The Origin of Community Impact Panels*

Community impact panels are rooted in three related national trends. The first, the victims' rights movement, urges more active victim participation in the criminal process.[56] The second, the relatively new community justice movement, seeks to draw the criminal justice system and communities closer together.[57] Finally, the panels operate within the restorative justice strategy, which overlaps the concerns of both the victims' rights movement and the community justice movement.[58] The panels borrow elements from the first two movements to create an innovative and restorative response to low-level crime.[59] The discussion that follows details each movement and explains its influence on community impact panels.

i. *Victims' Rights, Restorative Justice and Victim-Offender Mediation*

The impact panels are structured similarly to victim-offender mediation (VOM). As the oldest form of restorative justice, with over two decades of history, VOM focuses on assigning the victim

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people who live here? That there are people in neighborhoods and communities? I truly believe that neither of you three are truly aware of that."

Offender: "I think I am, to an extent. But I also think, I guess, that Manhattan is a lot more impersonal. That it's a huge city and who is going to notice?"

Female community member: "I think that's a false perception."

Offender: "It is ignorance. I understand what you are saying, yes. But I just thought it was more of an impersonal kind of thing."

Campbell, *supra* note 1, at 5-6 (alterations in original).

56. Lucas, *supra* note 21, at 1368 ("[A]n increasingly visible victims' rights movement in the United States has focused attention on the vital role victims can, and should, have in the disposition of those who have injured them.").

57. Campbell, *supra* note 1, at 4. *See generally* Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 338 (2002) ("[R]ecognizing the need to respond to more knowledgeable and critical public, the other players in the criminal justice system – the police, courts, and defense lawyers – have tried to find ways to collaborate with communities in the exercise of their functions.").

58. Campbell, *supra* note 1, at 4.

59. *Id.*

a more active role in the judicial process.[60] By providing an opportunity for the victim and the offender to meet face-to-face to discuss the impact of the crime on each other's lives, VOM aims to repair the harm done and prevent future offenses.[61]

Unlike community impact panels, VOM is used in a greater variety of cases, including more violent crimes such as murder, manslaughter, sexual assault, and armed robbery.[62] Also, the VOM model involves an individual victim, while the community impact panel recognizes the community as the victim.[63]

Notably, the most significant difference between the community impact panels and VOM is that the latter is voluntary. Both the victim and the offender choose whether to participate without regard of the actual sanction or punishment for the crime.[64]

Despite these few exceptions, community impact panels and VOM are nearly congruent within the restorative justice model. Both focus on the attributes of the offender, rather than the crime itself. By making offenders aware of the consequences of their actions, more emphasis is placed on offender accountability.[65] Additionally, the two models force the offenders to internalize the consequences of their actions by affording them a more proactive role in deciding the appropriate means to make amends for their crimes.[66] Furthermore, both offer victims the opportunity to meet face-to-face with their offenders to explain the impact the crime had on them. Finally, a trained facilitator is used in both models to ensure fairness and prevent abuse of power. Simply put, the community impact panel is a cognate version of the VOM model, but is used as a mandatory punishment rather than an optional program.

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60. Mark S. Umbreit et al., *The Impact of Victim Offender Mediation: Two Decades of Research*, FED. PROBATION, Dec. 2001, at 29.

61. *Id.*

62. *Id.* at 33.

63. *Compare id.* (stating VOM personalizes "the consequences of crime" by bringing the offender face-to-face with the victim) *with* Lucas, *supra* note 21, at 1371 (identifying the primary principle of restorative justice as the recognition of the greater community as a victim of crime).

64. Umbreit, *supra* note 60, at 30.

65. Lucas, *supra* note 21, at 1371.

66. *See id.* at 1371-72. *See generally* DeFiebre, *supra* note 19 (reporting how restorative justice programs bring "criminals and victims face to face to work out restitution").

Like community impact panels, VOM is a program boasting the strategies and principles of restorative justice.[67] The restorative medium of VOM aims to mend the relationship between the offender and the victim of criminal conduct.[68] Similarly, community impact panels, with their apparent congruence with VOM, fall within the family of restorative justice initiatives because they too aim to restore the relationship between the offender and the victimized community.[69]

ii. *The Community Justice Movement*

Community impact panels borrow elements from the fairly new community justice movement, which has led to more community involvement in the criminal process through programs such as community policing and community courts. Historically, police were generally not interactive with community members, but instead were merely reactive to crimes in the neighborhood.[70] Other than the occasional witnesses who helped in the investigation of certain crimes, the community's role in the criminal process was minimal.[71] A cultural transformation began in the 1990s with the emergence of community policing, the innovators of which envi-

67. *E.g.*, Lucas, *supra* note 21, at 1372 (stating "VOM is the most common form of restorative justice in use today."); Niemeyer, *supra* note 4, at 30 (citing BURT GALAWAY & JOE HUDSON, CRIMINAL JUSTICE RESTITUTION AND RECONCILIATION (1990)).

68. *See, e.g.*, MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME 102 (2d ed., Waterside Press 1996) (1991) ("Crime is a wound in human relationships, and creates an obligation to restore, to repair. [This] new paradigm . . . encourages victim and offender to see one another as persons."); Russ Immarigeon, *Restorative Justice, Juvenile Offenders and Crime Victims: A Review of the Literature*, *in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 305-09 (Gordon Bazemore & Lode Walgrave eds., 1999) ("Restorative justice theory is compelling in part because it aims to repair or return the losses to the victim and to heal the wounds of crime."); Nicholl, *supra* note 22, at 91 ("Victims and offenders may both be affected by the responses, behavior, and attributes of the other. Restorative justice acknowledges this relationship, and its processes seek to address this human dimension of all crime.").

69. *See* Nicholl, *supra* note 22, at 91.

70. Thompson, *supra* note 57, at 339.

71. "Police rarely interact with members of the community except in connection with the investigation of a specific crime." *Id.*

sioned the community playing an integral role in local law enforcement.[72]

A fundamental principle of the community justice movement entails the formation of partnerships between community members, police, and prosecutors.[73] Crime fighting institutions take on a more proactive—rather than the traditional reactive—role to address the problems and quality-of-life concerns within the community.[74] The partnerships address specific areas of concern and enable prosecutors to create goals that are "realistic and obtainable."[75] Finally, community justice programs target low-level crimes that directly affect the quality of life in the neighborhood. It is often suggested that failing to address these types of crimes would be ignoring the needs of the citizens within the community while potentially leading to more serious offenses.[76]

More than merely a call for greater community involvement, community justice is a set of ideals and principles that, when taken together, promote a justice system that involves officials and citizens working as partners to preserve the safe and peaceful well-being of the community.[77] Community impact panels share these same values, which place them at the forefront of the community justice movement.

The Midtown Community Court recognizes the community as a victim, combines punishment with treatment, and gives the

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72. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 295-99 (Christine Cardone ed., Macmillan Coll. Publ'g Co. 1994) (1966).

73. Doolan, *supra* note 26, at 562.

74. *Id.* at 560.

75. *Id.* at 567 (quoting Norma Mancini Stevens, *Defining Community Prosecution*, PROSECUTOR, Mar./Apr. 1994, at 14).

76. *Id.* at 569; GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 159 (1996).

77. Nicholl, *supra* note 22, at 75 fig. 11; *see also* Mark S. Umbreit & Robert B. Coates, *Multicultural Implications of Restorative Juvenile Justice: Potential Pitfalls and Dangers*, CENTER FOR RESTORATIVE JUST. & PEACEMAKING, at 3, *at* http://www.ojp.usdoj.gov/ovc/publications/infores/restorative%5Fjustice/restorative_justice_ascii_pdf/ncj176348.pdf (April 2000); John Feinblatt and Greg Berman, *Community Court Principles: A Guide for Planners*, CENTER FOR CT. INNOVATION, at 3, *at* http://www.courtinnovation.org/pdf/com_court_prncpls.pdf (2001).

community a voice in shaping restorative sanctions.[78] These values are evident in the implementation of community impact panels as a means of restoring the community's quality of life. Community impact panels add a new regiment in the battle against recidivism in low-level crime by empowering victims and adhering to community justice principles all within the restorative justice model.

III. EFFICACY

Of the various ways of measuring the effectiveness of punishment, perhaps the most often used measurement of success is recidivism.[79] Because of the novelty of community impact panels, there is a dearth of empirical data regarding its effectiveness. Nonetheless, an analysis of the effectiveness of community impact panels as compared to the success of their counterpart in the restorative justice model (VOM) is in order. Perhaps by doing so, we can better predict the likelihood of a successful future for community impact panels.

As stated above, community impact panels inform offenders of the consequences of their crimes so that they will be less likely to engage in that conduct in the future. In essence, the hope is that offenders who have attended a community impact panel will not re-offend because they know better. Due to both the novelty of and limited studies on community impact panels, gauging the success of the sanction based on recidivism rates is difficult. In order for results to be probative of the success of the impact panels, they must compare the re-arrest rate of those who attended the impact panels to a random sample of those who received a traditional sanction for similar crimes. These comparative studies have yet to become available.[80]

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78. Feinblatt & Berman, *supra* note 77, at 3.

79. *See* Niemeyer, *supra* note 4, at 33; Umbreit et al., *supra* note 60, at 32.

80. Panels similar to the community impact panel model have been effectively employed in drinking and driving cases by Mothers Against Drunk Driving. The long-standing use of the panels in drinking and driving cases provides more empirical data for evaluation. For instance, in Washington County, Oregon, the re-arrest rate of ninety drunk driving offenders was examined during an eighteen to twenty-four month period in 1987 and 1988. The background rate of recidivism, meaning the rate before the panels were implemented, according to the Oregon Motor Vehicle Division's estimate, was

Another indicator of effective punishment, and one that is perhaps more useful in the case of community impact panels, is victim and offender satisfaction with the process. Panel exit polls suggest that the parties who participated were satisfied with both the process and outcome. Of offenders, 60% said they thought their actions were harmless prior to attending the impact panels.[81] As for the community members, 96% were happy with the opportunity to voice their opinions, and 80% believed that offenders actually did learn that their conduct was harmful.[82] About 70% of both offenders and community members believed that the community impact panels were "worthwhile."[83]

IV. THE THEORIES OF PUNISHMENT

A broad purpose of punishment is to ensure that people engage in socially desirable conduct.[84] Because the community impact panels are a form of punishment, their role in furthering the purposes of punishment can be evaluated to predict their effectiveness. Various theories explain how punishment deters unde-

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42%. In contrast, only eight of the ninety offenders who attended the impact panels were re-arrested for drinking and driving, constituting only nine-percent of the sample. In Clackamas County, Oregon, 534 offenders who attended impact panels for drinking and driving were compared to 741 offenders who did not attend the panels. Results indicated that those who attended the impact panels were three times less likely to be re-arrested for drinking and driving. Finally, a Dallas study in 1990 showed that, before attending an impact panel, 87% percent of offenders said that they would continue to drink and drive. After attending the panel, 90% said that they would not drink and drive again. More significant studies regarding the recidivism rates of drunk drivers indicate that age and number of offenses are factors that need to be considered when evaluating these surveys. Also, the emotional nature and sensitivity of the drinking and driving cases should certainly be regarded as a contributing factor of their success. Such a factor is ostensibly lower in crimes such as public urination, prostitution, violation of open container laws and vandalism. *Recidivism Research*, *at* http://www.nhtsa.dot.gov/people/injury/alcohol /VIP/VIP_app1.html.

81. Campbell, *supra* note 1, at 9. Afterwards, when asked what they learned from the process, answers included: "It enlightened me that people live in this area," and "I learned specific acts can have a ripple effect." *Id.*

82. *Id.* at 10.

83. *Id.* at 9.

84. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, 1 SUBST. CRIM. L. § 1.5, at 36 (2d ed. 2003).

sirable conduct.[85] The following analysis examines community impact panels in light of the rehabilitation, education, deterrence and retribution theories of punishment.

A. *Rehabilitation and Education*

Rehabilitation of an offender is a major principle set forth in the restorative justice model of which community impact panels are a part. Under the rehabilitation theory of punishment, a treated offender returns to the community reformed, no longer needing or desiring to re-offend.[86] The Midtown Community Court combines punishment with treatment strategies derived from counseling and other social services to rehabilitate offenders within the community.[87] Rehabilitation is generally recognized to be more treatment than punishment, because it emphasizes reforming the offender and his behavior rather than making the offender suffer.[88]

As stated earlier, community impact panels focus on the offender's positive qualities and abilities instead of only the offense committed. This approach results in more accountability and understanding of the consequences of criminal behavior because the offender, rather than serving as the object of punishment, plays a more active role in the process. The expectation is that offenders will be less likely to re-offend due to the greater awareness of their behaviors' impact on the community.

In comparison, victim-offender mediation seems to aspire to the same rehabilitative justification. Like community impact panels, VOM attempts to restore the relationship between the victim and the offender by forcing them to view each other as real people rather than stereotypes.[89] For offenders to be truly rehabilitated, they must not only internalize the costs associated with their criminal behavior, but must recognize those costs as important.[90] Consequently, VOM has been criticized for not adequately promot-

85. *Id.* at 37-43 (summarizing all of the theories of punishment). For additional summary see JOSEPH R. NOLAN, CRIMINAL LAW, 32 MASS. PRAC. CRIM. L. § 7, at 11-13 (3d ed. 2001).

86. LAFAVE, *supra* note 84, § 1.5(a)(3), at 38.

87. *See* Feinblatt & Berman, *supra* note 77, at 3.

88. LAFAVE, *supra* note 84, § 1.5(a)(3), at 38-39.

89. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique,* 43 EMORY L.J. 1247, 1300 (1994).

90. *Id.*

ing the goals of punishment because rehabilitation may largely be a product of the individual's willingness to participate in the program.[91] Inasmuch as VOM is voluntary, those who participate are more likely to be rehabilitated because they ostensibly desired to be in the first place.

In contrast, community impact panels are a mandatory sanction and participants must attend regardless of their willingness to do so. Nonetheless, critics of VOM have expressed the concern that, although the program is voluntary, its use before an offender has entered the criminal process has the coercive effect on the offender to choose either to attend the VOM or face the less desirable criminal process.[92] The critique posits that if the VOM were mandatory, or at least had this coercive effect, then the rate of success would decline because participation is no longer limited to the willing.[93] According to this theory, community impact panels would have a less rehabilitative effect than VOM since it is a mandatory sanction and is not limited to those who have the initial desire to reform.

Furthermore, victims may not be best equipped to decide the level of impact awareness necessary for the rehabilitation of each offender.[94] Granting unfettered discretion to victims could have the chilling effect of usurping the role of the adversary system by empowering victims to implement punishment. But again, these concerns arise only when this face-to-face technique is mandatory. As a mandatory punishment, community impact panels run the risk of conferring gross discretion to community members to decide when and how rehabilitation is achieved. Therefore, although the Midtown Community Court, and others, aspire to interject treatment with punishment, the community impact panels cannot adequately ensure that the special needs of each offender will be addressed without giving the community members unwarranted power. Like VOM,[95] community impact panels might facilitate the

91. *Id.*
92. *Id.* at 1268.
93. *See id.* at 1296-99 (observing that VOM lacks a clear relationship to the traditional goals of criminal justice — deterrence, rehabilitation, and retribution).
94. *Id.* at 1300-01.
95. *Id.* at 1299-1300.

theory of rehabilitation, but the extent to which they do may be non-quantifiable.

B. *Deterrence*

A second theory of punishment promoted by community impact panels is deterrence. Generally, deterrence theory aims to "influence human conduct away from the undesirable, and toward the desirable."[96] "Fear of the consequences of committing a crime is a healthy motive for avoiding crime."[97] This rationale incorporates two forms of deterrence. First, specific, or particular, deterrence aims to deter an individual from repeating criminal conduct through punishment the individual would rather not revisit.[98] General deterrence, on the other hand, aspires to deter society as a whole by exploiting the punishment of one individual to deter others.[99] Community impact panels do promote specific deterrence, but an attempt to use them as a means to promote general deterrence carries significant risks.

i. *Specific Deterrence*

As with rehabilitation, the effectiveness of community impact panels as a specific deterrent depends largely on the offenders themselves; specific deterrence is only achieved if the individual who is punished finds the punishment unpleasant.[100] One criticism of this theory points to high recidivism rates even among offenders who have been punished.[101] Others focus on instances where punishment may actually contribute to future crime by instilling hatred and revenge in the person being punished.[102]

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96. LAFAVE, *supra* note 84, § 1.5(a), at 37.
97. NOLAN, *supra* note 85, § 7, at 12.
98. LAFAVE, *supra* note 84, § 1.5(a)(1), at 37.
99. *Id.*
100. *Id.* § 1.5(b), at 43.
101. *Id.* § 1.5(a)(1), at 37; *see also* LIVINGSTON HALL & SHELDON GLUECK, CRIMINAL LAW AND ITS ENFORCEMENT 17 (2d ed. 1958) (contending that the effect of "painful" punishment has been exaggerated, and the fear of punishment is only "one small item" that keeps people from violating the law).
102. LAFAVE, *supra* note 84, § 1.5(a)(1), at 38 n.14 (citing F. ZIMRING, PERSPECTIVES ON DETERRENCE 106 (1971)) ("Taken as a whole, studies of recidivism estimate that those subjected to punishment for major crimes commit many more crimes after their release than other groups in the population, but fewer perhaps than they would if they had not been caught.").

For community impact panels to successfully deter, offenders must perceive panel attendance to be a distasteful consequence of their offenses. At the very least, offenders must weigh the impact panels as a significant countervailing cost of re-offending.[103] Certainly, this may be so since some offenders would find the impact panels significantly unpleasant, or at least more unpleasant than paying a fine. The express goal of the impact panels, however, is not to instill fear in the offenders, but rather to reintegrate the offenders into the community by educating and informing them about how their behaviors victimized the community.[104] Ideally, recidivism is not reduced by making impact panels an undesirable consequence of an offense, but by creating a heightened awareness that should lead to more informed and acceptable future behavior.[105] Results actually demonstrate that offenders generally are satisfied with their treatment and the fairness of the process.[106]

Community impact panels' adherence to the specific deterrence theory of punishment exists only in certain individual cases where the offender does not re-offend due to fear of having to attend another impact panel. These few instances, however, would simply be incidental. Indeed, the primary goal of the impact panel model is to combat recidivism through the process of education and reintegration, not fear.

ii. *General Deterrence*

General deterrence, which attempts to deter the general public, could pose a substantial risk to the integrity of the panels. In order for an individual's punishment to have a general deterrent

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103. *Id.* § 1.5(a)(4), at 39 (citing F. ZIMRING, PERSPECTIVES ON DETERRENCE 3 (1971)).

> The theory of simple deterrence is that threats can reduce crime by causing a change of heart, induced by the unpleasantness of the specific consequences threatened. Many individuals who are tempted by a particular form of threatened behavior will, according to this construct, refrain from committing the offense because the pleasure they might obtain is more than offset by the risk of great unpleasantness communicated by a legal threat.

Id. at 39 n.26 (quoting F. ZIMRING, PERSPECTIVES ON DETERRENCE 3 (1971)).

104. *See* Campbell, *supra* note 1, at 6.

105. *Id.*

106. *Id.*; *Community Impact Panels*, *supra* note 38.

effect, society must first be aware of the punishment.[107] In the case of community impact panels, undoubtedly the community members who participate are aware of costs associated with being in the offender's shoes. The extent, however, to which non-participating community members are aware of those costs is more limited because they might not even know the panels exist.

One solution would be to publicize the effect that community impact panels have on offenders. This, however, could lead to the humiliating practice of labeling deviance.[108] Indeed, some offenders might feel embarrassed or humiliated in the presence of the community panel members. Therefore, some level of shaming should be tolerated so long as it is not widespread. Exploitation of a specific offender's response to community impact panels will have the chilling effect of degenerating impact panels into shame sanctions by humiliating the offender in the public eye.[109]

The primary purpose of the trained facilitator is to ensure that the process is fair and does not result in unreasonable, overly-judgmental dialogue.[110] Many argue that unreasonable and hostile communication is inevitable given the feelings and emotions involved when the victim and offender meet face-to-face.[111] Therefore, it is safe to assume that some form of humiliation is bound to be felt by some offenders, in at least some instances. In fact, one noted scholar argues that *all* forms of punishment involve some level of humiliation and shame.[112] Publicizing that effect in order to deter society in general amplifies the level of humiliation that the offender is forced to endure. This paradigm

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107. *See* Brown, *supra* note 89, at 1299.

108. Albert W. Dzur & Alan Wertheimer, *Forgiveness and Public Deliberation: The Practice of Restorative Justice*, 21 CRIM. JUST. ETHICS 3, 7-8 (2002), *available at* 2002 WL 100697511; *see also* Polly S. Woods, *Shame on You: Trendy Attempts at Public Humiliation are not Well-Suited to American Culture*, TEX. LAW., Apr. 1997, WL 4/7/1997 Tex. Law. 37.

109. Shaming punishments, recall, are punishments that rely upon the public castigation of the offender, intentionally designed both to express condemnation of the offender and his act, and to do so in a way that humiliates the offender before the public eye. Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2216 (2001).

110. *See* Campbell, *supra* note 1, at 6.

111. *See id.* at 7; Dzur & Wertheimer, *supra* note 108, at 12.

112. James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1055 (1998).

harkens back to the barbaric shaming practices of the western medieval world, where punishment was often a form of public humiliation.[113]

The impact panels should, however, have a general deterrent effect if the public is aware that this type of punishment is associated with certain criminal activity.[114] Other community members will be deterred from committing offenses such as public urination, vandalism, prostitution, and public drinking, if they know that by committing those crimes they will suffer the fate of attending a community impact panel. This generalized publication would avoid the danger of shaming a specific individual in the public eye.

iii. *Deterrence by Shaming and the Eighth Amendment*

Two major concerns arise if community impact panels humiliate or embarrass offenders to an extreme degree. First, and perhaps most obvious, subjecting offenders to a substantial level of humiliation necessarily undermines the goal of reintegrating the offender into the community. This shaming actually has the opposite effect. Instead of reintegration, shaming has a tendency to drive offenders away from the community to escape public humiliation.[115]

Second, shaming is an attack on the dignity of a person and, as an ingredient of community impact panels, potentially constitutes cruel and unusual punishment.[116] The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[117] The basic standard of the Eighth Amendment's prohibition of cruel and unusual punishment is "nothing less than the dignity of man."[118]

The Supreme Court has not been very clear on precisely what the dignity of man, or woman, is or is not. The Eighth Amendment "must draw its meaning from the evolving standards of decency

113. *Id.*
114. *See* LAFAVE, *supra* note 84, § 1.5(4), at 39.
115. *See* Whitman, *supra* note 112, at 1063.
116. *See generally id.* at 1068-79 (analyzing the history of shame punishment theory).
117. U.S. CONST. amend. VIII.
118. Trop v. Dulles, 356 U.S. 86, 100 (1958); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976); Woods, *supra* note 108, at 37.

that mark the progress of a maturing society."[119] This language indicates that the standard is ever changing and requires the examination of "objective indicia, which reflect the public attitude toward a given sanction."[120] If community impact panels employ humiliation and embarrassment techniques that pervert the sanctions into shaming, there exists a potential risk that they will violate the prohibition on cruel and unusual punishments.

The Supreme Court has never decided the constitutionality of shame sanctions and the debate over their use continues.[121] The recent development of community impact panels adds a new dimension to this debate. While inflicting physical pain on offenders may be cruel and unusual, shaming could itself constitute cruelty.[122] Shaming is a violation of one's dignity through treatment that is contrary to societal norms where even criminals deserve respect.[123]

Given that shame does in fact attack an individual's dignity, shame sanctions should fail in the face of constitutional muster.[124] The Eighth Amendment specifically aims to protect an individual's dignity from unreasonable attack and, depending on the degree of humiliation and embarrassment involved, shaming could potentially rob an offender of the very dignity that the Constitution protects.[125] Therefore, if community impact panels degenerate into shame sanctions, through the subjection of offenders to un-

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119. *Trop*, 356 U.S. at 101.

120. *Gregg*, 428 U.S. at 173.

121. *See* Markel, *supra* note 109, at 2173-77; Mark Spatz, *Shame's Revival: An Unconstitutional Regression*, U. PA. J. CONST. L. 827, 830 (2002); Whitman, *supra* note 112, at 1056; Woods, *supra* note 108.

122. Whitman, *supra* note 112, at 1068.

123. Several scholars have recognized this possibility:

> [R]egardless of how scrupulously shame sanctions leave the body of the offender intact, they violate the offender's *dignity* in some objectionable way – that they run contrary to some deep norm requiring us to treat even criminals with respect. The government, we would say, properly has the power to deprive offenders only of property or liberty, but never of dignity.

Id. at 1068-69. "[S]hame fails in that it so degrades human dignity that it is unacceptable in contemporary society and does in fact cause mental anguish to those who must bear the burden of fulfilling the draconian punishments." Spatz, *supra* note 121, at 843.

124. Spatz, *supra* note 121, at 845.

125. *Id.*

warranted attacks on their dignity, a constitutional challenge would surface.

Admittedly, if community impact panels regressed into shame sanctions, an attempt to convince a court that they violate the Eighth Amendment would be an uphill battle. Sanctions that involve much more humiliation and embarrassment, such as sign or advertisement punishments, have never been held to violate the Constitution's prohibition of cruel and unusual punishments.[126] Having to meet with a few community members to discuss the impact of certain behavior might not compare to having to declare penance from the steps of City Hall.[127]

In reality, shame sanctions seem to further the theories of punishment significantly.[128] In cases where constitutional challenges to certain humiliating punishments have been made, courts' decisions have appeared to hinge on the degree that the punishments furthered the deterrence and rehabilitative theories of punishment.[129] As suggested by some, shaming an individual is a cost-effective, politically viable means to achieve specific and general deterrence, rehabilitation, and retribution.[130] Therefore, the apparent usefulness of shame sanctions contributes to the difficulty in challenging them on constitutional grounds.[131] Only in

126. *See* Elizabeth Kelley Cierzniak, Note, *There Goes the Neighborhood: Notifying the Public When a Convicted Child Molester is Released into the Community,* 28 IND. L. REV. 715 (1995) (detailing how the notification to a neighborhood of a convicted child rapist's imminent release from prison resulted in the burning of the offender's house); Spatz, *supra* note 121, at 827 (documenting the criminal sentencing of a mother who plead guilty for not having her three-year-old daughter strapped into a car-safety seat, which included writing a mock obituary for her mentally and physically disabled child).

127. Spatz, *supra* note 121, at 827 (detailing the criminal sentencing of a Houston man convicted of domestic violence against his estranged wife, which included an apology from the steps of City Hall).

128. *See* Whitman, *supra* note 112, at 1058.

129. Goldschmitt v. State, 490 So. 2d. 123, 124 (Fla. Dist. Ct. App. 1986) (requiring drunk driver to place a bumper sticker on his car that read: "CONVICTED D.U.I. — RESTRICTED LICENSE"). "The deterrent, and thus the rehabilitative, effect of punishment may be heightened if it 'inflicts disgrace and contumely in a dramatic and spectacular manner.'" *Id.* at 125 (citing United States v. William Anderson Co., 698 F.2d. 911, 913 (8th Cir. 1983)).

130. Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998).

131. *See Goldschmitt*, 490 So. 2d at 125.

extreme circumstances, where the punishment is undoubtedly grossly offensive, would an Eighth Amendment challenge potentially succeed.[132]

As community impact panels now stand, with only incidental deterrent effects, they can be used as an effective tool to educate offenders and reintegrate them into the community. An attempt, however, to accelerate the theories of deterrence and rehabilitation through the introduction of shaming could have the adverse effects of undermining the primary goals of community impact panels and restorative justice and run the risk of perverting impact panels into cruel and unusual punishment.

C. *Retribution*

Retribution is the oldest theory of punishment, according to which society imposes punishment as a means of revenge and retaliation.[133]

> The doctrine that hatred and vengeance are wicked in themselves appears . . . to contradict plain facts, and to be unsupported by any argument deserving of attention. Love and hatred, . . . and the desire of vengeance for injuries, imply each other as much as convex and concave.[134]

Regarding the offender as morally blameworthy, the retributionist theory punishes the offender because he or she deserves it.[135] This "eye for an eye" theory has gradually been losing support in contemporary penology.[136] Victims, however, perhaps as a result of their alienation from the criminal process, continue to display retributive emotions.[137] Moreover, even its critics recognize that retribution "can fairly be regarded as the leading phi-

132. *See* Bienz v. State, 343 So. 2d 913, 915 (Fla. Dist. Ct. App. 1977) ("[S]uffice it to say that a command . . . that an adult male wear diapers in public would certainly be demeaning in the minds of, so-called, reasonable men. Not surprisingly, prior decisions involving such bizarre incidents are sparse.").

133. LAFAVE, *supra* note 84, § 1.5, at 41.

134. 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 82 (London, MacMillan 1883).

135. Markel, *supra* note 109, at 2158-59; *see also* LAFAVE, *supra* note 84, § 1.5, at 41.

136. *See* LAFAVE, *supra* note 84, § 1.5, at 41; NOLAN, *supra* note 85, § 7, at 12.

137. *See* Dzur & Wertheimer, *supra* note 108, at 5.

losophical justification for the institution of criminal punishment."[138]

Although the express goals of community impact panels do not imply retributive justification, retribution may nonetheless be at work. If victims are inherently seeking retribution, their role in the impact panels serves as a channel to fulfill those needs for revenge. During the process of describing the impact that the offender's conduct has had on their quality of life, community victims may take it upon themselves to retaliate or seek revenge. After all, impact panels under the restorative justice model afford the community members who represent the victim in low-level crimes a dynamic role in the process of those offenders.[139]

As stated earlier, community impact panels are rooted in the victims' rights movement.[140] Therefore, victim participation in the punishment of offenders would contribute to the panels' retributive effect. Although in its purest form retribution ignores victims altogether,[141] victims are nonetheless "'central to the norms whose violation justifies punishment for a retributivist;' . . . have a 'large place' in retributive punishment; and . . . 'are at the center of the norms whose violation is at the core of criminal law.'"[142]

Given that "[a]nger, hatred, and outrage are not merely defended and legitimized, but celebrated and glorified as appropriate retributive responses to crime,"[143] community impact panels would provide the means by which victimized community members could vent these deeply rooted emotions. Victims, charged with such emotions, may have a tendency to lash out at offenders, which could lead to unauthorized shaming. The risk of shaming is espe-

138. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 847 (2002) (quoting David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 (1992)).

139. Campbell, *supra* note 1.

140. *See supra* notes 16-18 and accompanying text; *see also* Campbell *supra* note 1, at 4 (stating that Community Impact Panels draw elements from both the "victims movement" and the "community justice movement").

141. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 67 (1999) (arguing that "victims should and must be ignored if you are claiming to be doing retributive theory").

142. Christopher, *supra* note 138, at 947 (citing Moore, *supra* note 141, at 72-73).

143. *Id.* at 959 n.606.

cially high because the actual victims mete out the punishment rather than a detached and unbiased entity.

Other traces of retribution can be found in the community impact panels' processing of the offender. One approach to the retribution theory "affirms the dignity of the offender by treating him as a responsible moral agent."[144] Offenders must acknowledge themselves as blameworthy and deserving of punishment.[145] Doing so allows them to express remorse for and understanding of their unlawful behavior while offering reasons and explanations why their conduct may have been excusable.[146] This cognitive process lends itself to the effectiveness of retribution.[147] Without it, retribution may fall short of justification and may ultimately be rejected by those who argue that punishment cannot be inflicted on an undeserving individual for the benefit of society as a whole.[148]

The contours of retribution within the community impact panel model, while present and expected to some extent, must be limited. The danger exists that revenge and retaliation, if out of kilter with the moral blameworthiness of the offender, could result in unjustifiable shaming.

V. CONCLUSION

Community impact panels are only one of the many programs operating under the umbrella of restorative justice. The fundamental principles of restorative justice labor towards an all encompassing, ideal criminal justice system. Acknowledging that the criminal justice system will fare better if all the parties affected by crime are involved in its process, restorative justice aims to mold the cast for a better and more effective criminal system.

Community impact panels should be limited to punishment for low-level crimes affecting the quality of life in communities. Victim-offender mediation is a program designed to achieve re-

144. Markel, *supra* note 109, at 2194.
145. *See id.*
146. *Id.*
147. *Id.*
148. LAFAVE, *supra* note 84, § 1.5(a), at 43 (positing the utilitarian theory of punishment runs counter to retribution); *cf.* JOHN STUART MILL, ON LIBERTY 22 (special ed., The Classics of Liberty Library 1992) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

storative results and should continue to be used to supplement the appropriate punishment in more substantial offenses. For crimes of a higher caliber, community impact panels would seem to be a punishment that is too painless. If imposed for higher offenses, they would certainly spark opposition. The panels are more suited for what they were designed for – low-level, quality-of-life crimes.

As with any new legal trend, legal scholarship must challenge and scrutinize community impact panels to ensure their justifiable position in criminal law. If they are going to work, they must be grounded in appropriate and reasonable justification without regressing into unwarranted and undue punishment. Procedural limitations and safeguards must be employed to ensure that the victims are not given gross discretion to determine the quality and quantity of punishment for the offender. This is especially necessary because the community members are the ones who have actually suffered the harm and might be tempted to express their anger and disapproval in ways that would unreasonably attack the dignity of the offender. Inherent retributive emotions must be quelled to reduce the threat of community impact panels degenerating into cruel and unusual punishment.

Statistics have yet to prove that community impact panels contribute to a substantial reduction in recidivism rates. But the test of their validity does not simply rest in empiricism. Community impact panels must continue to be examined in light of the evolving theories which are the justifications for punishment. As they now stand, community impact panels have the potential to achieve the goals of deterrence, retribution, rehabilitation and education. Nonetheless, the extent to which they seek to further these theories must be limited. Exploitation of specific offenders and their responses to the punishment in order to achieve a general deterrent effect runs the risk of unduly humiliating the offender in the public eye. Consequently, the impact panels could actually have the adverse effect of driving the offender out of the community to escape ridicule. Shaming and humiliation undermine the restorative goal of reintegrating the offender into the community.

Community impact panels raise many questions regarding their existing benefits and the direction of their future. How far can the model be pushed to further the traditional theories of punishment? Although many questions, for the time being, will re-

main unanswered, "How far can community impact panels be pushed?" has at least the rhetorical answer – "not too far." Extending community impact panels to their outer limits, in an attempt to further the theories of punishment, could undesirably undermine their restorative justice underpinnings and degenerate into shaming, or even cruel and unusual punishment.

Eric W. Nicastro*

* This Comment is dedicated to one of my greatest mentors, Steven D. Ryan, Ph.D., who will forever inspire me not only with outstanding scholarship, but with great *joie de vivre*. I miss him dearly.