

CRIMINAL LAW MULTITASKING

by
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Criminal law pursues multiple goals: retribution, deterrence, expressive justice, rehabilitation, restoration, and reconciliation. Scholars tend to analyze these goals and their implementation in separation from each other, without accounting for their interplay and coordination. A theory of criminal law multitasking is overdue.

This Article sets up a conceptual framework for such a theory. We develop a taxonomy that captures the interplay between various procedures and substantive goals promoted by criminal law. Based on this taxonomy, we discuss five mechanisms of criminal law. We propose that policy makers and law enforcers select one or more of these mechanisms to implement the chosen mix of retribution, deterrence, expressive justice, rehabilitation, restoration, and reconciliation. We provide reasons guiding this selection, among them constructive community involvement, offenders' responsiveness, and integration of victims' rights. We illustrate the operation of our multitasking approach in real-world cases and illustrate its ability to facilitate the implementation of the deferred prosecution and adjudication mechanisms promulgated by the current draft of the Model Penal Code.

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INTRODUCTION

In the last several decades, the mainstream criminal process has lost its monopoly on regulating criminal behavior due to disappointment and frustration with the criminal justice system. Criticism has been leveled at the failure of the system to effectively deter and prevent crime,¹ its discrimination and racial bias,² its inability to meet the needs of crime victims and uphold their rights,³ and more generally, at its unjust out-

¹ See MICHAEL H. TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 149 (1995) (criticizing retributive justice as being ineffective and unjust); LUCIA ZEDNER, *CRIMINAL JUSTICE* 94 (2004) (arguing that the high rate of violence in prisons and the high recidivism rates among ex-convicts demonstrate the low effectiveness of the punitive approach); Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions*, 2 CRIM. L. & PHIL. 21, 23 (2008) (discussing how adjudicating offenders may not have any preventive outcomes); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1737 (1999) (arguing that punishment plays a limited role in preventing crime); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 212–13 (questioning the effectiveness of retribution in deterring crime, among some groups of offenders and certain types of offenses).

² TONRY, *supra* note 1, at 49–50 (arguing that the American criminal justice system is racially biased); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1156 (2000) (noting that African Americans and Caucasians use drugs at comparable levels, but law enforcement against African American people in drug offenses is stricter).

³ LESLIE SEBBA, *THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM* 55–56 (1996) (discussing how the criminal justice process fails to meet the needs of crime victims); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 837 (criticizing the Federal Rules of Criminal Procedure for ignoring crime victims almost entirely); Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 20 (stating that the primary

comes.⁴ In light of these criticisms, an alternative discourse has emerged. Various “civilized” justice mechanisms have been developed as alternatives to formal criminal justice processes in order to improve, reform, and enhance the effectiveness and fairness of substantive criminal law.⁵ Such mechanisms seek to provide better processes and to expand the goals of substantive criminal law beyond deterrence, incapacitation, rehabilitation, and just deserts. Other objectives of criminal law, such as restoring relationships,⁶ repairing harm,⁷ enhancing individuals’ well-being⁸ and strengthening communities⁹ are also considered important and legitimate. Such multiplicity of goals and values is at the basis of the effort to reform the Model Penal Code to provide for deferred prosecution and adjudication in order to promote the rehabilitation and restoration of offenders, victims, and communities.¹⁰ The variety of alternative justice mechanisms that have proliferated in the last decades reflects not only a plurality of procedures, but also a substantive pluralism rooted in multiple philosophies and values.¹¹ Focusing on procedural analysis, this

source of frustration and dissatisfaction with the criminal justice process among crime victims is not knowing the developments in “their” case).

⁴ CHARLES K. B. BARTON, RESTORATIVE JUSTICE: THE EMPOWERMENT MODEL 15–16 (2003) (arguing that the criminal justice process disempowers both offenders and victims); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. REV. RES. 1, 68–69 (1999) (discussing how the criminal justice process humiliates offenders and stigmatizes them).

⁵ CIVILISING CRIMINAL JUSTICE: AN INTERNATIONAL RESTORATIVE AGENDA FOR PENAL REFORM 49–50 (David Cornwell et al. eds., 2013). The term “criminal justice process” refers to the formal procedure, whereas the term “substantive criminal law” refers to the goals and principles of criminal law. The term “criminal law” refers to both procedures and substance.

⁶ HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181–83 (1990).

⁷ HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE 192–93 (2002).

⁸ DAVID B. WEXLER & BRUCE J. WININCK, ESSAYS IN THERAPEUTIC JURISPRUDENCE 7–8 (1991).

⁹ LODE WALGRAVE, RESTORATIVE JUSTICE, SELF-INTEREST AND RESPONSIBLE CITIZENSHIP 76 (2008).

¹⁰ See MODEL PENAL CODE: SENTENCING § 6.02A(2) (Council Draft No. 4, 2013) (“The purpose of deferred prosecution is to facilitate offenders’ rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred prosecution should be offered to hold the individual accountable for criminal conduct when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal charge and conviction.”). Similar goals are offered for deferred adjudication. See *id.* § 6.02B.

¹¹ See Michael T. Cahill, *Punishment Pluralism*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 25, 25 (Mark D. White ed., 2011) (“[P]erhaps the ascendant view of punishment is more openly *pluralistic* about its purposes and its proper constraints”); Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2324–39 (2013) (demonstrating how non-punitive mechanisms, such as restorative justice, can attain criminal-law objectives, leading to a pluralistic understanding of criminal law); Lucia Zedner, *Reparation and Retribution:*

Article proposes an instrument to help manage the multiple processes, and to enable criminal law multitasking.

We develop a taxonomy of several criminal justice mechanisms¹² that provide state-based responses to crime without involving evidentiary hearings. We focus on five such mechanisms: mainstream criminal process,¹³ problem-solving courts, restorative justice, therapeutic settlement conferences, and restorative sentencing juries. We propose a list of parameters that identify various characteristics of these mechanisms and the position of each mechanism in relation to others along various continuums. To make our taxonomy less cluttered, we divide the parameters into four clusters: process-, stakeholder-, substance-, and outcome-related.¹⁴

Most literature describing innovative approaches to justice typically focuses on a single mechanism and on its advantages and weaknesses relative to the mainstream criminal process.¹⁵ By contrast, we provide an integrative analysis of five justice mechanisms that differ from each other in their underlying ideologies and practical implementations. Notwithstanding our subjective selection of the specific mechanisms and comparative parameters, our analysis proposes an objective comparative instrument that does not promote one mechanism as being *a priori* better than the others.¹⁶

Are They Reconcilable, 57 MOD. L. REV. 228, 228–29 (1994) (discussing reparative components in criminal justice and explaining that they present a normative shift from retributivism, beyond their procedural contribution). Alongside the views calling for reform, many still uphold a conservative view that does not support procedural plurality in criminal law. See Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 645–49 (2005) (discussing that stakeholders such as judges, prosecutors, and even defense lawyers oppose reforms to the criminal justice system, particularly the modernization of criminal codes, due to these stakeholders' entrenchment in the current system).

¹² By “mechanisms” we refer to processes, schemes, programs, practical approaches, and practices that aim to resolve conflicts arising from criminal offenses.

¹³ To enable equal basis for comparison, we limit our discussion on the mainstream criminal process to only such processes where, owing to the defendant's admission, there is no evidentiary hearing.

¹⁴ See *infra* Table 1.

¹⁵ See generally Erik Luna, Introduction, *The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1 (introducing special issue of the Utah Law Review, which contains articles that present arguments for and against the use of restorative justice). See Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 420–23 (2009) for a discussion of how drug courts transform court practices to divert offenders from prison to treatment and reject the traditional model of courtroom practice that forces the judge into a passive role, shifting the judge's primary role from the determination of guilt to the provision of therapeutic aid.

¹⁶ Taxonomies have been used as methodological instruments in the legal field but, to our knowledge, have almost not been developed and applied in the criminal context. But see Issachar Rosen-Zvi & Talia Fisher, *Beyond the Civil and the Criminal: Towards a New Procedural Taxonomy*, 38 HEBREW U. L. REV. 489 (2008) [Heb.] (proposing a taxonomy of criminal and civil procedures in Israeli Law, which questions the traditional divide between the two fields and offers new parameters for categorizing civil and criminal procedures). For taxonomical analyses of processes in

A structured, comprehensive categorization helps compare justice mechanisms by identifying their values, goals, and underlying philosophies. It creates new and typically overlooked perspectives through which to analyze these mechanisms and to understand the criminal sphere. More broadly, the taxonomy uncovers the coexistence of divergent approaches within criminal law. On the practical level, it suggests a potential for multitasking by supporting a system of concurrent referrals of different cases to different mechanisms or combinations thereof, implementing multiple values and objectives simultaneously. For example, some of the mechanisms we discuss reflect retributivist approaches, whereas others tend to be utilitarian in nature. Through its primarily procedural analysis, our taxonomy highlights the retributivist and utilitarian characteristics of each mechanism. Depending on one's normative preferences, the taxonomy is helpful in choosing the right mixture of processes that strikes a balance between these two competing paradigms.¹⁷

Our taxonomy offers more than a relative positioning of the various mechanisms along the different continuums. Together, the individual analyses of the mechanisms produce a bird's eye view of the system as a whole, which helps identify theoretical gaps or unclear elements in the theory of specific justice models. This methodology of movement from specifics to the general and back to specifics can be used to analyze other justice mechanisms that may develop within a heterogeneous criminal law system.

Beyond its analytical contribution, our taxonomy may be instrumental when legislators and policymakers consider possible mechanisms that are likely to promote desirable values, goals, or approaches. The taxonomy may also serve as the basis for a diversified system that offers various options for different cases, depending on the severity of the crime, the

other legal fields see Carrie Menkel-Midow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 7–19 (2004) (organizing the differences of alternative dispute resolution processes according to the modes of discourse, forms of process, leadership style, and the entities in conflict), Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 9–11 (2006) (considering characteristics of the case, the parties, and the process), Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 BERKELEY J. EMP. & LAB. L. 404 (2009) (analyzing various exceptions in U.S. Federal employment law treating familial care responsibilities), and Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 133 (2009) (proposing an evaluative framework that involves criteria regarding the goals, processes and structures, stakeholders, resources, success, and accountability of various dispute-resolution mechanisms).

¹⁷ Cf. Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1199–1202 (2007) (suggesting that evidentiary rules have a significant role in balancing retributivism and utilitarianism, promoting a coherent yet pluralistic legal system).

characteristics of the offender or the victim, and other attributes. Such a multifaceted system constructs multitasking into the regulation of criminal behavior because it involves the simultaneous development and implementation of diverse justice mechanisms representing varying values and goals.¹⁸ At the same time, in any given jurisdiction where several mechanisms are already in place, the taxonomy can assist law-enforcement professionals in selecting the most appropriate mechanism in specific circumstances. Professionals may also decide to combine two mechanisms in the resolution of a case in order to achieve a more comprehensive set of objectives.¹⁹

Methodologically, the taxonomy relies on the prototypical representations of the five justice mechanisms it analyzes. But because some of these mechanisms were developed “bottom-up” or evolved from existing practices, our analysis is not blind to developments on the grounds that have shaped specific mechanisms. The different theoretical and ideological foundations of the various justice mechanisms make the comparison between them a complex and challenging task. Therefore, our analysis is not definitive and does not aim to make conclusive statements. The greater the differences between various implementations of each model, the more tentative our statements become relating to them. Each implementation of the justice mechanisms we discuss requires a separate analysis across the various parameters in order to draw conclusions. Therefore, the contribution of the taxonomy is mainly methodological. Nevertheless, our analysis provides a sufficiently robust categorization that sheds light on our understanding of the distinct characteristics of each justice mechanism and of their potential ability to achieve certain goals.

The Article proceeds as follows. Part I presents the five selected mechanisms. Part II sets out the list of parameters, clustered into four groups. Part III considers the relative position of each justice mechanism in comparison with the others, along the various continua. Part IV discusses the practical uses of the taxonomy and provides some examples. This Article concludes by outlining future applications of our taxonomy in theory and practice.

I. HETEROGENEOUS CRIMINAL JUSTICE

Disappointment with the criminal justice system has prompted numerous efforts to improve it. Various additions and diversions, such as parole, probation, rehabilitation programs, cautioning, and victim empowerment schemes have produced some improvements, but have not succeeded in allaying concerns that the justice process is not just, effec-

¹⁸ *Id.* at 1201–02.

¹⁹ See, e.g., 1 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 142 (2007) (among those who “take seriously the reconciliation of religion with modernity, the constant quest is for a theory of pluralism that will admit simultaneous strains of conflicting views”).

tive, and respectful.²⁰ Indeed, at least among reformists, these “cosmetic” changes may have contributed largely to the claim that there is a need for a complete paradigm shift.²¹

There have been several efforts to reform existing criminal law. Some of the new approaches have sought to suggest new and revolutionary goals to criminal law by replacing formal criminal processes, while others endorsed the development of supplements in order to address the traditional goals of criminal law as well as newly defined objectives. The restorative justice movement, for example, has promoted a complete shift in the perception of crime, its outcomes, and desirable ways for regulating behavior.²² Therapeutic jurisprudence, in contrast, has injected a therapeutic spirit into the criminal courtroom, using relational styles in judging²³ and lawyering.²⁴ Although these efforts and others have been criticized as incomplete,²⁵ they have generated important insights regarding the nature of criminal law. We use the understanding provided by this literature to analyze the different mechanisms without suggesting that any single one can completely replace the mainstream criminal justice process, and without preference for any of them.

We focus on criminal law mechanisms that apply when there is no need for holding an evidentiary phase. In 95% of the cases or more, defendants confess or admit to the crime they are suspected of committing,²⁶ and the consequent process is aimed at reaching a sentence rather than proving guilt.²⁷ We do not discuss the minority of court cases in

²⁰ See *supra* notes 1–4.

²¹ ZEHR, *supra* note 6, at 92–94. According to Zehr, although changes in the retributive model have been made in order to improve it, the sense of dysfunction is widespread. Thus, perhaps the ground is being prepared for a shift in paradigm.

²² *Id.* at 180–81 (defining restorative justice as a “new lens” through which to look at crime and reactions to it); Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. (YOUTH CRIME & YOUTH JUST. SPECIAL ISSUE) 543, 543–44 (2004). Compare Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 AM. BEHAV. SCI. 768, 768–72 (1998) (positioning restorative justice against the retributive-rehabilitative dichotomy), with Paul McCold, *Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model*, 3 CONTEMP. JUST. REV. 357, 357–58, 399–400, 407 (2000) (presenting a purist’s approach to restorative justice).

²³ Bruce J. Winick & David B. Wexler, *Introduction*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 5–6 (Bruce J. Winick & David B. Wexler eds., 2003).

²⁴ David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 744 (2005); see also David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. 463, 463–64 (2014) (suggesting that therapeutic “liquids” may be poured into mainstream criminal-process “bottles”).

²⁵ STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 106 (2012).

²⁶ *Id.* at 20.

²⁷ Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST. L. 23, 24 (2008).

which, following a plea of “not guilty” the parties introduce witnesses and evidence.

To achieve “maximum variation sampling,” we chose five criminal law instruments that represent distinct ideologies and practices.²⁸ The justice mechanisms we discuss differ not only in their underlying philosophies but in many other ways as well. Some are constructed to be implemented independently of mainstream criminal procedures, whereas others can be easily adjusted to complement them. Some have been tested and practiced widely; others have only recently been introduced. Some are implemented in vastly different programs and models; others are more homogeneous in their implementation. Some have been conceptually developed and debated; others are in an earlier stage of development. Our selection criterion was that each of these mechanisms present a viable option, at least theoretically, in specific criminal cases.

We use the *mainstream criminal process*, the predominant criminal law instrument, as a benchmark in our analysis of other mechanisms, all of which add elements to better meet the needs of victims, offenders, and communities within criminal law. *Problem-solving courts* aim to address the root causes of criminality through a teamwork model headed by therapeutically oriented judges. *Restorative justice* provides space for victims, offenders, and community members to design a reparation plan that reflects a restorative perception of justice. *Therapeutic settlement conferences* enable victims, offenders, and prosecutors to reach settlements that are tailored to their interests. Finally, *restorative sentencing juries* envision a combination of restorative values with community-based notions of just deserts. Focusing on non-adversarial justice mechanisms,²⁹ we ignore instruments that are situated completely within the framework of the adversarial criminal process³⁰—with the exception, of course, of the mainstream criminal process itself. Ours is not a comprehensive sample of non-adversarial criminal law mechanisms, but a selection that we found suitable and sufficiently heterogeneous for our comparative goals.

Some of the mechanisms, such as mainstream criminal process, problem-solving courts, and restorative justice, are practiced regularly (if not frequently) in many jurisdictions. Others are known only in specific localities (therapeutic settlement conferences), or are the vision of bold reformers (restorative sentencing juries). Although restorative sentencing juries have not yet become operational, we decided to include them in our taxonomy because, beyond their procedural innovation, they reflect a unique mixture of seemingly contradictory values such as retribution and restoration.

²⁸ MICHAEL QUINN PATTON, *QUALITATIVE RESEARCH & EVALUATION METHODS* 243 (3d ed. 2002).

²⁹ See MICHAEL KING ET AL., *NON-ADVERSARIAL JUSTICE* 5–6 (2009).

³⁰ Examples for such add-ons are restorative cautioning, procedural rights for victims, and restitutive orders.

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A. Mainstream Criminal Process

To level the field for the mechanisms we compare, we considered only those mainstream criminal processes that do not require evidentiary hearings. We can justify this methodological decision by the fact that in approximately 95% of criminal cases in the U.S. defendants plead guilty,³¹ obviating the need to prove their guilt in court. Without the need for fact finding, judges typically decide only on the punishment, based on the blameworthiness of the defendant and mitigating or aggravating circumstances. But even without the evidentiary stage, modern adversarial criminal process is a complex mix of crime control and due process restrictions combined with victims' rights,³² rehabilitative, and restitutive elements, unlike the system described by Herbert Packer in the 1960s.³³

B. Problem-Solving Courts

In the last two decades, many courts have been reshaping their *modus operandi* to provide more comprehensive responses to crime.³⁴ Out of a growing understanding that criminal courts must go beyond resolving conflicts between individuals and the government concerning law-breaking, problem-solving courts have refocused their goals to address the human problems that cause people to engage in criminal behavior.³⁵ Problem-solving courts specialize according to the underlying results of crime. They include different solution-focused benches such as drug courts,³⁶ mental-health courts,³⁷ family-violence courts,³⁸ veteran courts,³⁹

³¹ BIBAS, *supra* note 25, at 20 (“Today, about nineteen out of twenty adjudicated defendants in America plead guilty. Trials became the exception and plea bargains the rule.”).

³² Although the victims' rights reform has changed criminal processes worldwide, in most jurisdictions victims are still considered interested parties, rather than “third parties” with equal rights. See generally SEBBA, *supra* note 3; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289; Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237 (2008).

³³ Herbert L. Packer, *Two Models of Criminal Process*, 113 U. PA. L. REV. 1, 23–61 (1964).

³⁴ Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1055 (2003); see also Judith S. Kaye, Policy Essay, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 125–51 (2004) (presenting the problem-solving approach and current knowledge about their effectiveness and fairness).

³⁵ Kaye, *supra* note 34, at 127–28.

³⁶ There are more than 2,800 drug courts in the U.S. today, according to the U.S. Department of Justice's Office of Justice Programs. U.S. Dep't. of Justice, Office of Justice Programs, *Drug Courts*, NAT'L CRIM. JUST. REFERENCE SERV. (May 2014), <http://www.ncjrs.gov/pdffiles1/nij/238527.pdf>. Evidence shows that recidivism is less likely among drug court participants. For a meta-analytic review see Ojmarrh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 J. CRIM. JUST. 60 (2012). See also Nancy Rodriguez & Vincent J. Webb, *Multiple Measures of Juvenile Drug Court Effectiveness: Results of a Quasi-Experimental Design*, 50 CRIME & DELINQ. 292, 301 (2004) (showing a

and teen courts.⁴⁰ Problem-solving courts abandon the traditional adversarial model in favor of a collaborative, future-oriented process.⁴¹

Judges in problem-solving courts act as team leaders and work with defense attorneys, prosecutors, and social workers to build rehabilitative programs for their “clients”—the confessing defendants.⁴² Such treatment programs often involve a broad range of reparative, rehabilitative, and supervisory measures such as restitution or symbolic reparation for victims, participation in anger management, family counseling, and other support programs, and regular urine and blood tests.⁴³ Problem-solving courts have been heavily influenced by their “close cousin,” therapeutic jurisprudence—a conceptual framework for identifying therapeutic and anti-therapeutic elements in laws, procedures, and legal actors.⁴⁴ Using the judge-client relationship as a motivational instrument, problem-solving judges meet their “clients” regularly to monitor their progress.⁴⁵

reduction in recidivism rates for juvenile participants).

³⁷ Caitlin T. Harrington, Note, *Breaking the Cycle and Stepping Out of the “Revolving Door”: Why the Pre-Adjudication Model Is the Way Forward for Illinois Mental Health Courts*, 2013 U. ILL. L. REV. 319, 321. Approximately 250 mental-health courts now exist in 43 States in America. See E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 520 (2012). For a discussion about the second generation of mental health courts and the dimensions distinguishing first- from second-generation courts, see Allison D. Redlich et al., *The Second Generation of Mental Health Courts*, 11 PSYCHOL. PUB. POL’Y & L. 527, 527, 532, 535 (2005). For a survey about the entire population of adult mental health courts in the U.S. and the characteristics of mental health courts, see Allison D. Redlich et al., *Patterns of Practice in Mental Health Courts: A National Survey*, 30 LAW & HUM. BEHAV. 347, 349–57 (2006).

³⁸ See Winick, *supra* note 34, at 1057–58. See generally Carrie J. Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263, 263–65 (2002).

³⁹ Stacy Lee Burns, *The Future of Problem-Solving Courts: Inside the Courts and Beyond*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 73, 75 (2010).

⁴⁰ See Winick, *supra* note 34, at 1058–59.

⁴¹ See *Community Courts and Community Justice*, 40 AM. CRIM. L. REV. 1501–1623 (2003) (providing a comprehensive overview on the development of problem-solving courts, their underlying ideology and practice, the various roles of the different players, and the characteristics of the different types of problem-solving courts). See also Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L.J. 1349, 1351 (2011).

⁴² See, e.g., Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1481–82 (2004).

⁴³ See *id.* at 1499; James L. Nolan, Jr., Commentary, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1542, 1547 n.32, 1562 (2003).

⁴⁴ David B. Wexler & Michael S. King, *Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence*, in DRUG TREATMENT COURTS: AN INTERNATIONAL RESPONSE TO DRUG DEPENDENT OFFENDERS 21, 21 (Caroline S. Cooper et al. eds., 2013), available at http://www.cicad.oas.org/fortalecimiento_institucional/dtca/publications/DTC_FINAL_PUBLICATION.pdf; see also Nolan, *supra* note 43, at 1548–50 (2003) (discussing the relationship between therapeutic jurisprudence and drug courts).

⁴⁵ Nolan, *supra* note 43, at 1542–43.

They express praise and pride when their clients are successful, and disappointment and anger when they fail, abandoning the image of blind justice in favor of a more human model of judicial work.⁴⁶ Despite their proliferation in the U.S. and elsewhere, problem-solving courts have been widely criticized for their failure to address the broader social causes of crime by focusing on individual responsibility,⁴⁷ for jeopardizing defendants' due-process rights,⁴⁸ and for incorporating the task of parole officers into the role of judges.⁴⁹

C. Restorative Justice

Restorative justice has been dubbed as a "new lens" through which to view crime and the appropriate responses to it.⁵⁰ The mechanism was first used in the 1970s, in the victim-offender mediation programs practiced in the United States and Canada.⁵¹ Since the 1990s, it has been part of family group conferencing in juvenile offending in New Zealand and Australia.⁵² In North America, the healing circles have become part of the formal sentencing process for Native American defendants.⁵³ Restorative justice has become a central mechanism within criminal legal systems across the globe.⁵⁴ Restorative justice processes bring together victims, offenders, their supporters, and community members to openly discuss the crime and its aftermath, and to consider ways to repair the harm caused

⁴⁶ See *id.* at 1543.

⁴⁷ See Miller, *supra* note 15, at 427 ("[A] strategy focused on individual responsibility and self-esteem cannot engage with the wider perspective of governmental and social failure that is the backdrop against which many drug addicts live their lives.").

⁴⁸ Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1533 (2000).

⁴⁹ Miller, *supra* note 15, at 424.

⁵⁰ ZEHR, *supra* note 6, at 180–81.

⁵¹ Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDozo J. CONFLICT RESOL. 511, 519–23 (2007) (describing the first victim-offender mediation processes and their development).

⁵² Kathleen Daly, *Mind the Gap: Restorative Justice in Theory and Practice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 219, 220–27 (Andrew von Hirsch et al. eds., 2003) (describing the introduction of restorative justice conferences in New Zealand and Australia); Gabrielle Maxwell & Allison Morris, *Youth Justice in New Zealand: Restorative Justice in Practice?*, 62 J. SOC. ISSUES 239, 243, 248–49 (2006) (describing family group conferences in New Zealand, conducted pursuant to the 1989 Children, Young Offenders and their Families Act).

⁵³ Rashmi Goel, *Aboriginal Women and Political Pursuit in Canadian Sentencing Circles: At Cross Roads or Cross Purposes*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 60, 60–62 (James Ptacek ed., 2010) (describing justice circles operated by Native American communities in Canada); RUPERT ROSS, RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE 16–17 (1996).

⁵⁴ See, e.g., Umbreit et al., *supra* note 51, 519–28. Victim–offender mediation is also gaining support amongst the states in the U.S. *Id.*

by it.⁵⁵ The various models of restorative justice differ mainly in the number of participants, the level of their formality, and in the stages at which they are used in the criminal process,⁵⁶ but they share some basic principles such as stakeholders' empowerment, reparation of harm, respectful listening, and non-domination.⁵⁷ Critics of restorative justice have raised questions about its ability to produce equal and just-desert outcomes⁵⁸ and the risk of over-empowering dysfunctional communities.⁵⁹ Others have highlighted the gaps between the theory of restorative justice and its application in practice.⁶⁰ Notwithstanding these and other critiques, there is sufficient evidence by now to demonstrate that, in appropriate circumstances, restorative justice can achieve the goals of criminal law.⁶¹ Most notably, a restorative redefinition of the deontological goal includes restorative justice as a criminal law instrument that can achieve a broadened, positive, just-desert outcome.⁶²

D. Therapeutic Settlement Conferences

A recently developed instrument practiced in Arizona—and regulated by its prosecutorial guidelines—is the criminal settlement conference,

⁵⁵ See generally TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW (1999); WALGRAVE, *supra* note 9, at 76–77; Braithwaite, *supra* note 4.

⁵⁶ John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 563, 563 (2002).

⁵⁷ *Id.* at 569.

⁵⁸ BIBAS, *supra* note 25, at 100; Andrew Von Hirsch & Andrew Ashworth, Review Article, *Not Not Just Deserts: A Response to Braithwaite and Pettit*, 12 OXFORD J. LEGAL STUD. 83, 92–94 (1992) (discussing the risk of unequal treatment of offenders by custom-tailored restorative justice processes).

⁵⁹ Concern about community involvement is particularly salient in cases of gendered violence. See, e.g., Loretta Frederick & Kristine C. Lizdas, *The Role of Restorative Justice in the Battered Women's Movement*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 39, 50 (James Ptacek ed., 2010) (discussing concerns about community members excusing violence against women as private or as deserved by the victim); Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 42, 54–55 (Heather Strang & John Braithwaite eds., 2002) (considering “the community” as both the source of the problem and its solution).

⁶⁰ See generally THEO GAVRIELIDES, RESTORATIVE JUSTICE THEORY AND PRACTICE: ADDRESSING THE DISCREPANCY (2007).

⁶¹ See, e.g., James Bonta et al., *Restorative Justice and Recidivism: Promises Made, Promises Kept?*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 108, 112–15 (Dennis Sullivan & Larry Tiffet eds., 2006) (describing the effectiveness of restorative justice in reducing recidivism rates). See generally LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE (2007); Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127 (2005).

⁶² Dancig-Rosenberg & Gal, *supra* note 11, at 2335 (“The offender's efforts to make amends and the promotion of the victim's wellbeing are likely to restore the moral balance which was disrupted by the offense . . . thus becoming the offender's secular penance, without imposing pain upon him. This is how justice in the restorative sense is achieved.” (citations omitted)).

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which is an extension of the plea negotiations hearing.⁶³ Mediated by a judge specifically assigned to this process, settlement conferences involve the state, the defense, and the victim, who ideally should be represented.⁶⁴ The goal of the conferences is to reach an agreed-upon settlement that addresses the needs and wishes of the victims, the defendant, and the state. Criminal settlement conferences overcome several of the vices of plea agreements. For example, the victims' voices are largely muted in standard plea bargaining negotiations.⁶⁵ This is overcome in criminal settlement conferences,⁶⁶ which are used in serious offences, including sexual offenses.⁶⁷

What we call therapeutic settlement conferences are criminal settlement conferences using the "last best offer" technique, a recent development inspired by ideas from arbitration, mediation, negotiation, therapeutic jurisprudence, and restorative justice.⁶⁸ According to this technique, the conference judge, after initial discussion of the crime and of the participants' needs, asks each participant to propose a sentence.⁶⁹ The judge stresses that if the participants do not reach agreement, rather than seeking a compromise or a combination of the various proposals, he or she would adopt one of them in full, assuming that it is lawful, reason-

⁶³ Robert L. Gottsfield & Mitch Michkowski, *Settlement Conferences Help Resolve Criminal Cases*, 90 JUDICATURE 196, 197 (2007). Rule 17.4(a) of Arizona's Rules of Criminal Procedure provides "Plea Negotiations. The parties may negotiate concerning, and reach an agreement on, any aspect of the case. At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice. Before such discussions take place, the prosecutor shall afford the victim an opportunity to confer with the prosecutor concerning a non-trial or non-jury trial resolution, if they have not already conferred, and shall inform the court and counsel of any statement of position by the victim. If the defendant is to be present at any such settlement discussions, the victim shall also be afforded the opportunity to be present and to state his or her position with respect to a non-trial or non-jury trial settlement. The trial judge shall only participate in settlement discussions with the consent of the parties. In all other cases, the discussions shall be before another judge or a settlement division. If settlement discussions do not result in an agreement, the case shall be returned to the trial judge." ARIZ. R. CRIM. P. 17.4(a). See also Gottsfield & Michkowski, *supra*, at 197.

⁶⁴ David B. Wexler & Michael D. Jones, *Employing the "Last Best Offer" Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation*, 6 PHOENIX L. REV. 843, 844–47 (2013).

⁶⁵ Simon N. Verdun-Jones & Adamira A. Tijerino, *Four Models of Victim Involvement During Plea Negotiations: Bridging the Gap Between Legal Reforms and Current Legal Practice*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 471, 477–78 (2004) (discussing how victims are excluded from plea-bargaining negotiations and their voices are heard only faintly, if at all).

⁶⁶ Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 300 n.28 (2005).

⁶⁷ Wexler & Jones, *supra* note 64, at 844.

⁶⁸ *Id.* at 845–49.

⁶⁹ *Id.* at 846.

able, and meets governing sentencing principles.⁷⁰ After each proposal is presented, the judge leads an open discussion about the various proposals, their appropriateness, and implications for each of the parties involved.⁷¹ The judge's commitment to fully adopt one of the proposals provides a strong incentive for the participants not only to propose fair and reasonable settlements, but also to reach an agreement with the others in order to avoid an external judicial decision. The lawyers' envisioned role is to guide their clients in considering the needs and wishes of their counterparts in addition to their own, as well as public interests such as deterrence, retribution, and prevention.⁷² If, after the final discussion, the parties do not reach an agreed-upon settlement, the judge can choose one of the three offers as an indicated sentence.⁷³ At this stage, the defendant can still veto the indicated sentence and obtain a trial with a different judge.⁷⁴ If none of the offers meet external requirements, the judge can refer the case back to the trial judge or ask the parties to revise and resubmit their offers.⁷⁵

We made a methodological decision to include therapeutic settlement conferences when practiced with the last best offer approach, despite the fact that the mechanism has not yet been scrutinized or developed. A more robust choice may have been the practiced and regulated settlement conferences, as specified in Rule 17.4(a) in the Arizona Rules of Criminal Procedure. Nevertheless, we chose to focus on the more innovative development of the last best offer approach because we believe that it advances the analytical discussion and highlights the therapeutic potential of this seemingly technical innovation. Despite the innovation in granting victims a status in the pre-settlement negotiations, settlement conferences are an inherently mainstream-criminal-process element because they do not regard participants' well-being and reconciliation as stated goals of criminal law. By contrast, therapeutic settlement conferences incorporate these considerations into the legal equation and can therefore be regarded as a truly separate justice mechanism.

E. Restorative Sentencing Juries

In response to the common belief that restorative justice has much to offer but fails to deliver retribution, Stephanos Bibas suggests a new sentencing mechanism, which he calls "restorative sentencing juries."⁷⁶

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 848; Wexler, *supra* note 24, at 755.

⁷³ Wexler & Jones, *supra* note 64, at 846.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See BIBAS, *supra* note 25, at 157 ("The idea would be to sever the useful procedures from the substantive anti-punishment philosophy. Restorative procedures could empower the parties to express themselves and heal in the course of having local lay juries gauge and impose deserved punishment. Restoration need not be at

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The juries consist of victims, their family members, and friends; offenders, their families, and friends; neighbors who are not directly related to the case; and a mediator.⁷⁷ Aiming to combine the authentic voices of the direct stakeholders with the public interest for fair and just punishment, restorative sentencing juries differ in size and majority requirements according to the magnitude of the offenses.⁷⁸ Victims and offenders are invited to express their wishes and feelings before jury members and can engage in a direct dialogue in which they would be “free to vent, discuss, apologize, and forgive, but could not be forced to do so.”⁷⁹ Jurors then retire to discuss the appropriate sentence, guided by what they have heard and by videotaped statements of the other stakeholders.⁸⁰ The balance of power is maintained through a composition in which half the jurors represent community members and the other half is divided equally between family members and friends of the victims and the offenders.⁸¹ Respectful listening and candid deliberation about possible just responses is maintained with the support of the neighbors, who pledge to keep their involvement fair and objective.⁸² Assisted by optional sentencing guidelines, the neighbors provide a balance for excessively vengeful or extremely forgiving victims, representing the public sentiments of justice.⁸³ At the same time, the neighbors are aiming to see both parties visibly satisfied and possibly begin to reconcile, making possible less punitive decisions. In short, restorative sentencing juries are envisioned to “restore checks and balances to our system, counterbalancing what had become unilateral prosecutorial power to plea bargain. They would restore a measure of sanity and common sense to offset overcriminalization.”⁸⁴

odds with retribution, but could complement it.”).

⁷⁷ *Id.* at 157–58.

⁷⁸ *Id.* at 158 (suggesting six jurors and a majority of votes to agree on a sentence for misdemeanors, twelve jurors for lesser felonies, and larger juries, with two-thirds or three-quarters requirements, for imposing punishment for more serious felonies).

⁷⁹ *Id.* at 159.

⁸⁰ *Id.* at 158. Another possibility, not mentioned by Bibas, is providing offenders and victims with the opportunity to be present while the jury members deliberate. Making the jury deliberations open to victims and offenders brings this mechanism closer to restorative justice.

⁸¹ *Id.*

⁸² *Id.* The jury system in general is debatable, and raises concerns about racial and gender-based biases, among other criticisms. See generally Paul Butler, *Essay, Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

⁸³ See BIBAS, *supra* note 25, at 158–59 (emphasizing that the advisory guidelines and the jury deliberations would check insiders, particularly public prosecutors who often pursue extremely harsh punishments for defendants who go to trial).

⁸⁴ *Id.* at 159. But see Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein’s Monster?*, 126 HARV. L. REV. 1299, 1322–24 (2013) (reviewing BIBAS, *supra* note 25) (criticizing the suggested mechanism as being a “romanticized” vision of a “village ideal”).

II. PARAMETERS

We propose four families or clusters of parameters to analyze the justice mechanisms discussed in the previous Section: process-, stakeholder-, substance-, and outcome-related parameters. Our choice of the following parameters is based largely on previous research. Of the parameters identified in relation to one or two of the mechanisms, we chose the ones that may be generalized and made applicable to the other mechanisms as well. The innovation in this taxonomy is in the effort to bring together many parameters relating to many mechanisms, creating a matrix that can help evaluate, compare, and select different mechanisms in various circumstances.

Within each family, each parameter is constructed as a continuum with two opposing ends. We do not aim to prioritize the parameters or their clusters, nor do we contend that either end of a scale is inherently superior to the other. Rather, we propose a comprehensive mixture of the evaluative elements and leave it to policymakers to judge the relative importance of each parameter, based on their normative preferences.

A. *Process-Related Parameters*

In this group of parameters we include elements that describe the nature of the mechanism: its format, structure, and characteristics. The first parameter refers to the existence of communication between the victim and the offender, creating a continuum between mechanisms that involve victim-offender dialogue and those that do not, with indirect dialog positioned in the middle of the continuum.⁸⁵ The existence of dialogue between offender and victim is an important criterion differentiating between mainstream criminal processes and other justice mechanisms,⁸⁶ because in the former the victim is not considered to be a party, and therefore messages cannot pass between the victim and the offender. Even victim impact statements and other participatory vehicles that enable victims to express their views to the judge or prosecutors do

⁸⁵ “Indirect dialog” refers to processes that allow victims or offenders to deliver messages to each other through an intermediary, typically the prosecutor or the judge. See Barbara Raye & Ann Warner Roberts, *Restorative Processes*, in HANDBOOK OF RESTORATIVE JUSTICE 211, 218–19 (Gerry Johnstone & Daniel W. Van Ness, eds. 2007).

⁸⁶ Some traditional criminal law scholars argue that a criminal act reflects a violation of abstract social norms that the state has chosen to protect through the criminal code. According to these scholars, the conflict is not between victims and offenders but rather between offenders and society, represented by state prosecution. See, e.g., DAVID ORMEROD, SMITH AND HOGAN’S CRIMINAL LAW 5–7 (13th ed. 2011); THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 178 (Joan Petersilia & Kevin R. Reitz eds., 2012). The restorative justice literature, by contrast, highlights the interpersonal elements of crime, arguing for the centrality of direct victim-offender dialog as a necessary step in addressing crime. See, e.g., ZEHR, *supra* note 6, at 181–82.

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not involve any direct or indirect communication with the offender.⁸⁷ By contrast, criminal justice mechanisms that facilitate communication between the victim and the offender, even with the assistance of a third party, can be characterized as enabling dialog. Indeed, some mechanisms encourage open dialog between participants, for example, between judge and victim or between judge and offender. This approach has more to do with our next parameter, the flexibility-formality continuum, because informality enables open discussions between participants in the process. This parameter addresses several questions about the characteristics of the process: is it custom-tailored or a one-size-fits-all? Are the parties bound (and protected) by strict evidentiary and procedural rules, or are they free to act according to the circumstances and dynamics of the situation? Is the process tightly structured or can it be changed according to changing needs? Is the process highly formalized in its symbolic representations such as language, attire, and physical architecture? The third parameter, hierarchy, moves along a continuum between mechanisms that treat the participants as complete equals in a flat hierarchy and those that treat participants differently according to their title, profession, and role in the process. The fourth parameter describes the recruitment of stakeholders to the various justice mechanisms, creating a continuum between voluntary and coercive processes.⁸⁸

B. Stakeholder-Related Parameters

This family of parameters relates to the characteristics of the parti-

⁸⁷ Some modern scholars, such as Dan Kahan, consider the communicative role of punishment and therefore are likely to argue that the mainstream criminal process involves some indirect dialog between victims and offenders. See Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1641–42 (1998) (reviewing WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997)) (discussing punishment having the function of reflecting the repugnance of the community, i.e., the “emotions of the community”). Antony Duff’s communicative theory refers largely to the role of punishment in delivering a censuring message from society to the offender and a supportive message to the victim. But when Duff discusses the role of the victim in court, he notes that the communication between the victim and the offender may foster an understanding of the harm caused by the crime and stimulate a sense of remorse and repentance in the offender. See generally R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001); R. A. Duff & S. E. Marshall, *Communicative Punishment and the Role of the Victim*, CRIM. JUST. ETHICS, Summer/Fall 2004 at 39 (2004).

⁸⁸ DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 75 (4th ed. 2010) (explaining that encounter-based processes, such as restorative justice, are committed to voluntary participation, and the hopes of offenders to receive a more lenient sentence do not preclude the voluntary nature of the process, as long as there is real alternative). Note that here, as in the other parameters, the position on the continuum of each mechanism reflects its relative ranking on the scale. No mechanism can guarantee absolute voluntariness on the part of defendants because the threat of being referred back to the formal criminal justice process is always present. Voluntariness, therefore, is a relative rather than an absolute characteristic of justice mechanisms.

pants and the nature of their involvement in the various justice mechanisms. The first parameter differentiates between mechanisms that empower the private stakeholders involved in the case, giving them a central decision-making role (lay-centered) and those in which the professionals hold the exclusive power of decision making (professional-centered). The second and third parameters relate directly to the degree to which the various mechanisms are attuned to the interests of victims and offenders. Justice mechanisms characterized as victim-oriented are sensitive to the victims' wishes, needs,⁸⁹ rights, and sense of justice, whereas mechanisms categorized as not victim-oriented disregard victim-related considerations. Likewise, mechanisms that are offender-oriented are focused on the rights, needs, or notions of justice of the offenders and are therefore either rehabilitative or retributive, according to the blameworthiness of the offenders and their rehabilitative prospects. In contrast, mechanisms that prioritize considerations external to the offender, such as general deterrence, are located at the not-offender-oriented end of the third parameter. The fourth parameter refers to the degree to which each justice mechanism is accessible to interested parties and the larger community, acknowledging that the consequences of crime reach beyond the offender and the victim. Process inclusiveness is measured by both the quantity of participants and the quality of their participation: some mechanisms explicitly invite a large number of participants whereas others limit participation to the direct stakeholders only. Similarly important, some mechanisms enable the extended parties to affect the outcomes whereas others admit indirect stakeholders only as witnesses or at best, as supporters. This parameter creates a continuum between inclusive and exclusive mechanisms. A fifth parameter, community- versus state-managed, describes the identity of those who manage the justice mechanisms: are they community representatives, reflecting a belief that crime is a matter that should be dealt with by civil society, or are they formal state representatives, based on the assumption that the state holds the monopoly on regulating criminal behavior?

C. Substance-Related Parameters

This set of parameters refers to the core values and commodities that are at the heart of each mechanism. First, some justice mechanisms use predominately rights terminology, whereas others resort to a need-based

⁸⁹ We consider needs as goals that are "instrumentally and universally linked to the avoidance of serious harm." LEN DOYAL & IAN GOUGH, A THEORY OF HUMAN NEED 42 (1991). According to Doyal and Gough, the two basic human needs are physical survival and personal autonomy, because these are the conditions for any individual action. *Id.* at 56, 59. Autonomy includes three elements: the ability to make informed choices, mental health, and opportunities (a certain level of freedoms). *Id.* at 60. Physical survival means physical health. *Id.* at 56. People may face serious harm when their health is in such condition that it limits their active participation in social life. *Id.*

or interest terminology.⁹⁰ The latter focus on the concrete needs or interests of their participants even when achieving these goals may jeopardize their procedural rights and formal entitlements; the former rely heavily on the stakeholders' entitlements, based on a unified set of rules and legal rights, and even when such rights are violated or limited, these interventions are justified by the rights terminology itself. A similar continuum distinguishes between mechanisms that endorse emotional discourse, and those that do not. Mechanisms positioned at the emotional end of the spectrum construct the expression of various emotions such as repentance, shame, sorrow, regret, anger, fear, resentment, hope, trust, empathy, and compassion into the discourse itself, reflecting a perception of emotions as important and relevant. By contrast, mechanisms positioned at the other end of the continuum ignore subjective, emotive expressions and even regard them as an interference with the essence of the process. In the next parameter, mechanisms that regard their procedural characteristics as promoting the achievement of their goals are positioned opposite mechanisms that regard procedural rules as limiting their ability to achieve their goals. Thus, the process-as-vehicle versus process-as-obstacle continuum refers to the function assigned to the procedural rules typical of each model. Non-adversarial mechanisms emphasize respectful, empowering, and therapeutic procedures, and regard them as promoting the achievement of the goals of empowerment, reparation, and problem-solving. The formal criminal process regards procedural justice restrictions as limitations in the prosecution's endeavor to achieve retribution and other utilitarian goals. The insertion of victims' rights into the criminal justice process is an example of how restrictions requiring prosecutorial representatives to consult, inform, and protect victims in the course of the process are obstacles in the achievement of the final goal.⁹¹ Finally, the fourth parameter differentiates between communitarian and libertarian mechanisms.⁹² Communitarian mechanisms, such as some models of community-based restorative justice, stress the importance of the community and its role both as a regulatory agent and a stakeholder (by virtue of being a victim) in a dispute.⁹³

⁹⁰ For a discussion of the relationship between rights and needs, see Jeremy Waldron, *The Role of Rights in Practical Reasoning: "Rights" versus "Needs"*, 4 J. ETHICS 115 (2000).

⁹¹ Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC'Y 294, 305–06 (2005).

⁹² See, e.g., WALGRAVE, *supra* note 9, at 77–79 (highlighting the differences between communitarians, who consider people's connectedness as an essential part of their identities, and liberals, who consider autonomy and self-interests to be key values, and noting that in both approaches taking the extreme standpoints is risky); see also John Braithwaite, Survey Article, *Repentance Rituals and Restorative Justice*, 8 J. POL. PHIL. 115, 122 (2000) (coining the term “individual-centered communitarianism”).

⁹³ Lode Walgrave, *From Community to Dominion: In Search of Social Values for Restorative Justice*, in RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS 71, 73 (Elmar G. M. Weitekamp & Hans-Jürgen Kerner eds., 2002).

Communitarian mechanisms treat offenders and victims not as entirely separate, autonomous individuals with mutually competing interests, but rather as inseparable community members whose interests are tied with those of their respective communities and, at times, with each other's.⁹⁴ By contrast, libertarian mechanisms treat offenders and victims individually, emphasizing the conflict between the state and the individual and between different individuals, and ignoring the social context in which the crime has been committed.⁹⁵

D. Outcome-Related Parameters

This cluster of parameters measures justice mechanisms based on the characteristics of their outcomes. First, justice mechanisms can be positioned along the continuum of future- versus past-oriented outcomes. Past-oriented mechanisms typically emphasize the blameworthiness of the offender and the severity of the offense as justifications for the process outcomes.⁹⁶ They also stress measurements for proportional punishment⁹⁷ and reject any reference to "contingent future benefits that [their outcomes] might bring."⁹⁸ This is the theoretical and moral basis of retributivism.⁹⁹ By contrast, future-oriented mechanisms seek to achieve utilitarian outcomes, such as rehabilitation, incapacitation, and deterrence.¹⁰⁰ They examine the possible consequences of available solutions and select the solutions that are considered to maximize wellness in society.¹⁰¹ A more specific parameter relating to past-oriented outcomes separates mechanisms that provide retributive requital¹⁰² from those that do not. Retributive requital refers to responses that are imposed as an act of vengeance, justified by their intrinsic moral value for being proportional to the severity of the offense and the blameworthiness of the offender.¹⁰³

⁹⁴ *Id.* at 81–82.

⁹⁵ See John Hospers, *The Libertarian Manifesto*, in JUSTICE: ALTERNATIVE POLITICAL PERSPECTIVES 22, (James P. Sterba ed., 4th ed. 2003). According to libertarian philosophy, the only proper role of the state is to embody the "retaliatory use of force against those who have initiated its use." *Id.* at 26 (emphasis omitted). Requiring people to help one another is inappropriate under this theory.

⁹⁶ See Sarah Holtman, *Kant, Retributivism, and Civic Respect*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 107, 108 (Mark D. White ed., 2011).

⁹⁷ *Id.* at 118.

⁹⁸ R.A. Duff, *Retrieving Retributivism*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 3, 3 (Mark D. White ed., 2011).

⁹⁹ The complexity of the term retributivism deserves a separate discussion, which is beyond the scope of this Article. See generally LEO ZAIBERT, PUNISHMENT AND RETRIBUTION (2006); RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY (Mark D. White ed., 2011).

¹⁰⁰ Cahill, *supra* note 11, at 32.

¹⁰¹ *Id.*

¹⁰² Dancig-Rosenberg & Gal, *supra* note 11, at 2324 n.44 (explaining the broad meaning of requital, which includes the various interpretations of retribution); *id.* at 2333 n.89 (defining requital as promoting "both the goal of achieving proportionality in punishment ('just deserts'), and the goal of 'making offenders pay' for their deeds (retribution)").

¹⁰³ *Id.* at 2333.

Non-retributive reignal refers to responses that may impose a similar burden on the wrongdoer, but out of motivation to “right the wrong” by repairing the harm caused to the victim.¹⁰⁴ A third parameter in this cluster differentiates between mechanisms that deliver outcomes that are rehabilitative in nature and those that typically incapacitate offenders. Finally, some mechanisms produce conflict-resolution outcomes, whereas others aspire to achieve a broader concept of justice. Conflict resolution refers to outcomes that provide short-term resolution of current legal disputes.¹⁰⁵ At the other end of the continuum, justice refers to more holistic outcomes that promote universal norms of human rights and truth-finding, beyond the resolution of the dispute at hand.¹⁰⁶ Current discourse separates between conflict-resolution and problem-solving outcomes,¹⁰⁷ and we can place problem-solving outcomes in the middle of this continuum.

III. TAXONOMY OF CRIMINAL JUSTICE MECHANISMS

We propose an integrated taxonomy, focusing on the prototypes of the five selected criminal law mechanisms described in Section I. We first position each mechanism along the continua of the various parameters. Next, we examine the emerging picture using a figurative chart, showing the relative position of each mechanism along the various continua and pointing out the considerations relevant for policy makers when choosing between various mechanisms.

A. Mainstream Criminal Process

As noted above, to create a basis for comparison between mainstream criminal procedures and other criminal law mechanisms, we chose to limit our analysis to non-evidentiary procedures involving either a plea agreement or the defendant’s admission of guilt. It is relatively simple to categorize the mainstream criminal process based on our list of parameters.

Mainstream criminal processes do not facilitate any dialogue between victims and offenders and prohibit victim-offender encounters.¹⁰⁸

¹⁰⁴ Kathleen Daly, Does Punishment Have a Place in Restorative Justice? 14 (Sept. 1999) (unpublished manuscript), available at http://www.griffith.edu.au/__data/assets/pdf_file/0016/50326/kdpaper7.pdf.

¹⁰⁵ KING ET AL., *supra* note 29, at 14.

¹⁰⁶ JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 251 (2002) (“The facilitator is an agent of justice first, conflict resolution second, because a restoration of harmony based on injustice makes mediation a tool of domination.”).

¹⁰⁷ Non-adversarial elements seek to address the root of the problem and solve it, instead of searching for a short-term resolution of the current legal dispute. KING ET AL., *supra* note 29, at 14–15.

¹⁰⁸ See, e.g., Stephanos Bibas & Richard A. Bierschbach, Essay, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 148 (2004) (arguing that the criminal justice process denies victims and offenders opportunities to reconcile).

They are formal, hierarchical, and coercive, although entering a plea-agreement is officially voluntary.¹⁰⁹ Court-based criminal processes are professional-centered,¹¹⁰ exclusive,¹¹¹ and state-managed because those in charge are public prosecutors and other state officials. They are offender-oriented because they consider the offenders' blameworthiness, rehabilitative prospects, and procedural rights, but are not victim-oriented, despite recent victims' rights reforms. When resolved through a plea agreement, the mainstream criminal process may be considered even less victim-oriented because victims are typically denied the opportunity to speak directly with the defendant.¹¹²

The mainstream criminal process is located at the extreme ends of substance-related parameters: it relies heavily on rights-based terminology,¹¹³ even when defendants' rights are secondary to deterrence and incapacitation. Mainstream criminal processes generally reject emotional language,¹¹⁴ regard due-process restrictions as obstacles, rather than vehi-

¹⁰⁹ See Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1417 (2003) (arguing that because the legal system threatens defendants with increased penalties for exercising their right to trial, they are pressed to submit *Alford* and *nolo* guilty pleas); cf. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1920–21 (1992) (explaining that plea bargaining does not rely on duress because prosecutors are not responsible for creating the defendants' predicament).

¹¹⁰ BIBAS, *supra* note 25, at 31 (explaining that "outsiders" are left without any ability to check, balance, and dispute decisions that public prosecutors and defense attorneys make on a regular basis without much public supervision).

¹¹¹ They are exclusive both in the quantity of people invited and in the quality of participation. Only the offender and those who may provide relevant evidence are invited. The interest of other stakeholders is not a consideration for inclusion. They are similarly exclusive in the quality of participation, because the ability of those invited (for example, the victim) to affect the outcome is limited and incidental. *Id.* at 38.

¹¹² *Id.* at 75.

¹¹³ *Id.* at 111–12. It is possible to argue that there is substantial discussion of the offender's needs in the defense arguments at the sentencing stage. Needs also emerge when state authorities are asked to report on the rehabilitative prospects of the defendant. Nevertheless, the dominant discourse is about defendants' due-process rights and the right against disproportional punishment.

¹¹⁴ *Id.* at 90. It is possible to argue that there is extensive use of emotive language during the sentencing stage aimed at eliciting desired outcomes: prosecutors talk about the gravity of the crime and the emotional damage to victims; defense attorneys stress their clients' sense of repentance and the horrific implications that incapacitation may have for their families. "Pure" criminal law, however, regards emotive discourse as undesirable and even contradictory to its fundamental principles. See *Payne v. Tennessee*, 501 U.S. 808, 818 (1991) (citing *Booth v. Maryland*, 482 U.S. 496 (1987)). In *Payne*, the Court overruled its previous decision in *Booth v. Maryland*, and held that victims may present victim impact statements. 501 U.S. at 827. The dissenting justices, in agreement with *Booth*, argued that the submission of victim impact statements in capital cases promotes "arbitrary and capricious" decisions. See *id.* at 845–46 (Marshall, J., dissenting) (citations internal quotation marks omitted).

cles for achieving just deserts, deterrence, and rehabilitation,¹¹⁵ and are based on libertarian notions of individual freedoms and autonomy rather than communal ties and obligations.¹¹⁶

With respect to outcome-related parameters, mainstream criminal processes are largely past-oriented, as they search for just deserts outcomes, but they may also integrate future-related outcomes when rehabilitation or incapacitation goals become salient.¹¹⁷ Court-based sentencing decisions have, *prima facie*, a reputation for achieving “justice” according to the terms of the continuum of justice-making versus conflict resolution, because they are purported to consider broader values than the dispute at hand, including the public interest of just deserts.¹¹⁸ In reality, however, the extensive use of guilty pleas, often based on prosecutorial estimates of win–lose chances, undercuts this assumption.¹¹⁹

We therefore follow the critics of the mainstream criminal process¹²⁰ and position it at the “conflict resolution” end of the justice scale. What most sharply separates mainstream criminal processes from existing non-adversarial mechanisms is that the former seek to achieve just-desert outcomes, that is, retributive requital. Punitive sentences are designed not only to rehabilitate, deter, and incapacitate, but, first and foremost, to provide a proportional retributive response to the wrongdoing of the offender.¹²¹ It is more difficult to place the mainstream criminal process along the rehabilitation-incapacitation continuum. Court-based sentences can lead to either of these outcomes, depending on the offender’s estimated rehabilitative prospects and the normative prioritization of sentencing goals within each specific legal system.

B. Problem-Solving Courts

It is difficult to make conclusive statements about the position of problem-solving courts along the various continua because different

¹¹⁵ Packer, *supra* note 33, at 61.

¹¹⁶ WALGRAVE, *supra* note 9, at 78.

¹¹⁷ See, e.g., Andrew Von Hirsch, *Punishment, Penance, and the State, in PUNISHMENT AND POLITICAL THEORY* 69, 69–70 (Matt Matravers ed., 1999).

¹¹⁸ See, e.g., BIBAS, *supra* note 25, at xv–xvi (contrasting the popular portrayal of criminal trials as morality plays that broadly evaluate conflicting societal values and do justice for victims and defendants with practitioners’ experience of a system where “plea bargaining is the name of the game.”).

¹¹⁹ *Id.* at 19 (arguing that, in practice, most sentences are not based on justice considerations, but on prosecutorial needs to win cases). Even when other interests are considered, such as the victim’s difficulty to testify, reaching a plea agreement to address those interests is often considered a legal compromise, not a triumph.

¹²⁰ *Id.* at 42 (“[Prosecutors] may use plea bargaining to help rack up relatively easy convictions and avoid risking embarrassing acquittals, at the expense of sentence severity. . . . They may be tempted to push a few strong cases to trial to gain marketable experience while bargaining away weak ones.”).

¹²¹ See Bazemore, *supra* note 22, at 769.

types of problem-solving courts rank differently in each scale.¹²² This diversity is particularly pronounced regarding stakeholder-related parameters. Drug courts, mental-health courts, and veteran courts are clearly offender-oriented, and it is rare to see a victim playing a meaningful role in them.¹²³ Domestic violence courts, by contrast, are noticeably victim-oriented, and it is likewise rare to see offenders' needs being discussed there.¹²⁴ Community courts represent a more balanced treatment of both offenders and victims and therefore may be considered as both offender oriented and victim oriented.¹²⁵ Problem-solving courts are largely exclusive, with the exception of some community courts, where community members can become members of the advisory boards and are welcome to take part in proceedings.¹²⁶ Most problem-solving courts are state-

¹²² See MODEL PENAL CODE: SENTENCING, Reporters' Memorandum at xx (Council Draft No. 4, 2013) ("The configurations of these courts, and the resources they command, vary by jurisdiction and by the problems they are designed to confront. Some courts operate as diversion programs, while others are positioned at sentencing or within deferred-adjudication programs. Many embrace nontraditional models of legal advocacy, setting aside some adversarial protections in favor of a more holistic or problem-oriented approach to criminal offending. Whatever form they take, these courts have strong supporters and equally vehement opponents.").

¹²³ See Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 568 (2010); Miller, *supra* note 42, at 1501; Shaughn Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 115–16 (2007); *see also* NAT'L ASS'N OF DRUG COURT PROF'L'S, DEFINING DRUG COURTS: THE KEY COMPONENTS iii–iv (Jan. 1997), available at <http://www.nadcp.org/sites/default/files/nadcp/KeyComponents.pdf> (listing ten key components, none of which mention the victim). We thank Eric Miller for pointing out that in drug courts and mental health courts, the offender's family may be considered the victim of the defendant's behavior. We note, however, that families of defendants may be considered their victims in all justice mechanisms, even when they do not get the same attention of the courts as in problem-solving courts. The direct victims of the offense that brought the defendant to court are typically excluded in non-domestic violence problem-solving courts. Drug court defendants retain some power and can always opt out of treatment and accept incarceration. See Stacy Lee Burns & Mark Peyrot, *Reclaiming Discretion: Judicial Sanctioning Strategy in Court-Supervised Drug Treatment*, 37 J. Contemp. Ethnography 720, 739 (2008).

¹²⁴ Michael S. King, *Should Problem-Solving Courts Be Solution-Focused Courts?*, 80 REV. JUR. U.P.R. 1005, 1023–24 (2011); Lisa Lightman & Francine Byrne, *Addressing the Co-Occurrence of Domestic Violence and Substance Abuse: Lessons from Problem-Solving Courts*, 6 J. CENTER FOR FAM., CHILD & CTS. 53, 59–60 (2005).

¹²⁵ Michael Cobden & Ron Albers, *Beyond the Squabble: Putting the Tenderloin Community Justice Center in Context*, 7 HASTINGS RACE & POVERTY L.J. 53, 56 (2010).

¹²⁶ Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L. REV. 897, 907 (2003). One example of a community court is the Victorian Koori Court in Australia, where the inclusion of community members is explicit. *Koori Court*, MAGISTRATES' COURT VICTORIA, <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/koori-court>. Community courts are also criticized in feminist literature for excluding women from the dialog. *See, e.g.*, Erin S. Mackay, *Therapeutic Jurisprudence: A Just Framework for Indigenous Victim/Survivors of Sexual Violence?* 81, 243–44 (Oct. 2013) (unpublished Ph.D. dissertation, University of New South Wales) (on file with

managed, but community courts are largely run by the community.¹²⁷ Problem-solving courts are relatively consistent in being professional-centered: although oftentimes lawyers are absent from regular sessions and there is emphasis on empowering offenders (clients), the decision-makers are still the professionals, in particular judges and social workers.¹²⁸

Problem-solving courts appear more consistent regarding the process-related parameters. Most problem-solving courts do not have built-in dialogue between victims and offenders, with some exceptions.¹²⁹ They differ from mainstream criminal courts in their flexible process that allows therapeutic communication between the judge and the defendant.¹³⁰ They are based on voluntary participation. Although judges are considered “team leaders” and are often accessible, informal, and communicative with their “clients,” the process is hierarchical and the judge makes the final decision; the professionals have an advisory role and the offender, at best, is consulted and informed.¹³¹

Regarding substance-related parameters, a defining element of problem-solving courts is their use of need-based, rather than rights-based terminology.¹³² Defendants attending problem-solving courts waive many of their procedural rights and receive a need-based consideration leading to a treatment program, rather than punishment.¹³³ At the same time, although emotional discourse exists in problem-solving courts, as when judges express their satisfaction or disappointment with their clients’ progress, it is the clients’ behavior, rather than emotion, that is typically

authors). In addition, the invitation extended to community members to take part in the advisory board does not ensure meaningful participation (quality inclusiveness).

¹²⁷ See Fagan & Malkin, *supra* note 126, at 898 (“Community justice projects go beyond the problem-solving court model to create legal institutions that bring citizens closer to legal processes.”).

¹²⁸ Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL’Y 125, 131–32 (2001).

¹²⁹ Some community courts have in-house programs that adopt restorative justice principles and involve direct victim-offender dialog. See, e.g., *Peacemaking: Practitioners from Navajo Nation Train Volunteers in Red Hook*, CENTER FOR CT. INNOVATION (Nov. 16, 2012), <http://www.courtinnovation.org/research/peacemaking-practitioners-navajo-nation-train-volunteers-red-hook>. Domestic violence courts may allow and even encourage victim-offender dialogs, particularly when there are no acute safety concerns and when the parties are interested in restoring their relationship.

¹³⁰ Petrucci, *supra* note 38, at 264.

¹³¹ Shannon Portillo et al., *Front-Stage Stars and Backstage Producers: The Role of Judges in Problem-Solving Courts*, 8 VICTIMS & OFFENDERS 1, 17–18 (2013).

¹³² KING ET AL., *supra* note 29, at 164.

¹³³ *Id.* at 14–15, 144, 164. The need-oriented approach is at times subject to criticism based on the concern that defense attorneys easily give away their clients’ procedural rights, even when the chances of winning the case legally are high, because of their commitment to their clients’ rehabilitative needs. See Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U REV. L. & SOC. CHANGE 37, 51 & n.89 (2000–01).

at the center of the discussion.¹³⁴ On the process-as-vehicle vs. process-as-obstacle continuum, problem-solving courts clearly regard their therapeutic procedures as enabling rather than limiting. Problem-solving courts utilize unique procedural qualities such as the emphasis on voice, respect, dialogue, judge-defendant relationship, and others as vehicles for attaining their desired outcome: the rehabilitation of their clients.¹³⁵ Problem-solving courts may have grown out of libertarian notions of individual rights and liberties, but community courts in the United States as well as some Aboriginal, Maori, and tribal courts worldwide have been injecting communal values and active participation into their standard processes.¹³⁶

Finally, regarding the outcome-related parameters, problem-solving courts are clearly future-oriented¹³⁷ and usually lack retributive requital, as long as the client is cooperative. Some problem-solving courts focus on resolving the individual conflict, as, for example, in domestic violence courts. Others search for broader, universal concepts of justice and seek solutions that promote equality, healing, and respect, even if the parties would settle for less.¹³⁸ Most problem-solving courts seek to address the root of the problem and solve it rather than search for a short-term resolution of the dispute at hand.¹³⁹

¹³⁴ Nolan, *supra* note 43, at 1543.

¹³⁵ KING ET AL., *supra* note 29, at 14. Problem-solving courts, however, as well as other non-adversarial mechanisms, are often measured in accordance with their success in reducing recidivism. This preoccupation with outcomes and specifically with recidivism rates often leads to the abolition of process-oriented mechanisms such as Problem-Solving Courts. One example is the abolition of the original Murri Court in Queensland, Australia, following a governmental evaluative study showing no reduction in recidivism rates. ANTHONY MORGAN & ERIN LOUIS, AUSTL. INST. OF CRIMINOLOGY, EVALUATION OF THE QUEENSLAND MURRI COURT: FINAL REPORT 145 (2010), available at <http://aic.gov.au/documents/9/C/3/%7b9C3FF400-3995-472B-B442-789F892CFC36%7dtbp039.pdf>.

¹³⁶ See, e.g., Greg Berman & Aubrey Fox, *Justice in Red Hook*, 26 JUST. Sys. J. 77, 78–81 (2005) (discussing the central role of the local community in planning, developing, and managing the Red Hook Community Court in New York); Rekha Mirchandani, *Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State*, 33 LAW & SOC. INQUIRY 853, 857–58 (2008) (explaining that restorative justice forums arose in places like neighborhood justice centers and offer individuals choices for active participation in the legal process). But see Fagan & Malkin, *supra* note 126, at 948–54; Miller, *supra* note 42, at 1574–76 (presenting a more skeptical standpoint).

¹³⁷ KING ET AL., *supra* note 29, at 140–41.

¹³⁸ Fagan & Malkin, *supra* note 126, at 928–30.

¹³⁹ KING ET AL., *supra* note 29, at 14; Nolan, *supra* note 43, at 1554 (“In the drug courts, . . . treatment, healing, [and] problem-solving . . . constitute the very meaning of justice. . . . In such a context, it is now possible to speak of ‘just treatment.’”); see also Susan Daicoff, *The Comprehensive Law Movement: An Emerging Approach to Legal Problems*, 49 SCANDINAVIAN STUD. L. 109, 125–26 (2006) (“[Creative Problem Solving] proponents sometimes use the “SOLVE” acronym This method relies on five steps: (1) state the problem clearly . . . ; (2) observe, organize, and redefine the problem . . . ; (3) learn about the problem by questioning it . . . ; (4) visualize possible solutions, select one, and refine it . . . ; and (5) employ the situation and monitor the

C. Restorative Justice

The challenge in classifying restorative justice lies not only in the many models (best known are victim-offender mediation, conferencing, and circles), but also in the variety of ways in which these models are implemented daily. Note that our taxonomy is based on the pure prototype of each criminal justice mechanism, not on the ways in which they are practiced in different places. With this cautionary note in mind, we place most restorative justice models at one end of most continua.

With respect to process-related parameters, most restorative justice programs facilitate direct dialog between victims and offenders—one of the main virtues of this non-adversarial justice mechanism. The programs are flexible, non-hierarchical, and voluntary.

Considering the stakeholder-related parameters, restorative justice programs are regarded as lay-centered because they transfer the decision-making power from the professionals to the private stakeholders. Although process facilitators play an important role in preparing the parties and ensuring a safe and respectful atmosphere, they lack decision-making power during the restorative encounter.¹⁴⁰ The role of other state representatives is typically limited to providing information and advice, and monitoring the implementation of the reparation plan.¹⁴¹ Restorative justice mechanisms are both offender and victim oriented. In their ideal form, the processes aim to address the needs, rights, wishes, and interests of both parties to the maximum extent possible. Moreover, proponents of restorative justice argue that this mechanism challenges the zero-sum game between victims' and offenders' interests, representing a win-win formula for resolving conflicts created by crime.¹⁴² Most restorative justice processes are inclusive and involve not only victims and offenders but also family members, supporters, and community members.¹⁴³ When these additional participants hold decision-making power, the process may be considered fully inclusive. But the more intimate variants, such as victim-offender mediation programs, are exclusive, and only the direct stakeholders and the mediator are involved.¹⁴⁴ When other interested parties attend, they are typically present as supporters, not as decision makers, rendering these variants more exclusive. Some restorative justice models, such as circles, are community-managed; others, such as police-based conferences, are state-managed, depending on the type of model and its local application.¹⁴⁵

results of it." (internal citations omitted)).

¹⁴⁰ W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM. J. TRIAL ADVOC., 501, 508, 511 (2008).

¹⁴¹ Yvonne Byrd & Judith Gibson, *Restorative Justice: ADR in Criminal Cases*, Vt. B.J., Fall 2010, at 49, 51–52.

¹⁴² STRANG, *supra* note 7, at 188–91.

¹⁴³ See *id.* at 43–44.

¹⁴⁴ See Marshall, *supra* note 55, at 11.

¹⁴⁵ For a discussion of community circles, see generally Julian V. Roberts & Kent

Within substance-related parameters, restorative justice promotes a need-based terminology, leaving the rights discourse out of the discussion almost entirely. Restorative processes encourage emotional discourse, based on the assumption, evidence-based by now, that it is the emotional elements of the discussion that make restorative justice so effective.¹⁴⁶ Restorative justice considers its procedural characteristics as enabling rather than limiting the achievement of its stated goals. For example, the preference for direct dialog is based on the premise that it promotes reconciliation and enhances the parties' well-being.¹⁴⁷ The emphasis on procedural justice is based not on a legal necessity but rather on the belief, by now also evidence-based, that perceived procedural justice enhances offenders' and victims' acceptance of justice decisions¹⁴⁸ as well as offenders' willingness to comply with them.¹⁴⁹ Most restorative justice models are founded on a communitarian conception that people live within social and family networks, that crime infiltrates these delicate bonds, and that it is the mission of the restorative process to restore the affected relationships. The community is regarded both as a secondary victim and as indirectly responsible for the crime.¹⁵⁰

Finally, restorative justice outcomes are largely future-oriented and intended to address the needs of all stakeholders.¹⁵¹ But restorative justice also endorses past-oriented outcomes, which are reflected in the symbolic and material reparation aimed at repairing the harm inflicted by the

Roach, *Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 237, 240 (Andrew Von Hirsch et al. eds., 2003). For a discussion of police-based conferences, see generally David O'Mahony & Jonathan Doak, *Restorative Justice—Is More Better? The Experience of Police-led Restorative Cautioning Pilots in Northern Ireland*, 43 How.J. CRIM. JUST. 484 (2004).

¹⁴⁶ Braithwaite, *supra* note 4, at 38–41 (explaining the reintegrative shaming theory and showing relevant evidence from different settings); Lawrence W. Sherman et al., *Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials*, 1 J. EXPERIMENTAL CRIMINOLOGY 367 (2005) (showing evidence supporting the argument that restorative justice involves therapeutic components of cognitive behavioral treatment); ELIZA AHMED ET AL., SHAME MANAGEMENT THROUGH REINTEGRATION 4 (2001) (explaining that shame management is “acknowledg[ing] shame and mak[ing] it work for you”).

¹⁴⁷ Caroline M. Angel, Crime Victims Meet Their Offenders: Testing the Impact of Restorative Justice Conferences on Victims’ Post-Traumatic Stress Symptoms (Jan. 1, 2005) (unpublished Ph.D. dissertation, University of Pennsylvania), available at <http://repository.upenn.edu/dissertations/AAI3165634> (presenting findings about reduced post-trauma symptoms among robbery and burglary victims whose cases were randomly referred to conferences).

¹⁴⁸ TOM R. TYLER, WHY PEOPLE OBEY THE LAW 63–64 (2006); STRANG, *supra* note 7, at 190–91.

¹⁴⁹ Braithwaite, *supra* note 4, at 41.

¹⁵⁰ Albert W. Dzur & Susan M. Olson, *The Value of Community Participation in Restorative Justice*, 35 J. SOC. PHIL. 91, 96 (2004).

¹⁵¹ Braithwaite, *supra* note 4, at 5–6.

wrongdoer.¹⁵² When practiced well, restorative encounters are constructed to achieve just outcomes.¹⁵³ But some critics of restorative justice have argued that these processes lead to the privatization of justice and, lacking any public message, leave the broader sense of justice outside the restoration plan.¹⁵⁴ There is disagreement about whether or not restorative outcomes involve an element of requital, but as we have shown elsewhere,¹⁵⁵ even if there is requital, it is present when the reparation plan designed to compensate the victim and prevent future harm constitutes a burden for the offender. Restorative justice outcomes may incapacitate, in a restorative meaning: car keys and licenses may be taken away.¹⁵⁶ But restorative justice processes clearly achieve rehabilitative outcomes, as measured by a decline in recidivism rates.¹⁵⁷

D. Therapeutic Settlement Conferences

This innovative model integrates ideas inspired by therapeutic jurisprudence and arbitration. Focusing first on its process-related characteristics, therapeutic settlement conferences facilitate dialogue between the interested parties. They are flexible because they are conducted outside the boundaries of evidentiary rules and procedures, providing the parties with a safe and privileged “playground” to express themselves freely and allow for therapeutic communication.¹⁵⁸ Moreover, the last best offer is submitted in the final stage of the process only after each party has submitted an initial offer, and the judge has examined them and provided opportunities for the parties and their legal representatives to express their interests and needs.¹⁵⁹ Therapeutic settlement conferences, howev-

¹⁵² *Id.* at 17, 24.

¹⁵³ See Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 J.L. & Soc'y 237, 248 (1998) (arguing that in restorative justice conferences the involvement of women's groups, community leaders, victim-support movements, and others can all be heard, contributing to the achievement of a clear denunciation of criminal behavior and setting standards for appropriate behavior).

¹⁵⁴ See Shirley Jülich, *Restorative Justice and Gendered Violence in New Zealand: A Glimmer of Hope*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 239, 243–45 (James Ptacek ed., 2010) (arguing that shifting power to the local community through community-based restorative justice processes is a way to absolve the state from its responsibility toward victims and reduce public expenses, relying on the good will of citizens to safeguard victims and rehabilitate offenders); Frederick & Lizdas, *supra* note 59, at 39–59 (discussing how a failure to generate a clear message against violence, or worse, victim blaming, may result not only in further victimization and isolation of the victim, but also in increased risk for her safety, because the perpetrator's behavior is not unanimously censured).

¹⁵⁵ Dancig-Rosenberg & Gal, *supra* note 11, at 2334.

¹⁵⁶ Braithwaite, *supra* note 4, at 66–67.

¹⁵⁷ Latimer et al., *supra* note 61, at 137.

¹⁵⁸ Wexler & Jones, *supra* note 64, at 846. (“This discussion would provide an excellent opportunity for the judge to use—and to encourage others to use—active listening, empathy, and perhaps confrontation.”).

¹⁵⁹ *Id.*

er, can also be considered formal because they are tightly structured according to specific steps, and allow the judge to accept one offer completely and reject the other.¹⁶⁰ This formality in process leads to creativity in substance because knowing that the judge must choose one offer over the other brings “the participants and their positions closer together, providing an incentive for each party to compromise and reach a settlement.”¹⁶¹

Therapeutic settlement conferences are completely voluntary, and both hierarchical and non-hierarchical in some respects. They are hierarchical in that there are clear differences in power between various participants: the judge selects the indicated sentence; the offender can veto the plea and take the case back to the mainstream track.¹⁶² They are non-hierarchical in that victims are considered full parties to the process and their offers may be selected as the verdict for the offender, in sharp contrast with criminal processes where victims may, at most, confer with the prosecutor regarding plea agreements. Concerning stakeholder-related parameters, offenders and victims are active in the dialog, but the state is represented by a professional prosecutor and both offender and victim are encouraged to be represented. It is therefore likely that attorneys will have some influence over the dialogue, making the conferences relatively professional-centered.¹⁶³

Therapeutic settlement conferences are offender-oriented because only the offender holds the right to veto. They are also victim-oriented, however, because victims play a central role, much more so than in mainstream criminal processes. The conferences are somewhat exclusive because, at least for now, they do not involve community participation; although they invite family members and other supporters of victims and offenders to attend, these participants typically do not have decision-making power, and therefore even when inclusive in quantity they are generally exclusive in quality.¹⁶⁴ They are state-managed, specifically judge-managed.¹⁶⁵

Regarding substance-related parameters, therapeutic settlement conferences use largely a rights-based terminology because they consider possible legally-prescribed sentences rather than individually-tailored reparative plans.¹⁶⁶ Although emotive talk is allowed during such processes, the need to reach an agreed-upon sentence is likely to minimize emotive discourse and limit the discussion to the desired outcomes. Therapeutic settlement conferences regard their unique procedural elements as ena-

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 847.

¹⁶² *Id.* at 846.

¹⁶³ However, there is ample room for authentic dialog between the direct stakeholders and their family members. *See id.* at 847.

¹⁶⁴ *Id.* at 847–48.

¹⁶⁵ *Id.* at 846.

¹⁶⁶ *See id.* at 846, 853.

bling rather than restricting, because the threat of the judge adopting one sentence over the other motivates the parties to reach a fair, balanced, agreed-upon outcome, which is the desired goal of these processes.¹⁶⁷

Finally, in the outcome-related parameters, therapeutic settlement conferences are likely to be past-oriented because they focus on the desirable punishment, although future-related outcomes such as rehabilitation may also be involved.¹⁶⁸ Because the parties need to reach a settlement that is “lawful, reasonable, and in accordance with governing sentencing principles,”¹⁶⁹ these processes encourage the parties to search for a just response that reflects, beyond the parties’ interests, the broader public interests of desert, rehabilitation, incapacitation, and deterrence. Therapeutic settlement conferences involve an element of retributive re-quital, and they may lead to both rehabilitative and incapacitative outcomes, depending on the specifics of each case.

E. Restorative Sentencing Juries

The vision of restorative sentencing jury hearings is that of marrying the retributive elements of mainstream criminal justice with the emotive, therapeutic, and empowering elements of restorative justice.¹⁷⁰ Regarding the process-related parameters, restorative sentencing juries allow direct dialog between victims and offenders, supported by family members and others.¹⁷¹ They are flexible in that they are “[f]ree of rules of evidence and procedure.”¹⁷² The juries are positioned somewhere in the middle of the hierarchy spectrum. They are non-hierarchical, as victims and offenders can equally affect the juries by expressing their needs, emotions, and wishes, and in that each jury member has an equal voice in determining the sentence. At the same time, restorative sentencing juries are hierarchical because victims and offenders cannot vote as part of the jury, but only persuade the jury through reason or emotion.¹⁷³ Faithful to restorative principles, the juries cannot be coercive. Victims cannot be forced to engage in a dialog with the offenders about the offense, and offenders must not be forced to approach their victims and supporters and express their remorse, as their neighbors watch them apologize.

Regarding the stakeholder-related parameters, restorative sentencing juries are lay-centered. Mediators have largely a “coaxing” role,¹⁷⁴ lawyers play only a limited, explanatory role, and the discussion is “in plain Eng-

¹⁶⁷ See *id.* at 853.

¹⁶⁸ See *id.* at 847–48.

¹⁶⁹ *Id.* at 846, 854.

¹⁷⁰ BIBAS, *supra* note 25, at 157–59.

¹⁷¹ See *id.* at 159–60.

¹⁷² *Id.* at 159.

¹⁷³ Private correspondence with Stephanos Bibas (Sept. 15, 2013) (on file with authors).

¹⁷⁴ BIBAS, *supra* note 25, at 159.

lish, not legalese.”¹⁷⁵ Restorative sentencing juries are both victim- and offender-oriented because they consider both as central stakeholders, if not decision-makers, in the process.¹⁷⁶ This envisioned model is likely to be inclusive rather than exclusive, and community- rather than state-centered because at least half the jury is composed of “a random range of neighbors not related to either party or directly harmed by the crime.”¹⁷⁷ Quality inclusiveness is achieved by granting decision-making power about the sentence to each participating community member. The jury’s sense of justice would counterbalance prosecutorial professional decisions through their sentencing decisions.¹⁷⁸

Regarding the substance-related parameters, restorative sentencing juries are envisioned to integrate the needs and rights terminologies. Sentencing guidelines and rules facilitate direct dialog that allows exchanges of apology, empathy, and acknowledgment of the harm done to the victim.¹⁷⁹ The authenticity of the dialog, however, is jeopardized by the presence of jury members, who seal the offender’s fate based, among others, on his expression of remorse. Restorative sentencing juries are likely to encourage emotional discourse.¹⁸⁰ They involve victims, offenders, their supporters, and community members, first in a potentially emotional dialog and later in deliberations about an agreed-upon sentence. Because they enhance both therapeutic and retributive goals, the juries lean toward process-as-vehicle. The opportunity for juries to witness the direct confrontation between victims and offenders goes to the root of what Bibas envisions as a “moral theater”¹⁸¹ designed to achieve just outcomes that represent both the public interest and the stakeholders’ moral sentiments. They are communitarian in nature because they place great importance on community members as both indirect victims of crime and as stakeholders accountable toward each other.¹⁸²

Finally, in the area of outcome-related parameters, the attribute that distinguishes restorative sentencing juries from other alternatives to formal criminal processes is that they provide retribution.¹⁸³ Therefore they

¹⁷⁵ *Id.* at 159–60.

¹⁷⁶ *Id.* at 158.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 159.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 159 (“[P]arties would be free to vent, discuss, apologize, and forgive, but could not be forced to do so.”).

¹⁸¹ *Id.* at 113–14 (According to the Morality Play Model, criminal justice should “include a wide range of parties: defendants, victims, their friends and families, neighbors, and the public at large . . . [and] should give them plenty of opportunities to speak and listen.”).

¹⁸² Hudson, *supra* note 153, at 249 (“With restorative justice, ‘the community’ is involved in expressing disapproval, and in providing and guaranteeing protection and redress for victims, but it is also involved in supporting the perpetrator in his efforts to change, and in maintaining him as a member of the community.”).

¹⁸³ BIBAS, *supra* note 25, at 156–57, 160.

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are likely to be categorized as mostly past-oriented. But they are also partly future-oriented because they may include forward-looking outcomes such as rehabilitation and deterrence, and most important, restitution.¹⁸⁴ In a similar vein, restorative sentencing juries are designed to bring about justice and move beyond the conflict resolution characteristics of many sentences based on bargaining.¹⁸⁵ Likewise, restorative sentencing juries are designed to involve a retributive requital, but they may involve both rehabilitative and incapacitative elements, depending on the circumstances of each case.

F. Integration

To make our taxonomy more robust, we now invert our viewpoint and make the parameters our starting point, then position each of the mechanisms along the various scales. This methodology ensures that our taxonomy withstands a change in perspective and confirms the tentative statements we made when discussing each mechanism separately. An additional goal of the table is to serve as a comparative instrument that highlights the differences between the various justice mechanisms once placed in relation to the others along each scale. Instead of repeating the analysis from the opposite direction, we show the results in the table below and discuss in footnotes only the points that need further explanation. Integrating the parameters with the relative position of the various mechanisms creates a diagram in which parameters are lined up along one axis and locations on each scale along another (Table 1). Note that the positioning of each mechanism along each scale is not conclusive but represents relative, general, tentative claims that may be challenged in specific circumstances and across implementations of each mechanism.

¹⁸⁴ We thank Stephanos Bibas for pointing out that restorative sentencing juries are likely to award both symbolic restitution (in the form of a verdict denouncing the crime) and some material restitution, which may in fact influence the retribution needed.

¹⁸⁵ *Id.* at 160–61 (“Sentence bargaining would be transformed from a raw quid pro quo to a process of explaining why a wrongdoer deserves a particular sentence.... As agents of the public, prosecutors should ordinarily convince the relevant public that their plea bargaining decisions are just.”).

Table 1: Taxonomy of Criminal Justice Mechanisms

Process-related Parameters	Victim-Offender Dialog	RJ, TSC, RSJ			PSC	CP	Lack of Victim-Offender Dialog
	Flexible	RJ	RSJ	PSC	TSC, CP ¹⁸⁶		Formal
	Non-hierarchical	RJ	TSC, RSJ ¹⁸⁷		PSC	CP	Hierarchical
	Voluntary	RJ, TSC, RSJ, PSC ¹⁸⁸			CP	Coercive	
Stakeholder-related Parameters	Lay-centered	RJ	RSJ	TSC ¹⁸⁹	PSC	CP	Professional-centered

¹⁸⁶ We placed mainstream criminal processes together with therapeutic settlement conferences in this parameter because the vast majority of criminal cases are resolved in plea agreements, which are less formal than court-based admissions of guilt. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2486–87 (2004) (“The theory of bargaining in the shadow of trial presupposes that parties can finely calibrate bargains to reflect slight gradations in probabilities.”). In both therapeutic settlement conferences and plea agreements accepted in mainstream criminal processes, there is ample room for informal bargaining outside the courtroom. At the same time, plea agreements are still bound by the formal restrictions of mainstream criminal processes, in particular in states that have adopted guidelines or mandatory penalties. See *id.* The small minority of cases that do not involve plea agreement would be placed closer to the formal end of this scale.

¹⁸⁷ Each of these mechanisms is more hierarchical than restorative justice because the judge retains the final word in both and because there are differences in decision-making power between the various stakeholders. Each of them is less hierarchical than mainstream criminal justice and problem-solving courts, because a deliberative, egalitarian process of shared decision-making precedes the final decision.

¹⁸⁸ All these mechanisms involve active participation of the victim and therefore cannot be coercive. They also impose certain responsibilities on offenders and therefore cannot be forced upon them either. Note, however, that none of these mechanisms are entirely voluntary, given the possibility of the case being returned to the mainstream process.

¹⁸⁹ In therapeutic settlement conferences the stakeholders are empowered to make their own offers regarding the suggested sentence, leading to the indicated sentence selected by the judge. Judges involved in therapeutic settlement conferences are required to adopt one of the offers completely, without any modifications, as long as that offer is “lawful, reasonable, and in accordance with governing sentencing principles.” Wexler & Jones, *supra* note 64, at 846. Despite this extensive prerogative provided to the parties, therapeutic settlement conferences are also somewhat professional-centered because the judge takes an active role throughout the process, and because the lawyers’ role is considered crucial for protecting their clients’ rights. In restorative sentencing juries, by contrast, jury members meet and discuss the crime, its aftermath, and the desirable sentence away from the judge. We therefore

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	Victim-oriented	RJ, PSC-DV ¹⁹⁰	RSJ, TSC ¹⁹¹		PSC, CP ¹⁹²		Not Victim-oriented
	Offender-oriented	RJ, PSC	RJS, TSC, CP ¹⁹³		PSC-DV		Not Offender-oriented
	Inclusive	RSJ ¹⁹⁴	RJ	PSC	CP, TSC		Exclusive
	Community-managed	RJ	RSJ	PSC	TSC	CP	State-managed
Substance-related Parameters	Needs-based Terminology	RJ, PSC		RSJ	TSC, CP ¹⁹⁵		Rights-based Terminology

placed the two closer to the lay-centered end of the continuum.

¹⁹⁰ Restorative justice gets the highest score on both victim- and offender-orientation. Problem-solving courts are generally offender-oriented, with their typical focus on client desistance. We have created a special category for problem-solving courts specializing in domestic violence (PSC-DV) in the context of victim-oriented—not-victim-oriented and offender-oriented—not-offender-oriented parameters, because they are vastly different in their orientation from other problem-solving courts. Thus, they are positioned at the far end of the victim-oriented parameter and at the opposite end from the offender-oriented parameter.

¹⁹¹ Both therapeutic settlement conferences and restorative sentencing juries receive a relatively high score in victim orientation because they allow active involvement of victims and consider their interests to be important. They are not as victim-oriented as restorative justice and specialized domestic-violence courts, however, because the defendants still hold the right to veto.

¹⁹² Because most criminal cases are resolved through plea agreements, the mainstream criminal process is less victim-oriented than mechanisms designed by victims' rights reforms, especially when the plea agreement includes an agreed-upon sentence. In these cases, victims are not heard even at the sentencing stage. Plea agreements are particularly non-victim-oriented when allowing defendants to "plea[] without confession[]" using Alford and *nolo* pleas, because they "leave victims frustrated and defendants defiant and resistant to treatment." Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1379 (2003).

¹⁹³ In these three mechanisms the offender's interests are balanced with external public considerations such as the protection of significant social values.

¹⁹⁴ We categorized restorative sentencing juries as the most inclusive model because, unlike restorative justice, they involve by definition community members and those representing the offender and the victim. Only some of the restorative justice models, in particular circles, involve community members and invite all who are interested to take part. Many others, like victim-offender mediation, are exclusive to direct stakeholders.

¹⁹⁵ Because most criminal cases are resolved through plea agreements, defendants "sell these rights to the prosecutor, receiving concessions they esteem more highly than the rights surrendered." Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992). Therefore, we placed mainstream

	Emotional Discourse	RJ	RSJ	PSC	TSC	CP ¹⁹⁶	No Emotional Discourse
Outcome-related Parameters	Process as Vehicle	RJ, PSC		RSJ TSC ¹⁹⁷		CP	Process as Obstacle
	Communitarian	RJ	RSJ	PSC	TSC	CP	Libertarian
	Future-oriented	PSC	RJ	CP, RSJ, TSC		Past-oriented	
	Without Retributive Requital	RJ, PSC		RSJ ¹⁹⁸ , TSC ¹⁹⁹		CP	With Retributive Requital
	Rehabilitative	PSC	RJ	RSJ, TSC		CP	Incapacitative
	Justice Making	RSJ	RJ ²⁰⁰	PSC	TSC	CP ²⁰¹	Conflict Resolution

criminal process together with the more therapeutic variant of plea negotiation, therapeutic settlement conferences.

¹⁹⁶ If the plea agreement does not include an agreed-upon sentence, the sentencing stage allows the expression of emotions by victims, defendants, and their supporters. Such cases are placed together with therapeutic settlement conferences along this scale.

¹⁹⁷ In restorative sentencing juries, the procedural arrangements that make the victim and offender engage in “moral theatre” are both an obstacle and a vehicle in promoting the combined goal of restoration and retribution. Although these procedural restrictions ensure neutrality and fairness, the concern is that they may encourage offenders to act according to jury expectations and make insincere statements. In therapeutic settlement conferences the procedural restrictions set clear boundaries as to the ability of the parties to engage in free dialog, but they provide incentives for the parties to offer balanced solutions.

¹⁹⁸ Although restorative sentencing juries place importance on retribution, when victims and their supporters express a willingness to forgive and an inclination to leniency, restorative sentencing juries are more receptive to such notions than the mainstream criminal process is.

¹⁹⁹ Therapeutic settlement conferences are conducted within the retributive paradigm, although Wexler and Jones do not specifically address the question of whether or not retribution per se is necessary.

²⁰⁰ Although restorative justice is aimed at achieving justice, in its restorative meaning, through accountability and the reparation of harm, restorative sentencing juries are said to achieve a broader understanding of justice, embraced by the neighboring community, and not only by the offender, the victim, and their supporters. Proponents of restorative justice argue that, at least in the broad models of community conferences and justice circles, it achieves the broadest meaning of justice possible (“Shalom,” as Howard Zehr explains). See ZEHR, *supra* note 6, at 130–

Table Legend

CP – Mainstream Criminal Process

PSC – Problem-Solving Courts

PSC-DV – Domestic-Violence Problem-Solving Courts

RJ – Restorative Justice

TSC – Therapeutic Settlement Conferences

RSJ – Restorative Sentencing Juries

IV. IMPLEMENTATION

Our taxonomy provides an analysis of divergent procedural mechanisms that reflect different ideologies and normative preferences concerning the substantive goals of criminal law. For example, restorative justice represents a utilitarian approach giving healing and reparation precedence over just deserts. Problem-solving courts are based on rehabilitative notions of criminal law. Mainstream criminal process integrates utilitarian and retributive objectives but currently emphasizes just-desert ideology in most jurisdictions. Policymakers and law enforcement professionals are continually balancing these competing philosophies. The taxonomy provides a rich framework from which it is possible to select the desired mechanisms and to arbitrate the conflicts between the utilitarian and retributive tendencies of criminal law.

Similar to the latent role evidentiary rules play in mediating competing philosophies in criminal law, identified by Bierschbach and Stein,²⁰² we suggest that the procedural plurality underlying our taxonomy reflects a plurality of values with priorities that vary according to circumstances. For example, rules that make restorative justice mechanisms the default option for juvenile offenders, first-time offenders, or misdemeanors play not only a practical role, but also shape substantive criminal law by stressing its rehabilitative and reparative elements.²⁰³ Similarly, procedural rules enabling the referral of cases involving Native American defendants

32. But the restorative sentencing juries envisioned by Stephanos Bibas arguably satisfy the additional public interest in retribution, achieved thorough the engagement of uninvolved participants and the guiding principles for sentencing that provide upper and lower boundaries.

²⁰¹ Ironically, the one instrument designed specifically to achieve just deserts and other public interest goals, the criminal *justice* process, has become a pragmatic, mechanistic, individualistic conflict resolution tool through its massive use of plea agreements. Even when the victim's wellbeing, rather than the evidentiary strength of the case, drives the prosecutorial decision, the broad sense of "justice" and "truth-finding" are arguably overlooked.

²⁰² Bierschbach & Stein, *supra* note 17.

²⁰³ See, e.g., COLO. REV. STAT. ANN. § 18-1.3-101 (LexisNexis 2013) (encouraging the development and use of pre-trial diversion programs for eligible offenders); F.L.A. STAT. ANN. § 985.155 (West 2011) (authorizing the referral of first-time, nonviolent juvenile offenders to neighborhood restorative justice programs).

to community healing circles emphasize such values as community empowerment.²⁰⁴

Our taxonomy also shows that at least some of the mechanisms discussed are procedural constructs designed to balance, within themselves, conflicting values and goals. This is true, for example, for restorative sentencing juries, which combine reparation of harm with retribution, and for therapeutic settlement conferences, which integrate emotional healing within retribution.

Finally, the taxonomy envisions a system that can mix and match two or more mechanisms for handling the same case, balancing varying and even conflicting criminal law goals. For example, some states enable victims of severe crime, including family members of homicide victims, to meet their perpetrators while they serve their prison sentence in order to reconcile under the auspices of victim-offender mediation programs.²⁰⁵ This possibility opens the door for injecting healing and reparation into the criminal process after other goals, in particular retribution, have been addressed through the formal process.

Our underlying perception of criminal law as a broad framework involving many processes and substantive goals is reflected in the current draft of the Model Penal Code relating to sentencing.²⁰⁶ This draft grants the prosecution the authority to defer charging individuals who are suspected of committing a crime with sufficient admissible evidence against them if they are willing to comply with certain conditions.²⁰⁷ If the conditions are met successfully, the case is dismissed without leaving a criminal record.²⁰⁸ The Model Penal Code also authorizes courts to refer eligible defendants to specialized courts.²⁰⁹ Our approach may be helpful in filling the broad provisions of the Model Penal Code with specific content.

²⁰⁴ See MINN. STAT. ANN. § 609.135 (West 2008) (allowing courts to refer defendants to restorative justice programs after their conviction and before sentencing). See also State v. Pearson, 637 N.W.2d 845, 846–47 (Minn. 2002) (authorizing lower court to refer Native American offenders to community healing circles to make decisions about the appropriate sentence).

²⁰⁵ Mark S. Umbreit et al., *Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue*, 6 INT'L REV. VICTIMOLOGY 321, 323 (1999) (describing the Texas Public Prosecution scheme that allows families of murder victims to have face-to-face restorative meetings with the incarcerated offenders; hundreds of families are awaiting their turn).

²⁰⁶ See MODEL PENAL CODE: SENTENCING §§ 6.02A, 6.02B (Council Draft No. 4, 2013).

²⁰⁷ Id. § 6.02A(3). See also id. § 6.02B(4) (authorizing court judges to defer adjudication after charges have been filed).

²⁰⁸ Id. § 6.02A(11) (“If the terms of the deferred-prosecution agreement are materially satisfied, no criminal charges shall be filed in connection with the conduct known to the prosecution that led to deferred prosecution. Completion of the terms of deferred-prosecution agreement shall not be considered a conviction for any purpose.”). See also id. § 6.02B(8) (providing that the court shall dismiss the case following material completion of the agreement, without conviction).

²⁰⁹ Id. § 6.13.

The characteristics of the justice mechanisms identified in the present taxonomy can guide states looking to develop new deferred adjudication or prosecution programs and for specialized courts. Our list of parameters and tentative suggestions regarding the relative position of each mechanism along each scale may also provide criteria to guide prosecutors and judges when selecting mechanisms in concrete cases.²¹⁰

For example, offenders' and victims' dispositions are potential criteria for selecting mechanisms that require them to take active roles in the process. Offenders who are willing to meet their victims, assume responsibility, and are responsive to self-regulation efforts may be suitable for mechanisms that involve emotive discourse and are dialog-driven, lay-centered, victim-oriented, and rehabilitative.

The type of the offense may serve as another criterion for selecting appropriate mechanisms. Offenses without a specific, individual victim are naturally less suitable for mechanisms that stress dialog and emotional discourse and are victim-oriented. Offenses that result from underlying addictions or illness are potentially suitable for mechanisms that are offender-oriented, rehabilitative, future-oriented, and non-retributive.

The inclination of the community to participate in the justice mechanism, denounce the offender's behavior, and promote the stakeholders' rehabilitation could be another helpful consideration. With a willing community, inclusive, community-managed, and communitarian mechanisms are likely to be successful. When the local community is unwilling to support the rehabilitation of the parties, censure the offender's behavior, and vindicate the victim, mechanisms that are strong in these parameters can be harmful.

CONCLUSION

Our Article highlights the multifaceted nature of criminal law, and its ability to use multiple instruments to achieve its goals.²¹¹ By developing our understanding of various procedures and their characteristics, the Article advances the theoretical discourse about the nature of criminal law and its pluralistic quality.

²¹⁰ Section 6.02A(14) determines:

Each prosecutor's office shall adopt and make written standards for its use of deferred-prosecution agreements publicly available. The standards should address:

- (a) The criteria for selection of cases for the program;
- (b) The content of agreements, including the number and kinds of conditions required for successful completion;
- (c) The grounds and processes for responding to alleged breaches of agreements, and the possible consequences of noncompliance; and
- (d) The benefits afforded upon successful completion of agreements.

²¹¹ Compare Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (pointing at the use of various procedural instruments within conventional criminal processes for achieving diverse goals).

At the macro-level, our taxonomy helps identify justice mechanisms that should be promoted and developed in given jurisdictions. The taxonomy does not prioritize the parameters, leaving it to policy makers to make these judgments. After policy makers have selected the parameters they consider important, they can use the chart to identify the mechanisms that receive high marks in those selected parameters. For example, if policy makers consider communities important and wish to create, strengthen, or awaken dormant communities, they may consider developing justice mechanisms that are relatively lay-centered, inclusive, community-managed, and communitarian. The same parameters are relevant if policy makers are concerned about public distrust and consider building trust to be important. Trust may be built through increased transparency of the decision-making processes and participatory justice mechanisms that enable interested citizens and stakeholders to become involved in justice-making; these parameters are helpful in identifying such mechanisms.²¹² Similarly, if retribution is considered to be a core element of criminal law, the taxonomy is useful in warning against mechanisms that do not contain retributive elements. Finally, policy makers who regard therapeutic goals such as healing and reconciliation as desirable can use the taxonomy to identify mechanisms that promote direct dialog and emotive discourse, are need-centered, and regard fairness, empowerment, and dialog as enabling procedural features for achieving these goals.

Law enforcement officials may find the taxonomy useful at the micro-level as well. Guided by the normative priorities and practical restrictions imposed by policy makers, law enforcement officials can use the chart to select the most appropriate mechanism that is consistent with given circumstances and available instruments. For example, in cases involving victims who are willing to participate in the process, a voluntary process that achieves other desirable goals may be more appropriate than the coercive criminal one, if such a process is available locally. In other cases, if the offender is responsive to persuasion and expresses willingness to employ self-regulation,²¹³ law enforcement officials may prefer processes that are more rehabilitative and future-oriented in their outcome-related parameters.

Although our taxonomy focuses only on five mechanisms, we envi-

²¹² See generally Denise M. Rousseau et al., *Not So Different After All: A Cross-Discipline View of Trust*, 23 ACAD. MGMT. REV. 393, 399, 401 (1998). See also M. Audrey Korsgaard et al., *Building Commitment, Attachment, and Trust in Strategic Decision-Making Teams: The Role of Procedural Justice*, 38 ACAD. MGMT. J. 60, 66–68 (1995) (arguing that processes which enable meaningful participation of the group members, and are perceived as fair, enhance the trust in the group leader).

²¹³ BRAITHWAITE, *supra* note 106, at 29 (“Responsive regulation requires . . . [that] if the offender is responding to the detection of her wrongdoing by turning around her life, kicking a heroin habit, helping victims, and voluntary working for a community group . . . then the responsive regulator of armed robbery will say no to the jail option.”).

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sion the development of a rich, pluralistic criminal law system with a growing number of justice mechanisms representing divergent values and goals. This trend is already noticeable in the current Model Penal Code draft. This pluralistic reality with multiple diversions and alternatives available for almost every criminal case may be problematic, in terms of equality and consistency. The taxonomy may act as a buffer against capricious decisions on the macro (policy) as well as micro (case) levels. It proposes a methodology that can be applied to other mechanisms as they emerge, assisting in making rational, informed, and structured selection of a single mechanism or combinations of two or more of them, which may be used concurrently, as needed. This methodology uncovers the potential for concurrent use of various mechanisms, reflecting criminal law multitasking.