

Regulating Restorative Justice: What Arbitration Teaches Us About Regulating the Restorative Process in Criminal Courts

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INTRODUCTION

My first encounter with restorative justice occurred in 2016, when I was working as a student researcher in Kigali, Rwanda. I had been employed by a local non-profit whose mission was to foster peace and reconciliation after the Rwandan genocide of 1994. My task was to interview survivors and perpetrators of the Rwandan genocide about their experience of post-conflict reconciliation. With the help of a translator, I talked to survivors and perpetrators in pairs. In the morning, I would hear the survivor's account of how the perpetrator had killed their family members, and why they nonetheless offered that person forgiveness. In the afternoon, I would hear the perpetrator's account of murder and remorse. The day concluded with a meal, shared by all parties.

Growing up in a retributive justice system in the United States, I had no frame of reference for what I was seeing. According to my sense of justice at the time, a murderer was to be tried by a judge, sentenced according to the law, and imprisoned for the requisite statutory period. However, such a scheme was not possible after the Rwandan genocide, since there were more killers than the traditional legal system could possibly process.¹ In lieu of a traditional court of law, the Rwandan people opted for a community-based court called "*gacaca*" to bring justice to the genocidaires.² In these *gacaca* courts, the genocidaires were sentenced by fellow community members, many of whom had no formal legal training.³ Punishments typically consisted of prison time, and/or activities designed to reintegrate the perpetrators into the community, such as repairing roads and public buildings and constructing new homes for the survivors.⁴

This process, wherein perpetrators and victims participate in community-based reconciliation, strongly resembles restorative justice. At its core, restorative justice is a community-centered approach to resolving crime and conflict that

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1. See *Justice Compromised*, HUMAN RIGHTS WATCH 13 (May 31, 2011), <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts> [<https://perma.cc/QM65-RTG3>].

2. See *id.* at 14-15.

3. See *id.* at 15, 17-18.

4. See *id.* at 73-74, 77-78.

rehabilitates the offender while reconciling them to their victims and the community.⁵ This approach is markedly different than the criminal justice system in the United States, which isolates perpetrators as a form of punishment. Under a restorative justice approach, the offender, the victim, and all affected community members generate their own agreement about how to fix the problem that brought the offender to court in the first place.

A. THE RESTORATIVE JUSTICE COMMUNITY COURT

After leaving Rwanda and returning to the United States, I dedicated myself to seeking out similarly restorative models for crime and punishment within the American legal system. In 2017, I started my two-year tenure as the intern for the presiding judge of the “Restorative Justice Community Court,” or “RJCC” in Chicago, Illinois. The RJCC is built on the same philosophy of restorative justice as the *gacaca* courts. Instead of simply giving prison time to those who break the law, the RJCC uses restorative justice to repair the harm and prevent it from reoccurring.⁶ The RJCC’s process is somewhat akin to victim-offender mediation, wherein the perpetrator and victim find a mutually satisfying way to repair the harm that was caused through the help of a skilled facilitator called a “circle keeper.”⁷ However, a restorative justice court process is different than mediation because it is more community focused.⁸ At the RJCC and other restorative justice courts, the defendant and victim are not the only ones in the room. Any community member who was affected by the crime is encouraged to participate in the conflict-resolution process and keep the offender accountable for repairing the harm that they caused.⁹

Unlike the *gacaca* courts, the RJCC contains more trappings of a traditional courtroom. The RJCC is an official court of record in the Circuit Court of Cook County. This means that (1) the RJCC is part of the official network of taxpayer-funded courtrooms in Cook County, (2) its proceedings are recorded by a court reporter and available for public review, and (3) the court is led by a full-time county judge who is appointed by Cook County Chief Judge Timothy Evans. The RJCC is in session once per week, and it meets in its own building located in the

5. See Howard Zehr, *LITTLE BOOK OF RESTORATIVE JUSTICE* 2-3 (2014).

6. See Press Release, State of Illinois Circuit Court of Cook County, Restorative Justice Community Court launched in Avondale – the first on the Northwest Side, (Aug. 5, 2020), <http://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2781/Restorative-Justice-Community-Court-launched-in-Avondale-the-first-on-the-Northwest-Side> [https://perma.cc/5DJW-DWE7].

7. “Circle keeper,” “restorative justice facilitator,” and “facilitator” will be used interchangeably.

8. According to the American Bar Association, mediation is “a private process where a neutral third person called a mediator helps the parties discuss and try to resolve the dispute.” *Mediation*, American Bar Association, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation/ [https://perma.cc/A6TK-4FN5] (lasted visited Feb. 15, 2021).

9. See K. Hope Harriman, *Restoring Justice: An Analysis of the North Lawndale Restorative Justice Community Court*, THE UNIVERSITY OF CHICAGO 51 (Apr. 17, 2018), <https://knowledge.uchicago.edu/record/2525?ln=en> [https://perma.cc/W8E5-5L57].

community in which it serves.¹⁰ The court is staffed by local community members, as well as all of the traditional players in a Cook County courtroom, including the Cook County State’s Attorney, Cook County Public Defender’s Office, Cook County Social Services, and Cook County Sheriffs.¹¹

The RJCC operates much like a traditional diversion court in that it offers qualifying participants an alternative to traditional courtroom prosecution.¹² In order to participate in the RJCC, a participant must be eighteen to twenty-six years old, have been charged with a nonviolent felony or misdemeanor,¹³ reside in the community in which the RJCC is located, have nonviolent criminal history, and accept responsibility for the harm they caused.¹⁴ Once all of these requirements are met, the defendant may opt-in to the process, and the victim will also have the opportunity to participate.¹⁵

From this point on, the conflict resolution process is most akin to victim-offender mediation. The defendant, victim, and all affected community members will participate in a series of “peace circles,” which are conversations led by a skilled facilitator about the harm that was caused and how to repair it.¹⁶ Lawyers, judges, and other legal personnel are not included in this part of the process. Once the group reaches consensus about the actions that should be taken to repair the harm – which may include restitution, job training, substance use counseling, an apology, and more – they will write them up as recommendations in a “Repair of Harm” agreement.¹⁷ Once approved by the judge, the Repair of Harm Agreement becomes the legal substitute for the defendant’s sentence. If the defendant successfully complies with all of the terms of the agreement, their case

10. *Id.* at 20.

11. *Id.* at 56.

12. For criminal proceedings, a diversion court is a criminal process that addresses a criminal case outside of the traditional criminal justice system. Typically, a defendant in a diversion court will have their charges dropped if they agree to the terms of the diversion program, which could include terms such as drug treatment, mental health counseling, and more. See Cornell Law School, *Diversion*, Legal Information Institute, <https://www.law.cornell.edu/wex/diversion> [<https://perma.cc/7QM7-5PGL>] (last visited Feb. 15, 2021).

13. See K. Hope Harriman and Sarah Staudt, *Rethinking Restorative Justice* (forthcoming 2022) (manuscript at 30-32) (on file with author) (discussing the possibility and limitations of the RJCC processing violent crimes).

14. See Press Release, State of Illinois Circuit Court of Cook County, Restorative Justice Community Court launched in Avondale – the first on the Northwest Side (Aug. 5, 2020), <http://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2781/Restorative-Justice-Community-Court-launched-in-Avondale-the-first-on-the-Northwest-Side> [<https://perma.cc/5DJW-DWE7>].

15. If there is no victim, a “surrogate victim” may be elected to fill this vacancy. See K. Hope Harriman and Sarah Staudt, *Rethinking Restorative Justice* (forthcoming 2022) (manuscript at 23) (on file with author).

16. See National Juvenile Justice Network, *Restorative Justice Community Court*, leaflet, <https://www.njjn.org/uploads/digital-library/07.2017-RJCC%20Brochure%20FINAL%20copy.pdf> [<https://perma.cc/F7JA-48AC>] (last visited Feb. 15, 2021).

17. *Id.*

will be dismissed. If they do not, their case will be transferred back to a traditional courtroom for adjudication.¹⁸

Since its launch in 2017, the RJCC has proven to be a success. As of January 19, 2021, the court had seen 145 cases.¹⁹ The most common charge in the court was narcotics (116 cases), followed by unlawful use of a weapon (nine cases) and possession of a stolen motor vehicle (seven cases).²⁰ Seventy-four total participants have graduated and had their offenses expunged, forty-two are still in the program, and twenty-nine didn't comply or opted out.²¹ Thus far, none of the graduates have committed another crime, an unusually strong marker of success.²² In an effort to expand this model, the Circuit Court of Cook County recently implemented two additional restorative justice courts, each of which employs the same model and process as the RJCC.²³ Each of the three restorative justice courts meets once per week in a different neighborhood, and each has its own appointed county judge and staff.²⁴

Chicago is not the only city that is using restorative justice as an alternative way of addressing crime and conflict. New York²⁵ and Baltimore²⁶ have already implemented restorative justice courts similar to the RJCC. Even in cities where there is no formal "restorative justice court," many judges are trying to infuse restorative justice ideas into their courtrooms, such as incorporating victims' feedback and participation and emphasizing community service and accountability.²⁷ As of now, it is unclear to what extent restorative justice courts will become mainstream within the American legal system. Some may argue that mediation already occupies a substantially similar role to restorative justice and there isn't a strong need for a new paradigm. Nonetheless, restorative justice has now been

18. See K. Hope Harriman, *Restoring Justice: An Analysis of the North Lawndale Restorative Justice Community Court*, THE UNIVERSITY OF CHICAGO 51 (Apr. 17, 2018), <https://knowledge.uchicago.edu/record/2525?ln=en> [<https://perma.cc/W8E5-5L57>].

19. *Diversion*, COOK COUNTY GOVERNMENT OPEN DATA, <https://datacatalog.cookcountyil.gov/Courts/Diversion/gpu3-5dfh> [<https://perma.cc/3H79-MB2X>] (last visited Feb. 15, 2020).

20. *Id.*

21. *Id.*

22. See The Chicago Tribune Editorial Board, *Editorial: Reducing Crime in Chicago: Instead of a Jail Record, A Second Chance*, CHICAGO TRIBUNE (Nov. 13, 2020), <https://www.chicagotribune.com/opinion/editorials/ct-editorial-restorative-justice-court-north-lawndale-second-chance-20201113-r74ushfv6re6rfgo2oklslvai-story.html> [<https://perma.cc/G3BT-PZP8>]. One participant was killed in a shooting.

23. See Mitch Dudek, *2 New Restorative Justice Courts Open Next Month in Avondale and Englewood*, CHICAGO SUN TIMES (Jul. 31, 2020), <https://chicago.suntimes.com/crime/2020/7/31/21349836/restorative-justice-courts-open-englewood-avondale> [<https://perma.cc/J6U7-BZS3>].

24. See *id.*

25. See *Red Hook Community Justice Center*, CENTER FOR COURT INNOVATION, <https://www.courtinnovation.org/programs/red-hook-community-justice-center> [<https://perma.cc/WP8N-H5S2>] (last visited Dec. 13, 2020).

26. See RESTORATIVE RESPONSE BALTIMORE, <https://www.restorativeresponse.org/> [<https://perma.cc/N262-JDPR>] (last visited Dec. 13, 2020).

27. U.S. DEP'T OF JUSTICE, RESTORATIVE JUSTICE SYMPOSIA SUMMARY 1 (1998), <https://www.ncjrs.gov/pdffiles1/nij/248890.pdf> [<https://perma.cc/FZ64-XC4R>].

endorsed by many notable bodies, including the American Bar Association, the United Nations, the National Council for Juvenile and Family Court Judges, National Council of Crime and Delinquency, and the National Organization for Victim Assistance.²⁸ As of 2016, 11 states had referenced restorative justice in a statute or code.²⁹

This Note does not argue that restorative justice is more or less effective than other forms of Alternative Dispute Resolution (ADR).³⁰ Rather, this Note recognizes that restorative justice is here to stay, and we need to learn how to use it effectively. Specifically, restorative justice is markedly underregulated compared to comparable forms of ADR. Although there are federal statutes regulating other forms of ADR such as arbitration and mediation, there are no federal statutes governing restorative justice courts.³¹ Though there are ethical codes for the facilitators in most forms of ADR,³² there is no ethical code for restorative justice facilitators.³³ As such, the restorative justice courts are regulated only by state statute, local court rules, and custom.

The goals of this Note are two-fold. First, this Note makes the case for the regulation of the restorative justice process, insofar as it occurs in courts of record. Not all restorative justice practitioners agree that the restorative justice process should be subject to any outside regulation or an ethical code, even though other forms of ADR are.³⁴ The final goal of this Note is to propose what some regulations for restorative justice courts ought to be, specifically in the realm of confidentiality and judicial monitoring³⁵ of Repair of Harm Agreements.³⁶ By using

28. Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 Justice Policy Journal 1, 4 (2016).

29. *Id.* at 7.

30. See 4 Am. Jur. 2d Alternative Dispute Resolution § 1 (defining ADR as “the techniques or procedures for resolving disputes short of a trial in the public”).

31. See *e.g.*, 9 U.S.C. § 10.

32. See *e.g.*, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (Am. Arb. Ass’n 2004); CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR MANAGEMENT DISPUTES (Nat’l Acad. Arb. 2007); MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Bar Ass’n 2005).

33. See Justice Michael B. Hyman & Judge Martha A. Mills (Ret.), *The Virtuous Circle Have You Considered Adding Restorative-Justice Techniques to Your Dispute-Resolution Tool Kit?*, 108 Ill. B.J. 38, 40 (2020). A circle keeper plays the role of the third-party neutral; they are the neutral facilitator for the restorative justice dispute resolution process, which is referred to as a “peace circle” or a “sentencing circle.”

34. See generally K. Hope Harriman and Sarah Staudt, *Rethinking Restorative Justice* (forthcoming 2022) (manuscript at 28-30) (on file with author).

35. “Judicial monitoring” is commonly referred to as “judicial review.” This paper uses “judicial monitoring” in lieu of the more common term to clarify that a judicial decision in an arbitration or restorative justice context is not appealable. When the judge in one of the ADR contexts vacates an award, the parties cannot appeal that decision to a higher court. This is not the case in a standard criminal proceeding, wherein the parties can appeal a judicial decision. The term “judicial monitoring” expresses this distinction.

36. “Repair of Harm Agreement” is name used by the Restorative Justice Community Court to describe the binding agreement generated by the parties with the help of the restorative justice facilitator. Other courts may use different names for this agreement. See National Juvenile Justice Network, *Restorative Justice Community Court*, leaflet, <https://www.njjn.org/uploads/digital-library/07.2017-RJCC%20Brochure%20FINAL%20copy.pdf> [<https://perma.cc/F7JA-48AC>] (last visited Feb 15, 2021).

the well-established regulatory procedures and ethical codes of arbitration as a starting point, this Note will propose ideas for (1) how to regulate and enforce participant confidentiality in restorative justice courts, and (2) how to control the judicial monitoring of “Repair of Harm Agreements.”

With a lot more work, and little more regulation, restorative justice could be one step toward a more just and effective American criminal legal system.

I. THE CASE FOR REGULATION

Despite the growing popularity of restorative justice courts, these proceedings are still notably underregulated compared to other forms of ADR. Much like arbitration and mediation, restorative justice allows parties to reach a unique result without all of the extra cost, inefficiency, and regulation of traditional court.³⁷ However, in arbitration and mediation, there is regulation of *the process* through which the award is made, even though the *substance* of the award is generally unreviewable.³⁸ Restorative justice, on the other hand, lacks regulation for both process and substance. As will be argued, the restorative justice *process* – at least as it occurs in courts of record – should be regulated. This could greatly increase the integrity of restorative justice proceedings and go a long way to protect the rights of defendants.

However, the *substance* of restorative justice agreements should remain unreviewable, as is the case with other forms of ADR awards.³⁹ Unique parties have unique needs, and too much regulation of the content of the agreement would thwart the flexibility and effectiveness of the process. Consider, for example, two defendants, both facing charges of theft. The first was motivated to steal because she didn’t have enough money to pay her rent that month. The second was motivated to steal because of a substance use issue. Each party will require something totally different if they are to truly repair the harm and prevent it from reoccurring. One defendant might need one month of job training, and the other might need two years of substance use counseling. The length of time and imposition on the defendant’s life are wildly different in each case. The facilitator who helped generate the Repair of Harm Agreements might have used a completely different approach with each defendant. Under a purely restorative justice philosophy, such disparities are perfectly acceptable, so long as each party’s needs are being met.⁴⁰

37. See e.g., Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1129–30 (2009).

38. See e.g., 9 U.S.C. § 10 (standards for review of arbitration awards under the FAA); Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 Y.B. On Arb. & Mediation 152, 153–54 (2013) (describing common-law avenues through which to challenge the procedure that generated a mediation award).

39. See note 38 and accompanying text.

40. See Alice Ristorph, *Proportionality As A Principle of Limited Government*, 55 DUKE L.J. 263, 331 n.78 (2005).

Importantly, a restorative justice process that occurs *outside* of a courtroom cannot and should not be regulated. Fundamentally, restorative justice is a community-based method for resolving conflict, and there is no reason that any outside body needs to regulate that process. Indeed, as many practitioners would say, a restorative practice that is regulated by any outside body – especially the State – is not really restorative justice at all.⁴¹ Restorative justice is built on shared power, party autonomy, and private problem solving, and too much regulation could upset this delicate balance.

However, the calculation is totally different when the restorative justice process moves inside of a criminal court of record. At a restorative justice criminal court, such as the RJCC in Chicago, there simply *cannot* be shared power and party autonomy because there is a judge who can override Repair of Harm Agreements at any time. There is not total flexibility for defendants to make mistakes and try again because there is a looming threat that they could be transferred back to a traditional court. As such, the process occurring in restorative justice courts isn't "purely" restorative justice.⁴² Indeed, criminal courts of record – where judges have the ultimate say, and the State has the power to unilaterally deprive someone of their liberty – are completely antithetical and even hostile to the restorative process. However, this does not mean that restorative justice courts are ineffective or should be discontinued. In fact, there is a lot of evidence that these courts are effective at repairing the harm from crime, giving defendants and victims the support that they need, and preventing recidivism.⁴³ The mechanism might not be "purely restorative," but it has restorative elements, and it seems to be working.⁴⁴

Indeed, it is actually counter-productive to attempt to create a "purely restorative" process in a courtroom that is fundamentally hostile to restorative principles.⁴⁵ The primary risk with an unregulated restorative justice process is that defendants may be denied basic due process rights. Specifically, restorative justice has been criticized for failing to guarantee the accused's right against self-incrimination, access to counsel, right to a fair trial, confidentiality, and more.⁴⁶ Comparing restorative justice to mediation, Mary Reimund cautions that "less

41. See K. Hope Harriman and Sarah Staudt, *Rethinking Restorative Justice* (forthcoming 2022) (manuscript at 28-30) (on file with author).

42. See *id.*

43. See The Chicago Tribune Editorial Board, *Editorial: Reducing Crime in Chicago: Instead of a Jail Record, A Second Chance*, CHICAGO TRIBUNE (Nov. 13, 2020), <https://www.chicagotribune.com/opinion/editorials/ct-editorial-restorative-justice-court-north-lawndale-second-chance-20201113-r74ushfv6re6rfgo2oklblsvai-story.html> [<https://perma.cc/G3BT-PZP8>].

44. See *id.*

45. See generally Mary Ellen Reimund, *Is Restorative Justice on A Collision Course with the Constitution?*, 3 *Appalachian J.L.* 1, 31 (2004); Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 *Wash. U. J.L. & Pol'y* 301, 301-08 (2007).

46. See Ikpa, *supra* note 45, at 311-17.

formal” practices such as these cannot and should not mean the loss of basic legal rights, such as the presumption of innocence or a right to a defense.⁴⁷

As of yet, there is still very little guidance on what due process in the restorative justice context should look like.⁴⁸ According to Reimund, “The courts offer no guidance since due process, as it relates to restorative justice, is untested thus far in the courts.”⁴⁹ This Note aims to begin filling in the gaps in this important area of scholarship. Currently, there are few statutory or common law guidelines for regulating restorative justice criminal courts, and even less scholarship on the issue. Hence, this Note will rely on regulatory procedures in other forms of ADR – specifically arbitration – to develop recommendations for what the procedural protections in the restorative justice context could look like. Though there are many realms in which arbitration could inform how we think about restorative justice, this Note will focus on only two: confidentiality and judicial monitoring.

II. CONFIDENTIALITY

This section addresses confidentiality, a key component of any ADR proceeding. First, this section explores the current state of confidentiality in restorative justice courts using the RJCC in Chicago, Illinois as an example. Next, this section provides an overview of the confidentiality regulations in arbitration. Finally, the discussion on arbitration is used to frame recommendations for how to increase confidentiality protections in restorative justice courts. These recommendations include (1) enacting federal/state legislation such as Illinois House Bill 4295, which would ensure that all aspects of the restorative justice process are privileged and can’t be admitted in future proceedings, (2) enacting a national code of ethics for restorative justice practitioners working in courts of record, and (3) encouraging local restorative justice courts to promulgate more confidentiality rules, so long as those rules do not fall below the minimum national standard.

A. CURRENT STATE OF CONFIDENTIALITY IN RESTORATIVE JUSTICE COURTS

Confidentiality rules in restorative justice proceedings are still underdeveloped, even though confidentiality is a cornerstone of the restorative justice process. Restorative justice is a relationship-centered process, wherein all parties share their personal experience of harm and what they need to heal. Because of the highly personal and vulnerable nature of these conversations, confidentiality is necessary to ensure parties can share freely without fear that their personal stories will be revealed publicly.⁵⁰

47. See Reimund, *supra* note 45, at 18 (2004).

48. See *id.*

49. *Id.*

50. See Lynn S. Branham, “Stealing Conflicts” No More?: *The Gaps and Anti-Restorative Elements in States’ Restorative-Justice Laws*, 64 St. Louis U. L.J. 145, 151–52 (2020).

Confidentiality is even more important for restorative justice processes that take place in a criminal court of record. The stakes are high. Without strict confidentiality, a defendant participating a restorative justice process in a court of record could accrue additional criminal charges by making admissions about other crimes during a conversation about their current case. For example, if two parties are resolving a dispute through a restorative justice process outside of a courtroom, there is unlikely to be any consequence if the one who caused the harm admits that she was under the influence of drugs at the time. However, if this same omission was made during a court-sanctioned restorative justice process, the person could face additional charges if this information reached the prosecutor.

Despite the extreme importance of confidentiality for restorative justice in criminal courts, there are very few statutory, common law, or ethical protections for this important right. There is no federal legislation about confidentiality in restorative justice courts. Moreover, there is no code of ethics to govern restorative justice practitioners working in courts of record. This lack of an ethical code is an anomaly in the ADR space.⁵¹ At present, any confidentiality protections for restorative justice proceedings in courts of record come through state law or local court rules, but even the protections in this area are scarce. Though the United States has nearly 200 statutory provisions pertaining to some aspect of restorative justice, very few of those laws address the confidentiality of communications and evidence in restorative justice proceedings.⁵² The few state statutes that do address confidentiality generally stipulate that records and communications are confidential,⁵³ with limited exceptions, such as reporting child abuse.⁵⁴

51. See *supra* note 32.

52. See Branham, *supra* note 50.

53. See *id.* at n.25 (“See, e.g., COLO. REV. STAT. ANN. § 18-1.3-104(b.5)(1) (2019) (subject to delineated exception, “[a]ny statements made during [a restorative-justice] conference [as part of a sentence to a “specialized restitution and community service program”] shall be confidential and shall not be used as a basis for charging or prosecuting the defendant”); *id.* § 18-1.3-204(2)(a)(III.5) (same when restorative-justice conference is held as a condition of probation); DEL. CODE ANN. tit. 11, § 9503 (2019) (subject to delineated exception, communications related to the subject on which a victim-offender mediation process is focused are “not subject to disclosure in any judicial or administrative proceeding”); 19 GUAM CODE ANN. § 5134(f) (2014) (subject to delineated exceptions, “[a]ll discussions that occur within a Balanced Approach and Restorative Justice process are confidential”); NEB. REV. STAT. § 43-247.03(1) (2019) (subject to delineated exception, discussions during restorative justice practices, such as family group conferences and victim-offender mediation, “shall be confidential and privileged communications”); OR. REV. STAT. § 423.600(3) (2017) (subject to “limited exceptions” established by rule, facilitated-dialogue communications “are confidential, and should not be admissible in any administrative, judicial or arbitration proceeding”); TENN. CODE ANN. § 16-20-103(a) (subject to delineated exceptions, communications related to the subject on which a victim-offender mediation process is focused are “not subject to disclosure in any judicial or administrative proceeding”); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a), (g) (2001) (subject to delineated exceptions, a dispute-related communication of a participant in victim-offender mediation “is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding”).”

54. See *id.* at n.26 (“See, e.g., COLO. REV. STAT. ANN. § 18-1.3-104(b.5)(1) (2019) (exception when the defendant commits a “chargeable offense” during the restorative-justice conference); *id.* § 18-1.3-204(2)(a)(III.5) (2019) (same); DEL. CODE ANN. tit. 11, § 9503 (2019) (exceptions when the parties waive the

The RJCC in Chicago serves as a useful case study for how local confidentiality rules at a restorative justice court might develop. Since the RJCC's inception in 2017, the general court policy was that the restorative justice process – or at least the peace circle conversation wherein parties discuss the harm that was caused and how to repair it – was confidential.⁵⁵ This notion was generally understood by the staff, advertised to the participants, and included in the court's promotional materials.⁵⁶ Moreover, when the court was founded, the Repair of Harm Agreements were entered into the official court record but put under restricted access so as to protect the confidentiality of those involved.⁵⁷ Now, nearly three years after the RJCC's inception, there is proposed state legislation in Illinois design to address confidentiality in restorative justice proceedings. This bill, introduced in 2019 and still under consideration by the legislature, proposes the following:

... [A]nything said or done during or in preparation for a restorative justice practice or as a follow-up to that practice, or the fact that the practice has been planned or convened, is privileged and cannot be referred to, used, or admitted in any civil, criminal, juvenile, or administrative proceeding unless the privilege is waived, during the proceeding or in writing, by the party or parties protected by the privilege ...⁵⁸

Under Illinois HB 4295, exceptions to the privilege would only exist where disclosure was required to prevent death, bodily harm, the commission of a crime, or to comply with another law.⁵⁹ This bill has received broad support from the legal, non-profit, and restorative justice communities in Chicago, with notable endorsements from the Illinois State Bar Association, the Cook County Public Defender, and several of the most reputable restorative justice programs in the

privilege or a communication threatens injury or damage to the person or property of a party to the dispute); 19 GUAM CODE ANN. § 5134(f) (2014) (exceptions when the participants agree to “some level of disclosure,” the law requires disclosure (for, for example, “present child abuse”), or communications reveal “an actual or potential threat to a participant’s safety”); NEB. REV. STAT. § 25-2914.01(4)(c) (2019) (exception when communications are subject to mandatory reporting for “new allegations of child abuse or neglect which were not previously known or reported”); TENN. CODE ANN. § 16-20-103(a)-(b) (exceptions when parties waive confidentiality and when a communicated threat of injury or damage to the person or property of a party involved in the victim-offender mediation is relevant in a criminal case); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(f) (2001) (exception when there is a statutory duty to report abuse, exploitation, or neglect).”

55. See National Juvenile Justice Network, *Restorative Justice Community Court*, leaflet, <https://www.njjn.org/uploads/digital-library/07.2017-RJCC%20Brochure%20FINAL%20copy.pdf> [<https://perma.cc/F7JA-48AC>] (last visited Feb 15, 2021).

56. See *id.*

57. See K. Hope Harriman, *Restoring Justice: An Analysis of the North Lawndale Restorative Justice Community Court*, THE UNIVERSITY OF CHICAGO 51 (Apr. 17, 2018), <https://knowledge.uchicago.edu/record/2525?ln=en> [<https://perma.cc/W8E5-5L57>].

58. Ill. H.B. 4295 (1st Sess. 2019).

59. *Id.*

city.⁶⁰ Indeed, absent federal legislation or a set of ethical guidelines for restorative justice practitioners, state legislation and local court rules are the only way to secure confidentiality rights for defendants and victims in restorative justice courts. If passed, Illinois HB 4295 and similar statutes in other states could go a long way to protect the confidentiality and integrity of the restorative justice process.

B. CONFIDENTIALITY IN ARBITRATION

Like restorative justice, arbitration is also a “private” dispute resolution method that takes place outside the public forum of a traditional trial.⁶¹ Also like restorative justice, arbitration proceedings have generally slim confidentiality protections. The Federal Arbitration Act does not address confidentiality, and other state and federal legislation in this area has been minimal.⁶² However, the ethical codes that govern arbitrators fill in some of these gaps. There are two sets of ethical codes for arbitrators – the Code of Ethics for Arbitrators in Commercial Disputes and the Code of Professional Responsibility For Arbitrators of Labor Management Disputes.⁶³ Both codes stipulate that all aspects of the arbitration proceeding must be treated by the arbitrator as confidential.⁶⁴ Both also stipulate that due to the confidential nature of the arbitration relationship, an arbitrator should not willfully become involved in enforcement proceedings.⁶⁵ The Code of Ethics for Commercial Disputes further stipulates that an arbitrator must protect confidential information in the event that they withdraw early from the case,⁶⁶ and that “An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.”⁶⁷

Importantly, though the arbitrators are bound by confidentiality rules, this does not mean that the parties themselves cannot share the information.⁶⁸ Generally, parties can make disclosures unless they have a separate confidentiality agreement.⁶⁹

60. Ill. H.B. 4295 Fact Sheet (unpublished).

61. Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1260 (2006).

62. *Id.* at 1261; *but see* 5 U.S.C.A. § 574 (1996) (regulating confidentiality and admissibility of information in ADR proceedings).

63. CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR MANAGEMENT DISPUTES 10 (Nat'l Acad. Arb. 2007); CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES 1 (Am. Arb. Ass'n 2004).

64. *Id.*

65. CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR MANAGEMENT DISPUTES 22 (Nat'l Acad. Arb. 2007); CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES 7 (Am. Arb. Ass'n 2004).

66. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES 3 (Am. Arb. Ass'n 2004).

67. *Id.* at 7.

68. AAA *Statement of Ethical Principles*, AM. ARB. ASS'N, <https://www.adr.org/StatementofEthicalPrinciples> [<https://perma.cc/H7VV-GJM2>] (last visited December 11, 2020).

69. *Id.*

In the case of public agencies, all arbitration awards are public.⁷⁰

Confidentiality rules get hairy when applied to the admissibility of arbitration communications at trial. Most states do not have statutes that render arbitration proceedings inadmissible, and those that do are generally limited to certain types of arbitration, such as those for attorney's fees.⁷¹

C. RECOMMENDATIONS: CONFIDENTIALITY

As demonstrated by arbitration, ethical codes can play a critical role in guaranteeing the confidentiality of ADR proceedings. Unlike state statutes, which usually govern the confidentiality of the entire process, ethical codes specifically target the conduct of the facilitator. Such regulation is essential to the integrity of the restorative justice process. Take, for example, Illinois HB 4295, excerpted above. The bill includes the facilitator as one of the parties covered by the privilege. However, the bill provides no discussion of the specific duties of the facilitator, or more elaborate guidance on how the facilitator should handle issues of confidentiality. Hence, this Note recommends that the restorative justice community draft ethical standards of confidentiality for restorative justice facilitators working in courts of record, using existing standards for arbitration as a guide. These standards should be included in a more comprehensive set of ethical guidelines for restorative justice facilitators, similar to those that already exist for arbitration and mediation.⁷²

Though a strict set of uniform guidelines is generally antithetical to the restorative justice process, such safeguards are necessary when the process occurs as part of an official court of record. As previously discussed, many seasoned restorative justice practitioners already don't view the RJCC as "purely" restorative justice.⁷³ Given this reality, there should be basic confidentiality rules to protect the due process rights of participants, including the presumption of innocence, the right against self-incrimination, and the right to a fair trial.⁷⁴ The confidentiality rules should be as flexible and restorative as possible, but they should be there. If they are not, defendants in restorative justice courts might pay a high price.

Below are three recommendations, based on the above analysis, to bolster confidentiality protections in restorative justice courts.

1. Illinois (and any state lacking similar protections) should enact Illinois HB 4295 or similar legislation, which, if passed, would guarantee that "anything said or done during or in preparation for a restorative justice practice or as a follow-up to that practice, or the fact that the practice has been planned or convened" is privileged and cannot be used in any subsequent proceeding.⁷⁵

70. *Id.*

71. See Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1273 (2006).

72. See *supra* note 32.

73. See *supra* note 41 and accompanying text.

74. See *supra* note 45-47 and accompanying text.

75. See, e.g., Ill. H.B. 4295 (1st Sess. 2019).

2. A nationwide group of restorative justice practitioners should come together to enact a set of ethical guidelines for restorative justice facilitators working in courts of record. This ethical code should address key concerns that are common in the ethical codes for other forms of ADR, such as the confidentiality obligations of the third-party neutral.
3. Local restorative justice courts should pass additional confidentiality protections, so long as they meet the minimum standards set forth in the relevant federal/state legislation and the ethical code for restorative justice facilitators working in courts of record.

A stronger set of protections is required to truly ensure confidentiality for defendants in restorative justice courts. Until basic structures for ensuring confidentiality are in place, the rights of defendants could vary greatly across different restorative justice courts, judges, and prosecutors. Out of a concern for due process, this flaw must be fixed – and certainly before earnest efforts to scale this model are underway.

III. JUDICIAL MONITORING

This section addresses judicial monitoring,⁷⁶ a key component of any ADR proceeding. First, this section explores the current state of judicial monitoring in restorative justice courts using the RJCC in Chicago as an example. Next, this section discusses judicial monitoring in the arbitration context, which is much more regulated than restorative justice. Finally, this discussion of arbitration frames the recommendations for how to better regulate judicial monitoring in restorative justice courts. These recommendations include: (1) enacting federal (and/or state) legislation to regulate the judicial monitoring of Repair of Harm Agreements so that one of these agreements could only be vacated for corruption, fraud, evident facilitator partiality, misconduct, or misappropriation of power; (2) enacting a code of ethics for restorative justice facilitators working in courts of record so that there are uniform standards by which a judge could evaluate corruption, fraud, evident facilitator partiality, misconduct, or misappropriation of power; and (3) encouraging judges of restorative justice courts to issue a written decision every time they vacate a Repair of Harm Agreement or remand to the parties for revision.

A. CURRENT STATE OF JUDICIAL MONITORING IN RESTORATIVE JUSTICE COURTS

In arbitration, restorative justice, and most forms of ADR, the private agreement generated by the parties is theoretically *not* subject to review by an outside party. Indeed, one of the principles of advantages of ADR is that the award is

76. See *supra* note 35 for an explanation of “judicial monitoring” as compared to the more common term “judicial review.”

final, binding and *not* subject to judicial review.⁷⁷ The finality of the process increases efficiency and decreases cost, which makes ADR attractive for parties who want a quick resolution. However, despite these lofty ideals of finality, judicial monitoring *does* occur in arbitration, restorative justice, and other forms of ADR. For example, in nonunion arbitration, a judge can vacate an appealed award for a number of pre-defined procedural errors, including corruption, fraud, evident arbitrator partiality, misconduct, or misappropriation of power.⁷⁸ Nonetheless, the *substance* of the arbitration award remains unreviewable.⁷⁹ This scheme is common across ADR, as courts generally prefer not to meddle in the contents of a lawfully-generated private agreement.⁸⁰

There are two principle differences between judicial monitoring in restorative justice and arbitration. First, judicial monitoring in restorative justice courts⁸¹ occurs *for every agreement* and not simply the limited instances when a dissatisfied party appeals.⁸² For example, for every case at the RJCC in Chicago, the defendant and victim work with a facilitator to generate a Repair of Harm Agreement. This agreement delineates exactly what the defendant is going to do to repair the harm that they caused. Once all parties have consented to the terms of this agreement, they are written down and sent to the judge. Each agreement is then reviewed in conference with the judge, attorneys for both parties, and staff from Cook County Social Services. Through this conference, the judge decides whether they will accept or vacate the agreement, or if they will remand it back to the parties with suggested changes.⁸³

At the defendant's next court appearance, the restorative justice court judge will state for the record what they have decided to do with the Repair of Harm Agreement. Typically, the judge doesn't offer an explanation for why they are vacating or remanding an agreement. This is because the contents of the agree-

77. See e.g., Frances T. Freeman Jalet, *Judicial Review of Arbitration the Judicial Attitude*, 45 CORNELL L. REV. 519, 521 (1960) (explaining that arbitration is final, binding, and not subject to judicial review).

78. See 9 U.S.C.A. § 10; see also 29 U.S.C.A. § 185 (prescribing standards of review under the Labor Management Relations Act). This note will only analyze 9 U.S.C.A. § 10.

79. See *supra* note 38 and accompanying text.

80. See, e.g., *infra* note 88 and accompanying text.

81. Different restorative justice courts may handle the judicial monitoring process differently. Only the procedures of the RJCC in Chicago are described here, as the processes of these courts are the most well-documented.

82. Compare K. Hope Harriman, *Restoring Justice: An Analysis of the North Lawndale Restorative Justice Community Court*, THE UNIVERSITY OF CHICAGO 51 (Apr. 17, 2018), <https://knowledge.uchicago.edu/record/2525?ln=en> [<https://perma.cc/W8E5-5L57>] (explaining the judicial monitoring process at the RJCC), and *Hall Street Associates v. Mattel*, 552 U.S. 576, 590 (2008) (explaining that parties to an arbitration award can appeal the award under the FAA or "they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.").

83. See K. Hope Harriman, *Restoring Justice: An Analysis of the North Lawndale Restorative Justice Community Court*, THE UNIVERSITY OF CHICAGO 87 (Apr. 17, 2018), <https://knowledge.uchicago.edu/record/2525?ln=en> [<https://perma.cc/W8E5-5L57>].

ment itself are confidential,⁸⁴ and there are no codified standards that a judge must follow when vacating an award or remanding it for revisions. The result is an ad-hoc review of the Repair of Harm Agreements. If the judge finds the agreement satisfactory, they will let the agreement stand. If the judge does *not* find it satisfactory, they will remand it to the parties for additional consideration. No opinion is written at this stage of the process. Because of this, it is nearly impossible to know what might cause a judge to vacate an agreement or remand it for changes.⁸⁵

The second principle difference between judicial monitoring in restorative justice and arbitration is that restorative justice has no codified standards for when a judge can vacate a Repair of Harm Agreement or remand it for revisions. In contrast, nonunion arbitration has very clear standards for vacatur, all of which are explained in the Federal Arbitration Act (or “FAA”).⁸⁶ In arbitration, judges who vacate an award are also required to write an opinion explaining why they authorized the vacatur. Hence, the judicial monitoring process for arbitration is currently more predictable and transparent than what exists for restorative justice.

It is important to note that the fact that Repair of Harm Agreements are open to judicial monitoring *at all* is one of the main criticisms of those who claim that restorative justice courts are not “truly restorative.”⁸⁷ A “truly restorative” process would be completely individualized to the parties, and not subject to review by any outside body.⁸⁸ Thus, the fact that *anyone* — much less a judge who was not affected by the harm and played no part in generating the agreement — has unilateral authority to reject the agreement reached by the parties is completely contrary to restorative justice principles.⁸⁹ In a “purely restorative” context, judicial monitoring would confer too much power to one person, thus upsetting the restorative process which is normally based on shared power and flat decision making. This power imbalance is only magnified if the reviewing party is the judge of a court of record, who has the full authority of the State behind them, and enough power to derive a non-compliant party of their liberty.⁹⁰

84. See National Juvenile Justice Network, *Restorative Justice Community Court*, leaflet, <https://www.njjn.org/uploads/digital-library/07.2017-RJCC%20Brochure%20FINAL%20copy.pdf> [<https://perma.cc/F7JA-48AC>] (last visited Feb 15, 2021).

85. Some possibilities include (1) that the agreement seemed disproportionately lenient as compared to the offense, or (2) the judge, based on their professional or personal judgement, didn't think the agreement was appropriate for the defendant.

86. See 9 U.S.C.A. § 10; see also *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 30 (1987) (“Absent fraud by the parties or the arbitrator's dishonesty, reviewing courts in such cases are not authorized to reconsider the merits of the award, since this would undermine the federal policy of privately settling labor disputes by arbitration without governmental intervention.”).

87. See K. Hope Harriman and Sarah Staudt, *Rethinking Restorative Justice* (forthcoming 2022) (manuscript at 28-29) (on file with author).

88. *Id.*

89. *Id.*

90. This is exactly the case at the restorative justice courts in Chicago: if a judge determines the agreement is not sufficient, they can remand it to the parties with recommended recommendations. If the judge determines

Despite this valid criticism, this Note is not trying to litigate whether or not judicial monitoring of Repair of Harm Agreements is a good idea. Rather, this Note acknowledges that though many restorative justice practitioners object to the idea of judicial monitoring, the reality is that these Repair of Harm Agreements often *are* subject to ad hoc, unregulated review by judges. Accordingly, restorative justice courts need a better, more consistent way to regulate the judicial monitoring process that has already started.

B. JUDICIAL MONITORING IN ARBITRATION

Judicial monitoring of arbitration awards serves as a productive analogy for what the judicial monitoring of restorative justice awards could look like.⁹¹ As a baseline rule, arbitration awards are final, definite, and not subject to judicial monitoring.⁹² However, this blanket rule has several important exceptions, which are enumerated in the Federal Arbitration Act:

1. In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
 - a. where the award was procured by corruption, fraud, or undue means;
 - b. where there was evident partiality or corruption in the arbitrators, or either of them;
 - c. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
 - d. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁹³

If one of the parties to the arbitration agreement believes that one of these exceptions applies to their case, they may appeal to a court to have their award confirmed, denied, modified, corrected, or vacated.⁹⁴ However, as the above language suggests, an arbitration award is only subject to judicial monitoring in the exceptional instances of corruption, fraud, evident arbitrator partiality, misconduct, or misappropriation of power.⁹⁵ The first three grounds for review are purely

that the defendant is not complying or will not comply, they can send the defendant back to traditional courtroom. Though the judges and staff at the RJCC in Chicago, for example, go to great lengths to listen to defendants' needs and provide flexible care, the power is anything but equal.

91. This analysis is drawn primarily from the FAA. See *supra* note 80 and accompanying text.

92. See 9 U.S.C.A. § 10.

93. *Id.*

94. Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 Hous. L. Rev. 739, 749 (2007) (citing 9 U.S.C. §16(a)(1)(D)-(E) (2000).

95. 9 U.S.C.A. § 10.

procedural, and the fourth has similarly been interpreted to foreclose any substantive review of the award.⁹⁶

Moreover, the Federal Arbitration Act also severely curtails the court's ability to modify the content arbitration award. Specifically, courts may only modify the content of an award where there was a miscalculation of figures, a material mistake in description, an arbitrator ruled on an issue not before them, or the form (not the merits) of the award is imperfect.⁹⁷ If the award is vacated before the deadline to finalize the agreement has expired, the court may send the award back for a rehearing by the arbitrators.⁹⁸ In short, a reviewing court is not meddling in the merits of the case, even where the reviewing judge disagrees with findings of fact or law.⁹⁹ Rather, the reviewing judge is to determine "whether the arbitrators did the job they were told to do – not whether they did it well, or correctly, or reasonably, but simply whether they did it."¹⁰⁰

Mediation, another notable form of ADR, has standards for judicial monitoring similar to those found in arbitration. However, unlike the judicial monitoring of arbitration awards, there are no statutes governing judicial monitoring in mediation. Rather, there are multiple common law avenues through which a dissatisfied party may challenge a mediation award, including issues with contract formation, fraud, coercion, or mistake.¹⁰¹ Like with arbitration, these grounds for review are procedural. Nonetheless, if the parties actually reach an agreement, it will be enforced by the court except for the rather rare instances of procedural or ethical defect.¹⁰²

C. RECOMMENDATIONS: JUDICIAL MONITORING

As the arbitration process suggests, courts can consistently and transparently implement judicial monitoring of ADR processes without meddling in the substance of an agreement or threatening party autonomy. Specifically, the standards

96. See Meriwether at 745; *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 37-38 (1987).

97. 9 U.S.C. § 11.

98. 9 U.S.C.A. § 10.

99. See *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 38 (1987) (refusing to vacate arbitration award even though there was too much factual inference in lower courts, stating that "so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to vacate his decision."); *E. Associated Coal v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 67 (2000) (court refuses to vacate arbitration award unless it violates explicit, well-defined, dominant public policy); *Major League Baseball Players Ass'n v. Garvey*, 523 U.S. 504, 509 (2001) (refusing to vacate an arbitration award even if there is "serious error" on the part of the arbitrator, so long as he does not "dispense[s] his own brand of industrial justice." (quoting *Steelworkers v. Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960))).

100. Meriwether at 745 (2007) (citing *Richmond, Fredericksburg & Potomac R.R. v. Transp. Comm'n Int'l Union*, 973 F.2d 276, 281 (4th Cir. 1992)).

101. Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, 5 Y.B. On Arb. & Mediation 152, 153-54 (2013).

102. *Id.* at 155; James R. Coben, Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 74 (2006).

for review set forth in the FAA are procedural instead of substantive, thereby preserving the content of all lawfully generated awards.¹⁰³ This framework translates very well into a restorative justice context. Like arbitration, restorative justice is based heavily in private agreements and individualized approaches to problem solving. As such, it is appropriate that judicial monitoring in each instance is limited to procedural errors, not substantive ones. As of now, there are no codified standards for the judicial monitoring of Repair of Harm Agreements. A judge could remand a Repair of Harm Agreement for a good reason, a bad reason, or no reason at all.

There is no need to leave the judicial monitoring of Repair of Harm agreements up to chance. The FAA standards of review could easily be translated to the restorative justice context. Below are three recommendations, based on the above analysis, to improve the judicial monitoring of Repair of Harm Agreements in restorative justice courts.

1. Enact federal (and/or state) legislation addressing the judicial monitoring of Repair of Harm Agreements the mirrors the standards of the FAA. Under such a scheme, a Repair of Harm Agreement would not be reviewable except in instances of corruption, fraud, evident facilitator partiality, misconduct, or misappropriation of power.
2. Enact a code of ethics for restorative justice facilitators so that there are uniform standards by which a judge could evaluate the partiality, misconduct, and misappropriation of power of restorative justice facilitators.
3. Encourage judges of restorative justice courts to issue a written decision or explanatory memorandum every time they vacate or remand a Repair of Harm Agreement. This would increase the transparency and credibility of the process and disincentivize judges from rejecting lawfully-generated Repair of Harm Agreements under false pretenses.¹⁰⁴

Codified standards for judicial review are necessary to bolster the legitimacy and predictability of outcomes in restorative justice courts. By enacting legislation that addresses judicial review, propagating an ethical code for restorative justice facilitators, and encouraging judges to issue a written decision every time they vacate or remand a Repair of Harm agreement, restorative justice courts can build a more even-handed process for judicial review.

CONCLUSION

The way the United States has been administering criminal justice isn't working, and restorative justice could be one important step in a new and better direction. However, the process is relatively new to courtrooms in the United States and still very much in the experimental phase. To give restorative justice a head

103. *See* 9 U.S.C.A. § 10.

104. Assuming the Repair of Harm Agreements remain confidential, as they currently are at the RJCC Chicago, these opinions would have to be written in a way that avoids disclosure of confidences.

start, it is important to take inspiration from how other forms of ADR have successfully structured and regulated their private dispute resolution processes. As the arbitration process illuminates, federal statutes and ethical codes go a long way in regulating the *procedure* that generates an ADR award without meddling in the content of the award itself. As demonstrated, these principles can – and should – be translated to the restorative justice context. Basic regulations regarding confidentiality and judicial monitoring in the restorative justice process will protect defendants' rights and ensure that a judge cannot baselessly vacate a valid Repair of Harm Agreement.

These protections are not complete, but they could serve as an important start. With just a little regulation, restorative justice could become the next best thing to hit criminal justice reform. Thankfully, there is no need to reinvent the wheel: the regulations in arbitration and other forms of ADR are already pointing us in the right direction.