Restorative Justice and Serious Harm
A Way Forward

Restorative justice has been rapidly gaining ground in the world of criminal justice reform, its virtues advocated for by everyone from prosecutors to abolitionists. In the U.S., it is increasingly called upon as an alternative to the standard legal process and as a means of reducing incarceration. Yet the reach of restorative justice has been constrained—primarily applied to juvenile offenses and minor charges and, often excluding crimes involving violence perpetrated by adults.[1] This fails to realize the full potential of restorative justice—both as a means of repairing and preventing future harm, and of reducing the use of jail and prison. Estimates suggest that half of the country's incarcerated population is serving time for violent offenses.[2]

At the Center for Justice Innovation, we began our engagement with restorative justice in 2013, focusing initially on restorative responses to lower-level charges. However, research and our own experience tell us that restorative justice is most effective when applied to cases of more serious harm.[3] This entails a much deeper engagement with the criminal legal system and here significant tensions emerge. Restorative justice is a values-based approach inspired by Native practices.[4] It recognizes our collective responsibility to each other and focuses on what lies ahead: accountability, repair, healing, and the prevention of future harm. The legal system, by contrast, focuses on the past and on individuals in isolation: what occurred,

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who is responsible, and what punishment they merit. Offering restorative justice processes to parties after the court process is set in motion is a balancing act, but it is one we have found well worth investing in.

The Harms of the Status Quo

The U.S. justice system's focus on punishment is often justified in the name of victims. Yet the legal system names the state as the harmed party and litigant, and the experience of victims often becomes a footnote to the state's case.[5] For the prosecutor, the professional rewards for obtaining a conviction and prison sentence can overshadow the wishes of a victim. Research consistently finds that victims feel ill-served by the system, and that the majority of crime victims neither want, nor benefit from, the punishment paradigm. In a recent national survey, fewer than one in four victims of crime believed long prison sentences are an effective response to crime. That same survey found victims of violence were significantly more likely to experience disability, chronic illness, and depression.[6] By contrast, research has found a significant reduction of symptoms of PTSD for victims who elect to participate in a restorative process.[7]

> Restorative justice is a different pathway to justice.

There is also little evidence the punishment paradigm is effectively addressing violent behavior. Prominent among the factors that fuel violence are isolation and shame; both are central to the experience of incarceration. A recent analysis of more than a hundred research studies concludes—as a matter of "criminological fact"—that incarceration has "no effect on reoffending or slightly *increase[s]* it when compared with noncustodial sanctions.[8] There is legitimate debate over the best response to harm—there are no easy answers. But the decades-long focus on harsh punishment in this country has not produced the promised benefits to public safety or met the needs of victims.

A Different Pathway

Restorative responses offer a promising alternative that acknowledges our collective responsibility to address the conditions that foster harm. The response seeks to *decrease* isolation where responsible parties have the opportunity to face the impact of their actions and take steps to make amends. The goal is the transformation of shame into accountability. Simultaneously, restorative responses explicitly offer care to victims based on the needs they have identified.

In short, rather than just a change in the type of sanction or supervision someone receives, restorative justice is a different pathway to justice.

A restorative approach significantly alters the experiences of everyone in the aftermath of a crime: those who were harmed, those who committed the harm, and their respective loved ones are invited into the process—the latter generally accorded little formal role in a traditional justice system response. There

is no adversarial element to a restorative process; no zero-sum outcome where one side's "win" is a function of the other side's loss.

In the adversarial system, victims who speak honestly about their own actions or acknowledge memory gaps can be at risk of being disbelieved and retraumatized. Similarly, individuals who have caused harm are instructed that staying silent about their actions, minimizing or denying their responsibility, can lead to a more favorable outcome—accepting responsibility can work against them. A restorative response, by contrast, views truth-telling as a critical part of healing and repair. It is a response built on open communication, seeking to understand what happened in order to determine what needs to be done to repair relationships and, critically, to prevent future harm.[9]

> Violence requires a response that opens opportunities for a different future.

Restorative justice challenges the idea that the state alone is best positioned to respond to harm. Based on consensus, restorative justice upends the power dynamics of the criminal court process, with power being shared equally by all those who have been impacted by harm and their supporters. This means implementing restorative justice *inside* of a criminal case—particularly one where the harm is more severe—poses a challenge to both processes.

Building Restorative Justice in the System

The Center began its system-partnered restorative justice work addressing misdemeanor charges through our Peacemaking Program at Brooklyn's Red Hook Community Justice Center and through Project Reset at Bronx Community Solutions. That work continues, chiefly focused on diverting people from system-involvement altogether, but we were determined to push the use of restorative practices into the further reaches of the criminal legal system.

In 2019, with growing enthusiasm for criminal justice reform and reducing the reliance on incarceration, the Center elected to prioritize the design and implementation of restorative responses aimed at addressing violent crimes and serious harm. The change in landscape opened the possibility for those charged with these crimes to earn non-incarceratory sentences through participation in restorative justice and other alternative-to-incarceration programming. However, this came with some peril for legal stakeholders. There are professional and political risks for prosecutors and judges, as public opinion frequently favors harsher punishments and incarceration for violent offenses.[10] For defense attorneys, encouraging their clients to, in essence, confess to their crimes before the state has proven their case can be anathema.

Restorative justice requires all of the legal players to relinquish a measure of power and control. Successful implementation requires careful navigation of stakeholders' tolerance for risk and their willingness to cede power.

Establishing a restorative process within the criminal court system also requires new thinking and mechanisms, and a structure safeguarding the rights of everyone involved. The Center's framework incorporates guardrails to protect participants, and the process itself, from the undue influence of the criminal system. Key components that the Center focuses on include confidentiality, voluntary participation, certainty of the legal outcome, limited exclusionary criteria, and the exclusion of legal actors from the restorative process.

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First, to ensure that information disclosed during a restorative process is not used for a subsequent prosecution, all referring district attorney offices must have a signed memorandum of understanding with the Center. This agreement specifies that any information shared during the process is confidential and cannot be subpoenaed or utilized in the prosecution of any criminal case. Second, participation in the restorative process is voluntary, and individuals must be screened for appropriateness before being accepted into the program. A successful process requires that participants understand the process and consent to participation. Third, a case is accepted only when the legal parties have either drafted a written agreement or entered a plea agreement in court, clarifying the outcome of the case should a restorative process move forward. Clarity of outcome is necessary for individuals to decide whether to opt in to the process.

Fourth, the cases we exclude—primarily gender-based violence and cases where there is a pattern of abuse—are due to the limitations of our practice and capacity. Outside of that, we commit to screening *any* case of interpersonal harm, regardless of charge or criminal history. Finally, the traditional power players in the legal system—judges, prosecutors, and defense attorneys—are expressly excluded from the restorative process itself, though they retain some influence over whether a restorative process can be offered.

In addition to thinking through the mechanics of how a restorative justice process would operate inside of a given legal system, we devoted considerable time to developing relationships with the referring offices. In each of the district attorney's offices we have worked with, the Center has provided presentations and training sessions, as well as establishing a direct relationship with the people uniquely positioned to identify and refer cases.

Opportunity for Healing

Restorative justice requires legal actors to take a broader, longer-term view of harm. This approach shifts the focus from legal theories and evidence, instead emphasizing the priorities of the people most impacted by the crime. While this shift may be challenging and even in tension with the traditional system, the benefits can be clear.

By way of conclusion, take the following criminal case where, with the consent of all the parties, we implemented a restorative justice response.

A man walking the streets of New York City is brutally attacked and beaten. The unpro-

voked assault is captured on surveillance footage. The victim spends a week in the hospital. He also suffers from significant psychological distress. His life feels like it was destabilized in an instant, he says, and he is full of unanswered questions. From the outset, he is also clear that, for him, justice cannot be achieved through incarceration. Like many other victims, he wants instead to understand why this happened, and to ensure it will not happen again to someone else.[11]

> We owe it to victims to have a justice process that supports their long-term healing and safety.

Through the restorative justice process, the parties meet face-to-face. The victim brings his close friend and the responsible party brings his wife. The victim shares how the incident has impacted his life and is able to let go of his fears that he had been targeted for his identity. The responsible party expresses remorse, shares about his use of alcohol which was a driving factor in the assault, and commits to addressing his substance use. The supporters share how they too have been impacted by the harm. They provide insight into the lives and characters of their loved ones. Together, all agree that the responsible party will enroll in outpatient treatment for substance use.

As a result of the restorative process, not only did the responsible party avoid incarceration and the negative consequences that often result from it, he took steps to address the underlying issues driving his behavior. The victim expressed that the process was an important part of his healing journey. The relief and empowerment this victim experienced, along with the commitment made by the responsible party to both him and to those who loved him, could never have been realized within the traditional legal system.

Violence requires a response that opens opportunities for a different future, not a doubling down on the very conditions that make it more likely to occur. We owe it to victims to tend to their needs, make amends where possible, and have a justice process that supports their long-term healing and safety. The wounds from violence are deep and long-lasting. But remediation is possible; restoring our sense of safety and the duty of care we owe to each other is possible. Not every victim or responsible party will opt-into a restorative process, but many of them do. It is urgent work that we intend to continue.

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