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Exploring Non-prosecutorial Justice Alternatives in America

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I. INTRODUCTION

Restorative justice has become an increasingly popular topic in the national conversation.¹ No longer just a niche legal concept, restorative justice has gained traction in a variety of contexts.² Importantly, restorative justice has emerged as a model that could remedy some of the problems associated with the traditional criminal justice model in the United States: one of the world's highest incarceration rates,³ family disruption and loss of civil rights due to brushes with the law,⁴ and a culture that is often motivated by fear and bias to put people behind bars.⁵

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¹ See, e.g., Ashoka, *Making Amends: A Restorative Justice Program to End America's Epidemic of Violence*, FORBES (June 24, 2020, 11:00 AM), <https://www.forbes.com/sites/ashoka/2020/06/24/making-amends-a-restorative-justice-program-seeks-to-end-americas-epidemic-of-violence/#3ea24e9f404e>; Gary Blankenship, *For Older Foster Kids, HOPE Can Be the Best Restorative*, FLORIDA BAR NEWS (Aug. 14, 2020), <https://www.floridabar.org/the-florida-bar-news/for-older-foster-kids-hope-can-be-the-best-restorative/>; Aaricka Washington, *How Some Educators Are Teaching Antiracism to the Youngest Students*, PBS NEWS HOUR (Aug. 27, 2020, 1:55 PM EDT), <https://www.pbs.org/newshour/education/how-some-educators-are-teaching-antiracism-to-the-youngest-students>; Kimmy Yam, *Critics fear NYPD Asian Hate Crime Task Force Could Have Unintended Consequences*, NBC NEWS (Sept. 2, 2020, 10:59 AM EDT), <https://www.nbcnews.com/news/asian-america/critics-fear-nypd-asian-hate-crime-task-force-could-have-n1239012>.

² Restorative justice has also been applied in child welfare and civil cases. See Melissa Green, *Here's HOPE for Restorative Practices in Child Welfare System*, JUVENILE JUSTICE INFORMATION EXCHANGE (Nov. 22, 2019), <https://jjie.org/2019/11/22/heres-hope-for-restorative-practices-in-the-child-welfare-system/#:~:text=Melissa%20Green%2C%20Esq.%2C%20is,School%20of%20Law%20in%202006>. Restorative justice “practices have been applied in justice systems, families, workplaces and neighborhoods, as well as in school.” *Id.*

³ Sintia Radu, *Countries with the Highest Incarceration Rates*, USA NEWS (May 13, 2019), <https://www.usnews.com/news/best-countries/articles/2019-05-13/10-countries-with-the-highest-incarceration-rates>.

⁴ William A Galston, *Criminal Justice Reform: Issues and Options for the Next President*, THE BROOKINGS INST. (Oct. 14, 2016), <https://www.brookings.edu/research/criminal-justice-reform-issues-and-options-for-the-next-president/>.

⁵ Lauren Kirchner, *Cycles of Fear and Bias in the Criminal Justice System: Exploring the Psychological Roots of Racial Disparity in U.S. Prisons*, PAC. STAND. (Oct. 30, 2014), <https://psmag.com/news/cycles-fear-bias-criminal-justice-system-93467> (last updated May 3, 2017).

In a Comment I wrote as a law student, which *Stetson Law Review* published in 2018, I explored restorative justice and other alternative models that different countries have used to administer justice following mass atrocities, when prosecuting in international tribunals was not feasible.⁶ The international legal system could not withstand the high volume of cases that needed to be prosecuted after the Rwandan genocide, Apartheid, and other horrific events, so these countries turned to alternative models to bring justice and build peace in their communities.⁷

However, alternative justice models may be preferable even when formal criminal prosecutions and incarceration are available. This Response explores the use of restorative justice models in America and their value compared to the traditional criminal justice model of formal prosecutions and incarceration.

II. DEFINITIONS

First, it is helpful to define restorative justice. Restorative justice is formally defined as

a theory of justice that emphasizes repairing the harm caused by criminal behavior. It is best accomplished through cooperative processes that allow all willing stakeholders to meet, although other approaches are available when that is impossible. This can lead to transformation of people, relationships and communities.

The foundational principles of restorative justice have been summarized as follows:

1. Crime causes harm and justice should focus on repairing that harm.
2. The people most affected by the crime should be able to participate in its resolution.
3. The responsibility of the government is to maintain order and of the community to build peace.⁸

Whereas traditional criminal justice emphasizes *state punishment* of offenders for criminal wrongdoing, restorative justice emphasizes *reparation by offenders* for the harm caused to victims, so that both parties can peacefully reintegrate back into their communities.

⁶ See generally, Kai Su, Comment, *Addressing Post-Atrocity Conflict: The Tension Between Peace and Justice*, 48 STETSON L. REV. 141 (2018).

⁷ *Id.* at 143–44.

⁸ *Lesson 1: What is Restorative Justice?*, CENTRE FOR JUSTICE & RECONCILIATION: A PROGRAM OF PRISON FELLOWSHIP INTERNATIONAL, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/> (last visited Dec. 7, 2020).

The concept of restorative justice can be traced to Native American origins, Canadian First Nations communities, Mennonites, and the Māori.⁹

Part of the difficulty in tracing this practice in the US is that for many Native American people, restorative justice is not a program or a model, but rather a part of their lives and culture. In the words of Chief Justice Emeritus of the Navajo Supreme Court, Robert Yazzie, coming together to determine how to “move forward in a good way” was something that emerged out of a worldview of interconnectedness.¹⁰

This notion of interconnectedness underlies restorative justice principles. Restorative justice approaches crime and violence by first recognizing the interconnectedness in the world—between offenders and survivors, between accountability for crime and healing of the harm caused, and between violence in society and the conditions that give rise to such violence.¹¹ Through this approach, restorative justice models aim “to address the underlying causes of violence and help foster a long-term process of transformation for individuals and communities.”¹²

III. BENEFITS OF RESTORATIVE JUSTICE

Restorative justice offers attractive benefits to the community, including reduced recidivism, increased safety, cost-effectiveness, and fostering a stronger community.¹³ Survivors feel more empowered, they have the opportunity to engage in meaningful dialogue with the people who harmed them, and they experience a greater sense of satisfaction and recovery from the restorative justice process.¹⁴ Finally, offenders have the opportunity to right their wrongs, put the incident behind them, and resolve the situation in a more timely manner than the traditional criminal legal process.¹⁵

Several communities have implemented restorative justice models with success. One example is Common Justice—an “alternative to prison” program based in New York—created “for people charged in the adult criminal courts with violent offenses like assault, robbery, and even attempted murder.”¹⁶ Survivors of crimes

⁹ *About Our Work*, IMPACT JUSTICE, <https://impactjustice.org/impact/restorative-justice/#faq> (select “Where Does Restorative Justice Come From?”) (last visited Dec. 7, 2020).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Common Justice Model*, COMMON JUSTICE, https://www.commonjustice.org/common_justice_model (last visited Dec. 7, 2020).

¹³ *Benefits of Restorative Justice*, COMMUNITY JUSTICE NETWORK OF VERMONT, <http://cjinvt.org/about-us/benefits-of-restorative-justice/> (last visited Dec. 7, 2020).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Ashoka, *supra* note 1.

must consent to diverting their case to Common Justice’s program, which implements restorative justice principles in “a process designed to recognize the harm done, honor the needs and interests of those harmed, and develop appropriate responses to hold the responsible party accountable.”¹⁷ Ninety percent of survivors choose to divert their cases to Common Justice.¹⁸ Actively involved in the process, survivors sit with offenders in restorative justice “circles” that include a facilitator and others supportive of the restoration.¹⁹ Survivors and offenders use the circle to come to an agreement, and Common Justice staff monitor offenders’ adherence to the agreements.²⁰ Agreements “may include restitution, extensive community service, and commitments to attend school and work.”²¹ If offenders successfully follow through on the agreement and complete a twelve to fifteen month violence intervention program, they are relieved of serving their incarceration sentences.²² Common Justice has seen encouraging results, says founder Danielle Sered:

After a decade of doing this and seeing the results, we can say that it works. Fewer than 8% of our participants have been terminated from the program for new crimes. You’d be hard pressed to find a prison that could come anywhere close to those results.²³

Another example is Impact Justice’s Restorative Justice Project (RJP) based in San Francisco, California.²⁴ The RJP focuses on diverting youth offenders from the criminal justice system as well as implementing restorative justice alternatives for intimate partner violence, sexual violence, and child sexual abuse.²⁵ RJP’s aim is to “shift the paradigm from punitive to restorative—recognizing and valuing every individual’s dignity and potential.”²⁶ Several California counties—San Francisco, Contra Costa, Alameda, and Los Angeles—have all adopted Impact Justice’s restorative justice youth diversion program.²⁷ Impact Justice works with other

¹⁷ *Common Justice Model*, *supra* note 12.

¹⁸ Danielle Sered, *Fighting for ‘Common Justice’, for Crime Victims and Their Perpetrators*, at 0:46–0:50 (WYNC Aug. 9, 2017) (audio at <https://www.wnycstudios.org/podcasts/takeaway/segments/common-justice-crime-victims-and-their-perpetrators>).

¹⁹ *Common Justice Model*, *supra* note 12.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Ashoka, *supra* note 1.

²⁴ *Partnering with Communities to Address Harm Through Dialogue*, IMPACT JUSTICE, <https://impactjustice.org/impact/restorative-justice/> (select “Diversion”) (last visited Dec. 7, 2020).

²⁵ *Id.* (select “Overview”).

²⁶ *Id.*

²⁷ Kyung Jin Lee, *Contra Costa Becomes 4th County in California to Adopt Restorative Justice Diversion for Youth*, IMPACT JUSTICE (May 8, 2019), <https://impactjustice.org/contra-costa-becomes-4th-county-in-california-to-adopt-restorative-justice-diversion-for-youth/>.

organizations in these counties, such as youth centers and district attorneys' offices, to carry out the program.²⁸

A similar restorative justice diversion program in Alameda County, California, has shown positive results.²⁹ Within one year of completing the diversion program, "youth were 44% less likely to get a new sustained charge than youth who were processed through the juvenile legal system."³⁰ Victim satisfaction was also high, with ninety-one percent of participants who completed the survey reporting they would participate again and ninety-one percent stating they would recommend the process to a friend.³¹ California district attorneys have also been supportive of restorative justice youth diversion programs:

"I have seen first-hand as a former superior court judge and now district attorney how the criminal justice system is not doing enough to support our youth," said Contra Costa County District Attorney Diana Becton. "Traditionally, the way our criminal justice system handled crimes committed by youth has not always worked. At the same time, restorative justice diversion leads to greater victim satisfaction, and creates a space for our youth to make amends with victims impacted by harm. With this proven restorative justice diversion program we can start to move in a new direction, to reduce youth involvement in the justice system, and lower recidivism rates."³²

In terms of cost-effectiveness, restorative justice diversion programs are inexpensive compared to incarceration in Contra Costa County.³³ It costs an average of \$10,000 per case for restorative justice diversion "versus over \$143,000 to lock up one child for one year in a Contra Costa County juvenile facility."³⁴

Restorative justice models can also be applied in civil, rather than criminal, contexts. Earlier this year, Broward County, Florida, started a restorative justice pilot program for teenagers.³⁵ The program is called HOPE (Helping Older Teens Powerfully Engage) Court.³⁶ The goal of the program is to help teenagers in the foster system "develop better skills for success in adulthood by infusing restorative practices

²⁸ *Id.*

²⁹ See Sujatha Baliga, Sia Henry & Georgia Valentine, *Restorative Community Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County*, IMPACT JUSTICE 1 (Summer 2017), https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf.

³⁰ *Id.* at 7.

³¹ *Id.* at 9.

³² Lee, *supra* note 27.

³³ *Id.*

³⁴ *Id.*

³⁵ Green, *supra* note 2.

³⁶ *Id.*

into the dependency system.”³⁷ HOPE Court seeks to help these teenagers succeed in their graduation from the foster care system and entrance into society, which can be a difficult phase to navigate.³⁸ Youth who graduate from foster care and turn eighteen become eligible to receive state benefits; however, “many do not maintain the status required to keep these benefits and may become homeless or imprisoned.”³⁹ HOPE Court was created to respond to this reality.⁴⁰ The program emphasizes community building between the teenagers, social workers, service providers, and legal professionals, which is a departure from the typically adversarial nature of the legal dependency system.⁴¹

IV. CRITICISM AND TAKEAWAY

Admittedly, restorative justice has its share of critics, and it may not always be the most appropriate response to crime or violence.⁴² There are situations in which the public interest is better served by incarceration rather than restorative justice, such as in the case of serious violent crimes where the offender cannot peacefully reintegrate back into the community.

The *gacaca* courts,⁴³ created after the Rwandan genocide of 1994, are illustrative of some common critiques of restorative justice.⁴⁴ While supporters of *gacaca* praise the courts “for promoting a restorative justice model rooted in local, customary practices,”⁴⁵ critics note that there have been few empirical, local studies of *gacaca*’s effectiveness.⁴⁶ They point to the following major weaknesses:

- (1) it is not truly participatory;
 - (2) it provides no compensation to victims;
 - (3) it is ‘victor’s justice;’ and
 - (4) it risks imposing collective blame on Hutu [the ethnic group accused of committing the genocide].
- In addition, *gacaca*’s community service component, a crucial restorative justice element, remains stalled in the development phase.⁴⁷

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See, e.g., M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 125 (2016).

⁴³ *Gacaca* translates to “lawn,” where dispute resolution processes have traditionally taken place in various African countries, like Rwanda. LARS WALDORF, *Rwanda’s failed experiment in restorative justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 422, 422 (Dennis Sullivan & Larry Tift eds., 2006), accessible at https://www.google.com/books/edition/_/v8Y8cZk8-g4C?hl=en&gbpv=1&pg=PA422&dq=gacaca+courts+restorative+justice.

⁴⁴ For further discussion of *gacaca* courts, see Su, *supra* note 6, at 170–71.

⁴⁵ WALDORF, *supra* note 43, at 422.

⁴⁶ *Id.* at 422–23.

⁴⁷ *Id.* at 429.

These criticisms of *gacaca* overlap with many criticisms of restorative justice in America.

An alternative criticism of restorative justice is that it is a poor substitute for the criminal court system. Some critics of restorative justice view mediation as a better, more neutral alternative for dispute resolution of criminal cases.

[R]estorative justice often functions as a therapeutic adjunct to prosecution that seeks to promote offender “accountability” and victim healing. This focus pre-determines the outcome of any dispute resolution encounter, an anathema to mediation practice, which permits the parties to determine the outcome. The therapeutic focus of restorative justice makes it inapplicable in any instance in which the accused’s culpability is uncertain or deserving of more nuanced interpretation. Finally, the rhetoric of restorative justice masks the influence that the criminal justice system has on out-of-court dialogue, including the potentially coercive effects of the threat of prosecution.⁴⁸

However, despite these criticisms, restorative justice may still be an attractive and valuable model. In my opinion, the greatest strength of restorative justice is its focus on long-term solutions that address the root causes of violence within communities.

The traditional criminal justice process of formal prosecution and incarceration focuses on punishment for wrongdoing. Restorative justice shifts the focus from punishment to reparation for the harm caused. Whether restorative justice actually achieves its goals can still be debated, but as restorative justice projects become more commonplace in America, more data on its effectiveness compared to the traditional criminal legal process will become available. If applied correctly, restorative justice models can facilitate the more complex, nuanced process of healing communities disrupted by crimes and address the underlying factors that cause violence.

⁴⁸ Hanan, *supra* note 42 (internal citations omitted).