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### **Separate and Apart: Why True Restorative Justice Cannot Exist in the Criminal Court System**

Restorative justice seeks to heal<sup>1</sup> people and communities when a harm has been done. One of the ancient and tried-and-true restorative practices is holding a circle for those affected by the harm to speak freely to one another.<sup>2</sup> In the circle, each person has an opportunity to speak and be heard about the harm or the event that brought the circle into existence.<sup>3</sup> The conversation among those affected by a conflict, tension, or harm is facilitated, protected, and deepened by the structured environment of the circle.

The open and honest expression of feelings, thoughts, and opinions in this supportive group setting allows people to find their own healing. This is how restorative justice circles facilitate healing. It is also precisely why true restorative justice cannot exist within our criminal court system.<sup>4</sup>

People all over the world have used restorative justice circles to resolve conflicts for millennia.<sup>5</sup> Circles bring people together to be present with each other.<sup>6</sup> Participants' voluntary engagement is essential to having a genuine, heartfelt, and effective dialogue. That is why the circle must be a safe space, in which people are free to express whatever they want<sup>7</sup> – be it rage, frustration, confusion, sadness, joy. The authenticity and vulnerability<sup>8</sup> expressed in circles contribute greatly to their power. Those who are in the circle decide what the rules of the conversation are<sup>9</sup>, if there are any at all. It is critical that the circle be free from externally-imposed rules, values, and judgments<sup>10</sup> – including labels like “offender” and “victim.” No one person or set of people inside or outside the circle can lord their power over others in the circle. That is because in the circle, all are equal.<sup>11</sup>

In stark contrast, our criminal courts have no space for a judgment-free, safe space, where all are equal and free to come and go as they please. That is simply not what the criminal legal system is designed and built for. For all the discussions that happen in law schools about the purposes of Criminal Law (Is it meant to deter? Rehabilitate? To make someone whole?), it becomes clear from observing and interacting with criminal courts that our criminal legal system exists only to punish those accused of wrongdoing. I say “those accused of wrongdoing” and not “those found guilty of wrongdoing” because the criminal legal system *does* punish those who are accused – even those who are innocent<sup>12</sup> or later found not guilty – from the second they are arrested. Examples of such punishment include incarceration during the pendency of a case, court dates dragging on for months or years, loss of jobs, housing, and custody of children, not to mention the toll on physical and mental health. Anyone who has witnessed any part of the criminal court system – from arraignments to regular calendar calls to trial – can see that the system is there to punish. Its *raison d'être* is completely antithetical to that of restorative justice: healing.

Courts are not spaces where people can voluntarily come and go. Those accused of crimes certainly cannot. If, after seeing a judge, a defendant who is supposedly at liberty even tries to leave the well in a courtroom without the judge implicitly or explicitly granting permission (or if he or she leaves in a way that the judge finds disrespectful), there are repercussions. If defendants do not come to court on their court dates, the judge can order a warrant for their arrest. Complainants are not really free to go to court<sup>13</sup> until trial, if there is one.

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Court is also not a safe space. Court officers and corrections officers with handcuffs and guns run courtrooms and courthouses – in some places, like a total police state. Some could argue that this is a “safe” space, but when I say “safe space,” I am referring so a place that is safe for everyone – including those accused of crimes and their supporters.

Nor is court a judgment-free zone. Judges are, of course, judging. So are prosecutors and defense lawyers, social workers, officers, program representatives, drug treatment court staff, the list goes on. And power dynamics abound, making it abundantly clear that all are decidedly not equal.

In a system in which the primary goal is punishment and in which complainants are only involved to the extent necessary to punish those accused of crimes, to attempt to integrate a completely different set of principles designed to facilitate healing *of everyone involved* is – bluntly put – a fool’s errand.

Restorative justice is a method for resolving interpersonal conflicts completely distinct and separate from our criminal legal system.<sup>14</sup> These two systems have distinct and separate histories and philosophies. If restorative justice principles were incorporated into our criminal legal system, the nature of the dominant system (to punish) would inevitably seep into whatever aspects of restorative justice were introduced – at best, diluting them, at worst, corrupting and destroying them.<sup>15</sup>

This becomes clear from doing a simple thought experiment. Various ideas have been floated around about how to integrate restorative justice into the criminal court system. What about holding a circle as a prerequisite to getting a favorable plea deal or dismissal? What about having a circle post-plea, pre-sentencing, as a prerequisite to getting a favorable sentence? What about sentencing someone to do a circle instead of probation or community service? The fundamental problem with all these suggestions is that none of them are in any way voluntary. In today’s criminal legal system, if a person accused of a crime agrees to any of the above, and then does not comply *fully* (e.g., is late to a circle, leaves early, or does not attend at all), then there are repercussions, likely involving jail. The need to punish overpowers the goal of healing.

Another problem is that none of these suggestions are free of outside rules, values, and judgments. In our criminal legal system, if a person accused of a crime agrees to any of the above, judges and prosecutors will want updates, reports, “proof” that the accused is “doing what he (or she) is supposed to do.” And if what the accused is doing is not acceptable in the eyes of the judge or prosecutor, then there are repercussions. The chilling effect of knowing that what is said in a circle can be reviewed and judged by a judge or prosecutor (and many others) is diametrically opposed to the idea that everyone in a circle can express what they want, free of negative consequences like jail time. Healing cannot take place if looming in the background of a circle is the specter of court – complete with judge, prosecutor, defense lawyer, and others sitting in judgment of your participation and performance – not to mention the threat of jail.

The only way that restorative justice circles can be a true alternative to an active case in criminal court is if there are absolutely no strings attached. In other words, the case must be dismissed

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immediately or guaranteed to be dismissed at some reasonable point in the future and there can be no chance of restoring it to the calendar and no jail alternative to anything. This is unlikely to happen, to put it lightly. So, as long as judges and prosecutors will not agree to this kind of arrangement, there can be no restorative justice within the criminal legal system.

Others may argue that restorative justice and restorative practices already exist within some courts, but I seriously question this claim. Is this “restorative justice” truly voluntary? If a defendant decides not to attend a circle and, as a result, faces any kind of punishment, including his or her case being restored to the calendar, then it is not. Is it free from outside rules and values? If there is any degree of oversight or approval needed afterwards from a prosecutor or judge, then it is not. Is it a safe space? If there are no rules of evidence to protect a defendant from having what he or she says during a circle used against him or her in court, then it is not. Is everyone equal, with equal power? If a judge or prosecutor gets the final say over whether a defendant should get a favorable outcome based on his or her performance or participation in a circle, then the answer is no. To me, this is not restorative justice.

To be clear, I fully believe in a future where restorative justice exists. In fact, I have a deep-seated hope for a future where restorative justice flourishes – as it did in our past<sup>16</sup>. But the restorative justice I believe in exists *in communities*<sup>17</sup>, belongs in the hands of individual people – not in courts and under the thumbs of judges and prosecutors – as it did in our past. Restorative justice is about restoring power to the people – power over their lives, the way they live their lives, the way they interact with others in their communities, the way they resolve conflicts. It is about not giving power over to police, prosecutors, and judges to make decisions for them. Restorative justice can only restore, repair, and bring healing to individuals if those individuals are at the helm of the process, self-actualized in their ability to make change and heal themselves.

I do wholeheartedly believe that restorative justice can be used to solve the collective struggle we have with systemic oppression of people of color and other marginalized people, over-incarceration, recidivism<sup>18</sup>, criminal activity, abuse of the criminal court system (e.g., making false reports or otherwise manipulating the courts to one’s own gain and benefit), lack of civic engagement, and the general disconnectedness of our communities. We can use restorative practices to achieve all these things. It is within our power to embrace and practice restorative justice in our lives, in our communities – not in courts, in fact, *instead of courts, instead of* involving the police in all of our conflicts, *instead of* looking to systems of prosecution to punish and seek vengeance. We can keep the vast majority of conflicts<sup>19</sup> out of the criminal legal system. Despite the inevitable resistance (be it political or simply resistance from inertia), we can educate ourselves about the ancient restorative justice traditions, establish our own restorative justice processes for our communities, and facilitate restorative justice circles when conflicts arise.

As our ancestors once did, we, too, can resolve our own problems and conflicts. We can also take care of one another as we do this<sup>20</sup>, though it will inevitably take time to collectively change course and remember how. But it starts with our intention. We can heal ourselves and our communities. We can start now, in our very own communities – right where we already are.

<sup>1</sup> The purposes of restorative justice have also been described as repairing harm and restoring wholeness – in other words, healing. *See, e.g.,* Michelle Maiese, *Restorative Justice*; BEYOND INTRACTABILITY, Jun. 2013, <http://www.beyondintractability.org/essay/restorative-justice>; Can. Dep't of Justice, *Values and Principles of Restorative Justice in Criminal Matters*, INT'L INST. FOR RESTORATIVE PRACTICES, 2003, at 1, <http://www.iirp.edu/pdf/RJValues-DOJCan.pdf>.

<sup>2</sup> This form of restorative justice was pioneered by indigenous communities all over the world and used for millennia. *See, e.g.,* Living Justice Press, *The Indigenous Origins of Circles and How Non-Natives Learned About Them*, <http://www.livingjusticepress.org> (follow “About Circles” hyperlink; then follow “The Indigenous Origins of Circles” hyperlink); SOCIAL STUDIES TODAY: RESEARCH AND PRACTICE 240 (Walter C. Parker, ed., 2015); Jill Callison, *5 Questions: Talking Circles Resolve Conflict*, ARGUS LEADER, Aug. 9, 2014, *available at* <http://www.argusleader.com/story/news/2014/08/09/questions-talking-circles-resolve-conflict/13819785/>.

<sup>3</sup> *See, e.g.,* *The Indigenous Origins of Circles and How Non-Natives Learned About Them*, *supra* note 2.

<sup>4</sup> The focus of this article is on the criminal court system within our criminal legal system, as the debate over integrating restorative justice into the criminal legal system is often focused on adjustments to the criminal court process (i.e., pre-conviction and pre-sentence uses of restorative practices – as opposed to post-conviction uses in prison and jails and in the re-entry context). The discussion of the role of restorative justice in a post-conviction or re-entry context is beyond the scope of this piece.

<sup>5</sup> *See, e.g.,* *The Indigenous Origins of Circles and How Non-Natives Learned About Them*, *supra* note 2; Parker, *supra* note 2; Callison, *supra* note 2.

<sup>6</sup> *See, e.g.,* MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE 94 (2009).

<sup>7</sup> *See, e.g., id.* at 93.

<sup>8</sup> *See generally* Brené Brown, *The Power of Vulnerability* (June 12, 2010), *available at* [http://www.ted.com/talks/brene\\_brown\\_on\\_vulnerability?language=en](http://www.ted.com/talks/brene_brown_on_vulnerability?language=en).

<sup>9</sup> *See, e.g.,* UMBREIT & ARMOUR, *supra* note 6, at 189.

<sup>10</sup> *See, e.g.,* KAY PRANIS ET AL., PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY 11 (2003).

<sup>11</sup> *See, e.g., id.* at 56; UMBREIT & ARMOUR, *supra* note 6, at 93.

<sup>12</sup> *See, e.g.,* Jennifer Gonnerman, *Before the Law*, THE NEW YORKER, Oct. 6, 2014.

<sup>13</sup> Although complainants are not explicitly prohibited from court, prosecutors naturally do not want them to make themselves available to defense lawyers, investigators, defendants and their family, including in the courthouse.

<sup>14</sup> According to pioneer psychologist, Albert Eglash, there are three separate justice systems: retributive justice (focused on punishment), distributive justice (focused on rehabilitation), and restorative justice. *See, e.g.,* Albert Eglash, *Creative Restitution: A Broader Meaning for An Old Term*, 48 J. Crim. L., Criminology & Police Sci. 619-22 (1958); *see also* DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE – AN INTRODUCTION TO RESTORATIVE JUSTICE 21-22 (4th ed. 2010) (citing and discussing Eglash’s 1958 articles).

<sup>15</sup> *See* THE RESTORATIVE CTR., THE NEWBURGH MODEL OF COMMUNITY CIRCLES TRAINING: THE WORKBOOK 63 (2015).

<sup>16</sup> I would like to underscore here that restorative justice and its principles are nothing new in the history of conflict resolution. *See, e.g.,* HOWARD ZEHR, CHANGING LENSES – A NEW FOCUS FOR CRIME AND JUSTICE 97, 268-69 (3rd ed. 2005) (crediting the First Nations people of North America and the Maori people of Aotearoa (New Zealand) for their role in designing and using restorative justice practices).

<sup>17</sup> For those who are concerned that restorative justice circles held outside of the criminal legal system will mean someone accused of doing a harm will not be sufficiently punished, I have learned that that is not often the case. When someone who feels harmed, his or her supporters, and members of the community are in a circle with the accused and his or her supporters, the group consensus often involves some kind of punishment to make the complainant and/or the community feel restored. The only difference from the court model in this respect is that everyone – including the harmed and the accused – has a say in what that punishment will be, making it more likely that it is actually done (fostering defendant accountability) and actually means something to the harmed party (addressing the needs of victims of crimes). It is a critical difference in process, and, not necessarily in result. *See also*, UMBREIT & ARMOUR, *supra* note 6, at 101.

<sup>18</sup> Freestanding restorative justice (non-coercive, collaborative environment with community members) lowers recidivism, whereas court-ordered restorative justice does not. HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 111, 117 (Dennis Sullivan & Larry Tiffitt, eds., 2006). Furthermore, restorative justice processes yield higher victim satisfaction rates. Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-*

*Analysis*, 85 PRISON J. 127, 136 (2005), available at

[http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj\\_meta%20analysis.pdf](http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj_meta%20analysis.pdf).

<sup>19</sup> I am not arguing that every single conflict and case in the courts should not be there. But the vast majority of them would be better addressed in restorative justice circles. People involved in the cases that remain in courts are absolutely candidates for post-conviction restorative justice circles – in prisons or in the community, after a sentence is served. Again, that discussion is beyond the scope of this essay.

<sup>20</sup> For those who believe that our criminal legal system is more effective, fair, or otherwise “better” than the restorative justice tradition, I pose the following question: Is it “better” to have a system where a young man like Kalief Browder (*see generally* Jennifer Gonnerman, *Kalief Browder, 1993-2015*, THE NEW YORKER, June 7, 2015) could be incarcerated pre-trial for *years* in a place like Rikers Island, the largest penal colony in the world (JENNIFER WYNN, *INSIDE RIKERS: STORIES FROM THE WORLD’S LARGEST PENAL COLONY* 8 (2001)), such that he subsequently becomes a victim of suicide after he is released? We owe it to ourselves to keep asking hard questions like this and try alternatives, like implementing restorative justice in our communities, rather than seeking justice in institutions that could allow, condone, or be complicit in such tragic and needless loss of life.