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SUSAN ABRAHAM

Through the Lens of Restorative Justice: A Re-Humanizing

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ABOUT THE AUTHOR: Professor of Law, New York Law School. J.D. Rutgers Law School, 1983; M.F.A. Warren Wilson College, 1991; B.A. Oberlin College, 1977. On April 12, 2019, the *New York Law School Law Review* hosted a day long Symposium dedicated to restorative justice. The author would like to thank the panelists and presenters at the Symposium who made the day a powerful learning experience, and a moving reminder of how much better we can do. Thanks to Dean Anthony Crowell for his continued support for restorative justice projects; Richard Marsico, Director of the New York Law School Impact Center, for supporting this Symposium; and Swati Parikh for her guidance throughout the planning process. Additional thanks to Michelle Zierler for supporting the Symposium and committing the formidable strength of the *Law Review* to it. Special thanks to Jarienn James—our Racial Justice Project Fellow—for the enthusiasm, energy, and hard work she put into making the Symposium happen, as well as students Lucy Reynoso and Rachel Welt who assisted with speakers and CLE materials. Thanks also to Rose White, the events and catering staff, the IT crew, and all of the *New York Law School Law Review* and Impact Center students who volunteered.

THROUGH THE LENS OF RESTORATIVE JUSTICE: A RE-HUMANIZING

My first job after graduating from law school in 1983 was at a trial-level public defender's office in a small New Jersey city. Shortly after I started, having had "practice" doing adult guilty pleas and informal juvenile hearings but no trial training, I was handed a file for my first adult trial. I was to represent a man charged with possession of one small glassine of heroin. A police officer claimed to have seen my client drop the glassine to the sidewalk while he stood with a group of men in front of a local bar, as the officer cruised by in his marked car and observed it through the passenger window. My colleagues referred to this as a "dropsy" case, a routine scenario rarely set for trial. However, because my client had a record of prior drug convictions, which meant under New Jersey law at that time a guilty verdict would have brought him a substantial mandatory prison sentence, and because he denied the charge, the matter had been set for trial. It was likely to be called early in my tenure as a public defender. I scheduled a meeting with my client so we could review what he remembered from the day of his arrest (not too much); we discussed the additional investigations I would do, and reviewed our trial goals and strategy. I was painfully aware that this was different from the mock advocacy experience I'd had in law school, and unlike the supervised real client experience from my law school civil clinic: if I made a mistake and failed to file a motion or object to improper evidence, my client could lose his liberty and end up in prison for many years. I was terrified.

My client, Michael,¹ turned out to be an appreciative, polite man who, due to his long history of addiction, was well known by the local police. He had, however, recently completed a residential drug treatment program where he felt he had successfully overcome his addiction, and had been in compliance with an out-patient methadone program. Although the charge arose from activities that took place prior to his treatment, while he had been an admitted user, he adamantly denied having dropped that glassine. He had not seen any glassine fall to the ground. He pointed out that he had pled guilty to charges in the past when he was in fact guilty, but was not guilty this time. He said he understood the risks of trial, frankly confided with a shrug that he had little expectation of a just outcome, sincerely hoped he could have the chance to rebuild his life, and thanked me profusely as he shook my hand. He was more concerned with where he would go and what he would do next; he hoped to return to his hometown when his methadone program ended but had difficulty finding work, especially in light of his record, his limited job skills, some medical disabilities, and his advanced age. He struck me as already defeated, and I recommitted to being a zealous advocate.

As might be expected, I hadn't slept well the night before the trial began or during the two or three days that it took place. Though it was mostly a blur—jury selection, opening statements, cross-examining the arresting officer and his partner, putting on my own investigator to testify as to distances viewed and lighting conditions, and quickly rehearsed closing arguments—I clearly recall my feelings of overwhelming responsibility while sitting next to my client whose life depended on the outcome. I also remember feeling concerned by the absence of emotion in his

1. I am using only his first name to protect his privacy.

face, his flatness. He “chose” not to testify, to keep the jury from judging him based on his prior record,² and barely spoke or reacted during the trial. In fact, he frequently laid his head down on the counsel table as witnesses testified, and closed his eyes for long periods, opening them occasionally to ask me, “Is that it? Did they find me guilty yet?” Three or four times, I explained that the jury hadn’t gone out yet. But by far the clearest memory I still carry from that trial, now about thirty-five years later, is that as soon as the jury finally went out to deliberate, the assistant prosecutor, who knew it was my first trial, approached me at the counsel table where I sat next to Michael, and said in front of him, without even lowering his voice, “Don’t worry, it’s not you who goes to jail, it’s just your client.”

When the jury came back in under two hours with a “not guilty” verdict, I was immensely gratified. Michael seemed frozen in what I first took to be disbelief, his head down on his arms, even after the jury had filed out of the room and the judge had left the bench. I remember tapping Michael gently on the shoulder, telling him that he could go home. I wondered if this stressful experience, albeit with a “happy” ending, would send him back to drug use. To be frank, despite the successful outcome, I needed to recover from the stress of the trial, but tried not to show it. Michael was the one who had gone through over a year of pre-trial court appearances, as well as a few weeks locked up in the county jail before his cash bail was reduced to something his sister could scrape together. While he was now free to leave the court as a free man, to resume his life as if nothing had ever happened, he had to be carrying the emotional aftereffects. The process, in which he became a defendant, the anxiety that came with every court appearance, and the feeling of having no agency (or dignity) had to be brutal. Although after the verdict came in, the judge banged his gavel while reciting something to the effect that Michael was no longer charged with a crime, neither the prosecutor nor the judge acknowledged the difficulty of this long process; no one representing the court or “The People” said a kind word, as his life was now handed back to him. Michael and I shook hands, spoke only briefly before he left, and despite a follow-up letter I sent him asking how he was doing, I never heard from him again. I eventually came to understand it wasn’t disbelief that kept Michael from reacting after the verdict. It was more likely his long-term numbness or trauma, a condition that the de-humanizing process of adjudication, the “criminal justice” system, most likely contributed to.

I remember celebrating the “win” after that trial at a local restaurant with colleagues who were pleased that “I” had won “my” first trial. I was aware of feeling that although it was the best possible outcome, it didn’t feel like a moment to celebrate. Yes, Michael was acquitted, but where would he go now, what would he do, what if he slipped back into drug use? After years of arrests and drug addiction,

2. New Jersey Rules of Evidence, like the Federal Rules, bar admission of a criminal defendant’s prior criminal convictions for the purpose of proving that he was likely to have committed this crime based on his character. *See* FED. R. EVID. 404; N.J. R. EVID. 404. However, had he chosen to testify, his prior convictions may have been admissible as bearing on his credibility as a witness. *See* N.J. R. EVID. 404. Even a limiting instruction from the judge as to how that evidence may be used, however, may not stop jurors from considering prior convictions when deciding whether a defendant is guilty. *See id.*

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he did not have a stable home environment or a job, and his body language, and inability to pay attention at trial indicated deeper problems that were not being addressed. My relationship with him was officially over; I would only see him again in the unfortunate instance of a rearrest in the same county. The system encouraged me to maintain a distance because, outside of representation, what could I offer him? I felt a disquieting sense that I was failing my client, that even when the system's due process protections and presumption of innocence "worked," the real problems were neither articulated nor addressed.

And of course, Michael was one of the lucky ones. He denied guilt and was acquitted. He could have been convicted, received a long prison sentence, or entered a guilty plea like most of my clients, and spent a substantial amount of time incarcerated, perhaps serving some time in punishing solitary confinement, perhaps being brutalized by another inmate or a guard, and finally being released on parole where further violations were difficult to avoid. Or if he were facing a shorter sentence, he might have been the recipient of what some judges have referred to as "a life sentence in 30-day installments."³

Over the next few days, I kept coming back to what the prosecutor had said to me in front of Michael. It wasn't just his arrogance and effort to intimidate me as a new lawyer that disturbed me, but the absolute invisibility to him of Michael as a human being, and his likely assumption that as a lawyer, I would see it the same way and would identify more with him, my adversary, than with my own client. Without articulating it clearly yet to myself, I felt the dehumanizing effect of working in this system and accepting many of its assumptions, where the majority of defendants in the courtroom were black and brown, where incarceration was the norm, and where the problems of poverty, racism, educational inequality, mental illness, and substandard housing were rarely acknowledged.

Perhaps the fiction that a prosecutor represents "The People" rather than any real human being made it possible for many of them to forget that the person facing the real danger of prison was indeed a human being deserving of dignified treatment, no matter the outcome of a trial. Surely the potential incarceration of the prosecutor or any member of his own family would strike him as terrifying, and would not be a joking matter. I believe that my client's invisibility arose in large part because of where the (white) prosecutor sat as a (so-called) representative of "The People" vis-à-vis someone he only knew as a "defendant" with a routine dropsy case, particularly a

3. Alex Calabrese is the presiding Judge at the Red Hook Community Justice Center and has been since the Community Justice Center was founded. See Jim Dwyer, *A Court Keeps People Out of Rikers While Remaining Tough*, N.Y. TIMES (June 11, 2015), <https://www.nytimes.com/2015/06/12/nyregion/a-court-keeps-people-out-of-rikers-while-remaining-tough.html>. Judge Calabrese inspired Judge Victoria F. Pratt to adopt his paradigms of procedural justice. See Tina Rosenberg, *Asking for a Little Respect*, RUTGERS MAG. (2016), <https://magazine.rutgers.edu/features/asking-for-a-little-respect>. Judge Pratt maintains that procedural justice is essentially costless to implement, and that something needs to be enacted to prevent recurring recidivism or what she stated to be, "the cycle of life sentences served in 30-day installments." *Id.*

black defendant about whom he knew almost nothing beyond the charge, and that he had a history of drug convictions, and was therefore likely to be guilty.⁴

It was an attitude I was to see over and over again from people employed “in the system” (prosecutors, judges, court employees, sometimes public defenders as well), hearing the (alleged) facts of crimes read out loud in courtrooms every day, dealing more with paper police reports, indictments, grand jury transcripts, and prior records than human beings charged with crimes, referring to those who faced charges as “defendants” as if they had no names, many already in jail garb, often carrying a paper bag holding their personal belongings, having a lawyer they may have never met stand up for them in court and stumble over their personal information. My sense was that the experience of sitting day after day through guilty pleas and sentencing hearings—where neither those charged nor those harmed by crime were heard to speak much, if at all, and where the people arrested, the vast majority of whom were people of color, were quietly taken away in handcuffs from arraignments because of an inability to pay a few hundred dollars for bail⁵—was so deeply disturbing but so commonplace as to be deadening to almost everyone, lawyers and judges included.

For many of the attorneys on both sides, trials were talked about as personal wins and losses, and provided fodder for storytelling at the local bar where the lawyers ate lunch or had an after-work beer. In retrospect, it seems clear to me how dehumanized we all were by the experience as we had not discovered a way to address the real problems underlying most of what we saw. Although the steady flow of poor people from mostly low-income neighborhoods to prisons did not solve any problems and harmed families and communities as well as the individuals locked up there, it was accepted as a given. We argued in favor of shorter sentences. The people who were most seriously affected by the criminal justice process were mostly silent and passive.

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4. I put the race of the prosecutor and my client in parentheses here, not because they are unimportant, but to make a point that I am not accusing this particular white prosecutor of being a racist, but the way in which the race of the prosecutor and the people charged with crimes plays a systemic role in the dehumanization of people arrested in our criminal justice system. This does not mean that it is always true with every individual prosecutor, but that it is a pattern and a contributor to the dehumanization. Of course, non-white prosecutors can and often do fall victim to the same assumptions and dehumanization. See generally Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69 (2019) (discussing the factors that contribute to many prosecutors becoming more punitive the longer they serve as prosecutors).
 5. Thankfully, the practice of pre-trial incarceration has since been reduced tremendously in New Jersey due to its reform of the bail system under the Criminal Justice Reform Act. The Act, which went into effect in 2017, withstood a challenge in federal court in 2018 by bail bondsmen who fought for their right to profit from this barbaric system. *Pretrial Justice Reform*, ACLU N.J., <https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform> (last visited Nov. 9, 2019); see generally *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018), *cert denied*, 139 S. Ct. 440 (2018) (finding that substantive due process did not provide a right to monetary bail, and the safeguards provided by the New Jersey Reform Act were not inadequate by the subordination of monetary bail). However, many states still routinely impose cash bail for charges for felonies and misdemeanors that have not been proven, resulting in widespread pre-trial incarceration for those who can't afford to pay. Colin Doyle et al., *Bail Reform: A Guide for State and Local Policymakers*, CRIM. JUST. POL'Y PROGRAM AT HARV. L. SCH. 7–9 (Feb. 2019), http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf.

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To the extent that those people arrested for crimes had a right to speak, either to testify at trial or speak before sentencing, they were likely advised by their own attorneys against it, for reasons that were often wisely strategic given the potential consequences. To the extent that they had an obligation to speak, as when entering a guilty plea, which required giving a factual basis for their involvement in the crime on the record, they were often advised to say as little as possible by their attorneys, for fear of invoking the wrath of the prosecutor or judge, which might ultimately result in a longer jail sentence. It was quite rare for someone entering a guilty plea, or being sentenced, to actually speak in anything but a rehearsed or one-word answer, and almost as rare to see a person harmed by a crime speak openly about their experience of being harmed in the courtroom. While those whose lives were deeply affected were moved passively through the system, attorneys presented arguments to judges, and judges made comments about defendants to justify sentences without engaging with them, often shaming them for their criminal behavior, with little effort to encourage true accountability.

In the 90 (plus) percent of cases that resulted in guilty pleas rather than trials, the narrow focus was on laws that were broken, the imposition of sentences, and lawyers paraphrasing facts and making arguments for and against presumptive sentences. In that context, it is hardly surprising that it was common practice for public defenders, prosecutors, and judges to view criminal charges narrowly, disconnected to the human lives involved, and blind to many of the factors that may have led to the violation. Defense attorneys did emphasize mitigating factors as well as certain hardships their clients faced, and sometimes sought treatment for their clients' addiction or other problems, but the choices were often slim, and the client generally sat mute during these arguments.

As lawyers, especially in the criminal context, we're trained to focus on our roles as rights-based advocates for our clients, and as adversaries in an adversarial system of justice, generally in the trial context. As judges, we often apply the rules of law to legal violations, rather than looking holistically at human beings who may have broken laws. Courtrooms are permeated with a power hierarchy that often generates fear in those appearing for pleas or sentencing. With long dockets and minimal contact between judges and defendants, there is little opportunity for judges or prosecutors to see criminal defendants as human beings. Trauma, abuse, and addiction were not subjects ever mentioned in my law school classes, let alone racism, poverty, and mass incarceration, even in those classes focused on criminal law or procedure, and until quite recently at least, awareness of these problems was not a part of most lawyers' training or thinking.⁶ As Bryan Stevenson⁷ has asserted, our

6. See Adam Foss, *A Prosecutor's Vision for a Better Justice System*, TED (Feb. 2016), https://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system?language=en.

7. Bryan Stevenson, a graduate of Harvard Law School and the Harvard School of Government, is the founder and Executive Director of the Equal Justice Initiative, a human rights organization based in Montgomery, Alabama. *Bryan Stevenson*, EQUAL JUST. INITIATIVE, <https://eji.org/bryan-stevenson> (last visited Nov. 5, 2019). As a widely renowned public interest lawyer, Mr. Stevenson devoted his career to helping the incarcerated, the poor, and the condemned. *Id.* He argued and won numerous cases at the

system of justice is one in which you are more likely to be acquitted if you are guilty and rich than if you are innocent and poor, but that discussion has traditionally been held outside of the law school classroom, if at all.⁸

I eventually moved away from being a trial lawyer, feeling that the system perpetrated injustice and failed to address the underlying reasons that people committed crimes, and that my role as a defense attorney tended to perpetuate those harms. I found my way first to arguing criminal appeals, and then to teaching law students. From the vantage point of being a teacher and passing on what it means to be a lawyer, I have had the distance to be able to see more clearly the dehumanizing effects on all of us of working within a system that did not give a substantial voice to either those charged with crimes or those harmed by them, and allowed us to continue building more prisons and filling them with people whose humanity we could routinely ignore. As trials have become more and more infrequent, our adversarial system, which does enshrine protections of defendants, like the presumption of innocence and due process, fails to adequately serve the purposes of guilty pleas and sentencings, as it does not directly address the needs of people harmed or the perpetrators of crime and violence. More and more has been written about the effects of our failure to address the individual needs of both those arrested and those victimized by crime, and we are finally recognizing how the devastating over-incarceration of the last few decades has not made our neighborhoods safer, addressed the underlying problems that have led to crime, or led to healing those who have survived devastating violence.

It was with a true awakening of hope that I first read Howard Zehr, Kay Pranis, Fania Davis, Robert Yazzie, and many others.⁹ A few years ago, after attending a conference where I was trained as a restorative justice facilitator, I was able to use a teaching sabbatical to learn about and visit many of the programs and projects in and around New York, and the many inspiring people all over the country that are working on restorative justice projects. Having the opportunity to bring these inspiring theorists, activists, judges, and lawyers together for this Symposium at New York Law School, for the benefit of all to learn, and especially to expose law students to these ideas and practices, was the realization of a dream I've had since I started to learn about restorative justice.

The Symposium, *Restorative Justice: Changing the Lens*, sponsored jointly by the New York Law School Impact Center and the *New York Law School Law Review*, was held on April 12, 2019, and included presentations by judges, defense attorneys,

U.S. Supreme Court. *Id.* In 2015, he was named one of TIME's 100 most influential people, and in 2016 and 2017, was recognized on FORTUNE's World's Greatest Leaders list. *Id.* He is the author of the New York Times bestseller, *Just Mercy: A Story of Justice and Redemption*. *Id.*

8. See generally BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17–18 (2014) (“My work with the poor and the incarcerated has persuaded me that the opposite of poverty is not wealth; the opposite of poverty is justice.”).
9. See HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 3–5, 12 (2d ed. 2015) [hereinafter LITTLE BOOK] (outlining that the restorative justice movement seeks to provide an alternate framework or lens for thinking about crime and justice).

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prosecutors, restorative justice activists and practitioners, those who work in Community Courts, academics, social workers, and community members whose lives have been deeply affected by our criminal justice system. The variety of presentations demonstrated that the concept of restorative justice has been slowly seeping into our criminal justice system from all directions, and that even courts have started to incorporate alternative ways of looking at the process for addressing violations of law. Looking at violations from a restorative justice perspective, we must acknowledge that people who commit crimes may have been victimized by crime or violence themselves; that, as Susan Marcus explained so clearly in her presentation, justice is not a zero-sum game; and that the harmful consequences of crime run in many directions, not just to those individuals traditionally called “victims of crime.”¹⁰ “Harmed parties,” in addition to those we’ve traditionally recognized as “victims,” could include the family members and loved ones of those directly harmed, that person’s larger community that is often affected by crime or by the number of people incarcerated, other community members affected by similar crimes, family members and loved ones of the person who committed the harmful act, and the person who committed the crime.

Where traditional criminal courts focus sentencing decisions on the judge imposing “appropriate” punishment, a restorative justice approach to sentencing asks the questions: “Who was harmed? What was the harm? How can we heal?” Restorative justice recognizes a human need to right our world and our communities, to allow those harmed to participate in a process that addresses the wrongdoer and the crime, to restore the dignity of each person’s life to the extent possible. It allows and encourages wrongdoers to take responsibility for the harm they have caused, to make amends as best they can, and to engage in a process through which the voices of each person affected can be heard and listened to, and through this process reach a consensus on how to move forward. This can be a process that takes place as an alternative to court proceedings through court, police, or community referrals; a post-guilty plea process that makes a recommendation about a sentence; or a post-sentencing process, focusing on healing or re-entry into the community. It can be manifested in a dialogue between the one harmed and the one who caused the harm, before or after the sentence has been imposed, to afford the opportunity for the wrongdoer to hear about the harm they caused, or the one harmed to ask questions about why or how the acts happened, in an effort to understand, to learn details, to re-assert a measure of control over one’s life, or to help achieve peace or closure. Those who can initiate the process include the prosecutor, defense attorney, or a person involved in the criminal incident. Restorative justice is not a substitute for a trial and does not seek to determine guilt or innocence or assign blame. Rather it is

10. Susan Marcus is a criminal defense attorney in private practice in New York and specializes in capital litigation and restorative lawyering, working primarily with violent cases involving trauma, brain damage, and mental illness. *Webinar: Restorative Justice and the Practice of Law*, ZEHR INST. FOR RESTORATIVE JUST., <http://zehr-institute.org/webinars/restorative-justice-and-the-practice-of-law/> (last visited Nov. 10, 2019). She focuses on working with clients, families, and communities to find restorative solutions to punishment, to resolve conflict, and to address the underlying causes of crime. *Id.*

an approach that can be used to work toward healing and accountability when the parties involved wish to engage in some kind of restorative dialogue to repair harm that has been done.

During the preparation for the Symposium, I became aware that most of my law professor colleagues did not know what restorative justice is. While it is true that definitions may vary somewhat, there is broad agreement on most of the principles discussed above. Because I confronted a number of misconceptions about the nature of restorative justice, I thought it worth clarifying for readers who may hold similar misunderstandings. One of my colleagues made the assumption that restorative justice was a concept overwhelmingly denounced by prosecutors and embraced by liberal defense attorneys. The Symposium and this issue of the *Law Review* should put that assumption to rest, as three of the pieces being published in this Symposium issue were written by prosecutors or ex-prosecutors, both state and federal, who urge the expansion of restorative justice practices in prosecutors' offices, and some argue to expand its reach beyond juvenile cases and low-level felonies to include violent felonies as well.

Other common misconceptions about restorative justice follow: (1) *That it is a movement that heavily favors criminal defendants and is led by criminal defense attorneys.* As our Symposium fully demonstrated by Judge Janine Geske, our Keynote Speaker, our powerful lunch speakers Kate and Andy Grosmaire, who pushed the prosecutor to agree to a restorative sentencing circle after their nineteen-year-old daughter was murdered, and by the many prosecutors on a number of panels, restorative justice is a model that is supported not only by many prosecutors and judges, but perhaps most importantly by those people who have survived or been harmed by crime and violence, even those who have suffered devastating losses. The goals of restorative justice include giving those who have been harmed by crimes, wrongs, or violence a voice and important role in the process of working out a way to move forward after they have been harmed, focusing on their healing and needs, and empowering them rather than excluding them from the process. As Danielle Sered has persuasively argued in her book *Until We Reckon*, many of those harmed by violent crime prefer a restorative approach to a long prison sentence for the perpetrator.¹¹ Also, restorative justice can be a process that helps the wrongdoer understand the harm they may have caused so that they can begin to take accountability and try to make amends. It applies to crimes that don't have clearly identifiable victims, as well as crimes of violence. (2) *That victims or survivors of violence must forgive the person who caused them harm.* Although restorative justice sometimes takes the form of victim-offender dialogues or even reconciliation between the wrongdoer and the harmed party or parties, and sometimes involves an apology, or a statement of forgiveness by the person harmed, neither a face-to-face meeting nor forgiveness is required by a restorative approach. Furthermore, a face-to-face dialogue between a person who harmed someone and the person who was harmed should only take place when the

11. See generally DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019) (discussing the current problems caused by mass incarceration and how restorative justice can provide an alternative remedy to the social marginalization that results from incarceration).

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parties choose to engage in that process; such a dialogue must be voluntary, not coerced. There are a number of restorative practices that can be implemented; not all require dialogue between a victim and offender, and, while the wrongdoer taking accountability is necessary, forgiveness by those harmed is never a requirement. That is a personal choice. (3) *That restorative justice necessarily means there cannot be punishment, or even incarceration, imposed as part of the sentence.* Applying a restorative justice approach does not necessarily mean there can't be a prison sentence. Some proponents of restorative justice are also opposed to incarceration in any form, but others recognize that there may be a need for punishment as part of making amends, and some accept the idea that a period of incarceration may be an appropriate punishment within a restorative framework, as Kate and Andy Grosmaire's story illustrates. (4) *That restorative justice approaches may only be utilized with non-violent or "low-level" offenses, or with juvenile offenses.*¹² While restorative justice approaches are more commonly used with low-level felonies, misdemeanors, and juvenile offenses, it does not need to be limited to those or to non-violent crimes. There are courts and prosecutors in New York City, and around this country, using a restorative justice approach when adjudicating violent felonies. One well-respected organization in Brooklyn, New York, Common Justice, has been successfully applying restorative justice practices in their work with violent felonies for a number of years.¹³ Likewise, there is no reason why defense attorneys could not incorporate restorative practices in their work representing people charged with violent felonies, including murder. Susan Marcus incorporates restorative practices into her representation, even in capital murder cases, whether the matter will be adjudicated in a traditional trial process or result in a guilty plea. (5) *That restorative justice is a new approach, "created" in the United States in the twentieth century.* Restorative justice (along with transformative justice, therapeutic justice, and other related approaches) is one of the more commonly used names that has been given to an approach and practices that are derived from, or are inspired by, the practices of many indigenous peoples around the world, including First Nation peoples in Canada, the Navajo and other indigenous peoples of North, Central and South America, New Zealand, Africa (the Zulu,

12. It should be noted that restorative justice practices have been adopted in a number of non-criminal educational settings, as well as in settings addressing conduct violations. Restorative justice practices can also address fears or concerns in educational settings that have not risen to the level of a violation, or can focus on someone's re-entry after suspension or incarceration. There have been many other non-criminal applications of restorative justice such as resolving workplace disputes or family conflicts, misunderstandings, or abuse. However, the Symposium focused exclusively on the application of restorative justice to criminal justice.

13. See Michelle Alexander, *Reckoning with Violence*, N.Y. TIMES, (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html>. See also Olivia Dana & Sherene Crawford, *Restorative Prosecution? Rethinking Responses to Violent Crime*, 64 N.Y.L. SCH. L. REV. 53, 64 (2019) (discussing the Common Justice organization; Miriam Krinsky & Taylor Phares, *ACCOUNTABILITY AND REPAIR: The Prosecutor's Case for Restorative Justice*, 64 N.Y.L. SCH. L. REV. 31, 41-42 (2019) (discussing the Common Justice organization and its successful application of restorative justice practices). See generally SERED, *supra* note 11 (discussing restorative approaches to violent crime).

Xhosa, Tswana, Venda, and other African peoples), and others around the world.¹⁴ In part, the term “restorative” may be a reference to a return to first principles that many cultures had once integrated into their resolutions of disputes, but have in more recent times veered away from.¹⁵

The Symposium opened with a moving Keynote address by Judge Janine Geske,¹⁶ a retired Wisconsin Supreme Court Judge who founded a restorative justice program at Marquette Law School.¹⁷ She described how she spends most of her time in retirement preparing and facilitating victim-offender dialogues, often as a volunteer in a maximum-security prison. Her transformation from serving as a judge on Wisconsin’s courts, who often imposed and then upheld life sentences at maximum security prisons, to a volunteer who facilitates victim-offender dialogues that take place in some of those same prisons, was one that she herself could not have predicted.

Judge Geske was originally quite skeptical about the value of restorative justice, and puzzled as to why survivors of violent crime would choose to engage in a dialogue with the violent offender who caused them harm. She described how and why her experiences of meeting with people who have committed crimes and those who have been harmed by them have persuaded her of their deep value, when both parties are interested in participating in them and are sensitively prepared for them. For both sides, Judge Geske learned firsthand how hearing the stories of people’s traumas face-to-face, outside of the courtroom where people can respectfully talk and listen to each other with the guidance of a facilitator, helped people who have committed crimes understand the deeply painful consequences of their own actions or allowed them to be heard by those who caused the pain. Judge Geske saw that the incarcerated men she worked with were more likely to take accountability sitting in a circle process¹⁸ where they were treated with a greater measure of dignity and respect than they had been able to receive

14. See FANIA E. DAVIS, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND US SOCIAL TRANSFORMATION* 21–29 (2019); *LITTLE BOOK*, *supra* note 9, at 9–12, 17–19.

15. *LITTLE BOOK*, *supra* note 9, at 8–12.

16. Before being named to the Supreme Court of Wisconsin, Judge Geske served on the Milwaukee County Circuit Court from 1981–1993. *Faculty and Staff Directory: Janine Geske*, MARQ. UNIV. L. SCH., <https://law.marquette.edu/faculty-and-staff-directory/detail/206250> (last visited Nov. 5, 2019). Judge Geske was also the chief staff attorney for the Legal Aid Society of Milwaukee and served as a clinical director at Marquette University Law School, where she was an assistant law professor. *Id.*

17. *Restorative Justice Initiative*, MARQ. UNIV. L. SCH., <https://law.marquette.edu/community/restorative-justice-initiative> (last visited Nov. 5, 2019). The Restorative Justice Initiative at Marquette Law School was merged into the larger law school curriculum when Judge Geske retired from the full-time faculty in 2014. *Id.*

18. *Common Justice Model*, COMMON JUST., https://www.commonjustice.org/common_justice_model (last visited Nov. 5, 2019). A circle process is one process used in a restorative justice approach, in which those affected by a crime, dispute, or wrongdoing sit in a circle:

[W]ith those they have harmed (or surrogates who take their place), people who support both parties, and a trained facilitator. This circle provides those most affected by a crime with the power and opportunity to address questions, impacts, needs, and obligations, in order to heal and foster accountability. Together the circle participants reach agreements about what the responsible party can do to make things as right as possible.

Id.

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throughout the criminal justice process, in which they were fearful, often shamed, and lectured at, and where they knew how devastating the consequences of accepting responsibility might be. For some, the need to make amends is what allowed them to keep on living, and helped them find a productive way to spend their time while incarcerated.¹⁹

Following the Keynote, I had the honor of moderating a conversation between Mika Dashman, an attorney, mediator, activist, and the founder of the Restorative Justice Initiative, and Greer Ellis, an advocate for restorative justice who is a Program Coordinator on Project Reset for the Center for Justice at Columbia University, in collaboration with the Osborne Center, where she conducts restorative workshops for people arrested for misdemeanor offenses, oversees peacemaking workshops, supervises social work interns, and lectures at Columbia and New York University. These two experienced restorative justice practitioners articulated their definitions of the concept of restorative justice, its goals and processes, and the variety of other contexts in which it can be utilized, such as following a crime to work toward healing or make a sentencing recommendation, to resolve conduct violations or disputes in an educational setting, community building, and re-entry in a community. They then gave examples of the many ways in which it has been applied to criminal justice.

Mika and Greer began the discussion by responding to a short animated video shown to the audience which was narrated by Danielle Sered, a leading advocate for restorative justice, and founder of the nonprofit, Common Justice. The video illustrated how increasing levels of incarceration have not moved us toward reducing violence, but rather, have put more people in an environment where they are exposed to the very conditions that have been identified as the factors contributing to violence.²⁰ Mika talked about the various restorative practices that could be used, such as sentencing circles, victim-offender dialogues, and dispute resolution circles, laid out the various purposes of the circle process, and echoed Judge Geske's point that the needs of people who have survived violence vary widely, and are often not explored in the traditional criminal justice process.²¹ Greer emphasized the importance of finding the precise language when we talk about people who were charged with crimes, or who were formerly incarcerated, referring to all people respectfully and being mindful of their dignity, rather than labeling them as "defendants" or "sex-offenders," so as not to refer to people as the worst thing they have done. This is one way that the training of facilitators, as well as judges and lawyers, is crucial, as the issues are sensitive, and language has powerful effects. Greer mentioned that participants need to be reminded to talk from the heart as well

19. Judge Geske has also applied restorative justice principles to a wide variety of problems, including child sexual abuse within the Catholic Church. John Feister, *Judge Janine P. Geske: Circles of Healing*, FRANCISCAN MEDIA, <https://www.franciscanmedia.org/judge-janine-p-geske-circles-of-healing/> (last visited Nov. 8, 2019).

20. See generally SERED, *supra* note 11, at 51–90 (discussing how violence is driven by poverty, inequality, lack of opportunity, shame, and isolation—all of which are perpetuated with mass incarceration).

21. See *id.* at 135–38 (discussing the purpose and process of dialogue circles in the "pathway to repair" involved in restorative justice).

as the head while participating in a circle process, referring back to Judge Geske's point about the need to expand on the skills we've been taught in law school, and the need for all to listen as well as speak.

In responding to audience questions, both panelists discussed why "recidivism" might not be an appropriate measure of restorative justice's success. First, because the primary goal of restorative justice is to heal harm that has already been caused, and to engage the community in that process, the degree of recidivism after a restorative process may not reflect whether the process was successful for many of the participants. Reducing future crime would be an added benefit but may not be the primary goal. Second, recidivism is not necessarily an accurate or precise measure as it is not an absolute—restorative justice practices may, for example, play a role in reducing more serious or violent crime, even if the overall number of arrests or convictions were to remain constant. A restorative approach could have a positive effect on the person harmed or on the individual who caused the harm, but could also have benefits in that members of a larger community might feel empowered or develop more respect for the criminal justice system, which could have myriad positive effects that are difficult to measure. Unless the examination is sufficiently nuanced, it is hard to understand the effect of recidivism on the commission of future crimes.²²

Susan Marcus, a criminal defense attorney in private practice in New York who was a public defender for many years, specializes in capital litigation and restorative lawyering. In the course of her work, she works with clients, victims, families, and communities to find restorative solutions to arrest and punishment, to resolve conflict, and to address the underlying causes of crime. She works primarily with people charged with violent crime, often where both the perpetrator and harmed parties have suffered from trauma. She talked about how an individual defense attorney can approach any criminal case from a restorative point of view, whether the case involves a capital offense or a property crime, and whether it results in a guilty plea or a trial.

Her talk addressed the question of what falls within a criminal defense attorney's obligation to her client, including taking the steps necessary to understand a client's underlying needs and problems, such as childhood or family trauma, mental health problems, and abuse, and working with the client, with the assistance of professionals, to provide resources and support the client's need to accept responsibility, feel remorse, and find a way to make amends. Often the practice of facing the harm done and working toward taking accountability is a necessary step for her clients to have the desire to go on living, even if it does not affect the ultimate verdict or sentence in the case. Other times, a restorative process can lead to useful information that might be shared at a sentencing hearing. A defense attorney might, for example, reach out to the victim of a crime, if there is an underlying relationship that needs to be addressed or healed. Other times, the client may need some help in healing from family trauma that might not be readily apparent or obviously connected to the

22. Several of the other presenters at the Symposium, including Judge Geske and Miriam Krinsky, presented statistics on how restorative processes have often reduced recidivism. See Krinsky & Phares, *supra* note 13, at 45–46.

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commission of the crime. For many in the audience, Susan's approach offered a fresh perspective that valued healing for one's client as much as "winning" a legal motion or argument, and was no less than earth-shattering in the possibilities it opened up. She finished her talk by describing how she has approached these goals in working with those facing multiple capital murder charges, sometimes incorporating restorative justice into the penalty phase of a trial.

Many of the people who attended the Symposium expressed to me afterwards that the most riveting speakers of the day were Kate and Andy Grosmaire, who shared with us their experience as parents in 2010, after they received the devastating phone call that their nineteen-year-old daughter, Ann, had been shot. Their first thought was to call her boyfriend Conor McBride, whom they had known since Conor and Ann had started dating in high school and felt like a member of the family. They were soon shocked to learn that Conor was the shooter, and had turned himself in to the police and confessed to the crime. Conor's parents rushed to join Ann's parents at the hospital to sit by Ann's bedside. The Grosmaires related the horror and confusion of the next few days as they learned their daughter had life-threatening brain injuries, was only kept alive by extraordinary measures, and eventually died from the injuries, while they were also grappling with Conor's request that they, Ann's parents, visit him where he was incarcerated.

Believing that their daughter would have wanted them to forgive Conor, and needing to feel that they, and Ann, could play an active role in the sentencing, the Grosmaires ultimately came to the realization that they wanted to have a restorative justice sentencing circle to determine a sentence for Conor that they would recommend to the judge. At that point, the Grosmaires had not yet heard of the term "restorative justice," but knew that the traditional sentencing process, with them merely observing a court impose a sentence controlled by someone who had never met Ann, would have been devastating. After some reluctance, the prosecutor agreed to attend a "pre-plea" conference, during which the Grosmaires were able to share with the others in the circle (Conor, the Grosmaires' priest, Conor's parents, an attorney assisting the Grosmaires and facilitating the circle, and the local prosecutor) details, memories, and achievements that told the story of Ann's life. The participants reached a consensus as to a fifteen year prison sentence with a number of other conditions Conor agreed to fulfill, such as community service and career training while in prison. The judge extended the sentence to twenty years but agreed to the other conditions. The Grosmaires explained that this process helped them heal, because they felt that Ann was at the center of it, and that her voice was considered through the stories they shared about her. The Grosmaires' presentation pulled together many of the strands of restorative justice that were circulating during the Symposium, including the relationship between punishment and rehabilitation, survivors' needs and well-being, and the role that forgiveness could play, and underscored that those who experience profound loss or trauma do not necessarily prefer the imposition of a long prison sentence or a judge-led proceeding. As Professor

Richard Marsico,²³ who was in attendance for their talk, described it, “restorative justice promoted their autonomy, and enabled them to cope with this tragedy in ways that were very personal and meaningful to them and also made them feel their daughter’s legacy could continue.”

After lunch we heard from a panel that described the work of the Red Hook Community Justice Center, a project in Red Hook, Brooklyn, spearheaded by the Center for Court Innovation (CCI), which is one of a number of problem-solving courts established by CCI. These courts have incorporated a number of restorative practices, and has emphasized the importance of procedural justice, into their adjudication of criminal charges. Sherene Crawford, the Program Director of the Midtown Community Court, the first Community Court established in New York, moderated a discussion among three panelists: Olivia Dana, a former prosecutor in Brooklyn who was assigned for a period of time to the Red Hook Community Justice Center, and subsequently joined CCI as a Deputy Director of Research-Practice Strategies; Amanda Berman, a former defense attorney who is currently the Project Director of the Red Hook Community Justice Center; and Alex Perlin, a criminal defense attorney at Brooklyn Defenders who has been regularly assigned to represent those charged with crimes at the Red Hook Community Justice Center. The discussion focused on how restorative justice practices have been incorporated into the court’s approach with the wholehearted support of its only full-time judge since the court opened, Judge Alex Calabrese. The stories told by the panelists illustrated how restorative practices can change the relationship between a community and a court of law, and how the court’s relationship with the community can help both those arrested and those harmed by crime to feel the support of the court to great effect. They talked about how the court evolved from early meetings between a planning team and community members to see how a Community Court could serve the unique needs of Red Hook, and how these efforts and community participation have contributed to both the court’s success and a healthier, more stable community. They gave examples of programs, such as Peacemaking and the Youth Court,²⁴ that reflected the incorporation of restorative approaches, and the importance of trust and respect to all of the participants. Alex Perlin reflected on the role of a defense attorney in a Community Court setting, making clear that his clients still had every opportunity to assert their right to trial, and often exercised those rights. He also discussed how the positive relationship they were fortunate to have with the judge

23. Professor Richard Marsico currently serves as the Director of the Impact Center for Public Interest Law at New York Law School. His recent scholarship has focused upon the Community Reinvestment Act. *See Faculty Profiles: Richard D. Marsico*, N.Y. L. SCH., https://www.nyls.edu/faculty/faculty-profiles/faculty_profiles/richard_d_marsico/ (last visited Nov. 5, 2019).

24. *See Peacemaking Program*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/peacemaking-program> (last visited Nov. 8, 2019) (explaining that peacekeeping sessions are held for those affected by disputes to “talk it out” and reach agreements about restitution and repair); *Youth Court*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/youth-court> (last visited Nov. 8, 2019) (discussing the use of positive peer pressure to “ensure that young people who have committed minor offenses pay back the community and receive the help they need to avoid further involvement in the justice system”).

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and the court gave those arrested a broader range of choices, and made the experience more dignified and respectful, but did not change the role of defense counsel or pressure those charged to waive any rights.

The needs of the Red Hook community arise in part from its relative isolation, the kinds of housing it offers, and the history of the waterfront's once plentiful jobs that no longer exist. To comply with the community members' stated needs, the court created training and jobs for community members in the court, set up a housing assistance office in the court, and incorporated many social service support groups in the court building itself that are available to all members of the community, not just those with criminal charges. The architecture and design of the court, and training of the personnel in the courthouse, intentionally reflect values conducive to a restorative approach, such as transparency and respect; the height of the judge's bench keeps the judge at eye level with those who appear before the court; the clarity of the signage, and the pleasant and respectful attitudes of the officers and security employees help maintain a positive and helpful line of communication.

Olivia talked about the shift in her own perspective, from the start of her career as a prosecutor with a more punitive point of view toward a more restorative and healing point of view. Interestingly, the two former prosecutors on the panel, Olivia Dana and Sherene Crawford, coauthored an article appearing in this issue, urging prosecutors to seek restorative justice approaches to criminal charges, even when the conduct involves violence, as experience has shown them that the outcomes even with violent offenses are often more effective.

The panel was followed by an individual presentation by Seema Gajwani, Chief of the Restorative Justice Program Section and Special Counsel for Juvenile Justice Reform with the Washington D.C. Attorney General, who described the commitment her office has made to resolving juvenile cases through a restorative process whenever possible. She related an anecdote about a restorative justice circle she observed in a school to resolve a conduct violation of a middle school student who had assaulted another student in school, which included both boys, their parents, teachers, and other students who knew them. The incident, a violent assault by one boy on a fellow student, was soon revealed to be a more complex story, as it became clear that the alleged perpetrator had been bullied repeatedly over a period of time by the alleged victim, and the boy who had been bullied finally lashed out at the other, which was when the authorities stepped in. In the course of the circle process, with a talking piece being passed around, allowing each participant to speak without being interrupted and giving all involved a chance to be heard, Seema observed a process in which the parents of the bully, who had come to support their own son, came to see the matter from a different perspective, responding empathetically to the boy who had lashed out at their son. They all heard the story from many different points of view, and by the end, both sets of parents were talking about how they could work together with their children to teach them better ways of handling this kind of problem. Ultimately, the circle participants came up with a plan for how both boys could make amends for their behavior and move forward in school in a positive direction with all of the students having a stake in these boys' success and well-being.

Seema realized that this process of bringing the community together to resolve disputes achieved a number of goals that a traditional court process would not. It empowered the community to address the underlying problems of bullying that had been going on for a while, allowing both boys to feel heard, and ultimately take accountability for their actions. It also brought the parents of both boys into the circle so they could assist their children in addressing these problems and gain a deeper understanding of their sons' lives. She was convinced that this process did more to solve problems and prevent future harm than a court process could, and was moved by the transformative effect the process seemed to have on all who were involved, including herself as a prosecutor. Her office has become a leader among prosecutors in their use of restorative practices for juveniles; after a circle process in which consensus is reached, if the young person meets the responsibilities the group agreed to, then charges are dismissed without adjudication. Her presentation demonstrated how the concept of restorative justice can work to achieve the goals of a prosecutor, and should be widely adopted.

In the article Seema Gajwani and Max G. Lesser have contributed to this issue of the *Law Review*, they also point out that the use of restorative practices in their office serves a secondary, but important, purpose: it reminds prosecutors that positive outcomes are achievable and it helps them avoid becoming cynical and unnecessarily punitive. They argue that the adversarial system of justice often contributes to difficult and negative relationships between prosecutors and defense attorneys, as well as growing distrust between those arrested and the courts. The hostility bred by adversarial relationships can create a negative working environment that affects morale, and tends to interfere with the ability of the attorneys on both sides to work together to find productive solutions to broken relationships, broken community trust, and crime. Among other things, the authors argue that by working restoratively, a prosecutor's office can revitalize the productive attitudes of prosecutors themselves, which in turn may lead to better outcomes.

The final panel of the day focused on how we might transform the law school curriculum to incorporate the concept of restorative justice into what students learn, as well as how we can train prosecutors and judges to use and incorporate restorative approaches into their work. Many of these concepts are not only foreign to judges and prosecutors but appear to them antithetical to their work, and even uncomfortable for them in their professional roles. Samantha Pownall, a visiting professor at New York Law School, moderated the discussion with Judge Geske, who had formerly taught at Marquette Law School both traditional courses and in the restorative justice program she founded, and Miriam Krinsky, a former Assistant U.S. Attorney, who is the Executive Director of Fair and Just Prosecution, an organization that seeks to bring together newly elected local prosecutors who seek to reduce incarceration and promote a justice system grounded in fairness, equity, compassion, and fiscal responsibility, moving away from the tough-on-crime policies that have led to over-incarceration and toward a focus on healing, safety, fairness, and problem-solving.

Miriam talked about the importance of changing the culture in prosecutors' offices, to one in which success is not measured by the number of convictions or even

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prosecutions, but rather by how much prosecutors connect with members of the community, seek input from them, and come up with creative solutions. Over-incarceration not only fails to address the problem or satisfy many harmed by crimes, but it also has devastating effects on its indirect victims, such as the families of those incarcerated and their communities. Speaking from personal experience, Miriam reflected on how prosecutors often become pessimistic over time, forgetting our fallibility as human beings, and growing increasingly punitive as they work in the system. She has found that exposing prosecutors to restorative justice, to have them listen to the stories of people on both sides who have been involved in the criminal justice system and to observe these processes in action, is having positive effects. Judge Geske talked about the benefits all law students would derive from exposure to restorative practices, as there are applications to civil practice areas as well as criminal. Finally, both speakers emphasized the need to expand the legal curriculum to include public health and trauma-related subjects, such as trauma-informed care, public health effects of crime and incarceration, and mental health conditions, all of which lawyers need to know about and understand, and all of which play a role in a restorative approach to criminal justice.

My experiences over the last few years, learning more about restorative justice, meeting and observing those who are practicing it, and being trained as a facilitator and peacemaker, have offered me that changed lens that Howard Zehr has written about, and have opened a door to what is possible. I am guided by these principles in teaching all my courses, my thinking about what it means to be a lawyer, and my student interactions. Efforts made to respond to the voices of community members our courts serve; the willingness to see that violations of criminal laws don't happen in a vacuum; valuing the goals of repairing communities and those harmed by crime and violence; and providing resources for those who violated laws so that they can take accountability and find a way back to their communities, are principles that can coexist even within a framework of punishment, and go far toward making our justice system more humane and effective. At the same time, it allows lawyers themselves to stop compartmentalizing their work from their humanity, and to value their own empathy and humanity while engaging in their work.

The people who came together for the Symposium, *Restorative Justice: Changing the Lens*, reinforced my hopefulness that restorative justice is in fact changing our views and practices professionally, and as a society. For me, the most important takeaway is that we can all do better than to accept our current criminal justice system as it is, and that there are ways to humanize the process for those arrested and for crime survivors so that they can feel heard and have their needs addressed. This does not mean being "soft on crime," but rather being clear on the goals of achieving safety, individual and community well-being, and positive outcomes. Restorative justice can offer a process in which people have the option of going to trial, or accepting responsibility and facing the harm they may have caused so that they can make change, rather than passively moving through a sentencing system that reinforces shame and violence. And in the process, we as lawyers, judges, court employees, and law students can find a way to re-humanize ourselves.

Our challenge now is how to bring these concepts and practices into the ambit of legal education from its foundations, including these principles in our core curriculum in the first year and exposing students to their applications, rather than just tacking on a small seminar or clinic in the third year of law school for those few who may have been exposed to it on their own. If we are to “change the lens” we must expose all students to this approach and interrogate some of our basic assumptions that have formed the foundation of our criminal justice system for decades. Perhaps this is why the high point of the day for me was overhearing a law student say he needs to “rethink everything he used to think.” This was the mindset I wish I had when I began my career hoping to do justice as a public defender in a system, but feeling like I was perpetuating harm. As lawyers, we all need to take time to step back and rethink everything we have accepted, in order to re-humanize ourselves, and the life-changing systems we create.