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Restorative Prosecution? Rethinking Responses to Violence

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RESTORATIVE PROSECUTION? RETHINKING RESPONSES TO VIOLENCE

I. INTRODUCTION

A growing number of criminal justice reform proponents argue that our nation will continue to engage in mass incarceration if we do not grapple with the current approach to violent crime. But the need to explore non-carceral responses to violent crime is a tough sell for many, especially prosecutors, to whom incarceration frequently seems the best way to ensure community safety. Thus, even most of the recently elected progressive prosecutors nationwide have focused their reforms on low-level, nonviolent crimes.¹ These progressive prosecutors, mostly serving large urban communities, have offered up an array of reforms.² Still, the old “tough-on-crime”³ approach continues to impact how even the most progressive prosecutors address cases involving violence. Put simply, there is relatively little being done to change our legal system’s response to acts of violence.

This article offers an alternative way for prosecutors to reframe both their role within the criminal justice system and their approach to acts of violence. Specifically, this article suggests that prosecutors utilize restorative justice, viewing each single

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1. Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

In Chicago, State Attorney Kim Foxx raised the threshold for felony theft prosecution to reduce the number of shoplifters who go to jail. In Philadelphia, the D.A., Larry Krasner, has instructed his prosecutors to make plea offers for most crimes below the bottom end of Pennsylvania’s sentencing guidelines. In Kansas City, Kan., District Attorney Mark Dupree created a unit to scrutinize old cases haunted by questionable police practices despite opposition from local law enforcement. More broadly, many of these new, progressive prosecutors are declining to prosecute low-level marijuana offenses and have stopped asking for bail in most misdemeanor cases.

Id.

2. See, e.g., Shaila Dewan, *A Growing Chorus of Big City Prosecutors Say No to Marijuana Convictions*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/us/baltimore-marijuana-possession.html> (explaining that prosecutors in Baltimore, New York, Philadelphia, Houston, and Chicago have espoused policies to divert or to altogether decline prosecution of marijuana offenses); Akela Lacy, *Reformist District Attorney Larry Krasner Argues Pennsylvania Death Penalty Is Unconstitutional*, THE INTERCEPT (July 15, 2019), <https://theintercept.com/2019/07/15/larry-krasner-pennsylvania-death-penalty-unconstitutional/> (discussing the Philadelphia’s District Attorney’s push to make the death penalty unconstitutional despite the historically hesitant practices of prosecutors); Rachael Rollins, *The Rachael Rollins Policy Memo*, SUFFOLK COUNTY DISTRICT ATT’Y 15–16 (Mar. 25, 2019), <https://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> (discussing changes implemented by District Attorney Rachael Rollins of Suffolk County, Massachusetts, including the non-prosecution of fifteen low-level offenses).
3. See Mirko Bagaric & Daniel McCord, *Decarcerating America: The Opportunistic Overlap Between Theory and (Mainly State) Sentencing Practice as a Pathway to Meaningful Reform*, 67 BUFF. L. REV. 227, 235–36 (2019) (discussing the tough-on-crime approach as one that prioritizes sentencing as the response to crime through means such as mandatory minimum sentencing, three-strikes laws, and life without parole).

criminal act within the complex universe of defendant, victim,⁴ and community.⁵ The mandate of prosecutors would then go beyond protecting the public, to encompass healing, growth, and community health. Victims of violent crimes would have increased opportunities to be heard and those who committed these crimes would be offered meaningful pathways toward repair. Restorative justice could serve as a path leading away from incarceration, and as a force pushing prosecutors to rethink both their role within the system and their responsibility to the communities they serve.

Part II of this article examines the mandate of prosecutors and explores opportunities to transform prosecutors' self-perceptions of their role in criminal justice reform. Part III discusses the use of restorative justice practices within the criminal justice system, highlighting the Red Hook Community Justice Center in Brooklyn, New York. We argue that by using restorative justice, prosecutors' responses to defendants, victims, and the community, are significantly altered, producing a far better result for all concerned. Part IV focuses on violent crimes and restorative justice. We conclude by affirming that any effort to end mass incarceration requires a changed approach to cases involving violence.

II. THE TRADITIONAL ROLE OF PROSECUTORS

Every day, in courtrooms across the country, prosecutors stand before judges, defense attorneys, defendants, and the public to state their names for the record and to pronounce that they are there "For The People." It is a statement that carries with it enormous responsibility. Yet, the gulf between prosecutors and the communities in which they work can be vast.⁶ Prosecutors frequently differ in race and socioeconomic status from the individuals they prosecute.⁷ Their knowledge of the communities in

4. A note on terminology: the authors of this article, both former prosecutors, will use the terms "victims" and "defendants" for this article, as they are the common descriptors of these roles within the criminal justice system. Restorative justice practitioners often refer to the participants as the "harmed party" and the "person who has caused harm." The latter language reflects a conception of crime as a singular act, causing harm that is ripe for repair, rather than contact with the criminal justice system as a static and encompassing descriptor of the identities of those involved.

5. This article does not specifically address the disproportionate outcomes for young men and communities of color. Young men of color experience incarceration at a much higher rate than other Americans. See Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT'G PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

6. See DAVID BINDER RESEARCH, *Summary Memo Re: Voter Opinion Towards Prosecution Prior to 2018 Elections*, ACLU (Dec. 12, 2017), https://www.aclu.org/sites/default/files/field_document/171212_dbr_aclu_campaign_for_smart_justice_memo_v5.pdf ("Not only do voters express support for policies and values that are very different than the views held by most current prosecutors, voters are willing to back up this support by supporting candidates in elections who share these views.")

7. See Leon Neyfakh, *Why Aren't There More Black Prosecutors?*, SLATE (July 8, 2015), <https://slate.com/news-and-politics/2015/07/prosecutors-and-race-why-arent-there-more-black-prosecutors.html>. A 2015 report found that:

Ninety-five percent of elected prosecutors in the U.S. are white and that more than 60 percent of the nation's 50 states have exactly zero black prosecutors in office. The study

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which the crimes they prosecute occur is sometimes limited to what they have learned in their law enforcement capacity, exacerbating explicit or implicit biases.⁸ Those weighty words, “For The People,” contain awesome power but lack substantive meaning if “The People” have limited decision-making authority and, save for the electoral process, little control over the way that prosecutors use their vast discretion.⁹

Prosecutors hold an inordinate amount of power within the criminal justice system.¹⁰ They exercise almost unchecked authority to decide whether to file charges at all, and if so, which charges to file.¹¹ An estimated 90–95% of cases are resolved

found that, of the 2,437 elected prosecutors serving around the country, which includes officials at the state and local levels, just 61 are black—and of those, more than half are concentrated in Virginia and Mississippi. In 14 states, all elected prosecutors are white.

Id. “[I]n 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages,” while according to Glassdoor, the average pay of an Assistant District Attorney is \$65,917. Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>; *Assistant District Attorney Salary*, GLASSDOOR, https://www.glassdoor.com/Salaries/assistant-district-attorney-salary-SRCH_KO0,27.htm (last visited Nov. 11, 2019).

8. *See, e.g.*, L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 *YALE L.J.* 862, 881 (2017) (“Filling criminal courtrooms with overwhelming numbers of people of color will likely strengthen the already ubiquitous conscious and unconscious association linking people of color with crime and whites with innocence because simply rehearsing associations strengthens them.”); Kacie Berghoef, *Implicit Bias: What It Means and How It Affects Behavior*, THOUGHTCO (June 21, 2019), <https://www.thoughtco.com/understanding-implicit-bias-4165634> (“An implicit bias is any unconsciously-held set of associations about a social group. Implicit biases can result in the attribution of particular qualities to all individuals from that group, also known as stereotyping. Implicit biases are the product of learned associations and social conditioning.”).
9. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (AM. BAR ASS’N 2018) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”). An oft-repeated description of the mandate of the prosecutor is to “seek justice,” a dictate so amorphous and subjective that it is arguably rendered meaningless. *See id.*
10. Robert H. Jackson, *The Federal Prosecutor*, 24 *J. AM. JUDICATURE Soc’y* 18, 18 (1940).

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous...The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.

Id.

11. Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 *HASTINGS L.J.* 1259, 1260 (2011) (citing *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.) (“Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings...”).

through plea bargains rather actual trials, with prosecutors driving the negotiations.¹² The decisions of prosecutors directly affect the level of incarceration in the United States, and on a personal level, the lives of those accused of crimes, their families, victims, and communities.

An environmental approach to transforming the role of the prosecutor would consider the impact of the courthouse's environment on the individual practitioners who work within it. Studies have examined the impact of the courtroom experience of defendants involved with the criminal justice system.¹³ Results indicate that perceptions of fairness about the court processes impact defendants' views regarding the legitimacy of court actors, as well as their subsequent rate of compliance with court orders.¹⁴ Factors found to increase perceptions of fairness include treating defendants with dignity and respect, as well as taking care that they understand and have a voice in the process, so they feel that decisions about the case are made neutrally. The quality of their experience is so important that their perceptions about the court process can affect their subsequent behavior, regardless of the outcome of their case.¹⁵

The same logic, applied to prosecutorial decision-making, would suggest that the environment in which prosecutors make their decisions may also impact those decisions. The process affects the outcome. When prosecutors under the current system must choose between punishment and doing nothing, they necessarily become punishment-oriented.¹⁶ The context of a crime or the complexity of relationship between defendant and victim when determining the right outcome too often goes unexplored; indeed such nuances could make punishing more difficult. When prosecutors have additional options for case resolutions such as drug or mental health treatment, they often become solution-oriented. They look at the defendants as individuals and attempt to address the underlying forces that have led to justice system involvement. Punishment for the sake of punishment becomes less desirable, and more difficult. When prosecutors turn to restorative justice, they gain an

12. See Lindsey Devers, *Plea and Charge Bargaining Research Summary*, BUREAU OF JUST. ASSISTANCE U.S. DEP'T OF JUST. 1–2 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

13. See *id.* at 1. Research indicates that criminal defendants and other litigants are more likely to leave court with a positive impression of their experience when they perceive the court process as fair—fairness has also been linked to an increased likelihood that litigants will comply with court orders and follow the law in the future. See Tom R. Tyler & Nourit Zimerman, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 *FORDHAM URB. L.J.* 473, 482–84 (2010). These findings support the theory of procedural justice, which concerns the role of fair and respectful court reactions to specific case outcomes. See *id.* at 482–83, 487.

14. See generally Tom R. Tyler, *Procedural Justice and the Courts*, 44 *CT. REV.* 26, 26–29 (2007).

15. See *id.* at 27–28 (“It is striking that people’s experience in a courtroom or at a conference with legal authorities, something that lasts at best a few hours, can be strongly affecting their behavior several years later.”).

16. Punishment can result in worse outcomes. See Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. 2 (July 2017), https://vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf (“Incarceration will increase crime in states and communities with already high incarceration rates.”).

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opportunity to nurture the community and enable healing.¹⁷ In such an environment, prosecutors must confront the humanity of both victims and defendants.

III. RESTORATIVE JUSTICE WITHIN THE CRIMINAL JUSTICE SYSTEM

Howard Zehr, the “grandfather” of restorative justice,¹⁸ describes it as an approach that:

[A]ims at helping offenders to recognize the harm they have caused and encouraging them to repair the harm, to the extent it is possible. Rather than obsessing about whether offenders get what they deserve, restorative justice focuses on repairing the harm of crime and engaging individuals and community members in the process.¹⁹

In the context of crime, restorative justice connects the justice system with the victim and community, creating an opportunity to repair rather than only punish.²⁰ It provides an opportunity for a form of accountability that addresses and acknowledges the harm caused.²¹ Restorative justice can manifest in the criminal justice system in several ways, including pre-arraignment diversion, pre-trial diversion, post-sentencing dialogues between the victim and offender, and more.²² These practices

17. John Braithwaite, a professor and author who has worked in the social movement for restorative justice, has written extensively on the subject. *About John Braithwaite*, JOHN BRAITHWAITE, <http://johnbraithwaite.com/about/> (last visited Nov. 11, 2019). He takes the position that restorative justice expands accountability to the broader community, because family and community members can be brought into the process, unlike in the traditional criminal justice process. See John Braithwaite, *Accountability and Responsibility Through Restorative Justice*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 33, 33–51 (Michael W. Dowdle ed., 2006) (“Restorative justice is conceived as a horizontal process of democratic deliberation that is integrated into external processes of accountability to courts and the rule of law.”). Braithwaite highlights how emotional authenticity can lead to the commitment needed to follow through on accountability. See *id.* at 38.

18. *Biography of Howard Zehr*, ZEHR INST. FOR RESTORATIVE JUST., <http://zehr-institute.org/staff/howard-zehr/> (last visited Nov. 11, 2019) (“Widely known as ‘the grandfather of restorative justice,’ Zehr began as a practitioner and theorist in restorative justice in the late 1970s at the foundational stage of the field.”).

19. *Restorative Justice? What’s That?*, ZEHR INST. FOR RESTORATIVE JUST., <http://zehr-institute.org/what-is-rj/> (last visited Nov. 11, 2019).

20. See HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 21 (2d ed. 2015). The goal of restorative justice is that:

They also believed that the prevailing understanding of legitimate participants or “stakeholders” in justice was too restrictive. Restorative justice expands the circle of stakeholders—those with a stake or standing in the event or the case—beyond just the government and the offender to also include victims and community members.

Id.

21. *Id.* at 15 (“[Restorative justice] means encouraging offenders to understand the impact of their behavior—the harms they have done—and to take steps to put things right as much as possible.”).

22. See *Building Community Trust: Restorative Justice Strategies, Principles and Promising Practices*, FAIR & JUST PROSECUTION 3–6, <https://fairandjustprosecution.org/wp-content/uploads/2017/12/FJP.Brief.-RestorativeJustice.pdf> (last visited Nov. 3, 2019).

can both improve the existing punitive structure of the system²³ and serve as off-ramps from the existing system.

At the Red Hook Community Justice Center, restorative justice is manifested largely through its Peacemaking Program. Criminal cases, including misdemeanor²⁴ and nonviolent felony cases, can be diverted to Peacemaking post-arraignment but pre-adjudication. Peacemakers are trained community volunteers who facilitate circles where those affected by the criminal act, including defendants, victims, and peacemaker community members, “talk it out’ and reach agreement about restitution and repair.”²⁵ They use a circle format and pass around a talking piece that indicates when it is a participant’s opportunity to speak. Participants discuss what has brought them to the harm, how the harm has affected them and others, and what may be done to remedy the harm.²⁶ Once a consensus agreement has been reached—which could take several sessions—the case is returned to court for final disposition.²⁷

Back at court, neither the judge nor the prosecutors are privy to whatever “healing steps”—steps for restitution and repair—were agreed upon and completed by the defendant.²⁸ The only information they are given is that all parties, victim, defendant, and community members, are satisfied and ready for the case to resolve. Cases usually resolve then, with an immediate dismissal, or an Adjournment in Contemplation of

23. The current punitive aspects of the U.S. prison system have led to:

An increasing number of victims of sexual assault, attempted homicide, and survivors of murder victims are requesting the opportunity to meet the offender to express the full impact of the crime upon their life, to get answers to many questions they have and to gain a greater sense of closure so that they can move on with their lives. In most cases this occurs many years after the crime occurred and the actual mediation/dialogue session is typically held in a secure institution where the offender is located.

Mark S. Umbreit et al., *Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue*, 6 INT’L REV. OF VICTIMOLOGY 321, 323 (1999).

24. This includes misdemeanor assault.

25. *Peacemaking Program*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/programs/peacemaking-program> (last visited Nov. 4, 2019); Suvi Hynynen Lambson, *Peacemaking Circles: Evaluating a Native American Restorative Justice Practice in a State Criminal Court Setting in Brooklyn*, CTR. FOR CT. INNOVATION 7 (Jan. 2015), <https://www.courtinnovation.org/sites/default/files/documents/Peacemaking%20Circles%20Final.pdf> [hereinafter *Peacemaking Circles*] (discussing the history and general principles of peacemaking circles).

26. *See Fact Sheet: Peacemaking Programs*, CTR. FOR CT. INNOVATION (Dec. 2016), https://www.courtinnovation.org/sites/default/files/documents/FactSheet_December2016_PeacemakingProgram_V1%20Updated.pdf. Cases can include both those with an identified victim and those that have no victim identified. *Id.* In cases involving an identified victim, the prosecutor must explain the restorative justice process and obtain the victim’s consent to proceed. *Id.* The victim is therefore invited but not required to speak with the program staff to decide on whether or not to participate. *Id.*

27. *See id.* If a consensus is not reached, the case is returned to court and continues through the regular adversarial criminal justice process. *See id.* (“The peacemaking process is concluded when everyone—including peacemakers and participants—can reach consensus for a peaceful resolution.”).

28. Healing steps can include participating in community service, gaining employment, and writing apologies. *Id.*

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Dismissal that generally results in a full dismissal after six months or one year.²⁹ Essentially, the case is thus diverted from the traditionally punitive criminal justice process by holding defendants accountable for their actions while also working to repair the harm caused to victims and their communities.

Prosecutors in Red Hook often serve as the gatekeepers to the Peacemaking Program by first meeting with victims to determine whether they are interested in talking with program staff about the restorative justice process. If the victim is interested in the Peacemaking Program after learning more about it,³⁰ prosecutors make a plea offer to the defendant that promises a dismissal upon successful completion of the program. If agreed to by the defendant, prosecutors and the judge monitor compliance with the program through reports of satisfactory progress from program staff on each court date, with prosecutors checking in with the victim as the program progresses to ensure that they continue to feel comfortable with the process. Prosecutors work in the same building as the peacemakers, attend community events such as service days and block parties with them, and watch them in mock peacemaking circles to learn more about the process.

Prosecutors assigned to the Red Hook Community Justice Center begin their days by declaring that they are there “For The People” and end them by regularly giving cases back to the community for adjudication through programs like Peacemaking. They do so based on their trust that victims and the community members who serve as peacekeepers are capable of ensuring there is a just resolution to the case, one that creates accountability while also repairing the harm that has been caused. Their conversations focus on the victims’ feelings about the harm they have experienced as a result of the crime and how the victims can move forward from the incident. It is the ultimate manifestation of the prosecutor’s mandate—seeking true justice for the community and victim alike.³¹ This model should be extended to cases involving more serious incidents of violence.

A majority of our nation is not satisfied with the state of the criminal justice system. A recent poll suggests there is a deep dissatisfaction, across the political divide, with America’s high level of incarceration.³² Most Americans believe in the possibility of redemption, even for those who have committed acts of violence, and prefer a problem-solving approach for individuals who struggle with mental health

29. *Peacemaking Circles*, *supra* note 25, at v.

30. Victims can also be referred to an onsite victim services program for additional support throughout the program. See Suvi Hynynen Lambson, *Perceptions of Safety, Community, and the Criminal Justice System in Red Hook, Brooklyn*, CTR. FOR CT. INNOVATION 14 (Oct. 2018), https://www.courtinnovation.org/sites/default/files/media/documents/2018-12/redhook_data_report.pdf.

31. Prosecutors can also extend their thoughtfulness about the defendant’s role within the community to non-peacemaking cases.

32. *See 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds?redirect=news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> (“71 percent say it is important to reduce the prison population in America, including 87 percent of Democrats, 67 percent of Independents, and 57 percent of Republicans—including 52 percent of Trump voters.”).

and/or substance abuse.³³ Another poll suggests that victims of crimes report by an even greater margin that the criminal justice system ought to focus more on rehabilitation than punishment.³⁴ Six in ten victims report that they would “prefer that prosecutors consider victims’ opinions on what would help them recover from the crime.”³⁵ This failure to respond to the needs of victims and communities may contribute to the 54 percent of violent crimes that go unreported.³⁶ If victims feel that the justice system will not adequately respond to their needs and improve their situation, they will not seek redress through the justice system. When victims are offered the opportunity to participate in restorative justice programs, they choose to 40–60% of the time. When they do participate, they report being satisfied with the outcome more than 90 percent of the time.³⁷ Victims have also reported that participation in restorative justice practices has resulted in “psychological benefits such as decreased fear and anxiety about a new victimization, decreased anger, increased sympathy towards the offender, and in some cases, even a decrease in post-traumatic stress symptoms.”³⁸

Restorative justice connects victims and communities to the criminal justice process in ways that they would not otherwise be connected.³⁹ This connection

33. *See generally id.* Polling found that:

[Sixty-one] percent of Americans believe that people who have committed crimes involving violence can turn their lives around. 61 percent of Americans also believe that people who suffer from drug addiction and commit serious crimes don't belong in prison but should be in rehabilitation programs where they can receive treatment. And a large majority of Americans (87 percent) believe that when people with mental health disabilities commit crimes that involve violence they should be sent to mental health programs where they can receive treatment from professionals.

Id.

34. *Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice*, ALLIANCE FOR SAFETY & JUST. 5, <http://allianceforsafetyandjustice.org/CrimeSurvivorsSpeak/> (last visited Nov. 3, 2019) [hereinafter *Crime Survivors Speak*]. By a two to one margin, victims prefer that the criminal justice system focus more on rehabilitating people who commit crimes than punishing them. *Id.* Seven in ten victims prefer that prosecutors focus on solving neighborhood problems and stopping repeat crimes through rehabilitation—even if it means fewer convictions and prison sentences. *Id.*

35. *Id.*

36. *See* Rachel E. Morgan & Barbara A. Oudekerk, *Criminal Victimization, 2018*, BUREAU OF JUST. STAT. U.S. DEP'T OF JUST. 8 (Sept. 2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf> (finding that only 43 percent of violent victimizations were reported to police).

37. Toran Hansen & Mark S. Umbreit, *State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence*, 36 CONFLICT RESOL. Q. 99, 102 (2018). One study of victim satisfaction with the traditional court process revealed a satisfaction rate of just 48 percent. *Id.* at 103.

38. *See* Jane Evans et al., *Restorative Justice: The Experiences of Victims and Survivors*, 11 VICTIMS OF CRIME RES. DIG. 27, 28 (2018).

39. Susan Herman, then the Executive Director of the National Center for Victims of Crime, suggested that while restorative justice may represent an opportunity for improved victim experience, it may not truly be a panacea for victims. *See* Susan Herman, *Is Restorative Justice Possible Without A Parallel System for Victims?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 3 (Howard Zehr & Barb Towes eds., 2004). In addition to arguing that the many victims that either do not report crimes, or whose crimes go

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encourages prosecutors to more fully embody their role of representing “The People.” By sending criminal cases to the community for resolution, prosecutors are tacitly recognizing that they may not always be adequately positioned to determine either the best short or long-term outcome for the parties involved. The profundity of that act resonates throughout their work. It situates the work of prosecutors within the context of the intricate web of relationships that surround each event—and thus, the environment of the entire criminal justice system is changed.

IV. RESTORATIVE JUSTICE AND VIOLENT CRIME

Using restorative practices to resolve criminal cases changes the way that prosecutors approach their responsibility to ensure community safety. This is required in order to realize criminal justice reform and to begin the slow process of reversing mass incarceration.⁴⁰ While many prosecutors have become comfortable with diverting lower-level, nonviolent cases, most are reluctant to extend a problem-solving approach to violent ones. For even the reform and safety-minded prosecutors, a stigma surrounds violent crimes and those charged with committing them. To many such prosecutors, the people charged with and convicted of violent crimes are seen as safety risks to the public. This is demonstrated on both the federal and state levels, as a prosecutor’s discretion is used to enact new policy and reform.⁴¹ The perceived higher stakes cause prosecutors to assume a paternalistic and punitive

unsolved, do not have access to restorative justice, she writes “even though they are often referred to as victim-centered, restorative justice programs are still very offender-oriented: the process is limited to those cases with an offender who admits culpability and wants to participate, and the remedies are limited to what the offender and, secondarily, the community can provide.” *Id.* Limitations on the use of restorative justice are problematic, and are why opportunities for restorative justice should be expanded to a greater variety of cases. *Id.* at 3–4. Also note that the Peacemaking Program at the Red Hook Community Justice Center is available for any conflict in the community, not just those that have resulted in arrest and prosecution. *Id.* See also *Peacemaking Programs*, *supra* note 25.

40. LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 6 (2007).

The evidence clearly suggests that [restorative justice] is a promising strategy for addressing many of the current problems of the criminal justice system. More important, it is a strategy that has been subjected to rigorous testing, with more tests clearly implied by the results so far. The development of [restorative justice] in the UK over the past decade is a model in the evidence-based approach to innovations in public policy. Like the old story of the tortoise and the hare, the evidence on [restorative justice] cannot be gathered by rushing ahead. The evidence so far suggests that sure and steady wins the race.

Id. See also Rebecca Beitsch, *States Consider Restorative Justice as Alternative to Mass Incarceration*, PBS NEWSHOUR (July 20, 2016), <https://www.pbs.org/newshour/nation/states-consider-restorative-justice-alternative-mass-incarceration> (discussing the attempts to integrate restorative justice in Colorado).

41. See Eric Holder, *Introduction*, 63 U.S. ATT’YS’ BULLETIN 1, 1 (2015).

Already, the Smart on Crime approach is transforming our response to a range of criminal justice challenges. As a result of changes, I have mandated with regard to Justice Department charging policies, today, individuals convicted of low-level, non-violent drug-related crimes will face sentences that are appropriate to their conduct, rather than draconian mandatory minimums that may be better suited to violent traffickers or kingpins.

rather than a more holistic approach. But once prosecutors begin to view the events and individuals of each case in context, the approach to how best to effectively respond to violence can begin to shift.

Restorative justice around the country is mostly used for nonviolent, low-level cases, as seen in Red Hook, and those involving juveniles.⁴² Establishing restorative justice as a procedural norm in higher-level cases involving violence would require a significant paradigm shift.⁴³ The “smart-on-crime” movement targets the low-hanging fruit, carving out violent crime from participation in diversion initiatives, problem-solving courts, and prosecutorial reform efforts.⁴⁴ Prosecutors, police, probation officers, and courts remain inordinately risk-averse when someone is accused or convicted of a violent crime. And like prosecutors, communities have generally only been given the options of punishment or nothing. But in a small set of cases, prosecutors and crime victims have shown a clear desire for less punitive tools when they are available—even if violence is involved.⁴⁵

The word “violent” when attached to a person generally evokes a reflexive hostile and fearful response, and community safety, the thinking goes, mandates that person’s removal. Yet this response contradicts actual experience, in which victims and their communities often know the perpetrators of the violence as their friends, family members, and neighbors—they share histories and relationships. They know that the person engaging in violence has often experienced their own trauma and has been a victim of violence.

Id. See also Maura Ewing, *Philadelphia’s New Top Prosecutor Is Rolling Out Wild, Unprecedented Criminal Justice Reforms*, SLATE (Mar. 14, 2018), <https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html> (discussing Philadelphia District Attorney Larry Krasner’s criminal justice reforms).

42. See Michelle Alexander, *Reckoning With Violence*, N.Y. TIMES (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> (“Numerous organizations—such as Community Justice for Youth Institute and Project NIA in Chicago; the Insight Prison Project in San Quentin; the Community Conferencing Center in Baltimore; and Restorative Justice for Oakland Youth—are [successfully practicing this kind of restorative justice] in communities, schools, and criminal justice settings from coast-to-coast.”). In this New York Times op-ed, Michelle Alexander, a leading criminal justice scholar and author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, highlights a number of these types of restorative justice programs focused on youth and lower-level offenses. *Id.*
43. TANYA RUGGE ET AL., *EVALUATION OF THE COLLABORATIVE JUSTICE PROJECT: A RESTORATIVE JUSTICE PROGRAM FOR SERIOUS CRIME 3* (2015).
44. See *The Attorney General’s Smart on Crime Initiative*, U.S. DEP’T OF JUST., <https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative> (last updated Mar. 9, 2017).
45. See generally Andria Moore, *Restorative Justice Program for Juveniles Aims to Foster Empathy, Heal Trauma*, THE DC LINE, <https://thedcline.org/2018/07/27/restorative-justice-program-for-juveniles-aims-to-foster-empathy-heal-trauma/> (last updated Aug. 9, 2018) (illustrating an example of a prosecutor and a victim’s mother opting for less punitive tools in dealing with a violent crime). Programs in Washington, D.C. and Brooklyn, New York, provide restorative justice options for cases involving violence. *About: A Vision In Action*, RESTORATIVE DC, <http://www.restoratedc.org/aboutrdc/> (last visited Nov. 7, 2019) (establishing a restorative justice initiative focused on juveniles charged with violent offenses); *Common Justice Model*, COMMON JUST., https://www.commonjustice.org/common_justice_model (last visited Nov. 7, 2019) (operating the first alternative-to-incarceration and victim-service program in the United States that focuses on violent felonies in the adult courts).

RESTORATIVE PROSECUTION? RETHINKING RESPONSES TO VIOLENCE

A paper from the executive session on the Future of Justice Policy, part of the Square One Project,⁴⁶ reports on the effects of incarceration nationwide. According to the report, people who have been incarcerated are more likely to be exposed to violence than those who have not.⁴⁷ The impact of mass incarceration on community is legion. Absent family members, and their cycling in and out of prison, has been shown to lead to an increase in crime rates.⁴⁸ Communities with higher rates of incarceration tend to align with higher rates of poorly performing schools and unemployment.⁴⁹

A survey conducted by the Alliance for Safety and Justice, a leading national organization that works to heal communities and shape public policy, found that violent crime victims seek meaningful accountability from the perpetrators of crimes and believe that incarceration is a counterproductive and inadequate response to keeping them safe.⁵⁰ Common Justice, located in Brooklyn, New York, is one of the very few organizations focused on restorative justice as an alternative to incarceration for violent felonies. Its founder, Danielle Sered, in her book *Until We Reckon*, cites studies showing that survivors report 80–90% rates of satisfaction with restorative processes, as compared to 30 percent in traditional court systems.⁵¹

These responses from victims should prod us to respond differently to violent crime and motivate prosecutors to seek out more restorative approaches. Legal scholar Emily Bazelon in her book *Charged: The New Movement to Transform*

46. The Square One Project brings together researchers, practitioners, policy makers, advocates, and community representatives to discuss new concepts in criminal justice with the primary question being, “if we start over from ‘square one,’ how would justice policy be different?” See generally THE SQUARE ONE PROJECT, <https://www.squareonejustice.org> (last visited Nov. 7, 2019).

47. This is particularly true amongst the youth population, as “ninety percent of youth in the Cook County, Illinois juvenile detention center reported exposure to traumatic violence, which included being threatened with weapons (58 percent) and being physically assaulted (35 percent).” James Austin et al., *Reconsidering the “Violent Offender,”* SQUARE ONE PROJECT 9 (May 2019), https://static1.squarespace.com/static/5b4cc00c710699c57a454b25/t/5d07b8d1ad75600001c270f2/1560787154096/Reconsidering-the-violent-offender-report-ONLINE_FINAL.pdf (providing evidence that supports “[a]n implication of the situational nature of violence is that those who have committed violence are likely to have also been victims of violence”). See generally Wesley G. Jennings et al., *On the Overlap Between Victimization and Offending: A Review of the Literature*, 17 *AGGRESSION & VIOLENT BEHAV.*, 16–26 (2012).

48. Austin et al., *supra* note 47, at 4–5.

Demonizing people as violent has perpetuated policies rooted in fear rather than fact. In this paper, we break from the tradition of punitiveness toward people convicted of violent offenses and argue that the violent offender label breaches the principle of parsimony, distorts proportionality, and fails as a predictive tool for future violent behavior.

Id.

49. Chicago’s Million Dollar Blocks program does an excellent job outlining not only the financial cost of mass incarceration but also the cost to the social fabric of the community. See CHICAGO’S MILLION DOLLAR BLOCKS, <https://chicagosmilliondollarblocks.com/#section-4> (last visited Nov. 7, 2019).

50. *Crime Survivors Speak*, *supra* note 34, at 5.

51. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 142–43 (2019).

American Prosecution and End Mass Incarceration, addresses the challenges that prosecutors face and the harm to communities when they have used victims to justify the use of severe punishment.⁵² Bazelon discusses how one prosecutor, Florida State Attorney Melissa Nelson, pushed against the norm and created an opportunity for restorative justice in two homicide cases, which then led to the development of an advisory committee to explore ideas for additional restorative responses.⁵³ Nelson's predecessor had sought the death penalty in one of these cases, against the wishes of the victim's family.⁵⁴ This restorative justice process provided answers to the family they would have never received in a traditional adversarial process, and offered them more control over outcomes as well as the discretion to offer forgiveness.

Applying restorative justice to violent crimes is revolutionary, and doing so would redefine the role of prosecutors, thereby transforming our justice system. There are few examples to offer at this time to demonstrate what a cultural shift in this direction would look like. Moving toward a culture that allows the community to act with more influence over outcomes involves a perceived higher level of risk for prosecutors. They would no longer serve as the final arbiter of justice, but rather, share that responsibility with the community.

What does the prosecutor's role in prosecuting violent crime look like when framed from a restorative, community, and victim-first approach? It looks like the Red Hook model, where prosecutors step back to let the community drive and set new measures for accountability, safety, and success. The victim's voice is heard and respected, and "doing justice" does not necessarily mean removing people from their communities but rather allowing people and communities to pursue restorative solutions that suit their needs.⁵⁵ In such a model, we would see an improvement in individual case outcomes, a reduction in incarceration, and a more holistic understanding by prosecutors of the individuals who commit crimes and their communities.

V. CONCLUSION

Restorative justice can provide a profoundly meaningful opportunity for prosecutors to more wholly fulfill their mandate of "doing justice" and to truly embody what it means to stand and state their name "For The People." As progressive prosecutors attempt to take on criminal justice reform, restorative justice offers a path forward, as well as a means of handling violent cases, and complements the reforms they are already carrying out for lower-level, nonviolent cases. Society needs

52. See generally EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019).

53. *Id.* at 169–71.

54. *Id.* at 169; see also Lisa Robbins, *Victim's Mother Urges State Attorney Angela Corey to Take Death Penalty Off the Table*, FIRST COAST NEWS (Feb. 24, 2016), <https://www.firstcoastnews.com/article/news/local/victims-mother-urges-state-attorney-angela-corey-to-take-death-penalty-off-the-table/54066687>.

55. Of course, sometimes—notably in cases involving serious violence—incarceration and restorative justice cannot happen simultaneously. But incarceration does not negate the value restorative justice provides to the individual that caused the harm, the harmed party, or community.

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policy and practice changes that trend toward evidence-based, trauma-informed, and individualized approaches to violence.⁵⁶ This is the only chance to put the brakes on the runaway train that is mass incarceration today.

Prosecutors today are rarely asked to consider what will happen when the people whom they have recommended for incarceration return to their communities. Restorative justice offers an opportunity for prosecutors to include that consideration in their decision-making. Restorative justice is a promising pathway to reforming how we deal with violence in our communities, both as an alternative to incarceration and as a catalyst for changing the way prosecutors view their responsibility toward the many people who are impacted by a criminal act. This practice not only transforms the outcomes of individual cases, but also aids prosecutors to better understand the communities they serve.

56. See generally Bianca E. Bersani et al., *Thinking About Emerging Adults and Violent Crime*, COLUM. U. JUST. LAB (May 2019), https://justicelab.columbia.edu/sites/default/files/content/EAJLC_YouthViolentCrime_final.pdf (explaining that emerging adults commit the most violent crimes and criminal justice reform is too focused on nonviolent offenders); Austin et al., *supra* note 47 (explaining that restorative justice reforms should focus on the violent offender in order to reduce mass incarceration rates and create potential trauma-informed solutions); Alexander, *supra* note 42 (arguing for criminal reform, instead of “tough-on-crime” policies for certain violent crimes); BAZELON, *supra* note 52, at 169–71 (explaining the efforts of a Florida prosecutor to deviate from traditional practices and adopt a restorative justice process in two violent crime cases).