RESTORATIVE JUSTICE AND ANTI-RACISM

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TABLE OF CONTENTS

I. RESTORATIVE JUSTICE: IDEAS AND EXAMPLES .......................... 1158
II. RACIAL JUSTICE CRITICISMS OF RESTORATIVE JUSTICE .......... 1163
III. RACIAL JUSTICE TOOLS OUTSIDE OF RESTORATIVE JUSTICE: ADDRESSING BOTH STRUCTURE AND AGENCY ..................... 1169
IV. BRINGING RACIAL JUSTICE TOOLS FOR RESTORATIVE JUSTICE ...... 1175
V. REFLECTIONS AND OCCASIONS FOR HOPE AND FURTHER CRITIQUES .............................................................................. 1177

The belief that we are divided is perhaps one of the few things that Americans still have in common. Is forgiveness—letting go of justified resentment—a way out? Should the United States or local communities establish truth and reconciliation commissions to heal national divisions? Should pandemic-era debts be forgiven? During the protests after the killing of George Floyd, some people revived the 1968 Kerner Commission’s call for massive investment in poor communities and policies to undue structural racism. That report reasoned that white racism—not anger by African-Americans—caused turmoil in the streets. Ironically, this report—now more than a half-century old—called out the failure of prior commissions on racial violence in the U.S. to achieve traction. In the summer of 2020, in the midst of the protests, some white police officers asked members of Black communities for forgiveness, though the jury is out about whether behaviors have changed.1 The contrasting behavior of law enforcement during those largely peaceful protests and then during the January

* 300th Anniversary University Professor, Harvard University. Delivered at The UNLV William S. Boyd School of Law & The Saltman Center for Conflict Resolution Memorial Beecroft Lecture, March 8, 2021. Thanks to Dean Dan Hamilton, Professor Lydia Nussbaum, and to the family and friends of Chris Beecroft. Lydia Nussbaum. Thanks to Mackenzie Arnold, Annie Kapnick, Juan Palacio Moreno, and Steven Wang for research and editorial assistance and to Anjali Adukia, Amy Cohen, Adriaan Lanni, Carrie Menkel-Meadow, and Alicia Ridenour for invaluable insights.


1157
6, 2021 violent assault on the U.S. capital prompts new questions about blame and forgiveness. And many of the fervent statements of support for Black Lives Matter made in the wake of the killing of George Floyd—statements by corporations, nonprofits, schools, and religious communities—have now faded as crises of each day unfold. Meantime, people in poor and predominantly white rural communities often and, perhaps increasingly, feel abandoned or disrespected. National divisions and distrust, collective amnesia about past collective amnesia, growing economic inequalities, inequities in law enforcement and structural racism: it all can seem overwhelming and surely larger than any one person can tackle. Nonetheless, that is our context, and I hope that addressing restorative justice and racial justice efforts may generate lessons to help.

I. RESTORATIVE JUSTICE: IDEAS AND EXAMPLES

“Restorative justice” refers to responses to harms and wrongs that focus on repair rather than punishment; that promote encounters and cooperative meetings among those harmed, those causing harm, and other willing stakeholders to discuss what happened and explore potential consequences and responses; and that do not only respond to past harms but also seek to transform individuals, relationships, and communities to remedy deeper injustices and prevent future harms. Transformative justice is a related idea for situations where there were no prior relationships to restore or repair. Restorative and transformative justice efforts are especially relevant in the contexts of criminal law and schools. Potentially applicable to all age groups and all kinds of offenses, restorative justice in the United States informs alternatives to criminal and school discipline processes. Restorative justice reflects roots in traditional and indigenous practices in several parts of the world, including in the United States.

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3 “Racial justice” and “antiracism” both represent commitments to conscious efforts to overcome personal, structural, political, and economic forms of disadvantages, biases, barriers to opportunity, and oppression based on race and harming people of color, and personal commitments to do more than be “nonracist” given the presence of social patterns perpetuating racial disadvantage. See Ibram X. Kendi, HOW TO BE AN ANTIRACIST (One World, 1st ed. 2019).

4 See, e.g., Howard Zehr, The Little Book of Restorative Justice (Good Books, 2002). For a thorough analysis of restorative justice ideas and assessment of expansion to serious crimes, see Adriaan Lanni, Taking Restorative Justice Seriously, 69 Buff. L. Rev. 635 (2021). Some treat “restorative justice” as a philosophy and “restorative practices” as a set of implemented activities and approaches; the terms will be used interchangeably here.

5 See infra note 34 and accompanying text (discussing mismatch between “restorative” focus and situations with prior lack of relationships or unjust conditions).

storative justice programs have been growing in the United States and other nations, and has attracted support from the United Nations and other international bodies. Some programs address concerns about mass incarceration in the United States, with versions explored by police, prosecutors, courts, as well as religious and other nonprofit organizations. Restorative justice responses to crime build on mounting evidence that mass incarceration has little or no effect on crime and on emerging research indicating that positive social engagement and stimulating environments induce positive changes to individuals’ neural circuits affecting empathy and emotion regulation. Some processes provide complete alternatives to prosecution and criminal convictions or school suspension or expulsion while others work alongside these more formal legal mechanisms.

In one restorative justice effort, Matthew Lee sat with the son of beloved philosophy professor Young Kun Kim. Lee had murdered Kim, and now sat with his son and others as each recounted from different perspectives the story of the professor’s death and its effect on those who loved and him. Matthew explained how it was a mugging gone wrong; he tried to grab cash from the professor who had just made a withdrawal from an automatic bank machine and pushed Mr. Kim who fell, hit his head, and later died. Lee faced charges of felony murder—a death occurring the midst of a felony—and faced 15–25 years in prison. Lee explained he had never before committed a crime; he was behind on rent and had no money. The victim’s son talked of his sadness that his daughter never would get the chance to meet his father; Mr. Kim’s daugh-

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10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
ter-in-law said her father-in-law had hoped to write a book called “Small Happiness,” which he would now never be able to write.\textsuperscript{15} Meantime, the offender’s sister discussed missing her brother since his arrest and incarceration.\textsuperscript{16}

Lee, the offender, apologized and thanked those who came:

“To have to bring everyone together right now and see everyone cry and shed tears... it’s going to stick with me for the rest of the days of my life.”\textsuperscript{17} The victim’s son explained his family had chosen to come to the restorative circle, “and I think having that, having made that decision, having this opportunity to talk to you and hear that you’re sorry... it will probably make me heal more than anything else... the hurt may never go away, who knows? But the hate I can control.”\textsuperscript{18}

Learning about the experience, Manhattan District Attorney Cy Vance, offered a reduced plea to manslaughter and a sentence of a 10-year prison term.\textsuperscript{19}

At the sentencing, the victim’s son appeared and said:

“I am grateful that you had the strength and courage to do the right thing afterwards.\textsuperscript{20} You confessed, accepted responsibility for your actions, and apologized to my family deeply and repeatedly.\textsuperscript{21} I am glad that I had heard your words directly, not filtered through lawyers. I believe you when you say that you are sorry and that you will do your best to stay out of trouble in the future.”\textsuperscript{22}

These insights align with the developing field of “positive criminology,” addressing factors that discourage or prevent criminal conduct.\textsuperscript{23} Strengthening social bonds and developing empathy and stress management skills—elements of some restorative approaches—can prevent future conflicts and also assist healing from past conflicts.\textsuperscript{24} Restorative justice thus can supplement existing criminal processes or offer alternatives to their use.

Especially in schools, restorative justice programs stress training for and efforts by whole communities while focusing on helping individual students to own what they did and work to make it right for those hurt or affected. Involving the whole community means training and roles for all staff members, including security guards and cafeteria workers and all students; parents, too, receive instruction and opportunities to learn and connect parenting styles to restorative approaches.\textsuperscript{25} The broader communities in turn work to help the vic-

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
tim and the offender and also to build local capacities to prevent future harms.26 This “whole-school” approach focuses on preventing conflicts as well as addressing the conflicts that arise by strengthening relationships and trust. Common practices use nonhierarchical communication circles and mediations, promote accountability and methods for making amends, and integrate conflict prevention and resolution into the project of education. Educational and training efforts address attention to the consequences of one’s actions, to the meanings behind taking responsibility for one’s actions, and to the crucial requirement of taking actions aligned with these messages.

In practice, even schools that embrace these ambitious goals often fall short of the ideal, as Professor Nussbaum and others have argued.27 But at its best, restorative justice directs individuals and communities to attend to deeper causes behind people’s conflicts—including understanding situations from multiple perspectives. It also, when working well, strengthens individuals’ capacities to manage their emotions and resolve disagreements peacefully, build capacity to change behavior that generates conflicts, and transforms conditions in communities and institutions that give rise to or exacerbate conflicts and harms.

Consider this example: Mercedes M. enrolled in a California high school after she was suspended due to too many fights at her previous school.28 Two classmates at her new school accused her of stealing a pair of shoes; they called her a liar and thief, and the “b”-word, the altercation came to the attention of a facilitator.29 The facilitator talked with Mercedes and earned enough trust to discover Mercedes had in fact stolen one of the girls’ shoes, but also learned that Mercedes and the two other students had in fact known one another for years, and had many previous intense disagreements.30 They did not know any other way to communicate.31 The three young women agreed to attend a “circle,” a confidential conversation facilitated by a trained leader.32 There, they each initially expressed anger. Then, Mercedes apologized and explained that she’d stolen the other girl’s shoes to sell them to help her mom pay for a drug test.33 If her mom could prove to the court that she was clean, she might be able

29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
to get Mercedes’s younger siblings returned to her from protective custody.\textsuperscript{34} When the other girls saw Mercedes crying, they empathized and gave her a hug.\textsuperscript{35} They didn’t ask her to replace what she’d stolen, but they wanted a restart—an assurance that, going forward, they could trust her.\textsuperscript{36} Mercedes later said that without this process, the conflict would have escalated, and she probably would have been suspended or expelled.\textsuperscript{37} Her school, with the help of such restorative justice circles, has reduced suspensions by half.\textsuperscript{38} This reflects the facilitated conversations and training in defusing conflict provided in the school.\textsuperscript{39}

An even more comprehensive restorative justice approach in schools work to equip students, staff, and faculty with knowledge to assist with managing emotions and conflict and also involves members of the broader community to find resources and opportunities to alter the troubling conditions that otherwise shape the lives of the students. Restorative practices involve offenders and victims in discussions, exchanges of apologies and acknowledgments, and other constructive steps such as restitution and community service. Some programs specifically attend to the trauma experienced by those committing harms as well as those who have been injured.\textsuperscript{40} Bridging school discipline and juvenile justice matters, a restorative justice model is now the go-to legal tool for prosecutors in the District of Columbia and initiatives such as the Teen Court in Los Angeles.\textsuperscript{41}

Racial justice reforms motivate both restorative justice initiatives and criticisms of them. The disproportionate effect of local and national criminal law processes on communities of color is mirrored by the racially disproportionate impact of school disciplinary processes.\textsuperscript{42} The possibilities of less punitive and more forward-looking solutions—such as investments in safe hang-out spaces

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
and in programs to deepen the social and emotional learning of students and of adults—can serve the interests of racial justice. Fania Davis, a leader of restorative justice thinking and programs, argues powerfully about its promise for racial justice in America.\textsuperscript{43} Education practitioners identify the reduction in racial disparities in out-of-school suspensions and in-school suspensions generally as a sign of the value of restorative techniques for racial justice.\textsuperscript{44} Decreases in arrest rates and increased perceptions of a positive school climate are further signs of success. From this vantage point, restorative justice is broadly desirable and should be available to people of color as well as others and should be available in poor districts as well as well-off districts.\textsuperscript{45} Risks of racial inequity arise if access to restorative processes is subject to the same kinds of discretion that feed racial prejudice and inequities in the formal systems of criminal law and school suspensions.

II. RACIAL JUSTICE CRITICISMS OF RESTORATIVE JUSTICE

Yet restorative justice initiatives, much like alternative dispute resolution in general, has prompted serious concerns from people attentive to racial injustice. Published in 2000, Richard Delgado’s article, “Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice,” builds on the criticisms he and others leveled against alternative dispute resolution.\textsuperscript{46} Like ADR, restorative justice, by design and by initial practice, he argues, compounds existing inequalities, bypasses procedural rights, and diminishes the public elements of dispute processes which can deter or expose racially-disparate treatment.\textsuperscript{47}


\textsuperscript{45} See Lammi, supra note 4, at 668–69, 671 (discussing concerns over discretionary allocation of restorative processes and proposing automatic assignments to ensure equitable access).


\textsuperscript{47} Delgado, supra note 46.
Neither public audiences nor normative legal standards discipline the activities that occur behind closed doors in mediated civil disputes or restorative justice circles.48

Some of the very qualities that make restorative justice appealing also give rise to criticisms by those focused on racial inequality. Because restorative justice processes focus on specific people and situations in the contexts of alleged criminal violations and school rule violations, the processes do not ensure or even seek consistent treatment across similar matters. Inconsistencies and the discretion that allows them can negatively affect members of racial and ethnic minorities.49 Restorative justice efforts do not follow the formal processes of an adversarial hearing, with advocates, and an impartial decisionmaker. This means the participants face the attitudes of the particular facilitator and others involved without the guardrails of formal rules and procedures. These are genuine concerns, but they arise with most school discipline processes as well, which usually are informal, behind closed doors, and involving adults empowered to act without many checks or oversight.

Nonetheless, the even-greater room for discretion in restorative processes may open room for further racial disparities in results. Even well-intentioned practitioners may have racial biases (we all do) or lack the ability to counter biases or domination by themselves or others due to their social position, education, and power outside the restorative process. Research findings about implicit bias suggest that mediators of any race lack neutrality despite good intentions and commitments to fairness.50

The emphasis of restorative justice work on building or rebuilding relationships exposes such work to the vagaries and unpredictability of specific interactions, communications, and interactions between people. Especially in the context of criminal offenses, conversations promoted by restorative justice may occur during short intervals and not extend into future relationships. Even in schools making longer-term commitments, relationships can be fragile and unpredictable. Human relationships are governed by emotion rather than general rules. Refinement of restorative processes and clarity about steps and assessments can help reduce the unpredictability.

Restorative justice processes may lead to remedial actions that some view as demeaning or not a good use of the time of individuals facing many challenging circumstances. Delgado points to plans for the offender to undertake restitution or community service as more often menial than meaningful.51 Or the remedial phase may prove too onerous for an individual who has childcare

51 Delgado, supra note 46, at 764.
duties, or must use the hours required by community service to earn income. Such criticisms should be contrasted with the alternatives that might involve school suspension or incarceration.

Imbalances of power and perpetuation of racial biases in restorative justice efforts trouble Delgado and other critics of restorative justice. Multiple authors in a recent edited work titled “Colorizing Restorative Justice” particularly caution against the recreation of racism through the informal discussion circles. One of the editors, Edward Valandra, notes how a student of color may be deemed “the problem” even though that student is the target of repeated verbal assaults and slights. Experts in the field are likely to view such results as poor implementation of restorative methods which are supposed to ensure full consideration of the perspective of the one accused with wrongdoing. Difficulties in implementation are not unlikely, however.

Kathleen Daly examines the dangers of inconsistent views across police officers, coordinators of conferences, and other participants in restorative justice and the erosion of a common project of equal treatment supported by the procedural safeguards of adjudication. Daly reflects on practices in Australia, which has been a leader in using restorative justice conferences and alternatives. She emphasizes how Aboriginal youth are more commonly in contact with police than non-Aboriginal youth, and how the restorative practices are saturated by racial and ethnic divisions and historical attitudes.

Concern with racialized disparities, though, could lead to a different kind of criticism of restorative justice when the victims are people of color. Are they expected or even pressured to forgive? And to do so when whites would not be so expected or pressured? It is not unusual to see greater expectations for women and women of color to forgive when compared with others.

Concern with disparate treatment should not be confined to what happens to offenders; treatment of victims also can fall prey to historic and ongoing patterns of discrimination and inequalities. Some may even worry that restorative justice is a lesser response for Black victims than criminal prosecution, adding onto the under-protection of people of color by police and criminal legal sys-

52 See Lanni, supra note 4, at 674.
55 See generally Kathleen Daly, Restorative Justice in Diverse and Unequal Societies, 17 L. CONTEXT 167 (2000); see also Kathleen Daly, The Limits of Restorative Justice, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 134-143 (Dennis Sullivan & Larry Tifft, eds., 2006).
56 See Daly supra note 55, at 180–81 (Daly explores these risks).
tems.  

Do expectations of forgiveness by people of color who have been harmed or victimized themselves reflect histories of power imbalances, or denials of room for anger, or for retribution? Heavy public or private pressure to forgive imposes a new victimization, denying victims their own choice. Such pressures may reflect racial and gender hierarchies, as powerful political and social traditions may suppress or discipline the anger of people of color and women. Philosopher Myisha Cherry criticizes journalists who seem more likely to ask Blacks than whites victimized by violence to forgive, and notes how such requests normalize oppression, violence, and racialized roles.

Lack of public accountability for a process that does not have the coercive powers of a court can also seem a disadvantage for those grappling with racial and economic injustices. Like ADR, restorative processes are not open to the public and do not offer structures for collecting similar claims. Eric Yamamoto criticizes ADR in civil matters for a “divide-and-conquer” approach, not only preventing class actions but also making individuals less confident in pursuing their claims even in informal negotiation. Similarly, restorative justice—like conventional discipline and judicial processes—typically focus on individual harms rather than institutional or systemic violence and violations.

The very idea of “restorative” justice presumes re-establishment of conditions that may well never have existed. David Hooker observes, “Restoration seems to indicate a re-establishment of ‘better days’ when the relationships between different groups were at some point positive, inclusive, respectful, and equitable” within agreed-upon rules. But the existing rules too often reflect and extend a past rooted in slavery, genocide, oppression, and exclusion of people who look like those in the restorative justice room. Barbara Sherrod identifies what she calls the “peculiar silence about collective harms” in restorative justice activities. And “restoration” may mean bolstering the status quo that contributed to the crime of conflict in the first place. Even well-meaning participants may be coopted by existing institutions that operate to perpetuate racial disparities and punitiveness.

Restorative justice circles and methods can reiterate attitudes and views that underlie existing patterns of racial and economic disparity. As groups de-

58 See Cherry, supra note 54.
59 See generally Yamamoto, supra note 46, at 805–07; see also Lanni, supra note 4, at 672–74 (Lanni urges care, preparation, training, and involvement of more community members in running transformative processes in order to guard against power imbalances and bias.).
60 See generally Yamamoto, supra note 46.
63 See Delgado, supra note 46, at 763–71.
velop special expertise in restorative justice and create credentials, they may install exclusions that disfavor the lived experiences of people of color. The restorative justice initiatives may bring in researchers and consultants from outside a community and displace or disrespect those who live and work long-term in the school or neighborhood. The lack of diversity among restorative justice facilitators and the risk that white practitioners will impose their own values contribute to concerns and distrust. Contributors to “Colorizing Restorative Justice” discuss the negative effects of predominantly white restorative justice spaces that treat nonwhite practitioners as tokens, resist criticisms, or chill critiques out of concerns over triggering “whites’ fragility.” Some of these criticisms suggest that restorative justice has been oversold.

At the same time, like many forms of ADR, restorative justice directs development of flexible, individualized remedies could expand the reach of that power further into the private lives of individuals. Although meant to redirect attention to the future and prevention, restorative processes are triggered by allegations of wrongdoing, and hence could perpetuate rather than undo the apparatus of blame and punishment, criminalizing behaviors that are misunderstood or reflect larger underlying and unfair patterns, such as the catch-22 faced by Mercedes’ mother or the causes of Lee’s poverty. Even if meant to divert people from the criminal justice system, restorative processes may then become appealing ways to refer to a restorative process people who seem to be a problem for a teacher, or police officer, or other person in authority. That may lead to more referrals and triggered processes than would conventional approaches viewed with greater skepticism by some teachers and community members; if so the result would enlarge the numbers of people caught in systems of control and surveillance.

Assessing the criticisms is as challenging as assessing restorative justice. Actual evidence of harms and benefits of restorative justice is in short supply. Especially limited are studies that show causality, though one addressing restorative-justice-informed treatments for domestic violence crimes reports statistically significant large reductions in both new arrests and severity of crimes. One study found a notable decrease in the post-traumatic symptoms

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69 See Linda G. Mills et al., A Randomized Controlled Trial of Restorative Justice-Informed Treatment for Domestic Violence Crimes, 3 NATURE HUM. BEHAV. 1284, 1289–91, 1289 tbl.3 (2019). See Donna Coker, Restorative Responses to Intimate Partner Violence, in
of victims and in their desires for revenge after having face-to-face meetings with offenders.\textsuperscript{70} A review of four randomized controlled studies found that “speaking circles” bringing together victims and offenders for 90 or 120 minutes produced a statistically significant increases in apologies which victims perceived as genuine.\textsuperscript{71} Suspicion of outside researchers and concerns about resources going to them instead of to the communities under study as well as difficulties conducting meaningful evaluations limit both the number and influence of such studies. Despite some thirty years of research about bias in alternative dispute resolution, a systemic review concluded that most of the studies were weak methodologically and omitted variables that explained different results for different groups.\textsuperscript{72} 

As a result, philosophic discussions are more prevalent than empirical answers about the racial, gender, and other biases in restorative justice processes. One crucial philosophic issue concerns conflict: is it always bad, in need of reduction, or is it sometimes good or necessary? In pursuit of peace and prevention of conflicts, restorative justice can suppress deeper criticisms of institutions such as schools, prosecutors, and prisons.

Restorative processes, though requiring a shift in mindset and practice, are integrated into existing schools and legal systems, while deeper criticisms may require even more profound change, involvement of entirely different sets of actors, and alteration of familiar forms of analysis and assessment. For example, consider how schools respond to hostile expression by students. Common responses are to remove the student from the classroom and send the student to an administrator for review and possible discipline.\textsuperscript{73} Anger is so often treated as a problem rather than a resource for upending existing systems.\textsuperscript{74} This is a

\textit{COMPARATIVE DISPUTE RESOLUTION} 46 (Maria Federica Moscati, Michael Palmer, & Marian Roberts eds. 2020) (restorative justice approaches to domestic violence include safety planning with survivors, and resources for both the person who was harmed and the person who caused harm, while avoiding collateral consequences of criminal convictions).


\textsuperscript{71} Lawrence W. Sherman et al., \textit{Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials}, 1 J. EXPERIMENTAL CRIM. 367, 379 (2005).


\textsuperscript{74} See Lamar I. Culpepper, \textit{Restorative Justice and Practices: Beyond Dialectics}, INT’L INST. FOR RESTORATIVE PRACS; see also Lawrence W. Sherman et al., \textit{Twelve Experiments in Re-
mistake according to those who view anger and mobilization as tools for desired change. Further, restorative justice initiatives to some seem too modest and insufficient in tackling structural racism and systemic problems that produce over-involvement of government in sanctioning the conduct of people living in marginalized communities. Restorative justice efforts may simply focus on “patching up” the harms of racist structures.

The assessment of any reform must ask, “compared to what?” Defects in restorative justice efforts thus must be contrasted with problems with traditional criminal justice processes. In this light, Delgado urges both defense attorneys and policymakers to push for more humane treatment and for deeper competition between the traditional adversarial process and restorative approaches. Moreover, Delgado argues, conflict itself is the logical result of struggles against social subjugation, and restorative justice may operate as a repression of rightful challenges to dominant structures.

Assessment of restorative justice is bound to reflect dominant practices created by whites and inattentiveness to others. How about shifting the question from whether restorative justice “works” to what should be the objectives of a “just” response to law breaking—just for the offender, the offended, and the bystanders? This is Daly’s suggestion from Australia. She implies that the goals should not focus just on controlling or preventing crime; also critical goals are reducing the use of incarceration, promoting safer communities, and bolstering responsible citizenship. As this approach implies, in a world marked by racism, economic inequality, and other social divisions, the very question whether restorative justice works needs to be met with the counter, works for whom?

III. RACIAL JUSTICE TOOLS OUTSIDE OF RESTORATIVE JUSTICE: ADDRESSING BOTH STRUCTURE AND AGENCY

Although some racial justice advocates are deeply involved in restorative justice efforts, most restorative justice work did not emerge from antiracist initiatives. Hence there could well be lessons from antiracism work for restorative justice practitioners to learn and adopt. The Civil Rights Movement of the 1950s and 1960s and some more recent civil rights initiatives offer an implicit contrast between racial justice efforts and restorative justice efforts. The earlier Civil Rights Movement deployed direct action, including boycotts, marches,

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75 See Delgado, supra note 46, at 768–69.
76 Id. at 770–71.
77 Kathleen Daly, Restorative Justice in Diverse and Unequal Societies, 17 L. CONTEXT 167, 184 (2000).
78 See generally id.
79 Id. at 184.
and other protests, as well as litigation. Contemporary racial justice efforts use protests, boycotts, and litigation, but also a set of newer tools. These include research detailing evidence of the entrenched and systemic barriers to racial justice; media, internet networking, and messaging to highlight racial hierarchy and oppression and to press for desired changes in policies and practices; lobbying public and private leaders; and trainings and skill-building workshops for people of different races to assist changes within and across organizations.

Yet the Civil Rights Movement of decades ago also spawned other kinds of efforts. Bob Moses directed the Student Non-Violent Coordinating Committee’s Mississippi Voter Registration Project from 1961–64; he co-directed the Council of Federated Organization as well. He also was a lead organizer for the 1964 Mississippi “Freedom” Summer Project. After the Macarthur Foundation selected him as a fellow for what is popularly known as a “genius award,” he launched the Algebra Project, which uses mathematics as organizing tool for quality education. The National Science Foundation undergirds the Algebra Project’s work with middle and high school students identified due to lowest performance standardized exams, and provides challenges and supports to achieve a high school graduation on time in four years, prepared to pursue col-

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lege level math for college credit. Perhaps restorative justice practitioners can
learn from this deployment of the organizing tools developed during the civil
rights movement. The ethos of social justice pervades the curricular materials
and teacher training, fund-raising efforts, and challenges to conventional expec-
tations and thinking in a program that produces impressive successes among
both those previously viewed as “failing” and those who mark such “failures.”

Confrontation and conflict are often tools for racial justice advocates, but
so are relationship-building, negotiation, and story-telling. This “both-and” ap-
proach is not only wise, but necessary. Aggressive challenges and empathic
bridge-building are complementary tools, each tackling what the other cannot
reach. Restorative justice visionary Fania Davis happens to have a sister—well-
known anti-racist political activist and professor, Angela Davis. The two siste-
ers’ work complement one another; they each found value in personally and
professionally focusing on repair while waging the long war against injustice.
In a dialogue with her sister about restorative justice, Angela Davis observed,
“And I think that now we’re thinking deeply about the connection between in-
terior life and what happens in the social world. Even those who are fighting
against state violence often incorporate impulses that are based on state vio-
ence in their relations with other people.”

Restorative justice programs in schools and in criminal law settings have largely focused on interpersonal is-
issues; civil rights initiatives have largely focused not on interpersonal but societ-
ial issues of law and structures of power. Yet increasingly, people are working
on interpersonal communication as part of racial justice work—and there are
opportunities for restorative justice efforts to champion racial justice initiatives.

A striking example of the joint work is called, “Coming Together,” a multi-
racial action group that creates opportunities for people to speak about their
own experiences with race in small groups; people of all races join in and learn
how to halt racist comments in conversations and how to become effective and
engaged with anti-racist work. Groups such as this one attend less to emotional
management and empathy—a focus for many restorative justice pro-

84 See ROBERT P. MOSES & CHARLES E. COBB, JR., RADICAL EQUATIONS: MATH LITERACY
AND CIVIL RIGHTS 93, 96 (2001); THeresa PERRY, ROBERT P. MOSES, JOAN T. WYNNE,
ERNesto CortÉS JR. & LISA DELPIT, QUALITY EDUCATION AS A CONSTITUTIONAL RIGHT 3–
15 (2010); LAURA VISSEr-MAESSEN, ROBERT PARRIS MOSES: A LIFE IN CIVIL RIGHTS AND
LEADERSHIP AT THE GRASSROOTS 299–301 (2016).
85 See supra note 59.
86 Id.
87 Sara Van Gelder, The Radical Work of Healing: Fania and Angela Davis on a New Kind
of Civil Rights Activism, YES! Magazine (Feb. 19, 2016),
https://www.yesmagazine.org/issue/life-after-oil/2016/02/19/the-radical-work-of-healing-
fania-and-angela-davis-on-a-new-kind-of-civil-rights-activism [perma.cc/Y35P-S9AX]
(quotating Angela Davis).
88 Welcome, COMING TOGETHER: UNDERSTANDING RACISM, WORKING FOR JUSTICE & BLDG.
CONNECTIONS IN THE AMHERST MA AREA, http://www.coming-together.org/ [per-
ma.cc/3R8L-SWRF].
nalization of societal views about race. In so doing, racial justice work spans the range from systems change to personal change.

Ibram X. Kendi, best-selling author of *Stamped from the Beginning* and *How to Be an Antiracist*, recently founded a university center on antiracist research that has as its watchwords: “Racial inequity is a problem of bad policy, not bad people.”

Meanwhile, Kendi chose as the banner for his own biographical page on the internet: “Being an antiracist requires persistent self-awareness, constant self-criticisms, and regular self-examination.”

There is much wisdom in each quotation and together, the ideas stand for contesting both the structural elements and personal dimensions of racial oppression. One the one hand, there are the public and private structures of a nation both founded in slavery and organized economically and legally around racialized ideas and practices. On the other, there are the attitudes internalized by people of all races raised in this society. Both structures and attitudes contribute to and are indeed necessary to the perpetuation of racial oppression.

Tackling both acknowledges that no one alive created either race or racism but everyone currently living has conscious and unconscious attitudes because of historical and ongoing treatments of race and racism.

The dual elements are reminiscent of structural and personal analyses brought together in other times and places. Jean-Paul Sartre proposed a method of thought combining the structural analysis of Karl Marx’s historical materialism with the existential psychoanalysis of Rollo May.

He argued that social analyses and actions need to understand the modes of economic production—capitalist industrialism—dominating social, political, and intellectual life and also need to comprehend how each individual has latitude for action.

The existentialist imagines that each of us can go beyond our current situation, however determined it may be by large historical forces. Our subjective experienc-


92 Jean-Paul Sartre, *Search for a Method* 33 (Hazel E. Barnes trans. 1963)

“There are two ways to fall into idealism: The one consists of dissolving the real in subjectivity; the other in denying all real subjectivity in the interests of objectivity. The truth is that subjectivity is neither everything nor nothing; it represents a moment in the objective process (that in which externality is internalized), and this moment is perpetually eliminated only to be perpetually reborn.”

93 *Id.* at 31.
es, argued Sartre, ground our abilities to invent and claim the freedom to create new ways of being.94

Other thinkers have influentially grappled with the relationship between individual human choices amid structures that determine the life prospects and even beliefs held by individuals, similarly to the efforts within contemporary racial justice struggles.95 W.E.B. Du Bois, for example, exposed through empirical research the false assumptions prevailing among sociologists in the 1920s about the causes of poverty and racial equality.96 He showed how patterns of exclusion and violence rather than inherent inferiority contributed to the impoverishment and criminal prosecutions of African Americans even as he demonstrated the agency of individual African Americans.97 Catherine MacKinnon crafted the idea of “sexual harassment” to name and challenge the abusive and hostile treatment of people at work simply because of their gender.98 In so doing, she illuminated the patterns of conduct condoned and permitted by individual employers and co-workers while enabling individuals to obtain relief and larger changes.99 At its best, racial justice civil rights advocacy similarly connects the dots to make clear the underlying systemic patterns and distributed individualized responsibilities for racial discrimination and disadvantage.100

Simultaneous attention to historic patterns and personal agency can make sense of complex political, legal, and interpersonal issues and support thoughtful distribution of responsibilities and opportunities. For example, as Laura

94 Id. at 11. Orlando Patterson has traced the conception of freedom to the experiences of slavery; people drew from their experiences to imagine and fight for very different conditions. See generally ORLANDO PATTERSON, I FREEDOM AND THE MAKING OF WESTERN CULTURE (1991).
96 Supra note 66.
97 Simon, supra note 95.
99 Id.
100 In a 5/4 decision, the Supreme Court upheld the use of statistical proof of disparate impact to establish violations of the federal fair housing requirement. Tex. Dep’t Hous. & Cnty. Affairs v. Inclusive Cmnys. Project, Inc., 135 S. Ct. 2507, 2525–26 (2015). Whether the Trump administration’s effort to eviscerate disparate impact housing cases will succeed depends now on both the Biden administration and further court responses.
Edelman demonstrates, organizations such as workplaces and schools embed practices that appear to prohibit discrimination but do little to alter discriminatory practices.\textsuperscript{101} Justices on the US Supreme Court neglect such dynamics when they treated Wal-Mart’s stated policy against sex discrimination as conclusive evidence that no intentional discrimination and also rejected arguments that managers in an organization with such a stated policy could act in a discriminatory fashion.\textsuperscript{102} In contrast, when a property owner tried to blame the property manager for the racially-based denial of an individual’s lease due to her race, the plaintiff and her lawyers were able to show how the owner’s own policies authorized the practice and created liability.\textsuperscript{103}

There is much to learn from individuals and organizations connecting interpersonal and structural transformative efforts in pursuit of justice. Here’s a recent example: After serving for nine years in the federal Equal Employment Opportunity Commission, Chai Feldblum decided not to return to her previous role as a law professor focused on antidiscrimination and legislative advocacy.\textsuperscript{104} Instead she made the surprising move to join an employer-side private law firm to build its new center on workplace culture consulting.\textsuperscript{105} In her government role, she had worked intensively investigating and deciding cases challenging discrimination on the basis of race, gender, disability, religion, sexual orientation, and gender identity and devising rules to regulate employer conduct from the outside.\textsuperscript{106} Feldblum concluded that more significant, rapid, and durable change would require working from the inside, and hence turned to advising companies and employers to “create safe, respectful, diverse, and inclusive workplaces” that prevent harassment and discrimination.\textsuperscript{107} She concluded that policies and even practices are not enough; hearts and minds also have to change—and enough to cross the tipping point for an organization and a nation.\textsuperscript{108} And for that, individuals and systems must join in the work of changing the hearts, minds, practices, and systems.

\textsuperscript{101} LAUREN EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016).
\textsuperscript{102} Wal-Mart v. Dukes, 131 S. Ct. 2541, 2554 (2011).
\textsuperscript{103} Asbury v. Brougham, 866 F.2d 1276, 1278–81 (10th Cir. 1989).
\textsuperscript{104} Morgan Lewis Partner Chai Feldblum Named Employment Law Trailblazer, MORGAN LEWIS (May 12, 2020).
\textsuperscript{105} Id.
\textsuperscript{106} See Michelle Cottle, Why is a Liberal LGBT Activist One of Trump’s Nominees?, THE ATLANTIC (Apr. 24, 2018).
\textsuperscript{107} Chai R. Feldblum Biography, PRACTICING LAW INSTITUTE (2021).
IV. BRINGING RACIAL JUSTICE TOOLS FOR RESTORATIVE JUSTICE

There is something to commend in the call for soul-searching and self-criticism by white practitioners of restorative justice but it is also insufficient. The group of restorative justice leaders must itself become more racially diverse and integrated (same can be said of teaching force, judges, and prosecutors); in addition, divides between credentialed experts and community members need to be overcome. Even more fundamentally, the work itself needs to attend to more than the stories of individuals who have harmed and been harmed if the broader patterns are to be understood and changed. And restorative justice work addressing individual conflicts needs to be connected to strategies for systemic alteration of racial inequalities and practices.

Consider the case of Matthew Lee who killed philosophy professor Young Kun Kim, and the experience of Mercedes who stole shoes from a high-school classmate. In both instances, restorative justice helped the individuals facing sanctions communicate, apologize, and be seen as human beings by those they had harmed. The life trajectories of those involved changed. But the broader promise of restorative justice is to draw in not just those immediately involved, but concentric circles of people implicated in these incidents. These broader circles of people, however, are not often brought into restorative justice processes as implemented. Violations of law and harms to people occur because of the confluence of individuals, incentives, and structures, and a building a better future of the individuals, communities, and societies means broadening the lens to understand broader patterns, causes, effects, and contributions.

A nonprofit organization founded by Anne Peretz to address domestic violence, child abuse, and other challenges experienced by families in poverty expanded its engagement with the families’ living contexts and related policies in order to become more effective. This journey followed immersion in the lives of clients and informed by rich theories of child development. A leader in childhood trauma explains, “When you are bombarded by poverty, uncertainty, and fear, it takes a superhuman quality to provide the conditions for a secure attachment.” A child who does not do assigned homework and chronically misses school may be dealing with lack of safety in the neighborhood and lack of access to basic health care and other resources as well as emotional challenges for himself and between his parents. The effort to connect individuals, family, community, and police inspires positive changes for people in Somerville, Massachusetts; in Kigutu, Burundi; and in rural Guatemala with

109 For further discussion, see Martha Minow, When Should Law Forgive? 153–154 (2019).
111 Id. at 31–44 (drawing on theories of David Kantor, Salvador Minuchin, John Bowlby and Mary Ainsworth, David Winnicott, Judith Herman, Bessel Van der Kolk, David Siegel, Katya Fels Smyth, Rosamund Zander, Alicia Lieberman, and Jacob Levi Moreno).
112 Id. (quoting Alicia Lieberman).
113 Id. at 53.
measurable improvement in reducing stresses and improving daily lives. Critical to the work is providing chances for individuals to communicate without shame, build trusting relationships and experiences in which they have control, opportunities to make sense of what has happened to them in ways that do not stymie growth and change, and settings to work with neighbors and community leaders to improve their lives. Connecting the dots offers ways of making sense and also ways of making change. Seeing how individuals relate to large patterns of social problems and how the later patterns help give explanations for what individuals feel and do can be invaluable steps in empowering individuals and groups and in framing effective strategies for change.

Despite real differences in original methods, there seems much for racial justice and restorative justice to share. Racial justice advocates rightly call for both personal change and also systemic transformation. Restorative justice points toward political, legal, and economic policies and practices while also working hard on transformations of the attitudes, feelings, and world-views of individual. Both need to attend as well to media and public education, as well as the day-to-day interactions in communities. And both point to ways to connect the personal and the structural, the interpersonal and the political, the individual freedom to act and the collective systems that so often seem hard to move. And both can focus on the concentric circles of actors and contributing influences on conflicts that can be resources for change.

What about the landlord who was about to evict Matthew Lee; what about the welfare staff member who would decide whether to return the other children to the home of Mercedes and her mother? What about Lee’s last employer and what about the school officials creating hallways and school schedules where students’ tensions from their own lives spill over into behavior issues? Would employers be able to offer opportunities to Lee, to Mercedes, and to her mother so that their sense of urgent need would not boil over into violating the rights of others? Involving these people outside the immediate circle would show that those triggering the inquiry were heard, issues are recognized, and responses can go deeper.

Hearing points of view and involving people in these different roles to hear about the problems could start deeper understanding of the patterns behind individual conflicts and alternative paths. This means recognizing that “responsibility” means not just who or what immediately caused the violation, but also, who or what contributed at earlier stages—and who may now have the ability to respond: responsibility, get it? Such extended groups would not perhaps be drawn into each restorative justice conversation, but more events that do could, perhaps, could point toward larger solutions. So might communication between people seeing individual conflicts and people working on policy and community reforms. What if restorative justice participants—experts and one-time us-

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114 *Id.* at 145–158, 172–73.
115 *See id.* at 53, 157–58, 163–165.
ers—also have easy access to larger efforts at reform? And what if those tackling policies, systems, and programs, more readily and often saw what conflicts feel like between people at the ATM and in the school hallways?

V. REFLECTIONS AND OCCASIONS FOR HOPE AND FURTHER CRITIQUES

Restorative justice invites hope by focusing on the future. New initiatives bring concrete hopes. Take the hip-hop-infused restorative justice organization, Circles and Ciphers, led by and for young people and using art, discussion, education, and direct action to advance personal healing and to challenge the systems producing mass incarceration. The Insight Prison Project sponsors dialogues between victims and offenders. Reimagine LA County, a coalition of activist groups, devised a way to invest money in social services rather than criminal law systems. Safe Space Radio offers public education around mental health and often features restorative justice efforts while offering beautifully produced radio interviews and advice as a kind of public health response to individual and community trauma.

Embracing restorative justice approaches to a national racial injustice, Canada settled its largest class action case in history—a challenge to the abusive treatment of children by Indian Residential Schools—and as part of the settlement, established the Truth and Reconciliation Commission of Canada. That six-year effort required $72 million (Canadian) to support truth-telling and reconciliation among former students, their families, their communities and all Canadians. It conducted seven national events across the nation to engage the Canadian public and educate people about the history and legacy of the residential school system. Producing a six-volume final report and a public record preserved for further study, the TRC made ninety-four “calls to action”—and researchers and media are tracking the progress, or lack thereof, in implementing these recommendations. As of July 29, 2019, the site has been updated to mark ten calls to action completed, twenty-one in-progress with projects underway, thirty-seven in-progress with projects proposed, and 26 not yet initiated.

Critics object that the Canadian TRC treated the issues as in the past while aspects of colonialism continue into the present and reflected government priorities rather than those from grassroots—missing the opportunity for different

117 Insight Prison Project, http://www.insightprisonproject.org/ [perma.cc/Z7HJ-HNY5],
118 Karla Mercado, Reimagining L.A. County: Shifting County Budget Priorities to Communities and Incarceration Alternatives, SoCal Grantmakers (Aug. 19, 2020).
119 Anne Hallward, From Violence to Voice: 10 Stories About Shame and Violence, Safe Space Radio.
121 Id.
forms of participation and governance.\textsuperscript{123} Other shortcomings: this TRC had no powers of subpoena; no authority to offer known perpetrators of abuse the possibility of amnesty in exchange for honest testimony about any abuses that may have been committed.\textsuperscript{124} Further, the commission did not have power to adjudicate charges of abuse and heard primarily from former residential school students and their families.\textsuperscript{125} But it is another example of an effort to bridge and integrate restorative justice and racial justice—and the criticisms advance the process of learning from it.

Central to that learning is asking the right questions. Fania Davis, restorative justice leader, poses this invaluable inquiry: “The question now is how we craft a process that brings the healing piece together with the social and racial justice piece—how we heal the racial traumas that keep re-enacting.”\textsuperscript{126} And speaking of asking the right questions, I have learned much from the Right Question Institute which equips students and others with to formulate their own questions and become effective participants in systems affecting their lives.\textsuperscript{127} Focused on schools but used also in social service, health care, and political settings, it is another initiative that creates levers for change, bridging something that can happen inside an individual and something that can transform institutions.

These initiatives suggest avenues for joining restorative justice and racial justice, connecting collective actions with individual reflections, and addressing both what lies within individuals and what contributes to and maintains societal patterns. There are tensions and limits, set-backs, and critiques. Poet Audre Lorde powerfully asserted that the master’s tools could never dismantle the master’s house.\textsuperscript{128} But maybe new tools can be forged. Maybe storytelling, self-criticism, empirical study, and group mobilization can combine with legal advocacy and politics. Looking at restorative justice and anti-racism means looking at unfinished business, but also at tools to help.

\textsuperscript{126} Van Gelder, supra note 87 (quoting Fania Davis).
\textsuperscript{127} \textit{The Right Question Institute Makes It Possible For All People to Learn to Ask Better Questions and Participate More Effectively in Key Decisions, THE RIGHT QUESTION INST.; DAN ROTHSTEIN & LUZ SANTANA, MAKE JUST ONE CHANGE: TEACH STUDENTS TO ASK THEIR OWN QUESTIONS (2011); SANTANA et al., PARTNERING WITH PARENTS TO ASK THE RIGHT QUESTIONS: A POWERFUL STRATEGY FOR STRENGTHENING SCHOOL-FAMILY PARTNERSHIPS 1–2 (2016).
\textsuperscript{128} AUDRE LORDE, \textit{The Master’s Tools Will Never Dismantle the Master’s House, in SISTER OUTSIDER: ESSAYS AND SPEECHES} 110–113 (2007).