

JOSH BOWERS: This discussion really interests me quite a bit. Restorative justice is not something I've written a tremendous amount about, but it's very much what we aimed to do in-house when I was a public defender at the Bronx Defenders. There was not in the Bronx much of a formal established set of mechanisms to realize the objectives of restorative justice. But I find it to be a very worthwhile enterprise.

And so why don't we get into it first by me asking you all-- and I'll just do an open ended question not directed at any panelist in particular, all of you guys can answer this question or set of questions-- so what is restorative justice to your thinking? What brought you to it? And maybe how does the restorative justice process differ from conventional criminal justice and procedure? So Liz, I guess we can just run down the line and start with you.

LIZ PORTER-MERRILL So let's do them one at a time instead.

JOSH BOWERS What brought you to it, and what does it look like?

LIZ PORTER-MERRILL Thank you. So restorative justice can mean a lot of different things. But to me, it means a social justice movement. It means that we're re-focusing on relationships and healing practices rather than punishment and wrongdoing, and we're treating all people as humans and making sure that we work towards repairing harm and healing people rather than punishing and incarcerating and other retributive practices.

I got to restorative justice, like Nathan said, I've been a public defender for about 13 years, 12, 13 years now. Many of them. I spent in appeals appealing my client's, indigent clients' convictions. I had two who were in solitary confinement, and I was brought to my knees by their experience and realized that the system is broken. And now, I will reframe that and challenge you to think that maybe the system is not broken but designed to do exactly as it's doing, and we need to rethink what we're doing.

And I really appreciated the last panel with the sex workers talking about-- is what we're doing working? And if we have 2.3 million people incarcerated in the United States, retributive justice and deterrence is not working. We are not the safest country in the world based upon incarcerating people. So I came to it from a very intentional perspective of being a defense attorney representing indigent people and realizing the system was broken and now realizing it's really messed up, and we need to reconsider what we're doing.

LIZ PORTER-MERRILL So what is restorative justice? So when I think about restorative justice, I consider it a paradigm shift. So I think in our traditional criminal legal system, we ask, what law was broken? Who broke it? And how do they deserve to be punished? Whereas in restorative justice, we're asking, who was hurt? What do they need? And then, whose obligation is it to meet those needs?

And so since we're asking such a different set of questions, really it is a shift from what it is we do now to something that's survivor focused and centered. I came to restorative justice because I grew up with five brothers, and I watched them make brilliant decisions with sound teenage reasoning. And then, I watched them punished and judged in ways that I felt were unfair and disproportionate to what they were doing.

And I remember thinking to myself, there has to be a way to make sure they know what they did was incorrect and to treat them like whole people, to hold their humanity and their dignity. And in my search, I looked towards criminal justice and sociology and psychology, which then led me to restorative justice, where I've done some work with implementing restorative justice practices and policies in institutions and then now working with sexual harms and domestic violence in Oakland.

And I truly believe that everyone deserves to have their humanity held and honored, especially people like my brothers.

SHANNON SILVA: I think the question of what is restorative justice feels like the simplest question, and it's probably the hardest question that we often have to answer. For me, in short, it's a philosophy that says that getting justice is about repairing harm as opposed to giving out equal hurt than what has been given to me and that levels the scores, instead, it says that getting justice is about repairing that harm that has been caused rather than returning it. To add to the lovely philosophical things that have been said, I'll talk a little bit about what it looks like.

It can look like a number of things. And so I often consider restorative justice a philosophy and a way of being and sort of a theoretical framework that guides my work. But it's also associated with a set of practices, and those practices typically involve the people who are involved in an incident of harm being caused, so the person that was harmed, the person or people that have caused harm, and their support members and other members of their community who have a stake in what has happened to meet together face to face and to

discuss what has gone wrong, who has been impacted, and what needs to happen to make things as right as possible, understanding that we can't always make harm right.

In criminal legal settings where we work it most commonly will include some form of an agreement. So in the diversion settings, for instance, that Liz works in, so those people as they meet together might develop an agreement as a group to determine what needs to happen to repair that harm. It may include responsibilities not only for the person who caused harm but also for the community members and support people who need to give something as well.

In diversionary settings, that agreement could be used to signify a completion of a process that would then divert the case from filing or from further court or correctional action. But often, restorative practices can be used in a number of ways embedded in the community that are either integrated with, alternatives to, or just operating alongside of criminal legal processes. So I don't know if that creates a clearer vision, because it really says that restorative justice can look like so many different things.

But I also think that that is what creates a lot of possibility in our work, like we can all describe very different ways in which we're working with taking this idea about what would it mean? How would we redesign systems and structures if we think that justice is about repairing harm instead of returning harm? And that that can include this entire category of practices and policies. I got into restorative justice because my primary work identity is as a social worker, and social work, while many of you may think about it in terms of a social service profession, it's actually historically a profession of social change and social justice.

So our mission as social workers and our set of values is to identify patterns in society that indicate structural inequities or structural injustices that we can address. And so for me, the criminal legal system has always been a particular area of focus to turn that lens to. And the first time that I heard about restorative justice, I think someone forwarded me an article about a victim offender dialogue, which is a specific restorative justice practice which I now study, which is most centered often or captures our attention, because it situates a family survivor often of a homicide across the table from the murderer. And they have a conversation and that captivates our attention, and forgiveness is exchanged.

But I read one of those sort of propaganda type stories, and I was really swept away with how just the humanity of it matched up with my values as a social worker.

JOSH BOWERS: Well, maybe I'll pick up on that last point and direct a question to you, Shannon. So you've got,

I believe, a study going funded by the National Institute of Justice looking at these victim offender dialogues. How do you measure success in that context? What does success look like? I mean, it strikes me as profoundly evaluative in nature.

SHANNON SILVA: Yeah, so our study with the National Institute of Justice was particularly funded by the Victims of Crime Act. So what's interesting, I think, about restorative justice is the broad range of stakeholders that it actually speaks to. So restorative justice may be misperceived as a conciliatory, or less punitive way to work with people who have caused harm.

We get a lot of tree hugger and hippie labels on us, and we might be also that.

[LAUGHTER]

But that's not why we support restorative justice. But in reality, I often ask students and other people that I work with think about a time that you personally have been harmed. And you don't have to go to the most intense harm of your life, but some sort of relational betrayal, friendship relationship, and to consider what you wanted in that moment.

For most of us, it's not revenge, although that might come up, or the impulse might partially come up. But it is an acknowledgment, a direct acknowledgment from that person about what they did. We want to hear them acknowledge that they caused us harm. We want to hear that they understand the impacts that what they did had on us. We might want a chance to explain to them what those impacts are so that we're convinced that they really do get it. We may want an apology.

So these are things that are not only not offered but are really subverted by the court process. So we put defendants in a situation where protecting themselves from incarceration or from other punitive sanctions means denying as much accountability as possible, when accountability is exactly what crime victims and survivors most want and need. And so the study on victim offender dialogue was specifically aimed at understanding the impacts of victim offender dialogue on crime victims.

And we have worked with the cases coming through the Colorado Department of Corrections over the past three years doing interviews and surveys with them. And what we have found is that in comparison with our control group that was recruited at the same period of time, that crime survivors who did choose to engage in a dialogue demonstrated quantitatively lower measures of trauma appraisals, so specifically, fear and isolation, or alienation, and less

depression following the dialogue than those in the control group over a similar period of time.

And they also talked to us a lot about those impacts on their life. That I used to be afraid because I had a picture of a monster who is out there in the world, and then when I met the person, they were a person, and my world was able to return to some normality. So hearing people talk about that is really talking about the resolution of PTSD or other types of trauma symptoms.

**LIZ PORTER-
MERRILL:**

If I could add onto that a little bit-- I'm not going to be able to speak to Shannon's research study, but I'm also a restorative justice facilitator trained in many different processes, and one of them is high impact victim offender dialogues. And through that process, I have now become not just an advocate for people who've caused harm and who have committed crimes but also for victims and survivors. And we're all the same. I think there's research out there that says that like 2/3 of humans are suffering from some sort of trauma.

We have trauma that needs to be healed, and the best way to do that is to sit down and have that dialogue and that conversation and that exchange of energy between people, have questions answered, and be able to recognize the humanity in one another.

JOSH BOWERS:

So that's perfect, because that's a great segue into the next question that I had for you, Liz, which is, as the lawyer and the public defender on this panel and speaking from my own experience of practicing in Bronx Treatment Court, I was very much in favor of the therapeutic engagement. But I also felt somewhat at sea, because-- you're trained as a facilitator, but most defense attorneys are not.

We're trained to be lawyers, to be adversaries. And suddenly, you're putting on this very different hat. My clients would ask me, should I take drug court? And I would say, I don't know. Are you going to be successful in drug court? And I really didn't know how to answer that question or how to effectively advise them. And so there's two things.

Number one, you're representing multiple interests, including the victim's interest. And number two, you're representing interests that are extra-legal in nature. So how do you navigate that space? Is there a risk, or is there a risk that the defendant will ultimately be punished for not getting with the program? Or is that eliminated by nature of the fact that many of these programs are-- restorative justice is a diversion project, so it's more of us outside of the criminal justice system.

LIZ PORTER-

MERRILL:

Yeah, I'm going to try to unpack that, because there's so many things I would like to address in response. First, I came into being a lawyer as wanting to be an advocate, wanting to fight for civil rights, actually. And yes, the criminal justice system-- I hesitate to say justice in that sentence-- the criminal legal system is the modern Civil Rights Movement, and we need to address this very seriously.

I came at this as a warrior, and I have learned that while I will put up a fight and will fight as hard as I can for someone I believe in and their rights and the Constitution-- and all of our rights are tied into a criminal defendant's rights in the legal system-- I prefer to be a healer. And Vanya Davis taught me that you can hold both of those to be true. You don't have to pick one or the other.

And that really gave me some clarity about my role. And I absolutely believe in being a warrior and advocating for people's rights, but we need to worry about also healing people. And with respect to trying to integrate restorative justice into the criminal legal system, the juvenile legal system, I think there are some critical pieces as a defense lawyer, as a guardian of due process, and the Constitution. We have to be very cognizant that we're trying to create a space that everyone can engage in authentically by protecting, through confidentiality, protecting statements that are made and that apology.

We incentivize apology in a lot of different contexts, such as medical malpractice. Why don't we incentivize apology in the criminal legal system as well? And so long as we have protections in place for confidentiality, so long as we have protections in place for voluntariness in terms of both the defendant participating in our process as well as a crime victim and survivor participating in this process-- no one should ever be forced to participate in restorative justice. It is no longer restorative justice at that point. As well as right to counsel issues. That comes up a lot with respect to doing restorative justice in a diversion context, where you have to have some guidance about if I'm going to admit liability, what will the consequences be legally?

And so long as we have those pieces in place, I think that we can use restorative justice in a meaningful way within the criminal legal system. I say that with one caveat in that-- and I find this with treatment court sometimes, too, in the diversion context. If we're just putting a Band-Aid on a broken or not so broken but just messed up system, are we thereby legitimizing it further? And so one of the things that I'm really trying to work a lot on is using this restorative justice outside of the legal system so that we can transform our communities and really

empower them to take back the power that we have given the states.

JOSH BOWERS: So Mikayla, the focus of this discussion is on dismantling mass incarceration. But anytime that we're talking about mass incarceration, we're also talking about what Michelle Alexander famously called the New Jim Crow. And so through your work at Impact Justice, in what way-- the Restorative Justice Project at Impact Justice-- in what we can restorative justice serve not just to dismantle mass incarceration but also to counteract racial and social injustice?

And is there a risk, maybe, that if the trigger to get into the restorative justice framework is agreement of the parties, and the victim or complaining witness saying this is what I want, that maybe a victim's implicit or explicit biases will lead to favoritism for the already privileged, restorative justice for the privileged, and conventional incarceration for members of more distressed communities?

MIKAYLA WATERS- Yeah, so getting to the first question. First, I just want to name that every process that people call restorative justice is not inherently racially and ethnically unbiased or without prejudice.

CRITTENTON: Every restorative justice process is only as good as the people that you bring into it. So the preparation process that is done, as Shannon mentioned, with the person who was harmed and the people who are supporting them, the person who caused harm and the people who are supporting them-- sorry I'm operating off limited sleep-- oh, yes, is done by facilitators.

And the facilitators can be really beneficial in gauging bias before a process begins and deciding who is going to be in the room, and who is going to speak first, and who is going to have the opportunity to respond first, and how power might play out in a process. Also having facilitators who have shared lived experience with the people in the room can be really important. It means that they might be cognizant or aware of things that other facilitators might not catch out of context.

So specifically in the Restorative Justice Project at Impact Justice, we do an implicit bias training first with all of our community partners. And then, we're pretty meticulous about the ways we sign memorandums of understanding with the district attorneys, and I think this might get a little bit into your second question, so that it's all of a particular kind of case will be automatically diverted to restorative justice in an effort to curb that idea of, oh, well these types of kids should go to a diversion process, whereas these other youth really aren't a good fit for the process.

And then, we try to be thoughtful about only taking high level misdemeanors and felonies so that we're reducing as much as we can the risk of net widening and inviting the system into neighborhoods, especially black and brown neighborhoods. And really, what our hope is is to empower communities and community based organizations to handle their own issues, because we fully, wholeheartedly believe that they have the wisdom to deal with their own needs in their own communities, and that any outside entity is not going to meet their needs as well as they can.

And since it's the community that's invested in the process and the youth who are going into it, I think that also helps balance the scales of who's getting the option of restorative justice and who's not.

JOSH BOWERS: I mean, you anticipated my next question with your point about net widening, right? So I think that's very important. If John Pfaff is right that what's driving mass incarceration is more long, draconian sentences for violent offenders or those convicted of violent crimes, and I think it's very much right for your efforts to be focused on precisely that community, do you get pushback that when it comes to sexual harms, intimate partner violence, and violent crimes more generally, the notion that, why are we providing-- however you might term it-- grace, forgiveness, to this group of offenders?

Is there a push towards, maybe this kind of diversion and restorative justice is fine with respect to the more trivial offenses, but it shouldn't be there for the more serious offenses?

MIKAYLA WATERS-CRITTENTON: So when doing restorative justice as it relates to sexual harm and sexual violence, that process is mostly outside of the system, actually, so there is not really a diversion aspect. And it's because we know that between 63% and 80% of sexual assaults and rapes go unreported. And we're aware that there are plenty of survivors who would rather have their families together than torn apart with trials and arrest. We know that because only 50% of survivors even contact the system.

And of the people who do report, a third of them say that it made them less safe. And so when we do get pushback about how restorative justice is supposed to be used and who is going to be able to benefit from it, the real question is, how are we meeting the needs of the survivors? If our system were meeting their needs, they would use it. And the information that we have says that they're not.

And so what restorative justice offers is an opportunity to listen and give agency and voice and

respond accurately to the self identified needs of survivors. And so what I'd say is, if we can tell what we're doing is not what people are utilizing, then why not offer a different option for them?

JOSH BOWERS: So Liz, to take some of these maybe more abstract ideas and put them in concrete form, JJ Dahmer sadly couldn't be with us today, but I understand that you can tell his story.

LIZ PORTER-MERRILL: Yeah. So one of our panelists was unfortunately unable to make it. JJ F is one of my friends, and I met him because he had been incarcerated. He had actually been in solitary for about 10 years of a 17 year sentence. And coming out of prison, he wanted to never go back. And he wanted to make a difference.

And then, he got wrapped up into a situation where he was hit by a drunk driver and became the victim of the very offense for which he was incarcerated. And through that, he decided he did not want the woman who had hit him to be prosecuted like he had. He did not want her to face the mandatory prison sentence that he had, and he wanted something different.

So he became an advocate for restorative justice, not just for himself but for others. And I was asked to facilitate his high impact victim offender dialogue with the woman who had hit him. And so that is how we met, and I learned his beautiful story. And he has now become an incredible advocate for restorative justice in the communities. And as a way for more transformational justice, where we try to help people not just repair harm that has been caused, but we try to transform conflict and crime into something different and better.

So he and I co-founded Circle Process, working with formerly incarcerated people coming back into the community through community corrections, and we started Circle Process, which is less about a conflict-- it can be about conflict, but what we're trying to do is build connections and community. And so like Mikayla said, the best way to do restorative justice is to engage the people with the lived experiences.

I'm not going to be able to, as a white woman who has never been incarcerated, sit there and bring people together who have been incarcerated in the same effective way that JJ can. And so he has been a huge leader and inspiration to the communities that we've been working with, because he can speak to both his lived experience as being incarcerated as well as his lived experience being a victim. And so he can hold people accountable in a way that I may not be able to.

And it's been a really beautiful process that we've undergone in the last year, and we're really expanding and trying to empower those communities, empower our own communities, each one of us, to hold circles and talk about restorative principles like respect, relationship, repair, accountability, and reintegration, and resiliency. And those are the values that we really try to hold up in our circle process, and I'm just really excited to engage people who have those lived experiences to lead this effort and really be the face of this movement.

JOSH BOWERS: What does that circle look like? In a room, so obviously, the facilitator the driver who struck JJ, JJ, the offender are dialogue-ing with one another. Who else? Family member? Prosecutor?

LIZ PORTER-MERRILL: Yeah, so two different processes, and it gets really complicated, because like Shannon said, that's one of the most difficult questions to answer is what does restorative justice look like. So two different models. The high impact victim offender dialogue model, which is what Shannon has been studying and what Mikayla already alluded to is the responsible party and a support person-- at least this is how we do it in Colorado-- the harmed person and their support person, and then two facilitators, two practitioners. We do that to guard against bias and other things.

And there are lots of preparatory meetings in advance. pre-conferencing is what we call it, to prepare each person to sit down in that dialogue. Then, the circle process that we are using, which I think is just an amazing tool for communities, something we can do in any community-- maybe that's our community within our home, or within our school, or within our workplace. We literally sit in circle, and it can include everyone, and it is supposed to be designed to be inclusive.

And we are trying to bring community members into community corrections facilities, so halfway house. So we have all the people who voluntarily come from the community corrections facility, as well as community members coming in, and we in our circles instead of-- so in the circle process, we call it circle keepers who are facilitators. And I really like trying to spread out the power dynamics.

So we all take roles being circle keepers and doing different pieces, like the opening ceremony and closing ceremony and readings and things like that. But we have prompts and invitations and literally pass the talking piece around the circle so that everyone has an opportunity to speak equally as well as an opportunity to listen equally, because both are equally important in this process. And we get to dive into really awesome topics, like mass incarceration, racism,

privilege, all these huge topics that we need to be having conversations about to be able to help our communities heal in our society.

SHANNON SILVA: You can see what a tree hugger she is.

JOSH BOWERS: Well, maybe I'll direct it away from the tree-hugging. In conventional--

LIZ PORTER-
MERRILL: Can I offer something to that? So to dispel the tree hugger thing, to dispel the idea that this is being soft on crime, I think one of the most powerful arguments about restorative justice is to sit face to face with someone that you harmed and take accountability for what you did and say, this is what I'm going to do to try to repair that harm, that is far more difficult than sitting in prison, and far more difficult than anything you'll ever do in your life, I would suggest.

So when prosecutors say, oh, this is just the easy way out, or this is a diversion, this is not a meaningful way to handle conflict and crime, I say, you sit in one of those high impact victim offender dialogues, and you let me know how you feel at the end of that. Because what I witness is an incredible transformation and healing process that allows us as a society to get past crime and see us all as humans.

SHANNON SILVA: MIKAYLA And to that point, one of the people who participated in a victim offender dialogue in Colorado who participated in a circle as the person who caused harm had said, I went to court, I spent seven years in prison, but that day was my judgment day. So people reflect that response of participating in the circle, that it's a higher level of accountability than actually what we ask of them in a punitive process.

JOSH BOWERS: So that's interesting, because one of the notes that I wrote to myself was, wolf in sheep's clothing, versus cheap grace? And it seems to me that what you guys are saying is that restorative justice is not cheap grace. It's hard work. But I guess if it's hard, and it can be painful, and in one sense, it is the big moment as compared to the seven years in prison, is there something to the wolf in sheep's clothing concern?

So here, what I have in mind is, I think of a case that I read in a juvenile justice seminar and law school, Henry Gault, where the takeaway is essentially the lower court did awful things to a juvenile offender who is facing a trivial charge of essentially making prank calls, and the answer was, well, what we're doing here is best interest of the child. It's not criminal punishment.

And so we can discard with procedural protections. So we can discard with limits on punishment, because this isn't punishment. So how do we keep this from getting too hard? Is there a risk that restorative justice can turn into a punishment exacerbator, or do we just have to be mindful that what it is is it's functioning as an alternative to incarceration as opposed to a compounder of incarceration?

I guess another way of saying this is, does restorative justice have a role to play in prisons? Or is it only as something outside the criminal legal system?

SHANNON SILVA: Yeah, I think this is a debate that we have a lot in the community, and Liz and I in particular were reflecting on this. So when I started out studying restorative justice, I said, I identify as a social worker, and in particular, I identified as a macro level social worker. I did community organizing. I worked in policy practice.

And I was particularly interested in how restorative justice was being iterated into law and policy. So Colorado has the most extensive statutory support for restorative justice in the nation. And that is what brought me to Colorado from Texas to study the implementation and the impacts of restorative justice laws. And I think in the time that I have studied that, I have become less and less convinced that embedding restorative justice into law and into the existing criminal legal structures that we have is the way to activate its potential in terms of having the impacts that we're talking about as aspirational impacts on our communities.

And our article here that Liz and I wrote together speaks a lot about this in more depth. Just thinking through the ways in which some of the policies that we have in Colorado have been really beneficial to the expansion and the thoughtful consideration of restorative justice in the state, but many of them have really not had the impact expected. And we also worry about whether-- and I'll separate this from the law conversation a little bit-- but whether and to what extent the integration of restorative practices into structures like pre file diversion, or other court and correctional contexts really co-ops and subverts what the magic of restorative justice is.

So as other people have referenced, what makes the restorative process powerful is that it's owned by the people who are participating in it. And we see often it get placed out of context in a state setting and get subverted in many of the ways that I think that you're alluding to. So does it ultimately end up the kind of process that we witness?

So while part of my answer to you is, I think restorative justice belongs everywhere, and I actually have been working in correctional settings in Colorado and thinking specifically about whether and how we can implement restorative practices and restorative circles as a means of conflict resolution in correctional facilities between correctional officers, between incarcerated people, between combinations of those folks inside the facility, that I also think that the ideal way for restorative justice to be practiced is in the community and among the people who are concerned directly with the harm that has been caused.

JOSH BOWERS: So Mikayla, Shannon talked about how restorative justice is owned by the affected stakeholders. Do you ever come across a tension, where at different levels of abstraction-- maybe you're looking at the particular offender and the particular victim, and they've got one set of interests, and they even have a shared set of interest. But then, you extrapolate out to family, or to neighborhood, or to community group, and the interest is cut in different ways.

How do you navigate that space within restorative justice, where-- I think Bob Weisberg wrote an essay called *The Dangerous Concept of Community*, where it's just like, it's almost impossible to define community. It's just a term that's used, gestured at. So when you've got a state that wants one thing, a community, however it's defined, that wants something else, immediate interested parties that may want a third thing, how does restorative justice navigate that space in between?

**MIKAYLA
WATERS-
CRITTENTON:** [LAUGHTER] Well, thinking about what the state wants and really about general and specific deterrence, one, I'd say there's no evidence that that works. Going back to Hammurabi's Code, there is nothing to support that that is an effective way to deal with harm, for one. And second, thinking about the potential differences in desires between the harmed party and the community, I have never seen or heard of a person who was harmed wanting something that was not in the best interest of the community.

And then thinking about who gets to be community. Part of that really-- since restorative justice is one, adaptable, and two, survivor centered, who gets to be a part of the community really gets built throughout the preparation process and throughout the beginning stages of trying to decide what kind of process is best. Is it going to be a restorative community conference or a family group conference? And . deciding from the process which people will be brought in, and doing that in a way that is meticulous and intentional, but also-- there was another point there.

JOSH BOWERS: Well, I can actually pick up on one of your points, which is-- I mean, I think I know where you're

going to go with this, because you're saying, and I agree with you completely, there's no evidence that the criminal legal system through incarceration realizes positive benefits in terms of general and specific deterrence. When I teach criminal law, like everyone else who teaches criminal law, you start by saying, here are the principles of punishment in our mixed criminal legal system.

Deterrence, retribution, and then incapacitation, and rehabilitation, which our system really doesn't care very much about, right? And one way to think about restorative justice, or one way I think about it, is that it's kind of rehabilitation for everyone, for the entire community. But it reminds me of a short essay I read by Margaret Etienne, where she said that restorative justice is a means of expressing our principles of punishment, and it strikes me maybe you disagree with that.

I think I disagree with it, too, that maybe it's something different altogether. It's not one of our principles of punishment. It's a wholly different paradigm. Do you see it as something separate from these four categories, retribution, deterrence, incapacitation, and even rehabilitation?

**MIKAYLA
WATERS-
CRITTENTON:**

I would say that restorative justice is an expression of accountability and not punishment, and also I think there is danger in conflating punishment with accountability. And like what Liz was saying, that if we're just punishing you and letting you just go off and say, you know, I didn't do it, it's no big deal, that's a lot different than, I have to own it, and I have obligations now because I've created needs through the harm that I've caused to you.

And so in regards to rehabilitation, I don't know if it's rehabilitation as much as it is you have a best self, and through this process, we would like to call you to be your best self. And we want to support you in getting there, because what's best for you is best for the person you harmed, and then it will be best for the community at large. And we've seen some really great statistics, actually, through a randomized control trial, where we showed the recidivism and re-offence rates for young people who had gone through a legal process and young people who'd gone through a restorative justice process.

Young people who went through the restorative justice process had much lower recidivism rates. But the part that was really exciting was even the youth who went through a restorative justice process in the beginning and then went through the criminal legal process at the end still had lower lower re-offence and recidivism rates. And so the idea of, as I treat you like a person, and as I hold your humanity from the beginning, what then are the effects of that? And

how does it show over time in your behavior?

**LIZ PORTER-
MERRILL:**

So one diagram that I think comes, actually, out of social work-- correct me if I'm wrong-- is a window of social control. And it breaks down into four categories. Authoritarian is when we do something to someone. Neglectful is when we don't do anything. And permissive is when we do something for someone, which was sort of where Mikayla was like, oh, sorry. Let you off and not hold you accountable.

And then, we have supportive, which is working with someone. And that's restorative justice. That box is restorative justice in my mind. And I think that one thing I would hope you'll be able to leave with is that restorative justice is not new. There is a modern restorative justice movement happening right now, but this is actually the most common form of justice over the history of humankind. This was the form of justice that existed when we lived in little tribes and had to survive.

You could not ostracize someone and kick them out of the clan, because you needed everyone to survive. And it got displaced, our community restorative justice types of systems, was displaced by William the Conqueror when he came over to England and conquered. And he was financed by war financiers, and he had to repay them. So instead of having accountability be within a community between the person who was harmed and the person who caused the harm as well as all the community who is responsible for holding up both those people and supporting them, he displaced the victim's right to have that conflict repaired by the state, the crown.

And restitution became owed to the state and the crown, so he could repay those were financiers rather than repaying the person who was harmed. So when we talk about the traditional form of justice, I challenge you to think that, well, maybe it's not what we're doing currently. And maybe, we should reconsider the ancient wisdoms that have been held up all over the world.

SHANNON SILVA: If I could add to that, I'm still sitting with your prior impossible question, which has really come full circle, about who is the community? What about the state? What about the individual people involved? How do these variables come into conflict with each other? And I think that one of the things that those of us who are practitioners at some level of restorative justice understand that restorative justice is messy, and that actually maybe that's OK.

So I often ask whether our desire for clarity on these kinds of matters about making things

black and white, putting things into boxes, is just an artifact of our colonized justice system. So this is like, we have a way of thinking and that we want to be linear, and we want to have certain really clear qualities. And when we practice restorative justice, we actually practice holding things in complexity. So we practice sitting with a group of people and embracing, this is beautiful that all these humans are here, and it's really annoying that that one person keeps talking so much and won't pass the talking piece.

And they just offered something that was incredible. Or there's someone here who caused harm, and it's horrifying, and we can hold with that how much the community owes that person and all the ways that they've been harmed, and what they're carrying. So we get trained to hold the complexity that allows us, I think, in a way that-- I'm a pretty structurally minded person, and so sometimes it creates some dissonance in my brain of, we need to answer all of these questions, and we to be able to fit in a manual, and we need to put it in a law.

And the reality is that when we sit in these spaces and we sit in circles, we can see that something is happening without that clarity. And that if we allow that to happen, it might surprise us.

JOSH BOWERS: So this taxonomy of authoritarianism, neglect, permissiveness, and support kind of gets at tension-- there's a criticism against rehabilitation that it doesn't appreciate the free will of the defendant. It just treats the defendant as a sort of patient to be fixed. And what I hear when you talk about support, you're saying, no. We're recognizing you as a human being, and we're letting you realize-- this goes back to what Mikayla said before-- realize your full potential as a human being. And so I find that really interesting and fascinating and enlightening.

The complexity point, I think that's unavoidable when you've got this adaptable process. And so a question is, when you've got something that's messy like that, can it scale up? And if not, is that a problem? Or do we just use it where we can? I'm thinking of a high volume-- and maybe the answer is, these jurisdictions need to be lower volume.

But as long as they are high volume, can we scale this up when person's got to be heard if they've got the talking piece until they're done talking?

LIZ PORTER-MERRILL: Well, I would suggest that maybe we dismantle the current system and replace it with restorative justice, and then, yes, I think in those contexts, if we have that paradigm shift in our minds and our hearts and in our society, then absolutely, we can accomplish this and scale

this up. And we re-empower the people that we're living with so that we can resolve the conflicts without involving the state government and the federal government.

And yeah, one last thing I've been thinking about that's not really relevant to your direct question right at the moment, but not only do we recognize that the current criminal legal system is not working with 2.3 million people incarcerated in the country as well as victims and survivors not getting what they need out of this process, but what we're doing to people by putting them through this process of the criminal legal system in trials, both people who've caused harm as well as people who have been harmed, is not working.

We're traumatizing people further. And then you add into the incarceration piece, and you're adding a whole lot of trauma onto people who have already been traumatized. So we're just exacerbating the problem rather than actually trying to meet people where they are and recognizing the complexities of humans, and that we are not all either good or bad. We all are complex, not just restorative justice being complex, but we as humans are complex, and we need to recognize that and hold that up.

And one thing that I fell in love about with restorative justice is as an appellate lawyer, I would fight propensity evidence, 404 b, all the time. It would come in about all the context about why my client was a shitty person, right? And we never were able to get into the context of why they were here. Like all the trauma and suffering that they had endured to get to this place. And also in that same trial process, you're not allowed to bring in any other pieces about prior relationships between that person who was harmed and that person who is being held accountable.

And there is so much here that is complex, and we do need a complex process to be able to address the complexities of humanity.

JOSH BOWERS: I find that fascinating. I remember, occasionally people would ask me about my clients. Like, what are your clients like? And I'd be like, they're like people. Some are jerks, some are great, some are interesting, some are not.

LIZ PORTER-
MERRILL: Yeah. And some of the most wise people I have ever met in my life are sitting behind bars right now and are not a threat to humanity or public safety.

JOSH BOWERS: So before opening it up to a Q&A, I wonder if I could just ask you guys about a specific instance which I wonder if you'd call this restorative justice, because it didn't take place in a

conventional restorative justice setting. But it may be familiar to a number of the people in the audience, so Amber Guyger is the police officer who entered what she thought was her own apartment, and it wasn't, and shot Botham Jean in his own apartment and killed him.

And at her sentencing, I believe it was at the sentencing, Botham Jean's brother, Brandt Jean, forgave her and very publicly asked-- I believe he asked to hug her, and they hugged, and it was tearful. And it was an emotional moment that got a lot of attention in the media. And I was moved by it, too.

But how would you describe that in the restorative justice context? Is that just dipping a toe into the waters of restorative justice? Is that showing the promise of restorative justice?

**MIKAYLA
WATERS-
CRITTENTON:**

So first I think before we answer that question and wanting to honor the time constraints here, I wonder if we might just take a moment silence to appreciate the loss of life? Thank you. And getting to your question about-- that was not restorative justice. And indeed, forgiveness is not an expectation or even a hope for restorative justice, and neither is grace.

We've used the term grace a few times today, and that is also not an aspect or expectation or hope of restorative justice. And getting into the importance of forgiveness and what it can mean, it's wonderful when a harmed party, or their family of survivors and victims they can forgive, but that's not what we would want them to think they need to do. And when thinking about the idea of forgiveness in the African-American community in the context of the US and how there is actually a need for African-American people to possess this somehow almost superhuman ability to forgive, to forgive microaggressions and macro aggressions and historical harms that play out over and over again in our daily lives, and not wanting to pathologize the fact that Brandt Jean did forgive her.

And also acknowledging that forgiveness has been put on some people as a means of survival. So I don't think it has any aspect of restorative justice in it, and I welcome my co-panelists thoughts.

SHANNON SILVA: I'm from Dallas, so I followed this story quite closely. And I would agree. I actually think it's dangerous that we often conflate forgiveness with restorative justice. I also heard that. Similarly, there was an incident a few months ago when Representative Omar received a death threat, and then she wrote this very public letter to the judge, but it was also made public, asking for leniency in the case of this person.

And the headlines-- I don't believe that she used the word restorative justice in her letter, but the headlines said that she called for restorative justice. So when we hear restorative justice in the mainstream media, it's often to conflate it either with forgiveness or with leniency. And the social opportunities window that Liz spoke to is a-- like if you imagine an x-axis and a y-axis, one is support, and one is control. So the with part that we're talking about where restorative justice lands is at the high end of both of those. So it's high support, high control.

And so we think control sounds very harsh, but what we meant is accountability. So high support, high accountability. So yeah, I think it's dangerous when we conflate restorative justice with forgiveness, because it's not what it's about. It's about accountability and acceptance of a person's humanity. But I do think that when we see things like that, we're touched by them, and they resonate because they show the human impulse that allows, or that speaks to the magic of restorative justice.

Why we feel drawn to restorative justice, we get a little window of that when we see someone forgive another person or act with benevolence toward them as a human. It sparks something in us, and that's the same thing that is sparked in a restorative justice process.

**LIZ PORTER-
MERRILL:**

Real quickly, I like to talk about forgiveness being the f word about restorative justice, because when a crime happens, power has been taken away from one person by another. And when someone who's caused harm then says, please forgive me, they're once again asking for more instead of allowing for that dynamic to be shifted back and the power to be back in the hands of the victim or the survivor so that we have even power fields, if that makes sense. So yeah, forgiveness to me is not part of restorative justice.

It can be part of restorative justice if that's what the victim survivor wants it to be.

JOSH BOWERS: We've got at least several minutes for Q&A if anyone's got questions.