

# To the Roots and Wounds: The Case for Restorative Justice in the Juvenile Correctional System

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## Abstract

Interest in the American criminal justice system has reached an unprecedented level. This interest has risen alongside a growing awareness of the system's failures. The public's attention to this issue has manifested in thematic shifts within popular culture and the passage of policies such as the First Step Act. To address the harms of this system, many are calling for changes that are, in effect, tweaks. These do not suffice; fortunately, a radical and viable alternative approach can be found in family group conferencing (FGC).

This corrective program aims to identify and address the causes and impacts of a crime in order to prevent reoffense. By placing the power to determine offenders' means of restitution into the hands of victims, rather than the state, FGC increases victims' senses of satisfaction and lessens their fears of revictimization. As for offenders, FGC's practice of "reintegrative shaming" preserves integrity and increases life chances; as a result, FGC significantly lowers rates of reoffense.

Despite the proven successes of this corrective approach, America continues to rely upon traditional criminal court proceedings. Moreover, in counties wherein conferencing is in practice, the implementation relies upon judicial discretion, resulting in a staggering racial disparity. A wider implementation of the practice will lessen the reach of this bias. This shift will also result in substantial government savings. Given these certain outcomes, it is imperative that policymakers implement the practice on a wider scale. A wealth of research on FGC and juvenile offenders exists; thus, the juvenile justice population is the appropriate starting place for standardization.

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American criminal court proceedings usually center around the relationship between the accused and the state. Within this framework, crime exists as an offense against an institution. In contrast, community-based approaches such as restorative justice respond not to the offense itself, but to the offense's roots and resulting wounds.<sup>1</sup> By identifying and addressing a crime's causes and impacts, restorative programs greatly reduce the likelihood of repeat offenses.<sup>2</sup> The prevailing restorative justice model—termed "family group conferencing"—fosters communication between affected parties through mediated conversations between offenders, victims, affected community members, law enforcement personnel, and a third-party facilitator.<sup>3</sup> Together, the attendees "negotiate a mutually agreeable resolution" in place of a traditional sentence.<sup>4</sup> This model has proved to be a viable alternative to incarceration in juvenile cases. Yet, within the United States, the practice operates on a small scale; in short, judges implement the practice at their own discretion. Given conferencing's successes, this underutilization is disquieting; moreover, this unchecked judicial discretion has resulted in a striking racial disparity. Conferencing should be the norm for all juvenile offenders. The wider implementation of the practice would not only lessen the impact of racial bias, but also significantly lessen recidivism rates and reduce government spending.

## Family Group Conferencing: Origins and Outcomes Abroad

In 1989, family group conferencing (FGC) arose in New Zealand. It initially served as a means of empowering the indigenous Maori people, whose youth were overrepresented within juvenile prisons.<sup>5</sup> Though the popularity of FGC has since skyrocketed within the country, the objectives remain the same: the empowerment of victims, harm repair, and lowered rates of reoffense, or *recidivism*.<sup>6</sup> Conference facilitators employ the themes of debt and redemption to achieve these objectives. In lieu of a traditional, punitive sentence, offenders pay restitution through an official mandate created by conference members.<sup>7</sup> Mandates often include monetary reparations, counseling and rehabilitation, and a variety of mandated lifestyle changes.<sup>8</sup>

If a conference fails to reach a resolution, the offender may be sentenced to a more traditional form of punishment.<sup>9</sup> Fortunately, failure is unlikely. In a study of British conferences, participating members reached agreements in seventy-nine percent of cases.<sup>10</sup> Thus, in most cases, FGC renders punitive measures wholly unnecessary. In fact, New Zealand's FGC system has superseded prosecution; today, the latter merely exists as a "backup."<sup>11</sup> This shift has proven beneficial. New Zealand studies reveal that the recidivism rates of offenders who have participated in FGC are significantly lower than the rates of the control group, comprised of traditionally sentenced offenders.<sup>12</sup>

## Family Group Conferencing Within the United States: Limits and Biases

Despite its proven successes, FGC remains an uncommon practice within the United States. Though restorative justice programs operate within thirty-five states, they exist along the margins.<sup>13</sup> In most states, the practice relies upon third-party nonprofits for both funding and execution. Due to limited funds and personnel, even some of the most effective and well-known programs have struggled to persist.<sup>14</sup> Moreover, in the few states wherein larger-scale FGC exists, case selection occurs on a referral basis. A young offender's community members may refer them to a court official or restorative justice provider.<sup>15</sup> More often, offenders are referred by law enforcement, prosecutors, probation officers, or prison staff.<sup>16</sup> Already, offenders harboring social capital have a significant advantage. After reviewing referrals, presiding judges either order offenders to participate in FGC or proceed with traditional proceedings. Though judges are to use criteria such as criminal history and crime classification to determine an offender's eligibility for conferencing, states allow them to exercise total discretion in each case.<sup>17</sup> This discretion creates space for bias. Public defenders often express concerns that judges will not deem their clients—most of whom are poor and many of whom are of color—"good candidates" for this alternative correctional program.<sup>18</sup> These attorneys' fears find grounding in statistics.

Judicial bias is especially evident in Colorado, a state often praised for its embrace of alternative corrective practices. Black youth currently account for thirty-one percent of Colorado arrests and twenty percent of the state's juvenile detention population.<sup>19</sup> Yet, of the 264 juveniles selected for FGC in 2016, only three were black.<sup>20</sup> Despite their overrepresentation within Colorado's criminal justice system, black offenders constituted a mere *one percent* of the conferencing pool. In addition, a 1992 study on restorative programs in four American states found that, out of every listed racial category, the judges selected black offenders least often.<sup>21</sup> Evidence from other studies on the restorative selection process—such as Warner's 1994 examination of conferencing and offenders' rights—reveals a clear bias towards white offenders.<sup>22</sup> Though late twentieth-century research into burgeoning restorative justice programs explored this racial imbalance, the issue is largely absent within contemporary restorative justice discourse. The inattention to this disparity contradicts the seemingly progressive objectives of the practice's leading proponents. Thus, a shift towards standardization is crucial to the integrity of the practice as a whole.

## The Proposal

America's standardization of juvenile FGC should mirror that of New Zealand. In essence, this standardization will transform the States' infrequent, discretionary program into a customary aspect of the juvenile justice system. The choice to limit this standardization to juvenile cases is intentional. In terms of preventing reoffense, juvenile conferences are far more successful than adult conferences.<sup>23</sup> Scholars have attributed this difference to the disintegration of offenders' social bonds over time. While the social bonds of adult offenders are usually quite weak, juvenile offenders often still retain these bonds.<sup>24</sup> The FGC model is dependent upon these social connections; as a result, the practice is more effective within juvenile facilities. Due to these divergent outcomes, the majority of existing FGC discourse focuses upon juveniles. Scholars and FGC practitioners should certainly continue to explore adult conferencing; however, the juvenile justice system is the appropriate starting point for standardization.

This appeal for standardization does not call for a complete disavowal of judicial discretion. Some discretion is vital to victims' wellbeing, public safety, and the efficient use of funds. Courts should continue to screen each defendant, primarily for a propensity towards violence. Offenders should also be screened for signs of retaliation and denial.<sup>25</sup> The identification of such signs is crucial, given that a facilitated conference with a vengeful or dishonest offender can greatly harm—and, in a sense, revictimize—the victim.<sup>26</sup> Judges may also use discretion to disqualify inveterate offenders who have previously participated in restorative processes.<sup>27</sup> That said, judicial discretion should be limited to these criteria, enabling many more offenders, victims, and community members to participate in this remedial practice.

## Benefits: Victims

FGC has proved to be of significant benefit to victims. In discussing experiences at trial, many victims note that they are forced to forego their own perception of the crime and its impact, in favor of a narrative that fits the prosecution's case theory.<sup>28</sup> Within the traditional system, victims merely serve as persuasive tools of the state. This limited victim role stands in stark contrast to the authoritative position they hold within FGC.<sup>29</sup> During conferences, facilitators encourage victims to recount the crime from their own perspective; victims and their families are also given space to detail the effects of the crime. This divulgence usually prompts the offender to apologize. Scholars consider expressed remorse a critical aspect of the conferencing process, regardless of the offender's sincerity. By apologizing to the victim without any direct involvement of

legal counsel or the state, the offender submits to the victim—and the victim alone. Technically, an apology “cannot undo what has been done,”<sup>30</sup> yet, by positioning themselves at the mercy of the victim, “this is precisely what [offenders] manage to do.”<sup>31</sup>

Lastly, FGC offers victims a leading role in determining the offender’s final course of redress. The value of victims’ power to decide—a power that the traditional court system withholds—is reflected in victims’ reported levels of satisfaction. A case study of two Canadian mediation programs found that, in comparison to victims whose offenders were traditionally prosecuted and sentenced, FGC victims were “significantly more satisfied” and felt that the case had been handled in a just manner.<sup>32</sup> The satisfaction rates of FGC victims average around eighty-nine percent, while the satisfaction rates of traditional victims hovers around a mere thirty-four percent.<sup>33</sup>

#### **Benefits: Offenders and Recidivism**

FGC also catalyzes a unique transformation in offenders. According to many restorative justice facilitators, after hearing victims’ raw accounts, even the most seemingly apathetic offenders displayed empathy, guilt, and shame.<sup>34</sup> Though all of these emotions are imperative to the transformation of the offender, shame plays a unique role. The shame produced through rehabilitative programs—termed “reintegrative shaming”<sup>35</sup>—differs from the shame and stigmatization birthed through traditional prosecution and incarceration. The primary objectives of the traditional process are the determination of guilt and punishment. This process humiliates offenders, leading to an unshakeable stigma that is unforgiving and permanent.<sup>36</sup> This stigmatization breeds defiance in offenders, which causes a long-term attachment to their criminal identity—or, a “psychosocial identification with non-conformism”<sup>37</sup>—and subsequent reoffending. This stigma also significantly limits offenders’ job and housing prospects, leading many to reoffend.<sup>38</sup> On the contrary, reintegrative shaming involves a simultaneous disapproval of the crime and respect for offenders.<sup>39</sup> In essence, FGC facilitators shame the crime while enveloping the offender in compassion and forgiveness. By encouraging offenders to confront the relationship between their own trauma and their path to criminality, FGC prompts offenders to change their behavior for the benefit of both themselves and their victims.

So far, American juvenile restorative justice programs have significantly reduced recidivism rates. In 2016, less than eight percent of the juvenile offenders who participated in Colorado’s 2015 conferencing program committed another offense.<sup>40</sup> This stands in stark contrast to the staggering

forty-four percent generated by the state’s traditional corrective program.<sup>41</sup> Similarly, the recidivism rates of participating offenders in Baltimore’s juvenile FGC program are around sixty percent lower than those of non-participating offenders.<sup>42</sup> In addition, a Wisconsin juvenile conferencing program has generated a thirty-percent drop in recidivism between participating offenders and a non-participating control group.<sup>43</sup> These studies prove FGC to be an effective crime deterrent. If deterrence is truly the chief aim of American correctional services, such institutions should not hesitate to implement FGC on a broader scale.

#### **Benefits: Government Spending**

Those unmoved by the practice’s remedial effects may be swayed by its economic benefits. The traditional court system is pricey; costs include the wages of public defenders, court clerks, law enforcement, prison staff, court security, jury stipends, plus steep per-inmate costs of incarceration.<sup>44</sup> By diverting juveniles away from lengthy court proceedings and incarceration and towards FGC, states will reap substantial savings. Policy analysts have estimated that the expansion of restorative practices such as FGC can save states twenty-seven million dollars annually.<sup>45</sup> A study of a Canadian conferencing program determined that for each dollar spent on FGC, the national government would have spent between two and twelve dollars on traditional corrective measures.<sup>46</sup> Similarly, representatives of the United Kingdom’s Justice Research Consortium estimate that the government saves nine pounds for every one pound allocated towards conferencing efforts.<sup>47</sup> These findings do not account for the savings wrought by lower rates of reoffense;<sup>48</sup> thus, the actual savings are undoubtedly even higher.

The aforementioned victim benefits will also lessen state spending. Studies have found that the feelings victims gain through the practice—namely, a sense of authority and lessened fear of revictimization—combat symptoms of post-traumatic stress disorder.<sup>49</sup> Therefore, family group conferencing can serve as a component of victim counseling and restitution, a service that many states are constitutionally bound to provide.<sup>50</sup> Currently, the federal Crime Victims Fund totals over two billion dollars.<sup>51</sup> Scholars project that the psychological healing found through FGC would significantly decrease the budgetary demands of victim services.<sup>52</sup> Of course, the positive effects of FGC do not serve as reason to curtail or eliminate more traditional forms of counseling and restitution; this budgetary shift should occur only alongside changes in victims’ needs. Though these savings may not be as immediate as those that result from cuts to court and incarceration costs, the possibilities are nevertheless promising.

## Conclusion

The American criminal justice system is currently on trial. Though calls for harsh criminal justice policies persist, knowledge and interest in the America's hyperpunitive system have reached an unprecedented level. Growing awareness of the traditional system's failures is evidenced in the recent passage of the First Step Act. In many respects, the Act is a win; however, it is indeed merely a first step. Less time and less contact with the traditional system cannot suffice when the system is the problem. This system not only fails to solve the problem—it recreates it. Fortunately, an alternative exists. As discussed, a standardization of family group conferencing will contribute to victim welfare, offender behavior modification, and government savings. The wider implementation will also lessen the reach of judicial bias. It is imperative that funding for juvenile incarceration is reallocated to offer this remedial approach on a broader scale. Proponents of this shift towards restoration are offering the American criminal justice system a means of redemption; policymakers would be wise to embrace this opportunity.

## Endnotes

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