

A BLUEPRINT FOR RESTORATIVE CRIMINAL JUSTICE IN THE UNITED STATES: THREE NON-TRADITIONAL SYSTEMS COMING TOGETHER

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ABSTRACT

The state and federal criminal justice systems in the United States aim to achieve two main goals: retribution and deterrence. However, neither of those goals are being effectively achieved. Retribution is lacking as victims are not able to seek justice on their own terms, offenders are never forced to take accountability for their actions, and society continues to pay the price for the harm done. Criminals are also not being effectively deterred, as recidivism rates are high, and incarceration is not an effective punishment. Three non-traditional justice systems: tribal courts, the South African Truth and Reconciliation Commission, and Rwandan Gacaca courts, have been practicing principles of restorative justice that would be more successful in providing retribution and deterrence than the current United States systems. This paper examines the infrastructure and principles behind the three systems and creates a modified restorative justice system to replace the current retributive system in the United States.

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I. INTRODUCTION

Some contend that the criminal justice system in the United States, at both the state and federal level, is broken.¹ Because the system plays such a crucial role in society, it is worthwhile to implement a new system to address its current failures. The concept of restorative justice has moved to the forefront as a possible solution, focusing on rehabilitating offenders by reconciling them with their victims and the community at large.² While restorative justice in its various forms comes with its own challenges, implementing it in a practical manner within the United States can have a positive impact on all the parties effected by crime, while still achieving the goals of retribution and deterrence that are ingrained in the American concept of justice. Constructing a restorative justice system that could provide the practical functionality needed is a daunting task. If it were simple, it probably would have been done long before now.

One of the biggest challenges in proposing an alternate system of justice is ensuring that it achieves the goals that are important to the members of society who rely on the justice system to maintain order. In the United States, two of the main goals of justice are retribution and deterrence, but neither goal is being efficiently achieved.³ Retribution is traditionally defined as deserved and severe punishment, and deterrence is preventing someone from doing something by threatening bad results if they carry out the act.⁴ As evidence that the system is not effectively deterring offenders, the United States has some of the highest recidivism rates in the world, with one study showing seventy-seven percent of released prisoners being arrested again within five years after their release.⁵ While studies suggest that incarceration rates reduce crime, the estimated average effect of incarceration on crime is unhelpful in policy decisions.⁶ Policymakers would be relying on skewed data as the effect of incarceration on rates applies unevenly

1. *Majority of Americans Think U.S. Criminal Justice System is Broken, Ineffective; See Need for Change*, OPEN SOC'Y FOUND. (Feb. 12, 2002), <https://www.opensocietyfoundations.org/newsroom/majority-americans-think-us-criminal-justice-system-broken-ineffective-see-need>; Meghan Laska, *A Broken System*, THE RECORD (Nov. 15, 2019), <https://www.bu.edu/law/record/articles/2019/record-fall-2019-cover-a-broken-system/>; *Criminal Justice Focus Issues*, STAND TOGETHER, <https://standtogether.org/issues/criminal-justice-reform/> (last visited Dec. 15, 2022).

2. See Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work*, GEO. PUB. L. REV. 1, 7–8 (2007); *Restorative Justice*, OXFORD LANGUAGES (2023), https://www.oed.com/dictionary/restorative-justice_n?tab=meaning_and_use#99192076277.

3. See HOWARD ZEHR, *CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES* 20 (Herald Press 25th anniversary ed. 2015).

4. *Retribution*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/retribution> (2021); *Deterrence*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/deterrence> (2021).

5. *Recidivism Rates by State 2022*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/state-rankings/recidivism-rates-by-state> (last visited Dec. 15, 2022).

6. JEREMY TRAVIS ET AL., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 176 (Nat'l Academies Press 2014).

among types of crime and might have adverse effects for things such as drug crimes if they increase post release criminality.⁷ In short, the current system is not achieving its goal of deterrence as it is not preventing people from committing crime, despite the threat of incarceration.

The justice system is also not meeting its goal of retribution. A system is not genuinely retributive unless it sets high standards of accountability that punish individuals only when they are blameworthy enough to deserve the punishment they get.⁸ In the United States, over half of the incarcerated population is mentally ill.⁹ Incarcerated people are more likely to be intellectually disabled.¹⁰ As well, everything from nonviolent trivial offenses to violent crimes trigger often similar, severe punishments.¹¹ In a truly retributive society, the justice system would draw an intrinsic link between an act and its consequences, making no room for an offender to rationalize and divert blame from themselves to other people and situations.¹²

Fortunately, should the United States be interested in making changes, three non-traditional justice systems have provided a blueprint for the justice systems in the United States that can be both practical and goal-achieving. First, for decades indigenous tribes have brought offenders together with their communities to provide opportunities for retribution and reconciliation through family group conferences and circle processes.¹³ Second, the South African Truth and Reconciliation Commission (TRC) was established to investigate gross human rights violations during the Apartheid regime, facilitate reconciliation, and turn guilt into a positive commitment for a better society.¹⁴ Third, the Gacaca courts of Rwanda responded to the vast amount of cases against genocide perpetrators following the 1994 genocide, reinventing mainstream justice mechanisms to involve the community in holding offenders and society accountable.¹⁵ All three of these

7. *See id.*

8. ERIN KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY* 17 (Harvard University Press 1st ed. 2018).

9. *Id.* at 16–17.

10. *Id.*

11. *Id.*

12. ZEHR, *supra* note 3, at 46.

13. *Id.* at 171; MARIANNE O. NIELSEN & JAMES W. ZION, *NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE* 46–47 (2005).

14. *Truth Commission: South Africa*, UNITED STATES INST. OF PEACE (Dec. 1, 1995), <https://www.usip.org/publications/1995/12/truth-commission-south-africa#:~:text=Mandate%3A%20The%20Truth%20and%20Reconciliation,includin%20abductions%2C%20killings%2C%20torture; Register of Reconciliation, TRUTH & RECONCILIATION COMM'N, https://www.justice.gov.za/trc/ror/index.htm> (last visited Dec. 15, 2022).

15. PENAL REFORM INT'L, *THE CONTRIBUTION OF THE GACACA JURISDICTIONS TO RESOLVING CASES ARISING FROM THE GENOCIDE*, PENAL REFORM INTERNATIONAL 11, https://cdn.penalreform.org/wp-content/uploads/2013/06/Gacaca_final_2010_en.pdf.

systems created unique solutions to difficult problems and were able to provide retribution for victims while addressing underlying problems to more effectively deter future crimes.

By remodeling state and federal justice systems in the United States after these non-traditional justice systems, the American goals of retribution and determent will be better met as offenders are more effectively punished than under current processes and recidivism is reduced as a result. The United States should abandon its current commitment to its retributive system and adopt a modified system of restorative justice. To further explain the current state of the justice system and the restorative changes it should undergo, this comment is divided into three parts. First, Part B will expand on how the current justice system functions and where it falls short. Next, Part C will explore the three non-traditional systems that this article will combine to create a new system. Finally, Part D will form the new system and explain both its strengths and its challenges.

II. THE CURRENT DISPOSITION OF UNITED STATES JUSTICE SYSTEMS

United States criminal justice systems currently have three main parties: the court, the offender, and the victim. The court has two main goals: holding offenders accountable and deterring crime.¹⁶ As one judge described, the court in sentencing must serve the need for retribution, isolate offenders from society, rehabilitate, deter, and hold offenders accountable for their actions.¹⁷ While the U.S. prides itself in being “tough on crime,” there is little evidence that the current punitive sentences, often involving incarceration, are doing much to deter crime, or causing criminals to adequately pay for their crimes.¹⁸ American incarceration rates are the highest in the world by a large margin, indicating that the current system is not effectively deterring crime.¹⁹

A. No Accountability, No Retribution

As for retribution, the criminal justice system incarcerates almost two million people in the United States for a variety of offenses, with most victims of violent crime wanting violence prevention rather than incarceration.²⁰ Judges, prison

16. ZEHR, *supra* note 3, at 20.

17. ZEHR, *supra* note 3, at 23.

18. Ana Zamora & David Safavian, *The Irony of Today's Tough-on-Crime Rhetoric*, THE HILL (July 3, 2022, 7:00 AM), <https://thehill.com/opinion/criminal-justice/3542002-the-irony-of-todays-tough-on-crime-rhetoric/>.

19. HELEN FAIR & ROY WAMSLEY, INST. FOR CRIME & JUST. POL'Y RSCH., WORLD PRISON POPULATION LIST 2 (World Prison Brief, 13th ed. 2021), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf (The United States incarceration rate is 629 people per 100,000. The next highest country is Rwanda at 580. The United States has over 2 million incarcerated citizens, which is astronomical in comparison to a country such as Canada who has a little over 38,000 incarcerated citizens.).

20. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

officials, and other actors make few if any efforts to rehabilitate offenders, missing opportunities for those individuals to perform the difficult work that comes with self-improvement and taking accountability.²¹ There is inherent difficulty in confronting our own wrongdoing and taking responsibility. As Howard Zehr, a primary founder of the restorative justice movement, describes it, “In many ways, taking one’s punishment is easier. While it may hurt for a time, it involves no responsibility and no threat to rationalizations and stereotypes.”²² As one study suggests, feelings of shame induce a strong motivation to change.²³ However, feelings of shame will not arise without self-critical thoughts.²⁴

The adversarial nature of the United States justice systems encourages offenders to deny their involvement in the crime, further diverting responsibility.²⁵ From the moment that a suspect is charged with a crime, the entire focus of the system shifts to proving or disproving that particular suspect committed that crime.²⁶ Because suspects focus on defending themselves, the system discourages them from seeing the real human cost of their actions.²⁷ Attorneys often encourage suspects to plead not guilty, and spend excessive time strategizing with the suspect about how they can avoid some or all of the blame.²⁸ As well, the threat of incarceration, especially for a lengthy period of time, discourages suspects from admitting the truth.²⁹ None of these natural consequences of the system help serve the goals of retribution and determent.

Communities are financially supporting inmates while the justice system isolates them, restricting them from making meaningful contributions to the community in return for the support.³⁰ As well, the justice system often imposes punishment on inmates that they feel is unfair, which allows them to blame an unfair system or unfair circumstances for their actions, rather than taking

21. *Id.*

22. ZEHR, *supra* note 3, at 198.

23. Guy Winch, *The Surprising Upside of Guilt and Shame*, PSYCH. TODAY (Mar. 7, 2015), <https://www.psychologytoday.com/us/blog/the-squeaky-wheel/201503/the-surprising-upside-guilt-and-shame>.

24. Hailey Shafir, *Shame: Causes, Effects, and How to Overcome*, CHOOSING THERAPY (Nov. 12, 2020), <https://www.choosingtherapy.com/shame/>.

25. *Pleading Not Guilty Even When Guilty*, HG.ORG, <https://www.hg.org/legal-articles/pleading-not-guilty-even-when-guilty-40222> (last visited Dec. 15, 2022).

26. *The Danger of Calling a Trial a “Search for the Truth,”* TEMP. UNIV. BEASLEY SCH. OF L., <https://law.temple.edu/aer/2017/05/18/danger-calling-trial-search-truth/> (last visited Dec. 15, 2022).

27. ZEHR, *supra* note 3, at 47.

28. *Pleading Not Guilty Even When Guilty*, *supra* note 25.

29. ZEHR, *supra* note 3, at 80.

30. Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, SUPPORTIVE HOUS. NETWORK OF NEW YORK 1, 6 (2012), <https://shnny.org/research/the-price-of-prisons-what-incarceration-costs-taxpayers/>.

responsibility themselves.³¹ Often when sentences are dealt out, a huge theme of the punishment imposed is the debt that an offender owes to society.³² This concept rarely makes sense to the offender as it is too abstract, and an offender can often feel animosity towards a society that they feel has let them down.³³

To adequately punish an offender, they need to feel remorse, take steps to repair the harm they have done, and work towards self-improvement such that they can avoid doing harm in the future. Traditional incarceration does not permit an offender to receive the punishment described here. Rather, incarcerated individuals are secluded with other offenders in a violent environment on society's dime.³⁴ They have plenty of opportunities to blame the system for their circumstances rather than their own actions. Offenders need to answer to human consequences that stem directly from their behavior.³⁵

i. Negative Effects of Isolation

Incarceration is isolation: from society, families, and even other inmates at times. While studies are sparse on the psychological effects of isolation on incarcerated individuals, studies on isolation in other contexts are insightful. Several studies have examined the health effects of isolation resulting from situations such as COVID-19 quarantine. Psychological impacts of quarantine include "increased stress, depression, anxiety, sleeping difficulties, post-traumatic stress, anger, boredom, stigma, substance abuse, and loneliness."³⁶ Anxiety is a particular concern during quarantine, as concerns about economic and financial matters are also in play.³⁷ This finding is highly relevant in an incarceration setting, as incarcerated individuals often face concerns in finding employment post-release, making it difficult to support themselves and their families.³⁸ This is not an unfounded fear, as the effects of isolation do not end once an inmate is released. One study found that inmates who were placed in solitary confinement were less

31. ZEHR, *supra* note 3, at 46.

32. Richard Dagger, *Restitution, Punishment, and Debt to Society*, UNIV. OF RICHMOND POL. SCI. FAC. PUB. 3, 3 (1980) (Suggesting a particular author differs from most people in feeling a criminal owes no debt to society).

33. ZEHR, *supra* note 3, at 56.

34. Henrichson & Delaney, *supra* note 30, at 6; Nazish Dholakia, *Prisons and Jails are Violent; They Don't Have to Be*, VERA (Oct. 18, 2023), <https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be>.

35. ZEHR, *supra* note 3, at 47.

36. Paula Dagnino et al., *Psychological Effects of Social Isolation Due to Quarantine in Chile: An Exploratory Study*, FRONTIERS PSYCH., 2 (2020), <https://www.frontiersin.org/articles/10.3389/fpsy.2020.591142/full>.

37. *Id.*

38. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE, (2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

likely to find employment after release and were more likely to reoffend within three years of release.³⁹

While the negative health effects resulting from isolation are concerning solely based on the impact on an offender themselves, the effects are far reaching beyond the individual. Studies suggest that isolation correlates directly to behavior. One study examined inmates who were placed in prisons far from their home cities and their rates of misconduct while in prison.⁴⁰ Inmates in a prison between 300 to 350 miles away from their home had higher rates of misconduct, which the researchers attributed to the lack of social ties to their outside friends and family.⁴¹ Similarly, another study found an increase in misconduct among inmates who had just had a family visit, which the researchers attributed to the feelings of loss and deprivation when their loved ones leave.⁴² Both studies suggest that isolation increases misconduct rather than discourages it.

Isolation-induced behavioral health problems from incarceration carry on post release, which has even more concerning implications for society in general. In one experiment on mice, isolation was linked to chronic stress.⁴³ In turn, mice suffering from chronic stress would make high risk decisions that would result in immediate rewards rather than make a low-risk decision for a delayed reward.⁴⁴ When looking at former inmates, this information is insightful.

It is likely that individuals who were previously isolated through incarceration would be exposed to chronic stress during that time. Once released, it is more likely that the individual would make high risk decisions for immediate rewards, including participating in crime.⁴⁵ As already discussed, reintegration into society can be difficult in ways such as finding employment, and it might be easier for someone who has been subjected to chronic stress to make high risk, illegal decisions for quicker rewards such as money or social recognition. Even if formerly incarcerated individuals are released from prison and choose to live positively, the health problems associated with isolation often lead to early death along with a host of

39. Christopher Wildeman & Lars Hojsgaard Andersen, *Long-term Consequences of Being Placed in Disciplinary Segregation*, 58 *CRIMINOLOGY* 423, 443 (2019).

40. Andrea M. Lindsey et al., *In Prison and Far from Home: Spatial Distance Effects on Inmate Misconduct*, 63 *CRIME & DELINQ.* 1043, 1044 (2015).

41. *Id.* at 1057.

42. Sonja E. Siennick et al., *Here and Gone: Anticipation and Separation Effects of Prison Visits on Inmate Infractions*, 50 *J. OF RSCH. IN CRIME AND DELINQ.* 417, 423 (2013).

43. Arish Mudra Rakshasa & Michelle T. Tong, *Making "Good" Choices: Social Isolation in Mice Exacerbates the Effects of Chronic Stress on Decision Making*, *FRONTIERS BEHAV. NEUROSCIENCE*, (May 25, 2020), <https://www.frontiersin.org/articles/10.3389/fnbeh.2020.00081/full>.

44. *Id.*

45. See *id.*

medical conditions.⁴⁶ Rehabilitated individuals can then only make a limited positive contribution to society, as they often die young or are chronically ill.⁴⁷

Incarceration is an obscure punishment that lacks an intrinsic link or natural consequence to the victim or crime itself.⁴⁸ While outsiders can view incarceration as “paying a debt to society,” a lack of a clear connection between the action itself and the consequence of incarceration makes it easier for offenders to rationalize their behavior and divert blame.⁴⁹ Even a person who successfully fulfills their sentence is often never pushed by themselves or their communities to accept responsibility or accountability for their choices, even as they have or are accepting their punishment.⁵⁰ Inmates can find justification for their feelings of unfairness because, until the 1970’s, judges had wide discretion to give sentences as they saw fit.⁵¹ Now, under sentencing guideline systems, including the Federal Sentencing guidelines, judges are drastically limited in the level of discretion that they have in sentencing.⁵² Commentators have criticized the guidelines for promoting uniformity over fairness and excluding relevant case characteristics.⁵³

In sum, isolation leads to mental and physical problems that make inmates more likely to misbehave while incarcerated and post release. Beyond that, it often creates individuals who are unable to contribute fully to society, no matter their intentions. This is counterintuitive to the theory that incarceration leads to an offender “paying their debt to society.”

ii. Benefits of Making Amends

The victim of a crime often becomes a victim of the criminal justice system. The court and attorneys largely withhold victims from the court processes in the cases brought against their offenders unless used as a witness.⁵⁴ As witnesses, the court, attorneys, and police often make victims provide information, stripping them of power to decide on what terms they will recount their experience and to whom, forcing them to relive an incident that can bring up trauma.⁵⁵ While the court “shall consider” victim impact statements in their sentencing, court rules do not make it obligatory, leaving the victim powerless in deciding what consequences their

46. Amy Novotney, *The Risks of Social Isolation*, AM. PSYCH. ASS’N, (May 2019), <https://www.apa.org/monitor/2019/05/ce-corner-isolation> (issues can include anything from higher risks of stroke and coronary heart disease to trouble sleeping and increased levels of depression and anxiety).

47. *Id.*

48. *Id.*

49. ZEHR, *supra* note 3, at 46.

50. *Id.*; David Indermaur, *Offender’s Perceptions of Sentencing*, 31 AUSTL. PSYCH. 15–19 (1996).

51. Ben Grunwald, *Questioning Blackmun’s Thesis: Does Uniformity in Sentencing Entail Unfairness?*, 49 L. & SOC. REV. 499, 499 (2015).

52. *Id.* at 500; U.S. Sent’g Comm’n, Guidelines Manual (2021).

53. Grunwald, *supra* note 51, at 500.

54. *Id.* at 38.

55. *Topic five- Victims and their participation in the criminal justice process*, U.N. OFF. ON DRUGS & CRIME (July 2019), <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-11/key-issues/5--victims-and-their-participation-in-the-criminal-justice-process.html>.

wrongdoer receives.⁵⁶ In short, the system does not respond to the need for the victim to regain personal autonomy after a crime.⁵⁷

When a crime is committed, many people are affected, but there are really two main players of a crime: offender and victim. When we hurt others as children, we are often taught that we should apologize and try to do better. To propose a similar simple solution when a crime has been committed seems laughable, especially in situations of violent crime. Perhaps that is the reason why the justice system in the United States has taken on such a retributive purpose. However, the power of making amends is underestimated. Taking accountability and making amends is more difficult than it may seem and, potentially more retributive towards an offender than incarceration. Pushing an offender to go through that process can initiate a permanent change in an offender that can deter them more efficiently. As a result, both victims and society receive a more just recompense from the offender.

Making amends is a vital part of many addiction recovery programs. However, the lessons learned in those programs apply to far more crimes than just those involving drugs. As one program describes, “Making amends is one of the most difficult steps [of recovery]. You are forced to reflect on your mistakes and shortcomings. It also requires you to put yourself at another’s mercy by apologizing and asking how you can make it right.”⁵⁸ Addiction recovery often involves going through several steps of self-discovery and improvement.⁵⁹ Making amends is one of the most difficult of those steps which indicates it is more difficult than it may seem at first glance. In turn, asking offenders to confront their crimes and victims, take accountability, and try to fix their mistakes is painful for them. If retribution is traditionally defined as “something given or exacted in recompense,”⁶⁰ creating a system for offenders to make amends and recompense their victim would be retributive.

This is especially true when considering the benefits victims receive from their offenders attempting to make amends. England made attempts in the 1980’s to implement a justice system focused on reparation.⁶¹ During that time, it was

56. *Id.*

57. ZEHR, *supra* note 3, at 31. Victims can often want a variety of consequences for those who have harmed them. Victims of offenders in the criminal justice system, unlike the civil system, are not just entitled to money. They can desire that their offender gets treatment or is locked away so they can’t harm someone else. These feelings are valid, and the important thing in a restorative system is that they have an opportunity to be heard.

58. *Why is Making Amends So Important?*, SMARMORE CASTLE, (May 24, 2018), <https://www.smarmore-rehab-clinic.com/blog/addiction-advice/why-making-amends-so-important>.

59. *12 Step Programs: 12 Steps to Recovery for Addiction*, AM. ADDICTION CTRS., (Oct. 21, 2022), <https://americanaddictioncenters.org/rehab-guide/12-step>.

60. *Retribution*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/retribution>.

61. See GWYNN DAVIS ET AL., *MAKING AMENDS: MEDIATION AND REPARATION IN CRIMINAL JUSTICE* 24 (Routledge, 1st ed. 1992).

discovered that “victims were typically interested in receiving an apology and overcoming the psychic and emotional scars of a crime, far more than in the sort of direct compensation which could be measured and standardized as a disposal technique for the court.”⁶² Restorative justice empowers victims in many ways, including helping them find answers, allowing them to influence the consequences their offenders receive, and giving them community support, among others.⁶³ In short, a system that seeks recompense for victims in ways that the victim actually needs is more retributive than one in which justice is dictated largely by the state.

Finally, society itself is much better served by offenders who have taken the time to fix what they have done than by those who are simply incarcerated for a time and then returned to the community. Even with sentencing guidelines, racial disparities continue to plague the justice system.⁶⁴ Incarcerated individuals face harsh sentences that are sometimes lifelong, even for non-violent crimes.⁶⁵ The government often denies released individuals benefits that other citizens receive, contributing to unique challenges to reintegration and making sentences lifelong, even if individuals are not behind bars.⁶⁶ In situations such as these, unfairness makes it easy to divert blame to other people and circumstances, as offenders can feel their actions do not warrant the punishment they receive.⁶⁷

Making amends is focused on seeking forgiveness from others, but it also facilitates self-forgiveness as well.⁶⁸ It might not seem like a punishment to allow an offender to forgive themselves, but the punishment lies in the process of self-forgiveness. In the end, it is a positive outcome for the offender to forgive themselves, due to the effect that will have on their behavior. If an offender fails to forgive themselves, it is likely they will fall into old patterns to cope with their pain, which could include committing more crime.⁶⁹ This is especially likely as culturally we are taught that doing something wrong leads to punishment rather than a learning opportunity where we can “refine our choices and actions.”⁷⁰ As a result, those who forgive themselves are more likely to think they are capable of making good choices in the future, leading to less re-offending, which lowers crime for society as a whole.

62. *Id.* at 36–37.

63. Alana Maria Abramson & Melissa Leanne Roberts, *Introduction to Criminology: 17.8 Benefits & Critiques of Restorative Justice*, <https://kpu.pressbooks.pub/introcrim/chapter/17-8-benefits-critiques-of-restorative-justice> (last visited Oct. 26, 2023).

64. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 passim (2014).

65. *Excessive Punishment*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/excessive-punishment> (last visited Dec. 15, 2022).

66. *Id.*

67. Indermaur, *supra* note 50; ZEHR, *supra* note 3, at 46.

68. Elizabeth Stockton, *The Importance of Making Amends*, RIVERSIDE RECOVERY, (Jun. 19, 2021), <https://rrtampa.com/importance-making-amends/#:~:text=>

69. *See Id.*

70. Samantha Stein, *Why Making Amends Is So Important*, PSYCH. TODAY, (July 5, 2021), <https://www.psychologytoday.com/us/blog/what-the-wild-things-are/202107/why-making-amends-is-so-important>.

II. SOCIETY'S ROLE IN CRIME

While deterrence aims to use punishment of an offender to discourage people from committing similar offenses,⁷¹ true deterrence should be aimed at discouraging crime by both the offender and other members of society. As explained earlier, the current justice system falls short of that goal. In fact, research has shown that the fear of being caught is a more effective deterrent than punishment, and incarceration is not an effective way to deter individuals.⁷² A closer inspection of who is committing crime and when shows that real deterrence will only be achieved when changes are facilitated in both the offender and the society in which they have been raised.

Society often paints the offender as the “bad guy” in the criminal justice system. Still, several factors often lead a person to commit crime, and society can only benefit from seeking to address those factors to help that person become a positive contributor in society.⁷³ Currently, prison systems dehumanize offenders and teach them obedience and submission.⁷⁴ However, crime often occurs because an offender feels that they have no control of their life, and this system only leads to a lack of self-governance.⁷⁵ Therefore, even obedient and submissive prisoners can have poor transitions back into society and can rebel.⁷⁶ This is especially alarming when prison teaches more violence.⁷⁷

In 1946, a pamphlet was published addressing concerns on whether a crime wave would be coming at the end of World War II.⁷⁸ In this pamphlet, the author described the causes of crime.⁷⁹ Unsurprisingly, individuals who we come in close contact with in our formative years shape our moral standards.⁸⁰ “The highest delinquency and crime rates” were in the slums, where people were poorest, sickest, and there was little supervision over kids.⁸¹ Gangs became prevalent,

71. BEN JOHNSON, DO CRIMINAL LAWS DETER CRIME? DETERRENCE THEORY IN CRIMINAL JUSTICE POLICY: A PRIMER 2 (Minn. House Rsch., 2019), <https://www.house.mn.gov/hrd/pubs/deterrence.pdf>.

72. NAT'L INST. OF JUST., U.S. DEP'T. JUST., FIVE THINGS ABOUT DETERRENCE (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>.

73. CRIM. JUST. INFO. SERVS. DIV., FED. BUREAU INVESTIGATIONS., HATE CRIME STATISTICS 2011: VARIABLES AFFECTING CRIME (2011), https://ucr.fbi.gov/hate-crime/2011/resources/variablesaffectingcrime_final.pdf.

74. ZEHR, *supra* note 3, at 43–44.

75. *Id.*

76. *Id.*

77. *Id.*

78. THORSTEN SELLIN, EM 3: IS A CRIME WAVE COMING?, AMERICAN HISTORICAL ASSOCIATION (Jan. 1946), [https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-3-is-a-crime-wave-coming-\(1946\)](https://www.historians.org/about-aha-and-membership/aha-history-and-archives/gi-roundtable-series/pamphlets/em-3-is-a-crime-wave-coming-(1946)).

79. *Id.* at 6–9.

80. *Id.* at 7.

81. *Id.*

turning petty crime into more complex crimes over time.⁸² However, the pamphlet also acknowledged that lack of intelligence, mental illness, interpersonal conflicts, and traditional punishment mechanisms could contribute to crime.⁸³ The same remains true today.

Rates of street crime are typically higher among poor people, although it is important to note that statistics might be skewed due to larger enforcement against poor people than wealthy people.⁸⁴ This is largely due to poverty, which creates anger, frustration, and economic need that leads to poor decision making.⁸⁵ There are also concerns about poor parenting skills and other experiences that lead to antisocial behavior in poor communities.⁸⁶ As well, “individuals with poor mental health are more likely to be involved in crime, either as an offender or as a victim.”⁸⁷ Without voluntary treatment, offenders might not have the ability to de-escalate violent situations, and victims might be in more vulnerable situations.⁸⁸

More alarming than crime itself is the large rate at which individuals are committing additional crimes after release and returning to prison. Currently, the recidivism rate in the United States is one of the highest in the world.⁸⁹ Nearly 44% of offenders return within the first year of release.⁹⁰ Recidivism rates tend to be much higher among Black men than among their white counterparts.⁹¹ Research suggests that there is implicit bias and racism against Blacks in the criminal justice system that result in harsher penalties and more convictions when there otherwise wouldn't be one.⁹² Many people are also returning to prison when they have previous history of drug charges or non-felony offenses.⁹³ Addiction plays a big role in repeat drug offenses, which the current system does not adequately account for.⁹⁴ As well, Black men are less likely to be successful in drug rehabilitation

82. *Id.*

83. *Id.* at 7, 9.

84. *Social Problems: 8.3 Who Commits Crime?* 339 (Univ. Minn. Librs ed. 2015) (2010), <https://open.lib.umn.edu/socialproblems/chapter/8-3-who-commits-crime/>.

85. *Id.*

86. *Id.*

87. Catherine Maclean et. al., *Local Access to Mental Healthcare and Crime*, VoxEU (Nov. 14, 2020), <https://cepr.org/voxeu/columns/local-access-mental-healthcare-and-crime>.

88. *Id.*

89. *Recidivism Rate by State*, WISEVOTER, (last visited Jan. 28, 2023), <https://wisevoter.com/state-rankings/recidivism-rates-by-state/#:~:text=Recidivism%20rates%20in%20the%20U.S.,within%20their%20first%20year%20out;Recidivism%20Rates%20by%20Country%202023,WORLD%20POPULATION%20REV.,https://worldpopulationreview.com/country-rankings/recidivism-rates-by-country> (only 6 other reported countries had higher recidivism rates than the US).

90. *Recidivism Rate by State*, *supra* note 89.

91. Nayely Esparza Flores, *Contributing Factors to Mass Incarceration and Recidivism* (pt. 4), 6 THEMIS: RSCH. J. OF JUST. STUD. & FORENSIC SCI. 1, 3 (2018).

92. *Id.* at 6.

93. *Id.* at 3.

94. *Id.*

programs, contributing to the problems of mass incarceration, particularly of Black men.⁹⁵

Socioeconomic problems are large contributors to recidivism as well. Factors such as labor and wage, neighborhood, and economic opportunities all effect the chances of recidivism.⁹⁶ It is extremely difficult to find work after incarceration, with many employers hesitant to take risks on former criminals.⁹⁷ There could be a lack of jobs in the neighborhoods to which the offenders are returning, and their skills may only be adequate for a low wage job.⁹⁸ It is even more difficult to overcome these hurdles when time spent in prison has likely interrupted time that could have been spent obtaining an education or getting skills in other ways.⁹⁹ Offenders are set up for failure when these factors are coupled with returning to a neighborhood where social ties provide belonging but are often involved in crime.¹⁰⁰

All this information indicates that offenders are not bad people merely committing crime because they want to. Combatting the effects of crime is a massive task, because to do so effectively requires addressing the larger problems of society at the core of all crime. When prison is a more inviting environment than the homes in which offenders live, it is unlikely that the threat of incarceration will be an effective deterrent. The system as it currently operates does not account for that hypothesis.

As discussed above, the current system underserves all three parties involved with it. The court is not effectively deterring or punishing those who commit crimes. Victims are voiceless and powerless in finding their own justice. Courts discourage offenders from taking true accountability, which means there is no pressure on offenders to accept fault and change behavior or make amends. While there are clear inadequacies on all fronts, replacing this system with something more effective is a tall order. Society has concerns about changing to a different system, including being “soft on crime” and risks to public safety, among others.¹⁰¹ Changing to another system might be less daunting if the change is accompanied by some proof of success beforehand. Non-traditional justice systems provide hopeful and helpful information on how to implement a more restorative system while simultaneously being more successful at deterring and punishing criminals.

95. *Id.* at 4.

96. Flores, *supra* note 91, at 7.

97. *Id.*

98. *Id.* at 7–8.

99. *Id.* at 8.

100. *Id.*

101. *Topic Four- Issues in Implementing Restorative Justice*, U.N. OFF. ON DRUGS AND CRIME (Apr. 2019), <https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-8/key-issues/4--issues-in-implementing-restorative-justice.html>.

III. A RESTORATIVE JUSTICE FRAMEWORK: THREE NON-TRADITIONAL SYSTEMS

Three non-traditional justice systems have implemented concepts of restorative justice for decades: indigenous tribal courts, the South African Truth and Reconciliation Commission (TRC), and Rwandan Gacaca courts.¹⁰² The philosophy at the heart of each of these restorative justice systems is that crime violates people and relationships, not the state.¹⁰³

Many indigenous cultures uniquely emphasize healing to find justice. For the Navajo people, for example, healing works through driving away the cause of an illness followed by reconciling a person with themselves, family, community, nature, and the cosmos.¹⁰⁴ One of the biggest goals of the TRC was to promote national unity and reconciliation at a national level to heal individuals at a personal level.¹⁰⁵ One of the five main goals of Gacaca courts was to reconcile the Rwandans and reinforce their unity.¹⁰⁶ All three systems attempted to mend relationships that had been violated, even on a large scale.

Each system shared a common goal, but they each bring something unique to a potential restorative system. The TRC provides a strong infrastructure, Gacaca addresses realistic consequences, and tribal practices inform how difficult but effective meetings and conversations can take place. None of these systems can be perfectly applied without modification to the justice system in the United States, but bringing pieces of the three together will form a system that promotes both deterrence and retribution.

Common characteristics of restorative systems include bringing the victim, offender, and community together in search of solutions that “promote repair, reconciliation, and reassurance.”¹⁰⁷ It acknowledges that harms create needs, it addresses obligations to meet those needs, and seeks to put right the wrongs through inclusive, collaborative processes.¹⁰⁸ Indigenous tribes, South Africa, and Rwanda all turned to their communities to solve problems that felt insurmountable at an individual level. While the solutions took different forms, all bear the markings of restorative efforts, bringing victims, offenders, and communities together into one place to facilitate healing.

102. See *The Origins of Circles*, LIVING JUST. PRESS, <https://livingjusticepress.org/origins-of-circles/> (last visited Dec. 15, 2022); *The Committees of the TRC*, TRUTH AND RECONCILIATION COMM., <https://www.justice.gov.za/trc/trccom.html> (last visited Dec. 15, 2022); PRI, *The Contribution of the Gacaca Jurisdictions to Resolving Cases Arising from the Genocide* (2009) https://cdn.penalreform.org/wp-content/uploads/2013/06/Gacaca_final_2010_en.pdf.

103. ZEHR, *supra* note 3, at 183.

104. NIELSEN, *supra* note 13, at 47.

105. Samara Auger, *Healing the Wounds of a Nation; The Truth and Reconciliation Commission of South Africa*, DRAKE UNIV. 1, <https://www.drake.edu/media/departments/offices/dussj/2010-2007documents/HealingAuger.pdf> (last visited Dec. 15, 2022).

106. Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENVER J. OF INT'L L. & POL'Y 125, 136 (2007).

107. ZEHR, *supra* note 3, at 183.

108. *Id.* at 235–36.

A. Indigenous Tribal Courts

To begin, many indigenous tribal justice systems reflect characteristics of restorative systems through two different programs: circle processes and family group conferencing.¹⁰⁹ Circle processes provide forums for developing sentencing plans while addressing community-wide causes and problems, community responsibilities, and needs for healing.¹¹⁰ Typically, circle processes are comprised of victims and offenders along with their representatives, but they also include support groups and interested community members.¹¹¹ Because circle processes are community oriented, they are often quite large and rely less on experts in order to build a better sense of community.¹¹²

Family group conferences (FGCs) are different than circle processes, as the people invited to participate are much less community oriented, so they tend to be smaller.¹¹³ However, FGCs are still relatively large. Meetings typically place a huge emphasis on the presence of the family members of the offender, including extended family.¹¹⁴ Beyond that, attendees to the conference typically include the victim and their families or representatives, caregivers, a youth advocate, and police or prosecutors, all providing divergent interests and perspectives.¹¹⁵ FGCs are unique in that they produce a solution for the entire outcome of the case, not just restitution.¹¹⁶

Circle processes have been used by many aboriginal communities to deal with issues such as addiction, violence, grief, and trauma, separate from tribal justice systems.¹¹⁷ In the 1990s, members of the First Nations in Canada began teaching the circle practice to non-Native people as an alternative to mass incarceration.¹¹⁸ Those practices have been used to help in youth centers, diverting young African-American men from going to prison, and stopping the school-to-prison pipeline by using circle processes in schools.¹¹⁹ FGCs in indigenous nations emerged in the late 1980s in response to concerns and traditions of the Maori

109. See *The Origins of Circles*, LIVING JUSTICE PRESS, <https://livingjusticepress.org/origins-of-circles/> (last visited Dec. 15, 2022); Reidunn Haoy Nygard, *Is Family Group Conferencing an Adequate Method outside the Origin of New Zealand? A Systematic Review* (pt. 1), 20 SOC. WORK & SOC. SCIENCES REV. 42 (2019).

110. ZEHR, *supra* note 3, at 176.

111. *Id.*

112. *Id.* at 175–76.

113. See *id.* at 175.

114. ZEHR, *supra* note 3, at 172–73.

115. *Id.*

116. *Id.*

117. Jean Stevenson, *The Circle of Healing*, 2 NATIVE SOC. WORK J. 8, 8 (1999).

118. *The Origins of Circles*, LIVING JUSTICE PRESS, <https://livingjusticepress.org/origins-of-circles/> (last visited Dec. 15, 2022).

119. *Id.*

people of New Zealand.¹²⁰ FGCs have been heavily used in social work in indigenous communities, assisting indigenous families in becoming decision makers in family reunification.¹²¹ Beyond that, FGCs have primarily been focused on resolving juvenile crimes in all but the most violent and serious cases.¹²² In this context, evidence has shown that conferencing has led to longer periods before reoffending and less incidences of crime.¹²³

While both circle processes and FGCs have hallmarks of restorative justice, they also bear the characteristics of transformative justice. Transformative justice goes beyond restorative justice in that it recognizes the socio-political and economic issues behind crime.¹²⁴ It attempts to look at the reasons behind the unfairness in the justice system.¹²⁵ As one author described, in a case where a queer, poor boy robs a store, restorative justice would look only to the burglary itself and the harm done to the shop owner.¹²⁶ Transformative justice would consider other factors like if the boy had a homophobic father who kicked him out of the home and the boy was hungry. FGCs, particularly in their application to social work, attempt to provide resources to address the “why” behind the harms in relationships.¹²⁷ Those who initially implemented circle processes meant to address underlying issues that often led to crime.¹²⁸ Under both systems, participants discuss and work to resolve underlying societal issues in order to heal both interpersonal relationships and the communities that are affected by individual choices.

It is incredibly important to note that these processes used by indigenous people are based on deep community values, often involving prayer and traditional ceremony.¹²⁹ The circle processes and FGCs discussed here reflect Western influences that have been integrated with traditional practices. It would be prudent to note that any attempt to use these practices and attribute them to indigenous peoples should reflect a mindful respect of the practices of indigenous peoples and attempt to honor the values and relationships that these processes were intended for.

120. ZEHR, *supra* note 3, at 171.

121. Reidunn Haoy Nygard, *Is Family Group Conferencing an Adequate Method Outside the Origin of New Zealand? A Systematic Review*, SOC. WORK & SOC. SCIENCES REV. at 78; *Honouring the Sacred Bond*, MA MAWI WI CHI ITATA CENTRE, <https://www.mamawi.com/family-group-conferencing/> (last visited Dec. 15, 2022).

122. Ann O’ Connor & Reece L. Peterson, *Family Group Conferencing*, UNIV. OF NEBRASKA-LINCOLN 2 (Feb. 2014), <https://k12engagement.unl.edu/strategy-briefs/Family%20Group%20Conferencing%202-24-2014f.pdf>.

123. Edmund F. McGarrell & Natalie Kroovand Hipple, *Family Group Conferencing and Re-Offending Among First-Time Juvenile Offenders: The Indianapolis Experiment*, 24 JUST. Q. 221, 239 (2007).

124. Anthony J. Nocella II, *An Overview of the Theory and History of Transformative Justice*, 6 PEACE & CONFLICT REV. 1, 4 (2011).

125. *Id.*

126. *Id.*

127. *Honouring the Sacred Bond*, *supra* note 121.

128. Stevenson, *supra* note 117, at 8.

129. *Origins of Circles*, *supra* note 118.

One of the difficulties in scaling FGCs or circle processes for use in mainstream United States justice systems is that local communities within the United States often do not have the same sense of obligation to neighbors that tribal members do. The TRC and Gacaca contributions to the new system that will be discussed later will help mitigate some of these concerns.¹³⁰ As the tribal systems rely on community participation to be successful, any new system incorporating these principles needs to find ways to involve community members successfully and consistently. Whenever possible, consulting with tribal members who traditionally use these processes would be valuable to ensure that any incorporation into new systems would honor indigenous traditions.

Circle processes present unique challenges in this regard, as the very format of the circle processes are steeped in tradition that might be difficult to use in general United States justice systems without being disrespectful or fundamentally changing the practice. Circle processes, as the name suggests, involve people gathering in a circle, often with objects placed in the middle to remind participants of shared values.¹³¹ A talking piece is used to ensure respect between speakers and listeners, two keepers of the circle guide participants, and ceremonies and rituals are used to keep safety and form.¹³² Any decisions reached are by consensus.¹³³ It would be particularly difficult to have shared values among victims and offenders while also participating in ceremonies and rituals that would be respected by all parties. As such, any use of circle processes in mainstream United States justice systems must either be subject to heavy consultations with indigenous peoples to maintain their integrity, or the concept of bringing people together must be loosely based on traditional circle processes in ways that do not disrespect indigenous culture.

The mainstream criminal justice system can effectively consult with tribal representatives to effectively implement these principles in a new system. Currently, more than 150 mental health courts have been established in the United States.¹³⁴ When communities are interested in establishing a mental health court, planning committees come together under the watchful eye of policy makers and agency leaders to create the infrastructure needed for the courts to be successful.¹³⁵ The planning committee is composed of stakeholders representing criminal justice, mental health, substance abuse treatment, and related systems.¹³⁶

130. See *infra* A. Infrastructure.

131. *Peacemaking Circles*, OAKLAND UNIFIED SCH. DIST., <https://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/97/PeacemakingCircles.pdf> (last visited Dec. 15, 2022).

132. *Id.*

133. *Id.*

134. MICHAEL THOMPSON ET AL., *IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER vii (2007).

135. *Id.*

136. *Id.*

The same could be done while establishing the new system, with tribal members being crucial players on planning committees.

FGCs are not fool proof. In some cases, when members of FGCs have agreed upon a resolution, there have been struggles in ensuring those resolutions are completed.¹³⁷ In particular, FGCs in social work cases have led to re-referrals for abuse, difficulties in carrying out plans, empowering dominant and abusive family members at the expense of those that are less powerful, and groups overriding the best interests of the child.¹³⁸ In applying FGCs as an incarceration alternative, these studies suggest that there could be problems with re-offense, lack of support in going through with plan, and abusive power dynamics among the group itself.¹³⁹ There is also a risk of the victim not having their role recognized in this process, similar to how they are treated in the current retributive system.¹⁴⁰ FGCs are arguably offender-driven and offender-dominant, allowing their group to sit down first, starting with the offender's story, and not having separate meetings with the victim alone before the large group meeting.¹⁴¹ It risks not meeting the various needs of the victim.¹⁴² All of these concerns can be addressed in a new system by implementing principles developed in TRC and Gacaca.

Perhaps one of the biggest challenges facing FGCs is that there are differences between reintegrative shame and stigmatizing shame, and it can be easy for offenders to experience stigmatizing shame in these settings.¹⁴³ Reintegrative shame is remorseful, and as the offender feels remorse, they are able to make changes that will allow them to be a positive contributor to society.¹⁴⁴ Stigmatizing shame makes offenders feel as if they are bad people that cannot redeem themselves, which leads to them feeling broken and unable to make amends.¹⁴⁵ If offenders do not feel they can redeem themselves, or that their efforts won't matter, stigmatizing shame will not lead to accountability and behavioral changes. Extra care must be taken in a new system using principles of FGCs to impose reintegrative shame, rather than stigmatizing shame.

Importantly, restorative justice practices, particularly ones that allow victims to meet with their offenders, have provided evidence of success in both deterrence and retribution. In one European study, most victims chose to participate in face-

137. ZEHR, *supra* note 3, at 174.

138. F. Bredewold & E. Tonkens, *Understanding Successes and Failures of Family Group Conferencing: An in-Depth Multiple Case Study*, 51 BRITISH J. OF SOC. WORK 2173, 2175 (2021).

139. *Id.*

140. *See* ZEHR, *supra* note 3, at 174.

141. MARK S. UMBREIT, CTR. FOR RESTORATIVE JUST. & PEACEMAKING, FAMILY GROUP CONFERENCING: IMPLICATION FOR CRIME VICTIMS 6 (2000), https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176347.pdf.

142. *Id.*

143. *See* ZEHR, *supra* note 3, at 174.

144. *See* UMBREIT, *supra* note 141, at 7.

145. *Id.*

to-face meetings with their offenders and were largely happy with the process.¹⁴⁶ That same study showed that restorative justice reduced the frequency of reoffending by fourteen percent.¹⁴⁷ Offenders involved in mediation programs have expressed that being able to meet with victims and “talk about what happened was the most satisfying aspect of” mediation programs.¹⁴⁸ As well, victim offender dialogues are up to fourteen times more cost effective than the cost of crimes prevented based on reduced recidivism rates.¹⁴⁹ In short, programs that implement the mediation aspect of circle processes and FGCs are valuable to both victims and offenders, even if they do not perfectly mirror the systems as being practiced by indigenous peoples.

B. South African Truth and Reconciliation Commission

South Africa practiced legally enforced racial segregation under the Apartheid system from 1948 to 1990.¹⁵⁰ After the Apartheid, a newly elected parliament set up the South African Truth and Reconciliation Commission (TRC) to investigate gross human rights violations during the Apartheid regime once it came to an end.¹⁵¹ The TRC had a unique aim of trying to “document and reflect the motives and perspectives of the perpetrators and their victims” so that justice could be found through reconciliation and national unity.¹⁵²

The TRC was composed of three separate committees.¹⁵³ The first was the Human Rights Violations (HRV) Committee, which was largely tasked with investigating reports to the TRC of human rights abuses.¹⁵⁴ This included identifying victims and determining whether the violations were deliberate.¹⁵⁵ The second was

146. *Evidence Supporting the Use of Restorative Justice*, RESTORATIVE JUST. COUNCIL, <https://restorativejustice.org.uk/resources/evidence-supporting-use-restorative-justice> (last visited Dec. 15, 2022).

147. *Id.*; see, e.g., Bailey Maryfield et al., *Research on Restorative Justice Practices*, JUST. RSCH. & STATS. ASS’N 1, 5 (Dec. 2020) (explaining studies show restorative justice practices have reduced recidivism anywhere from 7% to 32% after offenders were released).

148. Mark S. Umbreit, *Restorative Justice Through Victim Offender Mediation: A Multi-Site Assessment*, 1 W. CRIM. REV. 1, 1 (June 1998); Jill Suttie, *Can Restorative Justice Help Prisoners to Heal?*, GREATER GOOD MAG., (June 9, 2015), https://greatergood.berkeley.edu/article/item/restorative_justice_help_prisoners_heal.

149. Suttie, *supra* note 148.

150. *Truth Commission*, *supra* note 14.

151. *Id.*

152. Sarah Slasor, *South African Commission of Truth and Reconciliation*, PARTICIPEDIA (Sept. 19, 2022), <https://participedia.net/case/8116>.

153. *The Committees of the TRC*, TRUTH & RECONCILIATION COMM., <https://www.justice.gov.za/trc/trccom.html> (last visited Dec. 15, 2022).

154. *Id.*

155. *Id.*

the Reparation and Rehabilitation (R&R) Committee, where the HRV committee referred victims to receive support, creating policy proposals and recommendations on rehabilitation for both victims and communities.¹⁵⁶ Finally, the Amnesty Committee (AC) considered applications for amnesty from perpetrators which, if granted, made them free from prosecution.¹⁵⁷ Mary Burton, a TRC commissioner, emphasized that the TRC provided a way to take the guilt of individuals in society who participated in the Apartheid and channel it into a positive commitment to build a better society.¹⁵⁸ South African society was uniquely accepting its role in the Apartheid and the harms stemming from it.

The TRC took the testimony of about 21,000 victims, including 2,000 of those at public hearings.¹⁵⁹ The TRC received 7,112 amnesty applications but granted only 849.¹⁶⁰ After gathering information, the TRC completed a report that covered the structural and historical background of the Apartheid, as well as the institutional and social environment that fostered the tragedy.¹⁶¹ The commission then made recommendations for reparations to victims while simultaneously recommending reform to social and political systems.¹⁶²

The most obvious difference between the TRC and United States justice systems is the very specific and limited purpose that the TRC was established for. South African leadership intended that the TRC would process allegations of human rights violations to mend society over the Apartheid that had ended.¹⁶³ In the United States, crime is ongoing, and any sort of system modeled after the TRC would need to account for the longevity needed in the United States that the TRC was not meant for. As with all restorative programs, the execution of the TRC was not perfect. Few prosecutions took place when amnesty was denied, many documents identifying perpetrators and detailing events of the Apartheid were destroyed, and money reparations were delayed.¹⁶⁴ However, victim testimony was abundant when reparations were contingent upon testifying, and the TRC was able to advise on both institutional changes and victim reparations based on the information gathered during investigation.¹⁶⁵ The three committee system of the TRC was a great way to address systemic inequality at a national level, allowing the TRC to come up with proposals for particular solutions for both victims and society in general.

The TRC was particularly positive for victim healing. The Chairman of the Commission once noted that he had met many amazing victims who had arrived at

156. *Id.*

157. *Id.*

158. *Register of Reconciliation, TRUTH AND RECONCILIATION COMM.*, <https://www.justice.gov.za/trc/ror/index.htm> (last visited Dec. 15, 2022).

159. *Truth Commission, supra* note 14.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Truth Commission, supra* note 14.

165. *Id.*

the point that they were ready to forgive.¹⁶⁶ In one instance, police ambushed the “Cradock Four” while they were in their car.¹⁶⁷ The police gruesomely murdered them, and set their car on fire.¹⁶⁸ One of the men’s teenage daughter testified that she was ready to forgive, but she simply wanted to know who she needed to forgive.¹⁶⁹ The TRC uniquely put victims and communities in a position where they could tell their story, hear the truth, and heal.

C. Rwandan Gacaca Courts

Over a million people were killed in the Rwandan genocide in 1994.¹⁷⁰ Afterwards, the government imprisoned more than 120,000 suspects, but the judiciary could only handle “a few thousand cases a year.”¹⁷¹ In response, authorities created a hybrid system using the mainstream justice system and a traditional form of conflict resolution called Gacaca.¹⁷² Usually, Gacaca involved restoring social peace and harmony at a local community level.¹⁷³ Upscaling it to respond to the genocide required heavy modifications, mainly keeping the principle that justice requires local participation to succeed.¹⁷⁴ Importantly, post-conflict Gacaca aimed to allow for the reconstruction of the society that permitted the genocide in the first place.¹⁷⁵ This principle is especially important in comparison with society in the United States that fosters high crime and mass incarceration.¹⁷⁶

The entire population elected Gacaca judges, who were chosen for their integrity.¹⁷⁷ Gacaca separated offenders into three groups based on the type of crime they committed.¹⁷⁸ The Gacaca system sent the most grievous offenders to traditional courts, which included leaders and organizers of the genocide, notorious murderers, and those who committed sexual torture.¹⁷⁹ Sector courts handled all

166. *Tutu and His Role in the Truth and Reconciliation Commission*, S. AFR. HIST. ONLINE (Apr. 4, 2011), <https://www.sahistory.org.za/article/tutu-and-his-role-truth-reconciliation-commission>.

167. *Id.*

168. *Id.*

169. *Id.*

170. PENAL REFORM INT’L, *supra* note 15, at 11.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 13.

175. *Id.* at 11.

176. See *Crime Rate By Country 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/crime-rate-by-country> (last visited Nov. 26, 2023); Ashley Nellis, *Mass Incarceration Trends*, THE SENT’G PROJECT (Jan. 25, 2023), <https://www.sentencingproject.org/reports/mass-incarceration-trends/>.

177. PENAL REFORM INT’L, *supra* note 15, at 12.

178. *Id.*

179. Sosnov, *supra* note 106, at 135.

other cases not being handled in traditional courts or Cells, and Cell courts handled only property crimes, without an option for appeal.¹⁸⁰ The general population over the age of eighteen made up the Gacaca general assemblies and would attend procedures to help provide witnesses and find resolutions.¹⁸¹ Initially, nine judges met together once a week with the primary purpose of gathering information on events that happened during the genocide and who was involved.¹⁸² Once the information was gathered, trials were held and the hearings were public and mandatory in an effort to gather as much information as possible.¹⁸³

The Gacaca hybrid presented its own successes and shortcomings over time. Both perpetrators and victims were able to speak out and shed light on the truth of the atrocities that had occurred.¹⁸⁴ It helped defuse some of the societal mistrust and suspicion that naturally arose from the genocide.¹⁸⁵ Unfortunately, it was difficult to implement a system of punishment and reconciliation, the system was corrupted at times, and participation waned after general assemblies were being called together several times a week.¹⁸⁶ Despite these issues, Gacaca courts are most valuable to the United States in talking about retribution. Gacaca highly encouraged offenders to confess to their crimes, with the incentive that doing so would lead to a partial commutation of their sentence to community service.¹⁸⁷ Even more interesting, society saw confessions as the first step in offenders more wholly healing themselves to better make amends to their victims and communities.¹⁸⁸ The Gacaca system incentivizes offenders to make real efforts to fix their wrongs, while still requiring them to serve the communities they have harmed.

One example of the Gacaca in action involves John Pierre Munyakayanza, who was nineteen when the genocide happened.¹⁸⁹ He was part of a gang manning a roadblock when a Tutsi¹⁹⁰ ran the roadblock on his bicycle.¹⁹¹ The gang ran the Tutsi man down and gave him to soldiers; he was never seen again.¹⁹² Munyakayanza's case largely considered whether he participated in the murder of

180. PENAL REFORM INT'L, *supra* note 15, at 12.

181. *Id.* at 12–13.

182. Stephanie Wolters, *The Gacaca Process*, 14 AFR. SEC. REV. 67, 67 (2005), <http://issafrica.s3.amazonaws.com/site/uploads/ASR14NO3AWWOLTERS.PDF>.

183. *Id.*

184. PENAL REFORM INT'L, *supra* note 15, at 14.

185. *Id.*

186. *Id.* at 14, 18.

187. *Id.* at 19.

188. *Id.* at 21–23.

189. Jeb Sharp, *Part II: Rwanda's Gacaca Courts*, THE WORLD, (Feb. 14, 2007, 6:45 PM), <https://theworld.org/stories/2007-02-14/part-ii-rwandas-gacaca-courts>.

190. Tutsis are an ethnic minority in Rwanda and were the target of persecution from the ethnic majority, the Hutus, leading to the genocide. Jeremy Maron, *What led to the genocide against the Tutsi in Rwanda?*, CANADIAN MUSEUM FOR HUM. RTS. (June 26, 2019), <https://humanrights.ca/story/what-led-genocide-against-tutsi-rwanda>.

191. Sharp, *supra* note 189.

192. *Id.*

the Tutsi, resulting in him confessing to turning the Tutsi over.¹⁹³ As a result, the judge gave him two years of community service as he had already served six years behind bars.¹⁹⁴ In this case, one offender was ready to confess, but it is also important to note that Gacaca did not always appease the victim. One man, who lost his mother in the genocide, explained how confessing to killing is not enough to earn a lenient sentence; he wanted to see real punishment.¹⁹⁵

IV. A MODIFIED RESTORATIVE JUSTICE SYSTEM FOR THE FUTURE

While international justice systems provide powerful examples of what the United States justice systems could do under the banner of restorative justice, there are distinct differences in the United States and the three communities mentioned above that need to be accounted for. These differences include size, culture, and purposes that do not allow for a one-size-fits-all application. There are two important foundations that must be established to make restorative justice a reality in United States justice systems: infrastructure and practical considerations. Infrastructure includes how the system will be set up to serve the victim, protect the community, and hold the offender accountable. Practical considerations include accounting for the differences in types of crimes, who should participate, and ensuring that the new systems are adequate to provide relative fairness to all involved.

Under this proposed system, there would be three divisions patterned after the committees of the Truth and Reconciliation Commission. First, there would be an Investigations Division, tasked with uncovering what crime has occurred, who committed it, and what the resulting harms are. Second, there would be a Reparations Division which would serve a similar purpose to the Reparation and Rehabilitation Committee. This division would find resolutions to the harms caused that can be agreed on by offender, victim, and communities. Both the Investigations and Reparations Division would incorporate principles developed in family group conferences and circle processes to achieve their goals. Third, like the hybrid used by Gacaca courts, there would be a Judiciary Division, built upon the existing judicial system in the United States. The Judiciary Division would process cases of either the most grievous offenders who are unlikely to be rehabilitated or cases that were unsuccessful in the Investigations and Reparations Divisions.

A. Infrastructure

To begin, qualifying cases would start in the Investigations Division. The Investigations Division would largely follow the mediation practices in FGCs and circle processes. However, the processes would be victim-led, like medieval courts

193. *Id.*

194. *Id.*

195. *Id.*

where a victim would initiate and the court would act as referee.¹⁹⁶ Once a crime has occurred and a report is made, whether by the victim or by another representative such as a law enforcement officer, a victim would be able to decide whether they would like to participate in the circle process, send a representative, or abstain altogether.¹⁹⁷ If a victim is unwilling to participate, alternatives can be provided, such as surrogate victims, where a victim of a similar crime can come into the circle.¹⁹⁸

While traditional circle processes are not reliant on experts so that a better sense of community can be fostered, the proposed system would involve professionals in the circle.¹⁹⁹ The system would employ mental health experts as keepers of the circle, facilitating discussions and finding common ground among victims, offenders, and community members. The circle would then be composed of the victim and their support systems²⁰⁰, the offender and their families, law enforcement officers who responded to the crime, witnesses, and leaders from local organizations that can provide resources to everyone involved.

The Investigations Committee circle would allow the victim to decide whether they or the offender will speak first on what happened, followed by the other party. Like the Gacaca system, offenders who truthfully share what happened would be entitled to more reparations options, including community service. In providing such incentive, the offender will be more likely to answer the victim's questions about why the crime happened and why it happened to them, which can lead to regaining some of the personal autonomy victims lose.²⁰¹ The keeper of the circle would prepare a report on what was discussed, the victim's feelings toward the offender at the end of the circle, and the evidence of remorse from the offender. That report would be transferred to the Reparations Division.

Once the Reparations Division processes the report, both the victim and the offender would come together once more to hold a conference like an FGC. This conference would be much smaller than the Investigations Division circle, with the victim being present with their support system and the offender with their family. The representatives of the Reparations Division would present options for restitution from the defendant that would protect and benefit the community. Depending on the crime, those options could include things such as therapy, community service, monetary restitution, combinations of incarceration and community service, education programs, psychiatric treatment, drug treatment,

196. See Zehr, *supra* note 3, at 109.

197. Should this new system be implemented, Constitutional concerns, such as protecting the right to a speedy trial, would not dissipate. Once a report has been filed on a crime, the Investigations Division should schedule a time for the offender's circle. The scheduling should happen within 72 hours, with the actual circle taking place within 60 days. A victim does not have to indicate their intent to participate in the circle at the time of scheduling but can decide up to one week in advance of the circle.

198. See Zehr, *supra* note 3, at 206.

199. *Id.* at 175–76.

200. Support systems for victims would be dictated by the victim themselves. This can be family members, friends, personal therapists, etc.

201. See Zehr, *supra* note 3, at 32.

and others.²⁰² Once those options are presented, all the parties would conference until they could unanimously agree on an option, which the offender would be obliged to complete. Should the offender fail to comply with the option chosen or the parties fail to reach a consensus, the case would be referred to the Judiciary Committee.

The Judiciary Committee would look very much like the mainstream adversarial justice system that exists today, with those who work in the justice system such as lawyers and judges fulfilling the same roles they do now. Most importantly, it would not be burdened with the case load that it currently faces. The Judiciary Committee would prosecute all cases that either unsuccessfully passed through the Investigations and Reparations Committees or were so grievous that it would be unrealistic to seek rehabilitation, which will be discussed more when discussing practical considerations. While incarceration would often be the result of Judiciary Committee decisions, the decrease in the numbers of incarcerated people would allow for an increase in programs providing opportunities for community service, education, and victim outreach.

B. Practical Considerations

Not all crime is created equal, and some individuals do terrible things and pose a danger to others. However, our current justice system responds to all crime as if those crimes are committed by such individuals.²⁰³ That is not always the case.²⁰⁴ There are several factors to consider when deciding whether to use a traditional sentence or an alternative, nonpunitive sentence in response to crime.²⁰⁵ This includes the seriousness of the offense, the nature and attitude of the offender, and the victim's willingness to forgive and receive compensation.²⁰⁶ In addressing the seriousness of the offense, Gacaca courts provide relevant insight.

In 2007, the Gacaca Sector category was radically altered to have jurisdiction over "high profile murderers, torturers, and those who had degraded the dead bodies of victims."²⁰⁷ Even still, the Gacaca brought victims and perpetrators into the same forum, which was important so the victims could see justice in action.²⁰⁸ Also, perpetrators were held accountable when they otherwise would have

202. This list is non-exhaustive. The goal of the system is to provide healing for offenders, victims, and communities. As such, solutions can be proposed by representatives of any of those three parties that successfully address their unique and individual concerns.

203. See ZEHR, *supra* note 3, at 183.

204. *Id.*

205. *Id.* at 218.

206. *Id.*

207. PENAL REFORM INT'L, *supra* note 15, at 13.

208. *Id.* at 16; The victims and perpetrators were brought together in public and mandatory forums, so victims were direct witnesses if the perpetrators trial and sentencing.

escaped responsibility without Gacaca.²⁰⁹ Cases in the United States are inherently different than Gacaca cases because they are not in response to genocide, but they still involve individuals inflicting harm on others.

In many ways, United States cases can be split into three categories like Gacaca courts. The first two categories would be automatically referred to the Investigations Committee, and the third would be automatically referred to the Judiciary Committee. First, there are crimes that do not violate another's body. These crimes include property crimes, drug crime, and possibly even simple assaults. While none of these crimes should be minimized, people can often be prevented from wrongdoing out of self-respect or the desire to receive respect from others.²¹⁰ There are plenty of resolution resources for these types of crime such as treatment and restitution without much risk of violence posed to society in the meantime.

Next, there are crimes with victims that need unique protection from uneven power dynamics. This includes crimes such as domestic violence, sexual assault, and crimes against children. There are obvious concerns in bringing together victims and offenders for these types of crimes, but research on victim offender conferences suggest that the more serious an offense is, the more impactful an encounter between victims and offenders will be.²¹¹ With proper oversight and the use of representatives for victims who are unable or unwilling to meet their offender, the circle process of the Investigations Committee can be highly beneficial in addressing the underlying reasons for the crime committed.

The final category of crimes are those which are particularly grievous, where reparations are unlikely to be successful or society would be at risk by letting an offender go free. This includes the willful taking of life and cases where offenders are too mentally incompetent to participate in the Investigation and Reparations processes. These cases would automatically be handled by the Judiciary Committee, employing traditional adversarial processes and methods of punishment. However, as mentioned before, the reduction in other inmates in prison systems could allow for rehabilitative programs during incarceration or commitment to a mental institution.

There are some shortcomings to this categorical approach. As discussed previously, the consequences of sentencing guidelines have shown that not considering individual circumstances among the same crimes can lead to unfairness, and that could apply equally in those cases which go straight to the Judiciary Committee.²¹² However, this approach attempts to find relative fairness in benefitting individuals while simultaneously protecting communities. Individuals in this category would still be able to provide a defense for themselves and seek rehabilitative resources where offered.

209. *Id.* Perpetrators would not have been held responsible in a traditional system as discussed previously. See PENAL REFORM INT'L, *supra* note 15, at 11. There were simply too many cases and information on the offenses were hard to find without community participation. *Id.*

210. See Cameron Anderson et. al., *Is the Desire for Status a Fundamental Human Motive? A Review of the Empirical Literature*, 141 PSYCH. BULL. 574, 584–87 (2015).

211. ZEHR, *supra* note 3, at 164.

212. Grunwald, *supra* note 51, at 500.

C. Benefits of the Proposed System

Now, understanding what the modified restorative justice system would look like in practice, there must be adequate motivation to make the switch. Finding that motivation brings us back to the current goals of the United States justice systems: retribution and deterrence. As discussed above, current practices are not effectively discouraging future offenses or serving offender's the justice that society has deemed they deserve.²¹³ Reframing our understanding of what retribution and deterrence look like can help show that the system proposed here is much more adequately equipped to achieve those goals.

To obtain adequate punishment according the Zehr, all response to crime should begin with an offender confronting his victim and the effect that his actions had on them.²¹⁴ As the proposed system shows, this does not always come in the form of a face-to-face meeting. However, real accountability requires an opportunity to directly confront what one has done and whom one has done it to.²¹⁵ Once an offender acknowledges their role in that, they should be allowed and encouraged to join in the process of figuring out how to repair those harms to then start the repair process.²¹⁶ In being a direct participant in this process, the offender is unable to blame others for the punishment they are receiving, because they were

213. See discussion *supra* section A. Abstract 263

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I. Introduction.

214. Grunwald, *supra* note 51, at 500.

215. *Id.*

216. *Id.*

directly involved in deciding it. The justice system, as it currently functions with high rates of incarceration and few opportunities for rehabilitation, does not provide the positive experiences and opportunities as described above.

The success of the newly proposed justice system will largely hinge on not imposing isolation on offenders but in a small minority of cases and providing opportunities for making amends whenever possible. That is achieved in two ways. First, most cases will begin with the Investigations and Reparations Divisions. As discussed, the goal of those divisions is to come up with solutions that do not result in incarceration, at least not as a first resort. Ideally, the rates of incarceration would be very low, reducing the number of offenders who are forced to combat the health effects of isolation that could lead to problems in finding employment, reoffending, or being able to contribute fully to society.

Even more importantly, the work done in the Investigations Division would directly facilitate the process of making amends. Bringing professionals, community members, victims, and offenders all together in one place has the direct purpose of creating a mechanism in which the offender takes accountability, goes through the retributive process of seeking forgiveness from others and self, and interacts more positively with society as a result. The offender is punished but in a way that creates constructive and positive results. The victim is given personal autonomy and choice after a crime in which they did not have either. And society reaps the benefits of having a victim and offender who have found healing and who will contribute to their communities in a more positive way because of it.

Knowing that societal ills are a far more complex contributor to crime than the offender alone, the proposed system includes solutions to address those ills. Completely resolving generational trauma, poverty, or the effects of poor choices is not a realistic goal, as it has been the work of many people for many generations and will continue to be the work of generations in the future. However, the proposed system is unique in that it provides a community system that gives an offender a real chance at having the support needed to resolve their own problems. More than anything, the proposed system provides resources, both physically and psychologically, to allow an offender to fix what they have done, even if the reason they did it was, in part, a product of their environment.

First, allowing offenders to go through the Investigations and Reparations process will allow them to avoid the stigma and unproductive use of time that incarceration causes. While making amends, offenders can continue to pursue their education or work. They will not lose their jobs or their place in school and will work on finding ways to answer for their crimes that are more contributive to society. Without a conviction on their record, they will not face as many hurdles in pursuing work in the future, allowing them to break cycles of poverty and frustration. In short, offenders will have the practical ability to provide for themselves and their families.

Next, once a person does not have to be concerned about providing for themselves physically, they will be more able to focus on their victim and how to make amends. That might take the form of repaying damages, which would be possible because the offender would continue to work. That might look like drug treatment, community service, therapy, or a variety of individualized solutions that are decided based on individual circumstances by the groups in the Investigations process. No matter the solution, the goal is to create a well-rounded offender who

can contribute effectively to the repair of their harms on both the victim and society.

Additionally, in neighborhoods where rates of crime are high and opportunity is low, putting offenders through the Investigations process will make them more emotionally and physically stable. In doing so, they return to their communities as a positive influence. Not only will they not be contributors to crime, but they will also be an influence on their social circles. Principles learned in the Investigations process, including taking accountability, making amends, and fixing personal issues, can be taught to others through influence before they ever need to interact with the Investigations Division. Overall, offenders will go through the Investigations and Reparations process so that they will have the individual skills to combat societal setbacks, which will in turn give well-meaning individuals a real opportunity to avoid crime.

Implementing the Investigations and Reparations process has one other huge benefit: its potential to combat mass incarceration. Mass incarceration acknowledges that, while the United States incarcerates more of its own people than any other country, incarceration is imposed disproportionately on poor people of color.²¹⁷ In doing so, the previously discussed stigma and setbacks that accompany incarceration are imposed on people of color, making it extremely difficult to break out of generational cycles of poverty and crime. By diverting most cases away from the traditional judicial process and using incarceration as a last resort, a substantially fewer amount of poor people of color would be subject to incarceration. Even just avoiding incarceration for drug cases alone would make a huge difference. For example, 45% of individuals currently incarcerated by the Federal Bureau of Prisons are incarcerated for drug crimes.²¹⁸ Presenting alternatives such as rehabilitation or recovery programs during the Investigations process could provide much fairer results for poor people of color who interact with the justice system.

Finally, the proposed system comes together to remedy some of the shortcomings found in tribal court practices, the TRC, and Gacaca courts. Where FCGs fall short on follow through, the new system would encourage follow through as the threat of removal to the Judiciary Committee encouraging offenders to complete their agreements. Victims would be better protected than they were in the TRC as they are at the helm of the whole process. Offenders would also be given tools to change their behavior, helping to avoid stigmatizing shame. Because the new system in the United States would have enforcement mechanisms that are already in place in the existing justice system, the problems that the TRC faced in follow through and corruption would likely not be prevalent in the United States. Victims and participants are less likely to burn out or feel dissatisfied as those in the

217. *What We Mean by "Mass Incarceration"*, INST. TO END MASS INCARCERATION (last visited Jan. 28, 2023), <https://endmassincarceration.org/what-is-mass-incarceration/>.

218. *Offenses, FED. BUREAU OF PRISONS* (Jan. 21, 2023), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

Gacaca courts, as participants would be professionals, not just community members, and victims would largely dictate their offender's fate.

D. Acknowledging Shortcomings

It is important to note that the strength of this new proposed system could only be tested by putting it into practice. There are potential concerns in practicality that have not been fully discussed here, as well as aspects of the criminal justice system that this proposal does not address in depth. For example, the federal criminal justice system processed 64,565 cases in fiscal year 2020 alone, with state trial courts receiving over 50 million cases in 2020.²¹⁹ That is an extreme case load, with some cases passing through a judge's docket in a matter of minutes.²²⁰ It would be much more difficult to put that many cases through an Investigations and Reparations process successfully while maintaining the integrity of the system. Investigations processes might need to include multiple victims and offenders of similar crimes at one time to account for that. Inevitably, there would be issues in providing access to the system in a realistic and fair manner, and there is no statistical way to prove the effectiveness of this system as it does not exist yet. At the outset, the expertise of judges, court staff, attorneys, mental health experts, and other interested parties would be invaluable to organize a system that can account for the sheer mass of cases.

It is also important to note that there are many employees in the current justice system who would be affected by these changes. While their roles would likely translate to the Judiciary Committee, their case load would potentially be a lot lighter, so their role in the Investigations and Reparations Divisions would need to be more clearly defined. The experience of attorneys can be usefully employed in the Investigations Division to advise both offenders and victims on what to expect and what reasonable solutions can be proposed. Judges could sit on the Reparations Division to ensure that plans agreed on are adequately benefitting victims and the community while holding the offender accountable. Each of the existing roles in the current justice system could serve a purpose in the new one.

While all these concerns have merit, the justice system as it currently operates is failing. Inevitably, should the new system be implemented, there would

219. *Overview of Federal Criminal Cases, Fiscal Year 2020*, U.S. SENT'G COMM'N (last visited Jan 28, 2023), [220. *See Federal Judicial Caseload Statistics 2018*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> \(last visited Nov. 26, 2023\) \(providing statistics for the number of cases both filed and terminated in federal District Courts in 2018, which if divided amongst the 94 District Courts shows that amount of cases could not be resolved in a year without some passing through the docket within minutes.\) The problem would be presumptively worse at the state court level which has a vastly larger case load with only 27,570 trial court judges as of 2011. U.S. DEP'T OF JUST. SPECIAL REP. ON STATE CT. ORG. \(2011\), <https://bjs.ojp.gov/content/pub/pdf/sco11.pdf>.](https://www.uscc.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2020#:~:text=The%2064%2C565%20individual%20original%20cases,the%20work%20of%20the%20courts; CSP STAT Overview, CT. STAT. PROJECT (last visited Feb. 26, 2023), https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-overview.</p></div><div data-bbox=)

be setbacks or unforeseen issues that would need to be addressed as they come up. However, those issues would simply provide an opportunity for communities and experts to come together to create solutions that address unique community needs. As the justice system has such a huge impact on the lives of all who interact with it, trying something different is worth the risk.

V. CONCLUSION

The United States justice system is not adequately equipped to meet its goals of retribution and deterrence. Non-traditional systems such as indigenous tribal courts, the South African Truth and Reconciliation Commission, and the Rwandan Gacaca courts have provided powerful blueprints for a more effective system that will meet the goals of retribution and deterrence while better serving victims, offenders, and communities. The United States should implement a new justice system consisting of an Investigations Division, a Reparations Division, and a Judiciary Committee, as society would receive retribution through the difficult process of the offender making amends for their actions, which would serve the victim and deter the offender and others from committing crime in the future.

